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### THE RIGHT TO VOTE AND THE BILL OF RIGHTS DEBATE

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### *The Problem*

When the National Human Rights Consultation Committee, usually known as the Brennan Committee after its chairman, Fr Frank Brennan, was appointed to look at the possibility of protecting and promoting human rights, it revived what had been a pervasive theme in earlier efforts to discourage development of a Bill of Rights at federal or state level: if you want to protect any rights which might be deemed appropriate or advisable to protect, elected members of Parliament are to be preferred to non-elected judges. Eventually the wider question was returned to the back-burner where it normally resides. This paper will deal not with the broader issue of whether there should be some additional protection of rights in Australia, but only with what seems to me a 3-dollar bill some players frequently try to slip into the pot of any debate about bills of rights.

Given the wide-ranging nature of the previous slanging match, it may be advisable to start with some autobiography and head off any accusations that what follows had been suppressed. I was introduced to the first Bill of Rights I ever met by someone from Tom Jefferson's university's law school who in 1946 was moonlighting a summer session across the Potomac. The course was called "Government of the United States" and one of the two prescribed textbooks was the latest edition of "Cushman's Leading Constitutional Decisions". I didn't think all that much of this Bill of Rights. The voteless District of Columbia was then run by a committee of aged Southern Senators, and Jim Crow reigned in its schools and universities. The burning issue on campus was whether the University's largest auditorium should be desegregated so that the then third of the DC public who were of African descent might have some access to the performing arts. That historic problem warranted mention as recently as the 2009 Lincoln Memorial concert which preceded the inauguration of the new President. In the '40s Roberts and McReynolds, JJ bestrode the judicial landscape; Field, J had been the Moses who had showed the way to where we were then.<sup>1</sup> Incidentally, but relevant to our current purpose, 1946 was also the year when Frankfurter, J could still reject judicial involvement in the reapportionment process.<sup>2</sup> Had time stopped at that point, it is quite possible that Prime Minister Howard would have been an advocate of a Bill of Rights.

Mercifully Earl Warren's attempt to move on from one *elected* office at the state level in Sacramento to another at the federal level in Washington was defeated by the federal electorate in 1948. He was subsequently *appointed* to better use than the Vice-Presidency as it then was would ever have provided. Under his leadership the Supreme Court invaded the political thicket and rescued voting,<sup>3</sup> after which Lyndon Johnson and Congress ran with the ball. The Warren Court also overturned the established judicial doctrine of "separate but equal",<sup>4</sup> and when desegregation in Little Rock's schools was ordered by the courts Dwight Eisenhower, despite his regret for having appointed Warren to the bench, sent in federal troops to enforce the order. The three-quarters of a century in which the democratic strain in the American tradition had been subservient to political conservatism and economic liberalism, perhaps one should say ur-liberalism, drew to a close. Despite the accumulated evidence of what pre-Warren courts had done with one, I was converted to belief in a Bill of Rights. Its interpretation could be left safely in the hands of the highest court but it would be subject to amendment by a process involving those who were not the current holders of either federal judicial and legislative powers, the electorate. Since then I have several times borne witness to that belief.<sup>5</sup> That included recommending, as a member of Queensland's Electoral and Administrative Review Commission, both creation of a Parliamentary Scrutiny of Legislation Committee to review Bills and subordinate legislation that trespassed unduly upon rights and liberties, and adoption of a Bill of Rights that would have included a provision that "An adult who is an Australian citizen resident in Queensland has the right to vote by secret ballot in periodic elections of members of the Legislative Assembly."<sup>6</sup> The first recommendation was acted upon, the second was not; that Bill of Rights was not adopted. The earlier one of 1689 already in the State's statute books was, in part at least, under attack by the then Queensland Opposition and the local press because of the protection it gives speech in Parliament.

Returning to the present, what appears to be the favorite argument against bills of rights is that the process of election produces better guardians for rights than the process of

appointment will. For example, as soon as the impending consultation of the people was made known the national flagship of the Murdoch press declared:

Parliamentary democracy is by no means a perfect system of government, but its one redeeming feature is that Australians still get to sack politicians whose performance is found wanting. That is not the case with judges.<sup>7</sup>

Ability to sack is what an election may, or may not, do that makes the difference, similarly perhaps to the proposition that the ability to sack employees is essential to a healthy industrial relations regime.

When *The Australian*'s second sentence is elaborated, changes postulated that might bring judges up to a higher standard include rigorous appointment hearings before a parliamentary committee, appointment only after a confirming vote by parliament, perhaps fixed terms for judges, perhaps their direct election.

[T]hese ideas are commonplace in the birthplace of the most famous bill of rights, the US. ... The judiciary in the US is more powerful, more politicised and, correspondingly, subject to more political accountability. ... [T]he two issues cannot be separated.<sup>8</sup>

There are some state jurisdictions in the United States where legislators and judges alike are subject to the powerful sanction of recall ballots and, as one recent case involving judicial campaign fund-raising has reminded us, a majority in which at least some judges are elected. It might be asked whether the fact that legislators have to raise money from the electorate and its multiple interests to win elections is more likely to make them accountable than the possibility the electorate may sack them – and is quite likely to do just that if they can't raise enough money. In jurisdictions where such a system exists voters believe they have the highest form of democracy. There may also be a right to initiate legislation with or without involving the legislature, or the right to override by popular vote legislation which the legislature has already passed. Drawing the distinction

between representative democracy and direct democracy is advisable, and it also would be well to remember that the strength of democracy may go further and require proof that governments *have been changed*, not just that they *might be changed* by voters putting ballot papers in a ballot box.

A separate question current in Australia, especially in New South Wales, is whether our legislatures should have relatively fixed terms as some now do and, somewhat counter to that idea, whether the mechanism of ensuring democratic control of the government should be extended to create a novel variation of the recall that could tip out an unpopular government and its parliamentary majority which could otherwise shelter behind a fixed term.

Such tangential problems must wait for another day to concentrate on the mystery of election which, in Australia at least and for the time being, transforms MPs but not judges. The mystery's central problem can be put in familiar cosmological terms: if the universe of rights rests on the tortoise of elections, what does the tortoise stand on? This paper will seek an Australian answer to that question from the record of our appointed judges (mainly those of the High Court) whilst they grappled with rights questions in the electoral process by which our elected MPs achieved their more meritorious status. In doing this the paper will mostly ignore cases concerned with the conduct of the poll. These are more likely to come before a State superior court, often at the last moment, and to be concerned mainly with either allegations of illegal behaviour or the usefulness of injunctions. It also ignores attempts to litigate in an electoral context quite separate concerns such as the nature of legal tender, possible interpretations of the constitutional disqualifications of candidates or MPs, the double dissolution provisions of the Commonwealth Constitution, the nature of political parties and their members' rights in such organizations, and enforcement of disclosure requirements relating to campaign finance. It will ignore the 20 years of litigation that stemmed from a one-man campaign begun in 1987 to circumvent the statutory requirement of a compulsory expression of as many preferences as there are candidates at House elections. By the end it may incidentally constitute a response to the rhetorical call by John McCarthy, QC to name a

fundamental right that was not “currently protected” in Australia – if “effectively protected” was implied in that call.<sup>9</sup>

### *Australian beginnings*

The Commonwealth Constitution was negotiated and adopted near the end of half a century of democratisation of the original colonial constitutional regimes. The electoral ingredient in the negotiation process has an excellent literature.<sup>10</sup> Earlier, once the local legislatures effectively controlled their electoral legislation the Australian colonies pulled ahead of their Mother Country. Whilst the relationship in electoral matters between established democracy and novel federalism still had to be settled, it could be cobbled together by compromises. Retention of a property franchise for some State elections fell within the guarantee of the States’ existing constitutions (s.106) and, for the time being, it would have been arguable that if there had to be upper houses, those which were not elected but still appointed by the government of the day were at least more democratic than the then hereditary House of Lords under the British constitution. The usual federalist, and current US, option of indirect elections for the Senate was deliberately barred by the formula “directly chosen by the people” (s.7). The issue of votes for women had already turned the corner,<sup>11</sup> there was little controversy about the requisite age for voting, and the ancient, now residual, abuse of plural voting could be ruled out (s.30). After a transitional arrangement to get the first MPs elected, the qualifications for electors were left to the Commonwealth Parliament (ss.8, 30) and its legislative process. However the likelihood of racial disqualifications was flagged indirectly (s.25) and the *Commonwealth Franchise Act 1902* promptly excluded the aboriginal inhabitants of Australia, Asia, Africa, and the Pacific Islands (except New Zealand). In getting to 1902 and the first legislation for a truly federal election there had been less need to talk about the right to vote than to get on with devising machinery for its exercise by those it was generally agreed should have such a right.

Among the machinery problems were two essential preliminaries to an election. The first obviously was who may vote, but the second, how are the voters to be grouped for the

election, was important too. For the Senate an answer was easy; each State would be “one electorate” subject to an option for Queensland that it never exercised (s.7). The House of Representatives was provided with an interim allocation of seats among the States (s.26), but thereafter their members were “in proportion to the respective numbers of their people” (s.24) which closely followed the American constitutional precedent of “according to their respective Numbers” with an allocation pending the first enumeration. Whilst some detail was needed as to how this should be calculated in future, the most immediate problem for Australia concerned federalism rather than democracy, and the original members of the federation were each guaranteed a minimum of 5 seats in the House (s.24).

The next stage, dividing each State into its “electoral divisions”, was left to laws to be made by the Commonwealth Parliament, subject to two riders. A division should not be “formed out of parts of different States”, another federalism question, and in the absence of “other provision” each State should be “one electorate” (s.29) without saying exactly what should happen subsequently in such an event. The colonies had previous experience of multi-member electoral districts on British lines, and Tasmania had recently (1896) introduced the Single Transferable Vote for its principal urban centers, Launceston and Hobart. Had push ever come to shove with s.29 which it did not, it is likely that whatever method then in use for the State’s “one electorate” Senate elections would have been utilized for the House. Eventually, in 1983 an alternative remedy called “a mini-distribution” was devised for changed circumstances.

S.24 prescribes two steps for the House. First, a quota is determined by dividing “the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth” by twice the number of Senators. That divisor had been set earlier in the section by the requirement that the numbers of members of the House “shall be, as nearly as practicable, twice the number of the senators.” The second step deals with the inevitable problem of remainders by providing that, if there is a remainder greater than one-half of the quota, a State with such a remainder gets an extra Member. This is workable because of the amount of discretion in the “as nearly as practicable” formula,

and the original constitutional allocation of 36 Senators and 75 Members survived until 1934. S.24 dealt only with States; elsewhere the Commonwealth Constitution provided that Parliament may allow the representation of a Territory “in either House of the Parliament to the extent and on the terms which it thinks fit” (s.122). The first such action came in 1922 with the *Northern Territory Representation Act*; subsequent expansions have led to several constitutional cases which will not be considered here. Successive governments behaved reasonably by treating electors in the Territories like electors in the States, and fears, reputedly held in high places, that “the extent … it thinks fit” could allow packing the legislature with Territory MPs, never became real. S.51(xi) made “census and statistics” a legislative power of the Commonwealth, and the holding of regular and high quality censuses had become established practice in colonial times. In the absence of an explicit formula such as the US Constitution’s an “Enumeration … within every subsequent Term of ten Years” (Art.I), exactly when recourse should be had to the provisions of s.24 was left open. Whilst the Commonwealth Constitution repeated many of the arrangements of the US Constitution, importantly it did not leave the “Times, Places and Manner” of electing Members and Senators to the Australian state legislatures.

Neither did the Commonwealth Constitution experience the early addition of a Bill of Rights. The Australian High Court quickly more or less claimed and assumed the responsibilities of the US Supreme Court to interpret the Constitution, but in the absence of a Bill of Rights, cases that might involve electoral rights that came before it were likely to arise from particular disputed elections and be settled by a body of electoral law that combined common law and statutory elements. As soon as a federal electoral statute and a federal supreme court existed and there had been another federal election, the three new ingredients were bound to interact. By the outbreak of the Great War the High Court had decided a dozen cases to which we now turn.

The Commonwealth Electoral Act (hereafter CEA) 1902 recognized the Australian electorate’s mobility with some innovative arrangements, but the new divisional boundaries drawn under its rules had little regard for representational equality in either

population or enrolment numbers, deficiencies in which would later be labeled “malapportionment”. It (s.16) set the permissible deviation from state average, the “quota”, at plus or minus one-fifth, and successive Commissioners, first one, later three, appointed to draw boundaries made generous use of the range. In 1903 the largest in enrolment division had 2.6 times the enrolment of the smallest (the David-Eisenberg index of relevant American political science and jurisprudence), and a majority of the divisions need contain only 40.7 per cent of the national electorate (the American Dauer-Kelsay index). The Gini coefficient (a more widely known and used measure of inequality across the social sciences<sup>12</sup>) of .154 was the highest ever to be recorded for the House of Representatives – apart from the .164 recorded at the 1901 election which had used boundaries drawn by the state legislatures.<sup>13</sup>

At the first general election held under federal legislation in December 1903, even though there were 3 political parties in the field 17 of the 75 divisions were uncontested, and not many of the remaining 58 contests were likely to end up in court. Only 3 divisions were decided by fewer than 100 votes: Riverina by only 5, Denison by 31, and Melbourne by 77. Another 3 divisions had majorities between 100 and 500 votes: Darwin 129, Wimmera 169, Bendigo 300. Nevertheless 4 of those 6 divisions produced cases which went to the High Court after a single High Court judge sitting as the Court of Disputed Returns under the CEA, s.193 referred them to a full bench. With a new Act and a new Court, it should not have been surprising that with majorities so small some unsuccessful candidates would lodge petitions seeking a second chance either to be declared the winner or to have the result set aside and a by-election ordered. What if anything, including dicta, might the Court have to say about “a right to vote” in these cases?

Two cases arose from of the Riverina petition,<sup>14</sup> one from the Denison petition,<sup>15</sup> and one from the Wimmera petition,<sup>16</sup> but only the case resulting from the Melbourne petition<sup>17</sup> produced anything that might be thought relevant to electoral rights. The apparently narrow issue there had been whether a direction concerning an application for a postal vote and contained in a note to the form prescribed in a schedule to the CEA was mandatory, but it produced an insight into current judicial thinking about the significance

of voting. As it happened, the members of the first High Court could draw on considerable experience of the other two branches of government, a couple decades in their colonial parliaments for each of them, almost as lengthy ministerial experience for Griffith and Barton though only about three years of it for O'Connor. Like Earl Warren, they had been elected persons before they were appointed persons. Might that subtly affect their later opinions?

Griffith, CJ observed that the scheme of the CEA was “that every elector shall, as far as practicable, vote at the polling place for which he is enrolled” (s.109) and drew the conclusion that “[b]ecause a voter has no right to vote by post beyond such a right as is conferred by sec.109, and I think it is a clear rule that where a privilege is granted subject to a condition, the performance of that condition is necessary before the right to exercise this privilege arises”, the direction was mandatory.<sup>18</sup> Barton, J worried about “the disfranchisement of a number of electors who have done the best they knew to comply with the Act”.<sup>19</sup> But, he continued, the clear intention of the legislature had been to prevent personation and the fraudulent gaining of rights, “the destruction of proper vigilance and safeguards”, was more serious than disfranchisement, and “we cannot imagine” that the legislature could have wished to produce that. O'Connor, J added that postal voting had “infinitely more opportunities of personation than any other method” and it could have been expected that the legislature would have taken particular care with it.<sup>20</sup>

Thus at their first opportunity the High Court set out on a course that emphasized the integrity of the electoral process prescribed by Parliament and avoided any suggestion there might be an inherent *right* to cast a vote to protect. The elector's *privilege* derived from the legislature's provision of it. Whilst it might have been an improvement to sever a right to vote from its ancient and varied property connections and make it a benefit conferred by the legislative branch, there was potential for future problems.

The next general election, in 1906, produced a complex set of 3 cases concerning the choice of a Senator from South Australia. Most of the resulting judge-made law had little

or nothing to do with the present question,<sup>21</sup> but the composition of the High Court had changed slightly. A new member, Isaacs, J, a bit more radical and with much less experience of executive office,<sup>22</sup> turned the Court's attention to the words "directly chosen" which he described as "more than a mere direction, more even than a simple mandate as to the mode of election". They expressed "the essential nature of these branches of the Parliament" and were "fundamental to the directly elective character of the two Houses."<sup>23</sup> Vardon, who had been the loser in the Senate recount which had led to his initial election being found to have been void, subsequently attacked the validity of the South Australian Parliament's choice of a replacement under the provisions (s.15) covering "casual vacancies". A majority (Griffith, CJ, Barton, J and Higgins, J) examined the language of the Constitution and struck down the State Parliament's action. Isaacs, J agreed with that outcome, but saw wider implications in the Constitution.

The 1910 election followed the consolidation of the original 3 parties into 2. Only 4 divisions were uncontested, and whilst there were 7 divisions where the majority was between 100 and 500, there were none in which it was below 100 which would have provided the most attractive prospect for a challenge. The one division that ended up before a High Court judge, sitting as the Court of Disputed Returns, had a majority greater than 1,500 (54.4% to 45.6% in modern terms), but there was an allegation of bribery which if proven would be sufficient to unseat the winner and require a by-election. The allegation involved the supposed promise of a silk dress, there were two witnesses and one of them thought the offer had been serious, but O'Connor, J. had no doubt it had been a joke and entered into the spirit of the occasion by regretting that so serious a charge had been brought before the court "upon such an exceedingly flimsy ground."<sup>24</sup>

That left the petitioner with only illegal practices and irregularities sufficiently numerous to have been likely to affect the result of the election. One pleaded was the prevention of voters from voting by the extent of overcrowding in a polling place, but the judge thought the booth's turnout as a proportion of its enrolled voters did not indicate to him there could have been "any substantial number of persons prevented from voting by the

overcrowding”, and anyway the onus of proof was on the petitioner to show the result had been, or was likely to have been, affected. Another was that the confidentiality of voting had been violated by inadequate partitions where the voters marked their ballots; the judge preferred the evidence of the responsible polling official to the petitioner’s “more or less casual observation”. All told 9 matters were alleged, but the only one that excited O’Connor, J was the decisions by the presiding officers at 3 polling places to construe an official instruction that they were to prevent scrutineers from communicating with persons other than officials within the polling place to mean that the scrutineers had to stay either inside or outside the polling place for the entire period of polling. Three hardy perennial problems in electoral administration were raised: putting rules into instruments that did not have to survive the rigors that statutes or regulations did; ensuring adequate training of polling officials; and the potential for trouble with scrutineers. The judge found that the candidate was not to blame, and there was no evidence that had the scrutineers been present “the result would have been so different as to have affected the result of the election.”<sup>25</sup> The petition failed and the petitioner was down £150. Classic electoral law had been applied.

The next High Court case raised the extent to which the CEA might regulate beyond what might be thought the basic processes of an election. The 1911 amending act had not only introduced compulsory enrolment, for which it is usually remembered, but had sought to tighten up the control of campaign finance by requiring returns from candidates and newspaper proprietors, print then being the principal means of expenditure, and requiring identification in the publication concerned of the authors of electoral material. The Chief Electoral Officer R.C. Oldham had successfully prosecuted a Victorian newspaper, *The Argus*, for publishing an unsigned article commenting on the candidates for a NSW by-election in the division of Werriwa during the period between issue and return of writ; 6 editors had been fined £1 each.

In their application to the High Court to test the constitutionality of such legislation they had the benefit of four of the leading silks of the time, but Griffith, CJ was “unable to entertain any doubt”. Regulation of elections meant regulation of the conduct of persons

with regard to elections and that was intended “to secure freedom of choice to the electors.” Advertisements had to bear the name of the printer and the person authorizing them. Electors relied on guidance from others in the form of printed articles, the weight to be given depended on knowing who the authors were, and it was notorious that many electors were unable to form their own opinions about abstract arguments.<sup>26</sup>

Barton, J was of much the same opinion, as was Isaacs, J who again went a bit further. The appellants had sought to confine the Constitution’s words “relating to elections” so that “the object and the only object of an election is to get a formal registration of the actual opinion of each elector, without regard to the way in which that opinion has been formed.” But there was a wider principle which was “of the first importance”:

The vote of every elector is a matter of concern to the whole Commonwealth, and all are interested in endeavouring to secure not merely that the vote shall be formally recorded in accordance with the opinion which the voter actually holds, free from intimidation, coercion and bribery, but that the voter shall not be led by misrepresentation or concealment of any material circumstance into forming and consequently registering a political judgment different from that which he would have formed and registered had he known the real circumstances.<sup>27</sup>

The 3 general elections following 1910 had a dearth of plausibly challengeable outcomes. In total there were only 5 divisions within the 100-500 majority range, and 4 below the 100 mark although 2 of these were single digit margin results, Werriwa (in 1914) and Macquarie (in 1917). Perhaps the war discouraged Liberal losers from appealing. In 1917 the Commonwealth Electoral (War-time) Act raised some interesting questions which never got to court and will be discussed below; it was repealed in 1920. Then in 1918 the CEA was both consolidated and substantially amended by the introduction of preferential voting for the House, and in 1919 the new method of marking preferences and counting votes was extended to Senate elections. The drafting of the latter in relation to existing provisions of the CEA led to a case before the High Court<sup>28</sup> which need not concern us here. However it should be noted that a belated challenge to preferential

voting, on the ground that the prohibition of plural voting in ss.8 and 30 of the Constitution prevented it, failed.<sup>29</sup>

In addition there had been some dilution of the recently created two-party system with the appearance of the Country Party and its allies in 19 divisions. At the 1919 general election turnout fell from 78.30% in 1917 to 71.59%, and informal voting for the House rose from 2.64% to 3.47%. Preferences had to be distributed in 15 divisions to identify the winner and this changed the outcomes from what would have been the first-past-the-post result in 5 of them. Thus preferential voting had introduced another potential point for challenge, in the sequence in which candidates were “excluded” and their preferences distributed among the remaining candidates. Whilst the final figures might mean a comfortable majority for someone, the numbers might have been quite close when one candidate rather than another was excluded at an earlier count. Selection of one or other set of preferences for distribution could affect the final count’s result. There had been 4 divisions in the 100-500 range, including one where preferences had been distributed, and only one below the 100 mark, but the 2-candidate contest in Ballarat had been decided by a single vote, 13,569 to 13,568. The inevitable petition came before Isaacs, J who identified “a great number of official errors causing disfranchisement of electors” some of which “were due to almost incredible carelessness on the part of local Presiding Officers”, and consequently the result was declared void and a by-election ordered.<sup>30</sup> It overturned the previous result by a large margin.

His examination of the official errors led to a reaffirmation of 2 principles long established in electoral law. Such Acts should always be interpreted in favour of the franchise, and the secrecy of the ballot should not be compromised by allowing evidence as to a voter’s intention. There were also more novel findings that electors were not obliged to check reprinted rolls to guard against official errors, and that electors should be told if there were procedures they could follow to preserve their rights. Only the secrecy of the ballot led to loftier considerations:

The fundamental common law principle is that “elections ought to be free.” That basic principle was reaffirmed and enforced by the Statute 3 Edw.I. c.5. It lies at the root of all election law. For centuries parliamentary elections were conducted by open voting. Freedom of election was sought to be protected against intimidation, riots, duress, bribery, and undue influence of every sort. Nevertheless it was found necessary to introduce the ballot system of voting. The essential point to bear in mind in this connection is that the ballot itself is only a means to an end, and not the end itself. It is a method adopted in order to guard the franchise against external influences, and the end aimed at is the free election of a representative by a majority of those entitled to vote. Secrecy is provided to guard that freedom of election.<sup>31</sup>

The right of franchise was the citizen’s most important public right, the ballot was a means of protecting it and should not be used to defeat it, and the statutory right to petition to challenge an election result was “a means of protecting his right of franchise and representation.”<sup>32</sup>

As for 3 Edw.I c.5, it was during that reign “that Parliament became more and more conscious of its own power” and that the knights of the shire and burgesses were brought into the Model Parliament of 1295.<sup>33</sup> The statute’s language is brief and to the point:

And because elections ought to be free, the King commandeth upon great forfeiture, that no man by force of arms, nor by malice, or menacing, shall disturb any to make free election.

“Great forfeiture” covered both fines and imprisonment, and it is still thus: both will usually be prescribed for electoral offences. It might be added that the Bill of Rights (1 Will & Mar c.2) repeats the message: “That election of members of Parliament ought to be free.” It is usually glossed as requiring “regular, fair elections.”<sup>34</sup> However that is followed immediately by: “That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of

Parliament.” In the light of the recent sustained attack on that provision by the then Opposition and the leading daily tabloid in Queensland, it may be safer to continue to rely on King Edward I rather than King William III.

The 1919 election also produced a case involving the coincidence of elections for periodical and casual vacancies in the Senate and confusion between the original legislation relating to Senate elections and the 1919 amendments,<sup>35</sup> but it is irrelevant here.

*Meanwhile in Dublin and Weimar ...*

The Australian story to this point has been about a very gradual evolution, about the recognition of rights which emerged originally in the common law of elections, which might be embodied in statutory provisions, and which would be recognized by judges dealing with either a petition to overturn an election outcome or, perhaps less often, to resolve a point of law at issue. However there were alternative narratives which can be picked up at about the same point of time we have just reached, the end of the Great War.

The Irish story – that is the Southern Irish story – had much the same root as the Australian, an experience of elections to the House of Commons. The Irish experience was more direct for, after the abolition of the Irish Parliament in 1801, its electors (who since 1793 had included Catholics) sent their representatives (who after 1829 could include Catholics) across the Irish Sea to sit in the House of Commons.<sup>36</sup> When it had been agreed that the greater part of Ireland should have a new constitutional status it was embodied in a written constitution, just as the union of existing colonies in Australia had required one.

The Free State Constitution<sup>37</sup> which came into force in December 1922 contained several provisions relating to elections. All citizens had “the right to vote” subject to details much like those concerning the franchise that had been put into the Australian constitution, or had been expected to be soon applied in Australia: age 21 (but 30 for the

Irish Senate), no sex discrimination, no plural voting. The “mode and place of exercising this right” would be determined by law (Art.14). Constituencies should be determined by law, but as in the United States this should be reviewed at least every 10 years “with due regard to changes in distribution of the population” (Art.26). There were three additions to the Australian version, one of which has just been mentioned – recognition of a right to vote. The second was that elections should be “upon principles of Proportional Representation” thereby recognizing an undertaking given to the Protestant political interest in the negotiations for effective independence and the high degree of interest in PR then prevailing in Ireland.<sup>38</sup> The third was that representation, which could be measured by the members of parliament to population ratio, should “so far as possible, be identical throughout the country” (Art.26).

As for the effects of these provisions in the Free State Constitution, in 1918 the right to vote had already been extended by the United Kingdom’s Representation of the People Act with the result that the proportion of electors in the adult population of Ireland had increased from 26.9% to 73.7%; the remainder, younger women, were accommodated by Irish legislation in 1923.<sup>39</sup> The degree of proportionality, measured as party votes to seats, achieved would be affected by the increasingly small numbers of Members allocated to the constituencies drawn by the governments of the day.<sup>40</sup> However, in the beginning at least, an examination of the before-and-after-PR contrast ought to have quieted complaint. At the 1918 election Sinn Féin had won 71 of the 76 seats in the 26 counties with 65.2% of the vote; at the 1923 election the pro-Treaty coalition which included part of Sinn Féin won 63 of the 153 contested seats with 39.0% of the vote, and the anti-Treaty rest of Sinn Féin won 44 with 27.4%.<sup>41</sup> As for the other degree of proportionality, population or enrolment numbers to seats, it has been sufficient to avoid sustained controversy so far as the present writer is aware.

Even though Ireland is not Australia, anyone inquiring into the protection of rights would find interesting, even useful, the place the Irish Free State Constitution deserves in any debate about enunciations of rights.<sup>42</sup> Comparisons with contemporary developments on the continent of Europe, and the distinction between individualist and collectivist starting

points, are especially valuable. The point made now would be merely that this constitution specifically recognized a *right* to vote, *fairness* in determining election outcomes and *equality* in representation, whereas except for equality among the States the Commonwealth Constitution did not and that exception was subject to a qualification which originally benefited 2 states and continues to benefit one. Whether the courts have read anything on any of those lines into the Commonwealth Constitution will be considered below.

Germany too had experienced a massive enlargement of its electorate by the enfranchisement of women, even though there had been some diminution of its territory after the Great War. The 14.4 million electors of the 1912 national election had become 37.3 million at the 1919 special election. But, in contrast to Ireland, there was already a long tradition of constitutional provisions about elections. The aborted 1849 Constitution contained a statement of the Basic Rights of the German People which required franchise legislation to “provide for the right of the individual to vote for members of the national assembly” (Art.132) which in future should have a 3-year term, though it said merely that “[e]lections shall be held in accordance with the rules contained in the Reich Electoral Law” (Art.94). The National Assembly subsequently passed such a law which was to have “implemented the principle of a universal, equal, direct and secret ballot”.<sup>43</sup> The 1871 Constitution itself provided that the Reichstag would be elected “by universal and direct election with a secret ballot” (Art.20). However, in both 1848 and 1871 “universal” meant “universal male” and traditionally the age of majority in Germany had been 25. In reality though, it was the anti-democratic electoral system of Prussia, the constituent state that dominated Germany and its national legislature and government, which mattered. Prussian elections were indirect, the ballot was open, there had been no redistribution since 1860 despite a massive movement of population into the cities, and the three-class system grouped primary electors according to the direct taxes they paid, thus ensuring both inequality and irrationality.<sup>44</sup> Proposals for change were raised in 1917-18<sup>45</sup> but were overtaken by events at the national level.

The total collapse of the German government in November 1918 had been preceded in October by adoption of some elements of the 1871 constitution. After the collapse the revolutionary Councils of Workers and Soldiers were headed off, and a conference of delegates from state revolutionary governments proposed a national assembly to be elected by “what was perhaps the most democratic suffrage ever known”<sup>46</sup> with the franchise truly universal and the minimum age set at 20, and with d’Hondt’s version of proportional representation to be applied. The Constituent National Assembly met at Weimar and promptly adopted a draft constitution which was then elaborated over a further 7 months. Part II of the Weimar Constitution set out an extensive system of Fundamental Rights and Duties of Germans that included “The freedom and the secrecy of elections are guaranteed. Details are to be determined by electoral laws”. (Art.125) More specific electoral provisions read:

The [Reichstag] Deputies are elected by the universal, equal, direct and secret suffrage of all men and women above the age of twenty, upon the principles of proportional representation. Elections must take place on a Sunday, or a public holiday. Details are determined by the election law of the Reich.” (Art.22)

Each state must have a republican constitution. The representatives of the people must be elected by the universal, equal, direct and secret suffrage of all men and women of the German Reich upon the principle of proportional representation. ... The principles governing elections of the people’s representatives apply also to elections to local bodies. By a State law the qualification for a vote may, however, be declared conditional upon a year’s residence in the district. (Art.17)

The national election law was an ordinance dated 1 May 1920. In the meantime the application of the d’Hondt system in 1919 had been criticized because parties had been permitted to combine their lists which disadvantaged those parties, particularly the smaller ones, unwilling to form alliances or to compromise their principles. In addition, the initial drawing of district boundaries so that there were on average 11 members per district was thought to diminish the quality or effectiveness of representation. The Baden

system, named after an article in that state's constitution, provided that in a district each party would be allocated a member for every 10,000 votes received, with a fraction exceeding 7,500 producing a seat. Thus the number of members would depend on the votes cast rather than enrolment or population and thereby encourage participation. Three alternative versions of the Baden system were put to the people for consideration, after which the cabinet endorsed one. It provided for districts, usually with 4 members, beyond which groups of districts and finally a Reich total converted valid remainders into additional seats. In the event a system to conduct a necessary general election was urgently required, so the existing districts that had already been used for the National Assembly were confirmed, the intermediate groups of districts abandoned, and estimates – which suggested that almost one-fifth of the Reichstag might be chosen from the Reich total list – led to a manipulation of the list-alliance mechanism to try to maintain meaningful representation.<sup>47</sup> It might be noted that the September 2009 federal election was threatened by the reappearance of this problem, an excessive “overhang”.

Mention of Weimar and proportional representation in the same breath may raise ancient fears which once had vocal followers in Australia. Therefore it has to be said that the preceding, Bismarckian, national electoral system, quite like our House of Representatives' preferential voting, encouraged deals between parties; the Weimar system did not, being more like our Senate's proportional representation was thought to be prior to the 2013 election.<sup>48</sup> At the 1912 German election the 4 largest (in votes) parties were: Centre 16.4% votes, 22.9% seats; Social Democrats 34.8% votes, 27.7% seats; National Liberals 13.6% votes, 11.3% seats; Progressive Peoples' 12.3% votes, 10.6% seats. At the 1919 election the 4 largest (in votes) parties were: Centre 19.0% votes, 21.6% seats; Social Democrats 37.9% votes, 38.7% votes; Democratic 18.6% votes, 17.8% seats; National Peoples' 10.3% votes, 10.5% votes. The new system could be said to be fairer. Later, the Nazi Party, which started modestly but then took off at the end of the decade, secured: 1928 2.6% votes, 2.4% seats; 1930 18.3% votes, 18.5% seats; 1932 (July) 37.3% votes, 37.8% seats; 1932 (November) 33.1% votes, 33.6% seats; 1933 43.9% votes, 44.5% seats.<sup>49</sup> The conclusion to be drawn is not that fairness in election outcomes can be a dangerous thing if a wicked party were to get popular, but that

it is possible to say things about having the right to vote in a constitution without being locked into America's electoral experience.

*Back to Melbourne and eventually Canberra*

It will be recalled that the Commonwealth Parliament had acted promptly to apply the White Australia policy to the federal roll. In 1923 a Japanese, Jiro Muramats, who had been naturalized as a British subject in Victoria, challenged in the High Court the decision of the Commonwealth Electoral Officer for Western Australia to refuse him enrolment.<sup>50</sup> He had previously secured enrolment for that State's lower house and now sought enrolment on the separate federal roll; his right to do so appeared to be guaranteed by the Commonwealth Constitution, s.41. Whilst the equivalent State legislation contained a disqualification similar to the Commonwealth's, the situation was complicated by the possibility that its language allowed for someone to be on the roll but not entitled to vote. Three of the judges thought the Police Magistrate who confirmed the CEO's decision had been right. Higgins, J reflected on Japan's earliest history, thought the Ainu might have exterminated a previous people, but concluded that "inhabitants of Australia or Western Australia" believed "aboriginal" meant people who were there before the Europeans arrived. Therefore Japanese people born in Japan were caught. No one speculated about the possibility that a restriction on naturalized British subjects might be invalid.

The election of 1922 showed a further rise in informal voting for the House (to 4.52%) and a further decline in turnout (to 59.36%). Preferential voting mattered more with the number of divisions where preferences had to be counted increased, and instances where the original front-runner was overtaken doubled. Although there were 4 divisions decided by margins less than 100 (including the success of a future United Australia Party leader, Latham, on ALP preferences), and another 3 in the 100-500 range, the next instance of redress being sought in the High Court had to await the introduction of compulsory voting in 1924. Surprisingly informal voting for the House was now down (to 2.36%); inevitably turnout was up (to 91.39%). There was only 1 uncontested

division, and preferential voting mattered much less; preferences were counted in 7 divisions, changing the outcome in 2. Only 2 divisions offered any promise for challenge, both in the 100-500 belt. One of them, Herbert with a margin of 268, had considerable political significance in the long run.<sup>51</sup> But only the failure of E.E. Judd to vote for the Senate in New South Wales led to the High Court.<sup>52</sup>

Judd, a member of the Socialist Labor Party, took the view that his party sought to end capitalism, and therefore its members were prohibited from voting for supporters of capitalism. His counsel argued that the right to vote implied a right not to vote, and excluded the notion of compulsion. For the Divisional Returning Officer defendant who had prosecuted Judd, it was said the power to prescribe the method of election included power to make voting compulsory, and the nature of elections did not imply absolute freedom of choice. A duty had been imposed, and a “valid and sufficient reason” was required if the duty was not discharged. Disagreement with the political views of all the candidates was not such a reason.

Three judges held the power to make laws prescribing election methods was plenary and unrestricted save for the limitation that any law should be uniform for all the States. Judd’s reason if it was just the view of his party was insufficient, and if it was his own view it was merely “an objection to the social order of the community in which he lives.” Rich, J in a separate opinion said voting was not merely a right but a duty that each elector had to discharge. If a reason not to discharge the duty was offered, it had to be “valid” by being sound in law and fact, and be “sufficient” by being substantial and “satisfactory in the absence of countervailing answer.” Once again Isaacs, J went further. So long as there was freedom of choice of candidates and so did not “offend against the freedom of elections” and again 3 Edw. I, c.5 is cited, compulsion was acceptable. As for “valid and sufficient” a “reasonable excuse” is required, and its sufficiency is a question of fact dependent on the circumstances.

Higgins, J accepted the constitutionality of the requirement, but thought a valid and sufficient reason had been offered. Religious belief would have been sufficient under

s.116 (though whether the whole or some part of the section, perhaps “prohibiting the free exercise of any religion”, would have been the basis of such a finding is unclear), but that was not Judd’s point. His claim that this was his party’s command was not a valid reason. However the voting was preferential, and Higgins, J was of the opinion that if in truth he had no preferences that would be a valid reason.

It is to be presumed in favour of Parliament, unless it clearly says to the contrary, that the Act of Parliament does not compel a man to say that he has a preference when he has none – does not compel him to tell a lie. If in what is obviously a labour constituency there were two labour candidates and an anti-labour elector regarded one labour candidate as being as bad as the other, this would, in my opinion, be a valid reason for declining to vote. ... The object of elections being to ascertain the predominance of opinion in some given area, it must be presumed (in the absence of clear words to the contrary) that Parliament did not want to compel men to vote whose votes do not reflect any real opinion as between platforms and candidates, votes which would tend to defeat rather than to aid that object.<sup>53</sup>

Judd’s case warrants this much attention here because compulsory voting has been the aspect of elections that most often starts talk about rights in Australia. Moreover Higgins, J’s reasoning is helpful to the more recent argument for optional preferential voting.<sup>54</sup>

This was not to be the end of the matter, for whilst the outcomes of particular elections might disturb a couple political parties and perhaps dozens of unsuccessful candidates who believed they should have won, prosecutions or the possibility of prosecution for not voting offended tens, if not hundreds, of thousands. Nevertheless a return to the High Court took some time. After the 1969 election, a Victorian barrister who appeared for himself and may have benefited from the non-appearance of the prosecuting Divisional Returning Officer, convinced a stipendiary magistrate that his lack of a preference for any candidate was a sufficient excuse for his failure to vote. The Supreme Court of Victoria

upheld the majority in Judd's case and added, very usefully for future arguments on the subject, that the legislation was not compelling the elector to tell a lie.

To record an informal vote is not an offence. To fail to mark a ballot paper so as to show preferences as directed by s.124 is not an offence. What is made an offence is a failure "to vote" (s.128A(12)(a)), that is to obtain a ballot paper (which in reality is what s.128A(2) and reg.75 and form 39 of the Electoral and Referendum Regulations create as the detectable offence), as distinct from a failure by the elector "to record his vote" which is the notably different expression used, perhaps not insignificantly, in s.128A(1).

The view of Isaacs, J in Judd's case was not concerned with "likes and dislikes". The elector is told he must have either one candidate or the other.

This is a statutory injunction, and it follows that it must be a corollary of that enjoinder that the same statute is not permitting some philosophical or intellectual inability to differentiate between candidates to amount to a valid and sufficient reason for not voting.<sup>55</sup>

When another Victorian magistrate convicted a non-voter who offered the same excuse and the matter came on appeal before the High Court, Barwick, CJ agreed with the point made by Isaacs, J in Judd's Case that the excuse was "an open challenge to the very essence of the enactment" and the 3 judges upheld the conviction.<sup>56</sup>

A later try, which ended up in the Australian Capital Territory's Supreme Court, was based on the lack of sufficient evidence to form an order of preferences for an ACT House of Assembly election. After reviewing the previous cases Blackburn, CJ held that the statute did not require "a *true* expression of his preference among the candidates", that one school thought he was required to "make an expression of *apparent* preference" and the other that he "need not express himself intelligibly or at all".

The legislature apparently believes that the imposition of this obligation (whichever it is) on all electors, is for the public good, inasmuch as it will produce a sufficient proportion of genuine expressions of preference to ensure that the elected candidates are those actually desired by a majority of the electors. That there may be useless by-products of the system – a proportion of ballot papers which only appear to express the preference of an elector, and do not do so in reality, and another proportion of ballot papers which, being informal, do not even appear to express a preference – is a consequence which the legislature presumably accepts. The decided cases prevent me from thinking that the legislature intended to spare the consciences of those to whom to vote insincerely is distasteful. *A fortiori*, there can be no reason to think that it intended to spare from the inconvenience of a visit to the polling booth those for whom to comply with the Act is a meaningless formality, objectionable only because it is a waste of time.<sup>57</sup>

A doctrine that the legislature accepted there might be some static, “useless by-products”, on the best planned electoral arrangements would have its uses.

Returning to our main chronology, the next case after Judd’s came from the Senate and was concerned with ballot paper complications and the statutory interpretation of the relevant provisions.<sup>58</sup> Starke, J observed that the general rule was that an absolute enactment had to be obeyed exactly, and the numbering provisions prescribed a numerical succession unlike, for example, compliance with prescribed forms. This led to attempts to ease that burden on electors by amending the legislation as will appear below.

It was followed by a case from the House that sought to challenge the validity of certain voters’ enrolments.<sup>59</sup> Again it was Starke, J who upheld the CEA, s190 specific prohibition against the Court of Disputed Returns inquiring into the validity of the roll. This has led to complaints, still continuing, from would-be petitioners and their supporters that the integrity of the poll has been sacrificed. In neither case did Starke, J

think it necessary to raise any wider implications. Allegations of roll defects as a ground for enjoining the holding of an election failed in 1984.<sup>60</sup>

In an unreported case in the Court of Disputed Returns arising from the 1949 election in the division of Kingsford-Smith, Fullagar, J confronted the question whether a successful candidate who, in addition to spending beyond the prescribed limits and benefiting from Commonwealth Government publications, was “a professed member of the Roman Catholic church” was disqualified from sitting for allegiance to a foreign power, the Vatican being such under the Lateran Treaty of 1929 it was argued. The judge preferred s.116 of the Constitution prohibiting any religious test for public office over s.44(i)’s exclusion of anyone ”under any acknowledgment of allegiance, obedience or adherence to a foreign power” being chosen or sitting, and topped that up with a reference to the eligibility granted Catholics in 1829 for the House of Commons by 10 Geo. IV, c.7, s.2. The Commonwealth Constitution’s s.116, Fullagar, J said, was “not enacted by men ignorant or unmindful of history”.<sup>61</sup> Once the matter had been dealt with as explicitly as that in the Constitution there was no need to speculate further.

#### *Recent developments*

We now come to what might be thought of as the modern, that is post-1949, electoral era. A challenge arose from the Senate election in New South Wales in 1961. Despite the narrowness of the Coalition’s win in the House by 62-60, and the importance of preferences – which were distributed in 37 divisions and changed the outcome in 7, only 1 divisional margin fell below the 100 votes line, and 3 (including the notorious instance of Moreton which had ensured the final 62-60 total) in the 100-500 belt. For the House, close general elections do not necessarily require a number of close constituencies though they may occur.

However in the NSW Senate contest there had been 25 candidates, 22 of them in groups and 3 who stood as individuals. It produced a case that went before a Full Court, which had the benefit of M.H. Byers for the petitioner and L.K. Murphy (who had been elected

a Senator in that very election) for the respondent, and was concerned with whether an incorrect interpretation of voters' intentions had led to the rejection of ballot papers.<sup>62</sup> In the final count the last excluded candidate's 131,962 votes were distributed between the Democratic Labor Party's Kane who already had 132,106 and the Australian Labor Party's McClelland who had 252,771. McClelland's lead was thereby reduced to 3,412, and as there were almost 600,000 ballot papers in that count a successful challenge that altered roughly 0.5 per cent of them could have been sufficient to overturn the final result. Whilst the gap between Furley, the excluded Liberal candidate, and Kane had been smaller than 200 ballot-papers, a review of all informal ballot-papers was not sought which meant that a change in who took part in the last exclusion was not sought. In fact a distribution of Kane's preferences rather than Furley's would probably have seen more leaking to the ALP than the Liberal preferences at 9.9% had provided. Kane and his supporters would have preferred for him to win the place, but their next preference would have been for McClelland to be defeated by anybody else who could do it.

Kane's petition listed a number of deficiencies in the ordering of numbers that led to the ballot-paper being rejected as informal, and then claimed that so many of those ballot-papers favored him over McClelland that had they not been rejected he would have been declared elected. The Court began by thinking that *prima facie* obedience to directions on how to mark a ballot-paper must be looked for, "but it another thing to say that every deviation from its correct application spells informality or indeed that it is the only thing that is capable of indicating the voter's intention." The judgment by Starke, J previously discussed was now qualified: "[W]hat is clear is that the intention must be indicated so that it is not left to inference, still less conjecture, that is expressed or indicated in a way that leaves it indisputable." There had to be a number 1 and an order of preferences shown for all other candidates as s.133(1)(b) required, but as to some defects the petition offered only matters that might be "a shrewd guess" or "imaginary hypotheses."<sup>63</sup> The petition failed.

The next case also arose from the procedure for the Senate count in 1964. Again it was a DLP candidate. this time challenging the random selection of ballot-papers to be

examined and counted as successive exclusions took place. If a recount were to be required then different ballot-papers might be selected randomly.<sup>64</sup> This was not an occasion to talk about rights, the petition failed and random selection remained an irritation for defeated candidates until the use of computers rendered it unnecessary.

A further case from the 1964 election, also brought by a DLP candidate, argued for a recount with the hypothesis that Tasmania's informal vote had been considerably lower than the informal vote in other States since 1949, and lower than Tasmania's at previous elections.<sup>65</sup> As the figures are easily provided, it might be helpful to see what the evidence would have looked like had the High Court chosen to go down that path. Whilst it is certainly true that Tasmania in 1964 produced the lowest informal vote seen since the change to the voting system, allocating an explanation to that fact at the very least ought to be accompanied by a theory that explained the other striking variations in the data set. The Court found that the petition neither directly nor indirectly alleged any fact that would justify ordering a recount. A later case added that conclusions of law were not facts for this purpose.<sup>66</sup> One hypothesis that might have some legs at this point is that third parties and Independent candidates are more likely to rock the boat by lodging petitions, whereas the two major parties are unlikely to risk the inevitable reprisal(s). Another is that the informal vote is likely to be lower when electors have to use only one system of voting on that occasion as was the case in 1964 with a Senate-only election, but additional circumstances in a particular state may also affect the figures.

#### **Percentage votes informal for Senate elections 1949-64 by State**

Election	NSW	Vic	Qld	WA	SA	Tas
1949	12.04	10.70	7.12	9.98	11.63	10.55
1951*	7.87	6.62	4.70	8.91	5.80	11.58
1953**	3.96	5.61	2.64	7.19	4.87	5.09
1955	8.76	13.49	4.07	10.01	8.95	12.63
1958	12.46	9.89	7.17	9.40	7.74	11.21

1961	12.75	10.72	8.53	9.99	5.64	9.98
1964**	6.22	8.41	7.15	5.97	7.46	3.50

\* Double dissolution election

\*\* Senate only election

*Questions of rights at last*

Growing awareness of developments in the United States and changes in the leadership and the policy concerns of the Australian Labor Party, long enfeebled in Opposition,<sup>67</sup> finally brought electoral “rights” before the High Court, but in the first instance only as a matter of construction of the Commonwealth Constitution. Three young persons who had qualified for the franchise in South Australian State elections by reason of the reduction of the age of eligibility to 18 by an amendment of the relevant State statute in 1971 subsequently sought enrolment on the Commonwealth roll by virtue, primarily, of s.41: “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 Parliament of the Commonwealth.”<sup>68</sup> South Australia had been the first State to make the change to 18, and was followed by Western Australia. However attempts by the ALP to amend the CEA to bring Commonwealth eligibility down from 21 to 18 had been defeated by the Coalition Government on the ground or pretext of maintaining national uniformity in the franchise so far as was possible.

When counsel for the 3 plaintiffs, L.K. Murphy, began with the words “adult person”, referred to a number of legal instances where 18-year olds were held to be such, and indicated he would call a sociologist to give direct evidence, Barwick, CJ headed the Brandeisian approach off by turning first to the construction of the Constitution. The defendant Commonwealth preferred the meaning of “adult person” at the time the Constitution was adopted, 1900, when it meant 21 years of age, and the Court agreed in 6

separate judgments which turned largely on past and present recognitions of “adult person” status including contemporary colonial electoral legislation. Whilst it was possible for the Parliament to change the franchise age, s.41 did not do it for them. Stephen, J did begin by saying that the extent of the franchise in a democracy was of “fundamental importance” and could have gone into the Commonwealth Constitution as it had done with the Swiss constitution of 1874, and that many other countries had the franchise at 18-20, but he came to the same conclusion.

Another challenge resulted from new enthusiasms abroad in the political world, and it concerned establishing the principle of electoral equality rather than challenging a particular election result. One option was to put something into the Commonwealth Constitution, but when in 1974 1 of the 4 amendments put to the people simultaneously was called “Democratic Elections” and sought to tie redistributions to population rather than enrolment, only 47.2 percent of the votes nationally and a majority of votes in only 1 State were in favour of the amendment. That had always been the risk if the referendum process were to be tried, but the alternative of going to the High Court was equally chancy. If the people said “No” as they usually did when asked to amend the Constitution, or the High Court said “No” as it might be expected to do on past performances, the chance of success with the alternative approach was likely to be reduced.

When supporters of change tried the High Court route they claimed that the words “chosen by the people” required equal numbers of people in the divisions of each State, and declarations and injunctions were sought to establish the point. Their case could have been said to have asked whether *Wesberry v Sanders*, which had ruled US federal boundaries should be drawn so that “as nearly as practicable one man’s vote in a congressional election should be worth as much as another’s”, could be successfully planted in Australia.<sup>69</sup> Arguing that it could, the Commonwealth Attorney-General represented an elector of the Victorian division of Diamond Valley, which at the 1974 election had an enrolment of 86,763 when the Victorian average was 63,573. The South Australian Attorney-General represented an elector of Bonython where the enrolment had

been 79,498 against a State average of 62,526, and an elector of McPherson where the enrolment had been 89,177 when the Queensland average was 64,153, sought relief – not surprisingly – without the assistance of Queensland's Attorney-General

Six justices rejected the challenge to the existing provisions of the CEA, with Murphy, J as he now was dissenting, 4 of them holding that there was nothing in the history or language of the Constitution to support the claim. Neither had there been any signs of insistence on equality apparent in the State electoral arrangements prevailing at the time the Commonwealth Constitution was created. The circumstances and constitutional implications of the US Constitution were quite different.

The problem which is thus presented to the court is a matter of the legal construction of the Constitution of Australia, itself a legal document; an Act of the Imperial Parliament. 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 of the Parliament, namely, the Electoral Act, is to be decided by the meaning of the relevant text of the Constitution having regard to the historical setting in which the constitution was created and the terms and operation of the Act in respect of the subject matter which, upon that construction, is committed by the Constitution to the Parliament. 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.<sup>70</sup>

If the CEA, s.19 envisaged a degree of inequality, it set limits:

Equality is thus the objective to be sought, but the need for some departure therefrom is recognized. ... A margin of one-tenth is not one which in these circumstances takes away the quality of choice which s.23 of the Constitution enjoins.<sup>71</sup>

And the Act failed to indicate whether enrolment or population should be the basis for equality if that goal were to be pursued.<sup>72</sup> Dicta were added to the effect that, whilst there was no requirement for “as nearly as practicable” equality, inequality of numbers *could* be one factor that led to an inability to say this was a choice by the people, and that numbers *could* be so disproportionate as to say s.24 had not been complied with.<sup>73</sup> Any question of “rights” was disposed of by pointing out that whereas the US Constitution was adopted with the certainty that a Bill of Rights would be added, there was no such amplification of the Commonwealth Constitution which contains few guarantees of rights. The US Constitution sought to restrict legislative power, the Commonwealth’s showed confidence in the legislature which was left to flesh out the provisions it contained.<sup>74</sup>

However by a 4-2 majority, Murphy, J not deciding, the Court held that s.24 did require constant application as among the States, that consequently provisions of the Representation Act that tied redistributions to the census were unconstitutional, and a determination of State allocations was required before each regular triennial election though it would be impracticable for non-regular elections. In the view of 3 justices failure to observe the duty to test allocations would not invalidate a subsequent election. Gibbs, J generalised further:

No doubt most people would agree that for the healthy functioning of a democratic system of government it is desirable that the electorate should be fairly apportioned into electoral districts whose boundaries are not gerrymandered, that the ballot should be secretly and honestly conducted, that the vote should be fairly counted and that corrupt electoral practices should be suppressed, but opinions may well differ as to how these ideals should be attained. The Constitution does not lay down particular guidance on these matters; the framers of the Constitution trusted the Parliament to legislate with respect to them if necessary, no doubt remembering that in England, from which our system of representative government is derived, democracy did not need the support of a written constitution.<sup>75</sup>

Perhaps recognizing the novelty of what was happening and not wanting the practice to spread, Barwick, CJ reminded potential litigants that an individual citizen did not have standing to challenge the Representation Act; in this case South Australia had intervened. A year later the Fraser Government amended the Representation Act to implement the decision in *McKinlay's Case* by requiring that a new determination of the allocation of House seats to be made early in the life of each new House of Representatives. The legislation was subsequently challenged in a case which, because of the close resemblance of the Commonwealth Constitution's provision to the US model, involved an unusual amount of reference to American experience.<sup>76</sup>

At the same time the CEA was amended to comply with *McKinlay* a new quantitative criterion had been added to the drawing of divisional boundaries. Within each State no division with an area exceeding 5,000 square kilometers could have an initial enrolment greater than any division with a smaller area. It might that have been asked, though it was not, was this inequality on a scale that should have been struck down? On the 3 measures of inequality previously used here, a comparison of the figures at the 1977 election, after the new rule had been applied in the preceding redistribution with those at the 1969 election which had followed a redistribution without the new rule, suggests it did not. The David-Eisenberg measure is slightly worse in 1977, 1.76 against 1.57, but the Dauer-Kelsay (which is usually preferred) is slightly better, 48.27% to 46.76%, as is the Gini, .045 against .059. As for the sort of evidence that the High Court might have preferred, average enrolment in the 5,000 sq.km. divisions was 68,622 and in the others 72,127.<sup>77</sup> However, now looking at matters which even the US Supreme Court would have avoided, in for example New South Wales at the 1977 election, of the 12 divisions that benefited from the rule only one was won by the Opposition and that by the narrowest of margins; another could have been won with a small swing. The average Opposition two-party-preferred vote in the 12 divisions was 37.7% and in the State as a whole 45.4%. The rule did appear to confer a partisan benefit, but partisan advantage is not inequality.

However a number of criteria could be thought applicable to redistributions. Continuing with New South Wales after the 1977 redistribution as our illustration, 18 divisions were given enrolments below the State's quota: 6 rapidly growing divisions on the outskirts of Sydney which were on average 1.20% below quota, and 12 rural and regional divisions on average which were put 3.55% below quota. Given that there *might* soon have had to be another redistribution under the *McKinlay*-amended legislation, depending on the cut-up among the States, if there had been a challenge on these data the Court might have declined to intervene immediately and thus not have to address the merits of what had happened so far.

Meanwhile a challenge to the results of the 1975 Senate election in South Australia, which had turned on allegedly wrongful removal from the roll of "large numbers" of electors, incidentally mentioned that some of these had been deprived of their right to vote. Dismissing the application for a declaration Gibbs, J relied solely on the statutory provision (s.190) excluding the Court of Disputed Returns from such matters. Stephen, J with Mason, J concurring added that there were quite adequate remedies for those who thought they had been wrongfully deleted:

Any electoral system which, instead of providing a means of putting the electoral rolls in order before an election, allows alleged errors in those rolls to ground an attack upon the validity of the subsequent election exposes to risks of dislocation the democratic process which it is designed to serve. Hence, no doubt, the prior adjudication of disputes as to the state of the rolls, such disputes being treated as wholly distinct from, and not the proper subject matter of petitions concerning disputed elections and returns.<sup>78</sup>

The recent proliferation of political parties called attention to the threat to the soundness of electors' decisions at the polls, especially from the last-minute communication of numerous how-to-vote cards thrust into electors' hands as they entered their polling places. In 1966 the Senate election in Victoria produced an eve-of-poll challenge to a card which, it was claimed, might mislead would-be Liberal voters into supporting the

Liberal Reform team, but the injunction had been sought by a candidate and the Victorian Supreme Court did not think he had standing to do so.<sup>79</sup> The claim had been that there was a right to have elections conducted according to law, but its enforcement lay with the Attorney-General and the CEA made it reasonably clear that this was a matter for the Commonwealth.

In 1980 an application to restrain telecasting an allegedly misleading advertisement which advised against splitting the anti-socialist vote met the same fate in the South Australian Supreme Court when the judge commented: “Except in a clear case of misleading, I do not think that courts are well equipped to weigh appeals which are really directed to and meant to be weighed by the electorate to whom they are addressed.”<sup>80</sup> Apparently counsel for the plaintiff had indicated that he might seek to amend pleadings by advancing “the private right of property in relation to a vote” but now that the vote “is the right of every adult citizen of Australia” the judge doubted that would be sufficient to support a private right of action.<sup>81</sup> At the same election the Supreme Court of Queensland concluded that the Chief Electoral Officer had the same standing as the Attorney-General<sup>82</sup> and that was subsequently put into the CEA.

The 1980 Senate election in Western Australia, together with House contests in New South Wales and South Australia, produced a new version of interest in the elector’s state of mind. S.161 identified as an illegal practice either a how-to-vote card or an election handbill which effectively “was intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his vote.”<sup>83</sup> In the Western Australian case Evans, the top of the Australian Democrats ticket, petitioned against the election of Crichton-Brown, the third Liberal candidate on their ticket; the margin on this, the final count, was just over 500, 104,802 to 105,362. At issue were words in newspaper advertisements for the Liberal Party: “Now what about the Australian Democrats … in the last Parliament the Democrats voted with the Labor Party 8 times out of 10.” The inference, it was claimed, was that a vote for the Democrats had the same result as a vote for the ALP because the two parties shared the same philosophy and policies and their members were likely to vote the same way. The “8 times out of 10” was inaccurate if all

votes were examined, in which case the Democrats had voted with the Liberal (and National Party) government “upon a substantial majority of occasions”. Such incorrect and untrue statements were illegal practices under s.161 and affected the result of the election, and either Evans should be declared elected or else the election be declared void.

Gibbs, CJ as he now was, took the phrase “cast a vote” to mean, as in the Oxford or Websters dictionaries, to deposit a ballot-paper or give a vote, and not to include “to decide for whom to vote”. A statement about how to mark a ballot-paper that did not comply with the Act and would render the vote invalid might be caught by the provision, or an erroneous statement about polling hours. The words “in relation to” did not extend to forming a political judgment. As for Isaacs, J’s words in *Smith v Oldham* quoted earlier about forming a political judgment, that was true as a statement of general principle, but so was freedom of speech:

In a campaign ranging over a wide variety of matters, many of the issues canvassed are likely to be unsuited to resolution in legal proceedings, and a court should not attribute to the Parliament an intention to expose election issues to the potential requirement of legal proof in the absence of clear words.<sup>84</sup>

When it was subsequently proposed that Parliament should add appropriate clear words to the CEA, the proposal was soon withdrawn.<sup>85</sup>

In 1983 the guarantee contained in s.41 came around again. This time the High Court, with Murphy, J dissenting, held that whilst the section prevented the Commonwealth Parliament from disfranchising someone whose right to vote at state elections continued, it did not create a new right, and only those rights which existed prior to the passage of the first Commonwealth legislation in 1902 still endured. The intention had been to preserve the rights of women who were already enrolled in South Australia, and the various plaintiffs who were currently enrolled in New South Wales could not be added to the Commonwealth roll which had closed. Murphy, J in his dissent called attention to the

departure from usual practice in calling the 1983 election which effectively closed the roll earlier than might have been expected. That issue was to become a hardy perennial of partisan argument.

*The possibility of a new order*

The 1983 election changed the government, and the problem of premature roll-closing was dealt with by amending legislation before the year was out. When the government changed again in 1996, some of the old order was restored. This story will be recounted shortly. Once again American experience appears to have influenced Australian electoral ideas, in this instance the craft of roll-pruning. Moreover, again with frequent glances at and references to how things were done in Washington, the role of the High Court generally, coupled with accusations of judicial activism, became part of the small talk of Australian politics and took on a strongly partisan flavour.

The 1983 legislation had given a modest push in the direction of greater electoral equality for the House of Representatives by endeavouring to average inequalities out over the duration of a particular redistribution. That change was adopted by some of the states and it was a High Court challenge to continuing malapportionment at the state legislatures' level that has to be examined. The action was brought by two leading members of the Western Australian Opposition, supported by the Labor Governments of New South Wales and Queensland. The other 3 States, which then had non-Labor Governments, opposed the relief sought by McGinty and Gallop and supported the government of Western Australia. The relief sought was a declaration concerning the constitutionality of West Australia's electoral legislation, not the overturning of the result of a particular election that had already taken place.

The hearing began with an exchange immediately relevant to this paper. D.M.J. Bennett for the plaintiffs referred to a submission by the defendant, Western Australia, that the matter was "a political question within the exclusive competence of the legislature rather than this Court as a matter of separation of powers". A moment later McHugh, J cited

Frankfurter, J as “strongly of the view that courts should not intervene in this area” to which Bennett replied that such a view had been overruled in *Baker v Carr*; the view which prevailed in the 1940s and 1950s had been rejected “as early as 1962”.<sup>86</sup> Subsequently the Commonwealth’s Solicitor-General returned to competence. If, as was usually argued, Australia had avoided a constitutional bill of rights because of “the democratic determination of policy issues was preferable to that of unelected and technically irresponsible judges”, then the Constitution should safeguard the democratic process.<sup>87</sup> The paper will have to return to that point.

To appreciate the arguments put in this case it should be helpful to have some measures of the electoral support for each of the 7 governments involved, and also of the degree of malapportionment operating when that support had been recorded the better to estimate where self-interest might have lain. Data in the following table come from the last election held prior to *McGinty*, apart from the Gini II column whose data come from the various elections immediately preceding the Commonwealth’s 1983 changes to the redistribution process. They could indicate the extent to which change might have been under way already, and thus be a two-edged sword that could either justify leaving the matter with the legislatures or else record a change in contemporary understanding of what a constitution meant that could guide the court to a new approach.

	Election	Primary %	2PP %	Seats %	Gini I	Gini II
Cwlth	1993	44.92	51.44	54.42	.033	.070 (1983)
NSW	1995	41.26	49.00	50.51	.024	.039 (1981)
Vic	1992	51.99	56.30	69.32	.023	.088 (1982)
Qld	1995	42.49	46.60	50.57	.058	.171 (1983)
WA	1993	49.48	55.45	56.14	.161	.194 (1983)
SA	1993	52.80	57.60	78.72	.017	.090 (1982)
Tas	1992	54.11	n.a.	54.29	.014	.037 (1982)

Clearly Western Australia provided the best case for a challenge to malapportionment. Its Gini I figure was roughly 3 times as large as Queensland’s and, whereas other

jurisdictions had shown significant reductions in malapportionment over the previous decade, Western Australia's reduction expressed as a proportion of the old measure had been slight. It might be added, though the point is not relevant to this paper, the matches between share of the two-party-preferred vote and seats appeared acceptable save for the two jurisdictions, Victoria and South Australia, where the governments had received a conspicuously larger share of that vote; South Australia subsequently undertook remedial action for its more obvious problem. Moreover, the Western Australian legislation at issue contained a very specific provision that drew a line that separated electoral districts (and consequentially their electors) of one sort from the other sort of districts and electors, instead of leaving a degree of discretion to the independent commissioners who had to apply qualitative criteria even if they might produce a similar outcome.

Potentially useful for the plaintiffs was the High Court's recent introduction of the camel's nose of "representative government" into the constitutional tent by the Political Advertising Case.<sup>88</sup> The Commonwealth, in support of the plaintiffs, argued that after 20 years McKinlay's Case "has been overtaken, if not overruled implicitly" by that case; "broader constitutional implications of representative government" had been articulated.<sup>89</sup> These were stated:

[T]he concepts of representative and responsible government recognized by the Court as embodied in the Constitution signify government by the people thought their representatives ... [T]his necessarily presupposes that every member of the people of the Commonwealth has an equal share in the political process which the Constitution ordains and sustains ... [T]he democratic right to participate equally in the electoral process is not formal. Government by the people necessarily implies that each voter has a substantially equal voice in determining the choice of representatives of the people. So, as to this aspect, our submission is that a system in which the votes of some voters carries [sic] significantly more weight than the votes of others is inconsistent with the essential concept of representative government or government by the people. ... [I]f there is an electoral inequality that can enable a minority of people to determine who is to govern the

Commonwealth or a State and to determine the policies by which they are governed against the wishes of the majority and by definition ... that would mean such government is not representative of the people it governs.<sup>90</sup>

Parenthetically, if the two-party-preferred vote were taken to be an acceptable measure for such calculations, it would have meant the governments of New South Wales and Queensland which were supporting the applicants were not representative of their peoples. This might be thought something of a paradox, though possibly one that reflected favourably on those states' adherence to principle. Whilst there have been electoral systems that provided a "top-up" of seats to ensure their correspondence with vote shares and thereby avoid such a situation, suggestions this might be tried in Australia have fallen on stony ground with the argument that such members of the legislature would be perceived as second class and recent British experience with the new legislatures in Scotland and Wales suggests this might indeed happen.

The plaintiffs' new approach faced three difficulties. Had the arrival of "representative democracy" on the scene changed anything? In particular did it imply electoral equality? Was there a link between the Commonwealth and Western Australian constitutions? Did representative government imply electoral equality? It failed with all three.

As to the role of "representative democracy", Brennan, CJ pointed out it was in neither constitution. It could not be treated as if it were and then attribute to it meaning or content from sources extrinsic to that constitution, and then invalidate legislation for inconsistency with that attributed meaning.<sup>91</sup>

Dawson, J had reservations about equality of electoral weight:

[T]he extra weight is only in the consequence that an elector in a smaller electorate is required to share his or her representative with a lesser number of electors than in the larger electorate. There are other ways, perhaps more significant, in which the value of a vote may be affected as, for example, where

electoral districts are defined in such a way as to allow one party in a two-party system to return a majority with less than a majority of the total votes, which may occur whether or not malapportionment also exists. Disproportion of this kind may intentionally be caused by a gerrymander.<sup>92</sup>

When he addressed earlier speculations that there might be such gross disproportion as to render an election not “directly chosen by the people” he concluded the authors had envisaged “extreme situations markedly different” from what prevailed in Western Australia.<sup>93</sup> McHugh, J thought that, if there had been relevant constitutional restraints, the Western Australian situation would have breached any principle of electoral equality “so far as is reasonably practicable”, but there were no such restraints.

There were 2 minority opinions. Toohey, J relied on the judgment in *Stephens v West Australian Newspapers*<sup>94</sup> for a link between the state constitution and representative democracy which required MPs chosen directly by the people. The Constitution Acts Amendment Act of 1889, had not been followed.<sup>95</sup> Gaudron, J agreed with him that the state’s “chosen by the people” requirement had not been complied with, but whilst s.106 of the Commonwealth Constitution required “the States, as constituent members of the federation, be and remain essentially democratic” that stopped “considerably short” of requiring equality of electoral power.<sup>96</sup> But the majority had made it clear that the “American” approach would not work in Australia.

Nevertheless a slightly different line eventually opened. If the status quo could not be improved by the courts, perhaps an attempt to wind back the status quo could be challenged there. Some history is necessary to show how the opportunity arose from the field of prisoners’ voting rights. In 1983 the majority of the Joint Select Committee on Electoral Reform proposed the CEA’s current term of imprisonment that took away prisoners’ voting rights be raised to 5 years “as an initial revision”, but Senator Carrick argued that 1 year should be retained but matched to the actual sentence rather than the statutory maximum for the offence of which they had bee convicted.<sup>97</sup> Thereafter the provision was an issue of partisan politics, the Labor Party wishing to abolish the

disqualification or lengthen the term and allow more prisoners to vote, and the Coalition parties to shorten the term and allow fewer to vote.

Following the 1984 election the JSCER majority recommended the disqualification be abolished, and the minority recommended it be retained in the current form.<sup>98</sup> Following the 1987 election the majority of what was now the Joint Standing Committee on Electoral Matters (JSCEM) merely noted that the Electoral and Referendum Amendment Bill 1988 which had dealt with, *inter alia*, prisoners' voting rights, had not been passed. In 1989 an Electoral and Referendum Bill revived the disqualification, but the Senate rejected the proposed amendment. The JSCEM Report on the 1990 election ignored the subject, but in the 1993 election Report the majority proposed the amendment and the minority opposed it.<sup>99</sup> By the 1996 election legislative roles had been reversed. The new, Coalition, majority recommended all prisoners be disqualified, and the new, Labor, minority sought to retain the status quo, and a new cycle of debate began.<sup>100</sup> In the 1998 election Report the majority observed that the proposal to disfranchise all prisoners in what became the *Electoral and Referendum Act [No 1] 1999* had been defeated in the Senate and concluded that "the current legislation should stand until there is sufficient and widespread public support for a change." The Labor minority said nothing, and the Australian Democrat minority argued for abolition of the restriction.<sup>101</sup> Following the 2001 election the major combatants said nothing about prisoners, but the Australian Democrats coupled a proposed review of the possible adoption of a Charter of Rights with a recommendation for CEA amendment to remove the disqualification.<sup>102</sup>

Finally in 2004 the Coalition succeeded in obtaining amending legislation which increased the disqualifying term of imprisonment to 3 years. In the report on the subsequent 2004 election, the majority re-stated their wish for a complete ban on prisoners' voting and the one Australian Democrat member of the Committee sought a Charter of Rights which would end the disqualification.<sup>103</sup> In 2006 amending legislation, the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures Act 2006)*, finally achieved the Coalition objective; all prisoners were disqualified from voting although their enrolments stood. In 2007 there was another change of

government, but the Labor Party lacked the numbers in the Senate either to restore a relatively long disqualifying term or else to abolish the disqualification entirely.

Whilst the Coalition government was still in office in Canberra, a prisoner serving a 6-year term under Victorian state law, who being an Aborigine and a woman incidentally representing two classes of persons who had originally been denied the franchise, challenged the existing provision for a complete disqualification on 4 grounds including the absence of elector disqualification provisions from the Commonwealth Constitution which meant that disqualifications had to “satisfy the representative government criteria” and that the provision limited the operation of the system of representative government mandated by the Constitution.<sup>104</sup> The first argument failed quickly: “qualification” was broad enough to include “reservations or exceptions to a qualification”. On the second argument there was a majority constituted by the opinion of Gleeson, CJ and the joint opinion of Gummow, Kirby and Crennan, JJ.

Gleeson, CJ followed *McKinlay* and a lecture by Sir Own Dixon in 1942: the Australian Constitution, unlike the American, was not concerned with provisions controlling the legislature, and important features of the Australian democracy that now prevailed like compulsory voting, preferential voting for the House and proportional representation for the Senate, and votes for women and Aborigines had been left to the Parliament. However there had been changes in interpretation of particular words, for example “foreign power” which had been drastically altered in 1999<sup>105</sup> and in *McKinlay* 2 justices had said “universal adult suffrage may now be recognized as a fact”. The Constitution’s ss.7 and 24 “because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote.”<sup>106</sup> Thus it was “difficult to accept” that Parliament could reverse Catholic emancipation:

Ordinarily there would be no rational connection between religious faith and exclusion from that aspect of community membership involved in participation, by voting, in the electoral process. It is easy to multiply examples of possible forms of disenfranchisement that would be identified readily as inconsistent with

choice by the people, but other possible examples might be more doubtful. An arbitrary exception would be inconsistent with choice by the people.<sup>107</sup>

We will return to the question of religious disqualification below, but as for imprisonment the Chief Justice pointed out that if it was the fact of detention at 30 June 2006 22 per cent of those confined in Australian prisons were unsentenced, mainly on remand awaiting sentencing. To that we might add, recently there was the case of David Hicks confined in a South Australian jail under the sentence of a United States court who clearly should have been enrolled and able to vote, and more commonly there are prisoners sentenced e.g. by the courts of adjacent countries for drug offences, and permitted to serve their sentences in an Australian jail who would require additional legislation. Moreover most prisoners were in State jails serving sentences imposed by State courts, and there were problems, albeit not insurmountable, with Commonwealth legislation imposing an additional penalty for their offence. However it was “consistent with our constitutional concept of choice by the people for Parliament” to treat those imprisoned for “serious criminal offences” to suffer a temporary suspension of their rights, and he had no doubt that a 3-year term was valid, and maybe a specified lesser term too. S.44 of the Constitution had applied a 1-year term to MPs but that also made the point that the mere fact of imprisonment was not enough.<sup>108</sup>

The joint opinion followed precedent by turning to “the systems of representative government with which the framers were most familiar as colonial politicians” for, whilst they did not “necessarily limit or control the evolution of the constitutional requirements” at issue, “they help to explain the common assumptions about the subject to which the chosen words might refer over time.” Canadian and Australian experience prior to 1900 was examined, and the linking of MPs’ and electors’ disqualifications in the *Australian Constitutions Act 1842* (Imp) focused attention on the expression “infamous crime”, leading on to a delicately-worded passage about disqualifications which “manifested an understanding of what was required for participation in the public affairs of the body politic, particularly in polities such as the Australian colonies where the immigrant societies were not underpinned by a class system.” Griffith’s intervention in the

constitutional negotiations in 1897 had turned “felony or any infamous crime” into “any offence punishable by the law of the Commonwealth or of a State” in respect of MPs but left electors to the ministrations of the Commonwealth Parliament when it came into being and whatever State law was in effect in the meantime. However Griffith’s proposed “term of three years” was reduced to “one year” by the Drafting Committee in 1898, and that version ended up in the *Commonwealth Franchise Act 1902*, s.3 together with a slight extension to “under the law of any part of the King’s dominions”. In the 1918 consolidation and amendment, the provision became the *CEA*’s s.3 which underwent the various changes described above. The question first in hand was the constitutional validity of the 2006 amendment, now CEA, s.93(8AA).

In the majority’s view there was “a constitutional bedrock when what is at stake is legislative disqualification of some citizens from exercise of the franchise” and that has to be for a substantial reason which is “reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government”.<sup>109</sup> The current provision operated “without regard to the nature of the offence committed, the length of the term of imprisonment imposed, or the personal circumstances of the offender” and thereby breached “long established law and custom”, and also created an incompatibility with the constitutional provision (s.44) relating to disqualification of legislators which was set at 3 years. The provision cast the net of disqualification too wide, when its end “stigmatizes offenders by imposing a civil disability … beyond what is reasonably appropriate and adapted (or “proportionate”) to the maintenance of representative government.”<sup>110</sup> The invalidity of the 2006 amendment revived the 2004 amendment to which the majority next turned. A 3-year provision disqualified for only one 3-year electoral cycle; it did not operate “without regard to the seriousness of the offence”; it was “reflective of long established law and custom” which antedated the Constitution; and fell within “the permissible area in such matters for legislative choice”.<sup>111</sup> The 2004 version stood and Roach’s disqualification should be subject to it. Gleeson, CJ agreed with this outcome.

However 2 justices did not go that far. Hayne, J thought s.30 of the Constitution allowed the Parliament to determine its own franchise, and the words “directly chosen” were “an expression of generality” the nature of which was indicated by the prevailing franchise laws at Federation all of which contained imprisonment disqualifications. The Constitution did not “establish a form of representative democracy in which the limits to the legislative power of the Parliament with respect to the franchise are to be found in a democratic theory which exists and has its content independent of the Constitutional text.”<sup>112</sup> The 2006 version was not invalid.

Heydon, J agreed, but added dicta that narrowing the franchise, winding the clock back, was possible:

Many think that one of the advantages of having a liberal democratic legislature, particularly when the legislators belong to political parties having different opinions on some issues, is its capacity to experiment, to test what does or does not work , to make up for unsatisfactory “advances” by carrying out prudent “retreats”. That capacity stands in contrast to the tendency of totalitarian regimes to become gerontocratic and ossified, faithful to only one technique of government.

The plaintiff had raised questions about possible restrictions of the franchise, which it had not been necessary to test, but whilst narrowing the franchise “may be highly undesirable, it does not follow that it is unconstitutional.”<sup>113</sup>

When the JSCEM reported on the conduct of the subsequent 2007 election, the majority noted the decision in *Roach* required some tidying up of the CEA text but proposed soldiering on with the 3-year term. It noted that the Human Rights and Equal Opportunity Commission had proposed that any disenfranchisement should be part of the sentencing process so that relevant facts were available to determine an appropriate period. The minority favoured going back to the 1-year term thereby aligning it with the constitutional requirement for MPs.<sup>114</sup>

*What is to be done?*

First it has to be asked if there is a problem. Would it matter if the electoral process by which those said to be “the best” guardians of our rights are put in office appears deficient on the “free and fair” scale that is generally used to rate elections? Would it matter if the process in place, though presently producing an acceptable result, is ineffectually protected against significant lowering of its “free and fair” rating? Does it matter that, when the Australian guardians who are supposed to be concerned about protecting the electoral process, they divide into two enduring camps – those who say they fear excessive and improper influence on the legislative process through the campaign finance part of the electoral process and proposals to restrict the franchise and discourage its operation, and those who say they fear extension of the franchise and encouragement of its operation and failure to protect the integrity of the electoral process from breaches of the CEA – and that neither has directed much attention to the protection of citizens’ rights aspect? Is it sufficient for there to be a token or symbolic election, as in Stalin’s USSR say, where voters might vote against the one candidate in sufficient numbers to prevent their election? What about those “elections which serve only to confirm the same rulers in their positions”? Whereabouts on the “free and fair” scale, though two scales, one for “free” and the other for “fair”, might be preferable, does the magic cease to work? And if “equal” were to join “free” and “fair” a third scale would be needed.<sup>115</sup>

If pragmatism is to be the order of the day, might it be useful to run some hypothetical cases through what would appear to be the existing machine, see how they are handled and then ask if that is satisfactory. Five cases have been devised, some of which reflect things that have been said previously in talk about the Australian electoral system(s), and others which may seem to come unexpectedly out of right field.

1. Capacity. Recently some recipients of federal welfare payments have been brought under a management regime whereby part of those payments has been sequestered to

ensure the money is spent on approved purposes like nutritious food and childrens' needs. If such recipients cannot be trusted to spend their money sensibly, can they be trusted to vote wisely? If the policy is applied only to Aborigines and their special welfare schemes, would disenfranchising such recipients be a racial disqualification that some justices have said is no longer possible?

Being in receipt of charity had been a disqualification in 3 of the colonies in the 1890s, but it ought to be possible to distinguish private charity from governmental welfare payments made under statute. The courts would be unlikely to start on the steep and slippery slope of assessing electors' capacity to make sensible decisions provided they had got over the minimal hurdle of understanding the nature and significance of the voting act.

2. Treason. In the long-running, and substantial, debate about prisoners' rights, it has invariably been pointed out that a conviction for treason is above reproach as a disqualification. However some of the prosecutions for the offence after World War II showed that treason might be more Protean than it had previously thought to be, and experiments with new offences and new "judicial" processes in the post-9/11 period have muddied the water still further. If extension of the treason disqualification into these new fields were to be attempted, some ingenuity might be necessary to bring offenders under such a disqualification.

Harking back to World War I experience will introduce a difficulty that appears to have escaped attention previously. The *Commonwealth Electoral (War-time) Act* 1917 (repealed in 1920) disqualified from voting naturalized subjects who had been born in the Central Powers countries subject to 3 exceptions: such a person was serving in the armed forces, or the parent, wife, brother or sister of such a person, or having previously been a subject of the Sultan of Turkey was a Syrian or Armenian Christian. It appears that persons in this last category were given special treatment under other war-time measures as well. If "profiling" practices were to lead to comparable provisions today, might a finding that a person had been classified an "enemy combatant" in a sphere in

which Australian forces had been participating support a disqualifying amendment in the CEA if one were passed? Further, might a possibly acceptable disqualification like previous nationality be held invalid if it were coupled with an undoubtedly unacceptable ground like religion? The power to prescribe qualifications has been held to support a power to prescribe disqualifications and perhaps the chain could be extended to recognize a power to prescribe exceptions to disqualifications.

There remains the problem of the Constitution's s.116. Might an elector be said to hold an "office or public trust under the Commonwealth"? In 1917 the voting rights of Catholics, Lutherans and the many varieties of the Orthodox were struck down readily, neither was the right of an Armenian who happened to be a former subject of the Bulgarian King or the Austro-Hungarian Emperor preserved. There is probably no need to enter that Serbonian bog for such a provision would most likely be overturned as arbitrary and without a rational justification. Finally the enfranchisement of 18-year olds in the armed forces for two world wars is no longer a problem if everyone is entitled to enroll at 17 and to vote at 18.

3. Age. However age does sometimes get a mention in respect of compulsory voting. The occasional letter-writer proposes that young voters, under say 21 or 30, be exempted from the duty to vote the better to enjoy their carefree salad days, or less often because of their inability to discharge that duty due to lack of relevant knowledge or experience. The counter-part letter writer seeks to exempt elderly voters, the figure used to be 70 but probably would be later nowadays, so they might better enjoy their autumnal days or at least not have to turn out in bad weather. This question has effectively been subsumed by the wider considerations of complete abolition of compulsory voting which will be discussed below.

4. Length of residence. Before Federation residence in the colony was a major consideration that varied greatly in application. Thus the 1880 Act in New South Wales required 5 years, but the 1990 Act in Victoria and the 1893 Act in Western Australia merely 12 months. The *Commonwealth Franchise Act* 1902 settled that by setting a

Commonwealth residence of 6 months, and it is unlikely any attempt to lengthen that period would succeed.

However there is also a residence in the electoral district requirement with a long history and some partisan flavor e.g. successive Queensland Acts before Federation set the figure variously at 6 months, 1 month bona fide residence in the preceding 9, and 2 months bona fide residence in the preceding 7. Subsequently when Labor came to power in 1915 it became 1 month and after it lost power 3 months. The diminution of the migratory workforce has put an end to partisan considerations, and to the likelihood of a new polling place named the X Miles in a marginal district shortly before polling day. Whilst there are data to suggest that recidivist movers are more likely to vote Labor, the fine calculations as to whether they are better left in the previous districts or counted where they have temporarily landed take them out of practical politics.

5. The end of federalism as we have known it. This section would probably not have been written save for a throwaway line in a 1-paragraph news report that read: “Nazi Germany had a Bill of Rights.” An initial reaction was that the appropriate response should be “Sort of, but in a state of suspended animation.” It was followed by concern that the earlier mention of Weimar in this paper warranted an account of what subsequently happened, not least because of the consequences for German electors’ rights. One follows. Its length is warranted because the details are now largely forgotten, yet the story is of great significance for understanding the part elections and electoral systems can play in what might be thought more fundamental questions.<sup>116</sup>

Article 48 of the Weimar Constitution began by authorizing the federal President to use the armed forces to compel a State to do its duty under the Constitution or federal law, and continued:

When public security and order are seriously disturbed or endangered within the Reich, the President of the Reich may take the measures necessary for their restoration, intervening in case of need with the help of armed forces. For this

purpose he is permitted, for the time being, to abrogate either wholly or partially the fundamental rights laid down in Arts. 114, 115, 117, 118, 123, 124, and 153.

The President should tell the Reichstag if he does so, and the Reichstag could demand the abrogation of his acts. The details were left to a federal law. The Articles specified concerned the usual, basic political rights; none dealt with elections as such as did Arts. 22 and 125. A distinguished French constitutional lawyer explained:

The President of the Reich has not, what is called in France, *le pouvoir réglementaire*, that is to say, the right to issue general ordinances obligatory on all citizens. He cannot make regulations of this kind except in cases where the Constitution or an ordinary law gives him power to do so. In such a case either he issues the regulation, naturally with the countersignature of a Minister (Articles 48, 49, 51, 59 of the Constitution, for example), or he must first obtain the consent of the Reichstag.<sup>117</sup>

Those were the rules. In February 1920 the infant National Socialist Party issued a program of 25 Points, the last of which demanded creation of a strong central authority at the national level with the national parliament having authority over the whole country and its organizations. As the economic depression deepened and existing political institutions failed to cope, the Nazis' popular and electoral support grew. As the Reichstag became unworkable, Chancellor Brüning of the Center Party, who had been in office since March 1930, resorted to Article 48 to govern by decree. The support of the Social Democrats who remained outside the ministry provided the necessary ratification by the Reichstag.

By the 4 major elections held between 10 March and 31 July 1932 the Nazis were approaching electoral success. In the first Presidential poll (10 March) Hindenburg's 18.7m votes were well ahead of Hitler's 11.3m, and the run-off (10 April) only slightly narrowed the gap to 19.4m to 13.4m. The third event, state elections (24 April) that involved five-sixths of the country, gave the Nazis only 35 per cent of the combined vote,

but in the crucial state of Prussia, with three-fifths of Germany's population, the Nazis and the Catholic Center Party now had a potential majority in the Diet. For the time being a coalition of Social Democrats and moderates dating back to 1925 remained in office in Prussia.

On 12 May a crisis broke out in federal politics. Brüning narrowly survived a confidence vote, but Groener, the Defence and Interior Minister, resigned his first portfolio having lost the confidence of his permanent head, von Schleicher, and the Reichswehr Ministry. On 30 May Brüning and his cabinet resigned, and President von Hindenburg turned to a more right-wing Centrist, von Papen. The Center Party chose to go into Opposition, but von Papen resigned from the party and formed a government that included von Schleicher at Defence now as the Minister. As Wertheimer said, the new Cabinet had negligible (less than 10 per cent) parliamentary support, was responsible to the President alone, was "entirely satisfactory" to the Army, and "consisted of non-party aristocrats of the class which before the war ruled Germany".<sup>118</sup> President von Hindenburg dissolved the Reichstag (4 June) on the ground that the state elections showed that the Reichstag no longer represented the people and a date was set for the fourth event (31 July).

In the meantime attention turned to Prussia and the possibility of ousting its moderate government and installing a federal commissioner. The federal ban on the Nazis' militia, the Storm Troops, was lifted (16 June) and a wave of riots and violence followed. When a Nazi march through a Communist district (17 July) left 17 dead and 70 wounded, all open-air meetings and parades were banned subject to severe penalties. The ingredients for invoking Article 48 were now in place, and Chancellor von Papen issued a decree under its first 2 provisions appointing himself Reich Commissioner of Prussia, and other decrees sacking the Prussian Minister President and Minister of the Interior. Berlin and the surrounding province of Brandenburg were placed under martial law. Thus both the army and the powerful Prussian police were now controlled by anti-democratic forces

The 31 July general election showed the Nazi vote stuck at about the same level as at the recent state elections, which meant a narrow majority in alliance with the Center Party,

but there had been a substantial increase in the Communist vote since the 3 preceding events. Hitler insisted that he would have to be Chancellor. When the Reichstag met (12 September) the von Papen government immediately dissolved it and set the next election date (6 November) whereupon the Reichstag voted lack of confidence in the government 512-42. When a legal challenge to the use of Article 48 was decided by the federal Supreme Court (25 October), it held (i) that the suspension of the Prussian government and appointment of the Reich Commissioner were valid, (ii) but the suspension was only temporary and only applied to the Ministers' administrative duties, and (iii) the suspended Cabinet was still entitled to be represented in the Reichsrat.

The 6 November general election produced another deeply divided Reichstag of 584 members: reading from right to left Nazis 196, Nationalists 51, Center 70 and their associated Bavarian Peoples Party 20, Social Democrats 121, Communists 100, and another 26 with miscellaneous labels. There had been slight movements of seats from the Nazis to the Nationalists and from the Social Democrats to the Communists, but the dominant indication was that the von Papen government lacked support; it promptly resigned (17 November). The President met Hitler (19 November) who was commissioned (21 November) to try to form a government subject to conditions imposed by the President. When Hitler rejected the restrictions the President turned (2 December) to von Schleicher who formed a government which made some conciliatory moves.

However when a dissolution had been sought and refused, von Schleicher's government resigned (28 January 1933) and immediately (30 January) a new cabinet was formed with Hitler as Chancellor and von Papen Vice-Chancellor and Reich Commissioner for Prussia. The other 2 Nazis in the Cabinet, Frick and Goering, were respectively in charge of the federal and the Prussian police forces. Two members were Nationalists and the remaining 5 independents leaned towards the Nationalists. With only 247 votes in the Reichstag, plus a handful from smaller rightwing groups, the new government would have required support from the Center Party. The Centrists indicated their policy terms, but Hitler chose a dissolution instead. The Prussian Diet was also dissolved, and both elections set for 5 March.

On the night of 27 February the building housing the Reichstag burned down. The Nazis had already been setting the tone for the election campaign. The next day (28 February) President von Hindenburg used Article 48 to suspend all the constitutional articles dealing with political rights. Severe penalties, which included death and were without redress in the courts, were introduced for offences against members of the government, and the rest of the campaign was without incident but “tense in the extreme”.<sup>119</sup> The new (and enlarged, up from 584 to 647 members) Reichstag at last had a majority supporting the cabinet: Nazis 288, Nationalists 52, Center 74 and Bavarian Peoples 18, Social Democrats 120, Communist 81, others 14. These numbers were soon altered by the exclusion of the 81 Communists and 16 of the Social Democrats from the new Reichstag’s initial meetings on 21 and 23 March. Article 72 of the Constitution entitled one-third of the Reichstag’s members to delay the promulgation of a new law for a period of 2 months; the exclusions circumvented that provision.

The meeting on 21 March had been divided between a formal session in Potsdam at the tomb of Frederick the Great in the morning and an organizing session in Berlin in the afternoon at which Goering was re-elected president of the Reichstag. On 23 March the Reichstag heard a speech by Hitler outlining his government’s intentions, and then considered an Enabling Act, entitled “Law to Combat the Misery of the People and Reich”, which was passed 441-94 and came into effect the following day, the Reichrat having met immediately after the Reichstag passed the measure and consented to it. Only the remaining Social Democrats had voted against it. The Enabling Act, as it is usually known, completes the story.

Its Article 1 gave laws enacted by the Cabinet equal status with those passed by the legislature, and Article 2 authorised such laws to deviate from the Constitution except they might affect the powers of the Reichstag and the Reichrat or the President. Nevertheless the Reichrat was abolished by decree on 14 February 1934 on the plausible ground that it had become superfluous. The Enabling Act originally was given effect for 4 years or until a new cabinet was appointed, but the addition of a new Minister, Dr

Goebbels as Minister for Propaganda and Public Enlightenment, on 13 March, the resignation of a Nationalist Minister on 27 June, and the addition of two Ministers without Portfolio, Roehm representing the SS and Hess representing the party, on 1 December failed to terminate the Enabling Act.

It only remains to note what happened to political parties and elections under the new regime. All parties but the NSDAP were declared illegal or dissolved. The Communist Party was banned and the mandates of its members just elected to the Reichstag and the Prussian Diet voided on 31 March. On 2 May the Socialists' resources i.e. the premises, bank accounts, etc. of the trade unions, were seized, and on 7 July their mandates for Reichstag and Diet voided. The ground for eliminating the parties of the left was treason. The end of the parties of the center and right was less tidy. After the various Nationalists organizations had been closed down, on 27 June the German National Front, their current manifestation, dissolved itself and their Minister resigned from Cabinet as already noted. After their organizations had been disrupted by the secret police, the Bavarian Peoples Party and the German People's Party (4 July) and the Center Party (5 July) voted to dissolve themselves. On 14 July 1933 a "Law Prohibiting the Formation of New Political Parties" was promulgated which made the NSDAP "the only political party in Germany" and anyone who sought to maintain another party or form a new one was liable to a jail sentence up to 3 years or "a higher penalty under other provisions." This was followed on 2 December with the "Law for Safeguarding the Unity of Party and State".

As for elections, on 12 November 1933 there was held a plebiscite on foreign policy – to approve Germany's withdrawal from the Disarmament Conference, and an election for a new Reichstag with a single list of candidates supplied by the NSDAP but including a sprinkling of former Nationalists; 93% of voters agreed with the policy and 92% backed the single list; 3 million ballots were invalid. The next election was in 1949 under a different electoral system.

There is one other matter to mention for it will be recalled that Art.17 of the Weimar Constitution dealt with state elections. Whether or not the Weimar constitutional regime

was truly a federation is, as has been said, a question that depends largely on definitions.<sup>120</sup> Whatever it was, the system was transformed by 4 pieces of legislation, 3 of which were made under the Enabling Act. The title of the first (31 March 1933) spoke of the coordination (Gleichschaltung) of the states with the Reich; it paralleled the provisions of the Enabling Act in permitting the state cabinets to legislate and to do so contrary to the federal Constitution. It dissolved all the state legislatures except the Prussian Diet which had just been elected (5 March), and provided that each should be reconstituted according to the vote at the federal election in that state save that Communist votes should not be counted. Local representative bodies were similarly dealt with, and both were given a life of 4 years.

The second piece of legislation, the Reich Regents Law (7 April), created political appointees chosen by and responsible to the Chancellor to link federal and state policies and ensured the first had absolute control. In the case of Prussia, the Chancellor himself was Reich Regent, thereby reviving the 1871 Constitution's arrangement (Art.11) that the King of Prussia was hereditary president of the Reich with the title of Emperor, the Kaiser. The third piece, The Law Concerning the New Structure of the Reich (30 January 1934), recited that the recent plebiscite and elections "have proved that the German people has been blended into an indissoluble unity which has done away with all internal political frontiers and opposition" and declared (Art.1) that the popular representation of the state was abolished, and the states were subordinate to the Reich, effectively leaving them as administrative units. The Commonwealth Constitution does not appear vulnerable to any comparable developments.

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<sup>1</sup> R.G. McCloskey, *American Conservatism In The Age Of Enterprise, 1865-1910* (New York, Harper & Row, 1964), *passim*.

<sup>2</sup> Colegrove v. Green (1946) 328 US 549.

<sup>3</sup> Baker v. Carr (1962) 369 US 186; Reynolds v. Sims (1964) 377 US 533.

<sup>4</sup> Brown v. Board of Education (1954) 347 US 483.

<sup>5</sup> C.A. Hughes, 'An Australian Bill of Rights' in ed. P. Alston, *Towards an Australian Bill of Rights* (Canberra, Centre for International and Public Law, Australian National University and Human Rights and Equal Opportunity Commission, 1994), pp.165-76; Electoral and Administrative Review Commission, *Report on Review of the Preservation and Enhancement of Individuals' Rights and Freedoms* (Brisbane, EARC, 1993).

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- <sup>6</sup> Electoral and Administrative Commission, *Report on Review of Parliamentary Committees* (Brisbane, EARC, 1992), v.1, pp.100-02; id., *Report on Review of the Preservation and Enhancement of Individuals' Rights and Freedoms* (Brisbane, EARC, 1993), p.148.
- <sup>7</sup> 'Charter of Wrongs: Don't swap the rule of law for the rule of judges,' *The Australian*, 4 December 2008; see Robertson, op.cit., pp.158-61.
- <sup>8</sup> A. Tudge, 'Qui pro quo for a powerful judiciary,' *The Australian*, 31 December 2008.
- <sup>9</sup> "Just the Bill for Lawyers," *The Australian*, 9 October 2009; "Battalions of Lawyers offer no Cost Benefits", *The Australian*, 13 October 2009.
- <sup>10</sup> E.g. G.S. Reid and M. Forrest, *Australia's Commonwealth Parliament 1901-1988* (Melbourne, Melbourne University Press, 1989), pp.84-112; J. Norberry, "The Evolution of the Commonwealth Franchise: Tales of Inclusion and Exclusion," in eds. G. Orr, B. Mercurio and G Williams, *Realising Democracy: Electoral Law in Australia* (Sydney, Federation Press, 2003), pp.80-99.
- <sup>11</sup> A. Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle?* (Cambridge, Cambridge University Press, 1992), pp.59-67.
- <sup>12</sup> E.g. K. Jordan and F. Stilwell, "Economic Inequality, Insecurity and Financial Futures", *Dialogue* 26(3) (2007), pp.3-18; P. Saunders & T. Hill, "Mr Howard and the Gini Coefficient", *Dialogue* 27(1) (2008), pp.49-58.
- <sup>13</sup> C.A. Hughes, *A Handbook of Australian Government & Politics 1965-1974* (Canberra, Australian National University Press, 1977), Appendix A.
- <sup>14</sup> Chanter v. Blackwood (No.1) (1904) 1 CLR 39; Chanter v Blackwood (No.2) (1904) 1 CLR 121.
- <sup>15</sup> Cameron v. Fysh (1904) 1 CLR 314.
- <sup>16</sup> Hirsh v. Phillips (1904) 1 CLR 132.
- <sup>17</sup> Maloney v. McEacham (1904) 1 CLR 77.
- <sup>18</sup> Ibid., at pp.83-84.
- <sup>19</sup> Ibid., at p.88.
- <sup>20</sup> Ibid., at p.90.
- <sup>21</sup> Blundell v. Vardon (1907) 4 CLR 1463; R v Governor of South Australia (1907) 4 CLR 1497; Vardon v. O'Loughlin (1907) 5 CLR 201.
- <sup>22</sup> Z. Cowen, *Isaac Isaacs* (Melbourne, Oxford University Press, 1967), pp.111-12.
- <sup>23</sup> Vardon v. O'Loughlin (1907) 5 CLR 201 at p.213.
- <sup>24</sup> Crouch v Ozanne (1910) 12 CLR 539 at p.542.
- <sup>25</sup> Ibid., at p.548.
- <sup>26</sup> Smith v Oldham (1912) 15 CLR 355 at p.358.
- <sup>27</sup> Ibid., at p.362.
- <sup>28</sup> Mulcahy v Payne (1920) 27 CLR 470.
- <sup>29</sup> Sogemeir v Macklin (1985 unreported).
- <sup>30</sup> Kean v Kerby (1920) 27 CLR 449 at pp.451, 470.
- <sup>31</sup> Ibid., at p.459.
- <sup>32</sup> Ibid., at 0.460.
- <sup>33</sup> H.G. Hanbury, *English Courts of Law* (London, Geoffrey Cumberlege Oxford University Press, 1944), pp.62-63.
- <sup>34</sup> E.g. J. Burnside, *Watching Brief: reflections on human rights, law, and justice* (Melbourne, Scribe, rev.ed. 2008), p.137.
- <sup>35</sup> Mulcahy v Payne (1920) 27 CLR 470.
- <sup>36</sup> P. Jupp, *British and Irish Elections 1784-1831* (Newton Abbot, David & Charles, 1973), pp.152-57.
- <sup>37</sup> L. Kohn, *The Constitution of the Irish Free State* (London, George Allen & Unwin, 1932); N. Mansergh, *The Irish Free State: Its Government and Politics* (London, George Allen & Unwin, 1934), chap.V.
- <sup>38</sup> C. O'Leary, *Irish Elections 1918-1977: Parties, Voters and Proportional Representation* (Dublin, Gill and Macmillan, 1979), pp.14-15.
- <sup>39</sup> R. Sinnott, "The Electorate", in ed. H.R. Penniman, *Ireland at the Polls: The Dáil Elections of 1977* (Washington, American Enterprise Institute, 1978), p.37.
- <sup>40</sup> O'Leary, op.cit., chap.9.
- <sup>41</sup> T.T. Mackie & R. Rose, *The International Almanac of Electoral History* 3<sup>rd</sup> ed. (London, Macmillan, 1991), pp.224, Tables 11.3b, 11.3d.
- <sup>42</sup> Kohn, op.cit., pp.104-11; Mansergh, op.cit., pp.50-51.

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- <sup>43</sup> E.M. Hucko, *The Democratic Tradition – Four German Constitutions* (Oxford, Berg, 1987), p.17.
- <sup>44</sup> C. Seymour and D.P. Frary, *How the World Votes: The Story of Democratic Development in Elections* (Springfield, MA, C.A. Nichols, 1918), v.2, pp.20-23.
- <sup>45</sup> Ibid., pp.33-34.
- <sup>46</sup> R. Brunet, *The New German Constitution* (New York, Knopf, 1922), p.24.
- <sup>47</sup> Ibid., pp.100-09.
- <sup>48</sup> G. Loewenberg, “The Development of the German Party System”, in ed. K.H. Cerny, *Germany at the Polls: The Bundestag Election of 1976* (Washington, American Enterprise Institute, 1978), pp.3-4.
- <sup>49</sup> Mackie & Rose, op.cit., Tables 7.5b, 7.5d, 8.5b, 8.5d,
- <sup>50</sup> Muramats v Commonwealth Electoral Officer (WA) (1923) 32 CLR 500.
- <sup>51</sup> R. Fitzgerald, “*Red Ted*”: *The Life of E.G. Theodore* (St Lucia, University of Queensland Press, 1994), pp.182-84.
- <sup>52</sup> Judd v McKeon (1926) 38 CLR 380.
- <sup>53</sup> Ibid., at 388, 389.
- <sup>54</sup> Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2007 federal election and matters related thereto* (Canberra, 2009), pp.330-31.
- <sup>55</sup> Lubke v Little [1970] VR 807 at pp.811-12.
- <sup>56</sup> Faderson v Bridger (1971) 126 CLR 271 at p.274.
- <sup>57</sup> O’Brien v Warden (1981) 37 ACTR 13 at p.16.
- <sup>58</sup> Blakey and Findley v Elliott (1929) 41 CLR 502; Perkins v Cusack (1930) 43 CLR 70.
- <sup>59</sup> Perkins v Cusack (1930) 43 CLR 70.
- <sup>60</sup> Berrill v Hughes (1984) 59 CLR 64.
- <sup>61</sup> Crittenden v Anderson; the case is noted briefly at 51 ALPJ 171-72.
- <sup>62</sup> Kane v McClelland (1962) 111 CLR 518.
- <sup>63</sup> Ibid., at pp.527-28.
- <sup>64</sup> Re Lack, ex parte McManus (1965) 112 CLR 1.
- <sup>65</sup> Cole v Lacey (1965) 112 CLR 45.
- <sup>66</sup> Re Berrill (1978) 19 ALJ 254.
- <sup>67</sup> G.E. Baker, *The Reapportionment Revolution: Representation, Power and the Supreme Court* (New York, Random House, 1966); C.A. Hughes, “Electoral Affairs” in eds. H. Emy, O. Hughes and R. Mathews, *Whitlam Re-Visited: Policy Development, Policies and Outcomes* (Leichhardt, Pluto Press, 1993), pp.229-46.
- <sup>68</sup> King v Jones (1972) 128 CLR 221.
- <sup>69</sup> Attorney-General (Australia) (Ex rel McKinlay) v Commonwealth (1975) 7 ALR 593; Wesberry v Sanders (1964) 376 US 1.
- <sup>70</sup> Ex rel McKinlay, per Barwick, CJ at p.600
- <sup>71</sup> Ibid., per McTiernan and Jacobs, JJ at pp.616-17.
- <sup>72</sup> Ibid., per Barwick, CJ, at p.606.
- <sup>73</sup> Ibid., at p.615, and per Mason, J at p.636
- <sup>74</sup> Ibid., per Barwick, CJ at p.605.
- <sup>75</sup> Ibid., per Gibbs, J at pp.623-24.
- <sup>76</sup> Attorney-General (NSW) (Ex rel McKellar) v Commonwealth (1977) 139 CLR 527.
- <sup>77</sup> *Report by the Distribution Commissioners appointed for the purpose of redistributing New South Wales into Electoral Divisions* (1977), v.1, p.5
- <sup>78</sup> Re Berrill’s Petition (1976) 51 ALJR 127 at p.128.
- <sup>79</sup> Webster v Dodson [1967] ALR 309.
- <sup>80</sup> Beck v Porter (1980) 48 FLR 470 at p.476.
- <sup>81</sup> Ibid., at p.477 per Zelling, J.
- <sup>82</sup> Pearson v Evans, Supreme Court of Queensland No 4035 of 1980.
- <sup>83</sup> Evans v Crichton-Browne; Muscio v McMahon; Gun v Chapman (1981) 147 CLR 64.
- <sup>84</sup> Evans v Crichton-Browne at p.207.
- <sup>85</sup> *Joint Select Committee on Electoral Reform, Second Report (August 1984)* (Canberra, AGPS, 1984).
- <sup>86</sup> Transcript of Proceedings, McGinty v Western Australia, No P44 of 1994 (hereafter McGinty Transcript), pp.3-4.
- <sup>87</sup> Ibid., p.96 quoting L. Zines, “A Judicially Created Bill of Rights”, 16 *Sydney Law Review*, p.177.

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- <sup>88</sup> Australian Capital Territory Television Pty Ltd v Commonwealth (1992) 177 CLR 106.
- <sup>89</sup> McGinty Transcript, p.80.
- <sup>90</sup> Ibid., pp.94-95.
- <sup>91</sup> MSS JMENT, p.7, ca. n.25.
- <sup>92</sup> MSS JMENT, p.26, ca n.97.
- <sup>93</sup> MSS JMENT, p.30, n.112.
- <sup>94</sup> (1994) 182 CLR 211.
- <sup>95</sup> MSS JMENT, p.41, ca. n.139.
- <sup>96</sup> MSS JMENT, p.64, ca. n.244.
- <sup>97</sup> Joint Select Committee on Electoral Reform, *First Report* (Canberra, AGPS, 1983), pp.106, 230.
- <sup>98</sup> Joint Select Committee on Electoral Reform, *The Operation during the 1984 General Election of the 1983/84 Amendment to Commonwealth Electoral Legislation* (Canberra, AGPS, 1986), pp.33-36, 218-19.
- <sup>99</sup> Joint Standing Committee on Electoral Matters, *The 1993 Federal Election* (Canberra, AGPS, 1994), pp.142-44, 165.
- <sup>100</sup> Joint Standing Committee on Electoral Matters, *The 1996 Federal Election* (Canberra, AGPS, 1997), pp.48-49, 131-32.
- <sup>101</sup> Joint Standing Committee on Electoral Matters, *The 1998 Federal Election* (Canberra, 2000), pp.89-90, 169-70.
- <sup>102</sup> Joint Standing Committee on Electoral Matters, *The 2001 Federal Election* (Canberra, 2003), pp.293-94.
- <sup>103</sup> Joint Standing Committee on Electoral Matters, *The 2004 Federal Election* (Canberra, 2005), pp.128-29, 404-05.
- <sup>104</sup> Roach v Electoral Commissioner (2007) 233 CLR 162.
- <sup>105</sup> Sue v Hill (1999) 199 CLR 462.
- <sup>106</sup> Ibid para 7.
- <sup>107</sup> Ibid para 8.
- <sup>108</sup> Ibid paras 19-20.
- <sup>109</sup> Ibid para 82, 85.
- <sup>110</sup> Ibid para 95.
- <sup>111</sup> Ibid paras 98-102.
- <sup>112</sup> Ibid para 142.
- <sup>113</sup> Ibid paras 179-80.
- <sup>114</sup> Joint Standing Committee on Electoral Matters, *The 2007 Federal Election* (Canberra, 2009), pp.294-95, 332-33.
- <sup>115</sup> C.A. Hughes, "Fair and Equal Constituencies: Australia, Jamaica and the United Kingdom," *Journal of Commonwealth & Comparative Politics* 16(3) (1978), pp.256-71.
- <sup>116</sup> It relies heavily on M.S. Wertheimer, "The Nazi Revolution in Germany" in V.M. Dean et al, *New Governments in Europe: The Trend Toward Dictatorship* (New York, Nelson, 1934), pp.158-236.
- <sup>117</sup> R. Brunet, *The New German Constitution* (New York, Knopf, 1922), pp.162-63. n.1.
- <sup>118</sup> Wertheimer, op.cit., p.165. Sixty-four years ago Franz Neumann lecturing us on the Government of Germany observed that one member of the Cabinet, the Minister of Finance Count Schwerin von Krosigk, who had begun his career in Wilhelmine Germany and held office ever since, was hard at work for the British in Bizonia.
- <sup>119</sup> Wertheimer, op.cit., p.192.
- <sup>120</sup> R. Schlesinger, *Federalism in Central and Eastern Europe* (New York, Oxford University Press, 1945), pp.135-38.