George Winterton Memorial Lecture 2025

The Evolution of the Australian Electoral System as a Constitutional Process

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Abstract

The form of popular sovereignty empowered by the *Australian Constitution* was framed to be government by 'the people' in constitutive and routine manifestations, both sustaining and sustained by the system of government it called into existence. It was framed to be dynamic — the design of the electoral system according to which the people would act in those distinct manifestations having been entrusted to development by ordinary legislation made by the Commonwealth Parliament. And this form of popular sovereignty can be seen to have evolved: through the development of a broad franchise and through the establishment of a system of compulsory and preferential voting by which that broad franchise has come to be exercised. The form of popular sovereignty empowered by the *Australian Constitution* can accordingly be seen today to be government by 'the people' writ large. In this lecture, I trace this evolution as a process by which ordinary legislation has built out the constitutional structure empowering popular sovereignty.

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I Introduction

In an essay entitled 'Popular Sovereignty and Constitutional Continuity' published towards the turn of the millennium, George Winterton commented on what had then recently been observed to have been a 'fundamental paradigm shift' in Australian constitutionalism from 'parliamentary sovereignty' to 'popular sovereignty'.[1] Winterton identified the concept of 'sovereignty' as having been used in two distinct senses: 'the first referring to the source from which the *Constitution* derives its authority, and the second to the location of the power to amend the *Constitution*'.[2] Asking why such a paradigm shift had occurred almost a century after Federation, he noted that attention had been focused in and after 1986 on the *Australia Acts*[3] marking the end of Imperial parliamentary sovereignty.[4]

Winterton pointed out that the popular underpinnings of the *Australian Constitution* in fact dated back to Federation. He referred to the approval of a draft of the *Constitution* at referenda in 1899 and 1900 by electors referred to in the preamble to the *Constitution* as 'the people' who had 'agreed to unite in one indissoluble Federal Commonwealth'.[5] Winterton quoted historian John Hirst's description of the movement to Federation as 'the quintessential republican moment in our history', and Hirst's observation that 'the Australian people were more involved in the making of their national constitution than the people of any of the other great democracies'.[6] Conceding the legal authority of the *Constitution* to have been derived originally from its enactment by the Imperial Parliament, Winterton pointed out that the 'destiny of the *Commonwealth Constitution*' had always lain 'in the hands of the Australian people acting directly through referenda and indirectly through their representatives in the Commonwealth Parliament'.[7]

Just how successive generations of Australians have been empowered by the *Australian Constitution* to act as 'the people' has been facilitated by and mediated through the electoral system, according to which membership of the Senate and the House of Representatives has been chosen in periodic elections and according to which the constitutional text itself has, on rare occasions, been altered in referenda. The legislative realisation of the federal electoral system is the topic I now address. My claim is that the legislative evolution of the electoral system has a constitutional dimension: it can be seen as the outworking of the constitutional empowerment of popular sovereignty; it can be seen to have contributed to the representative nature and contemporary functioning of the Commonwealth Parliament; and it can meaningfully be said to be a constitutional aspect of our national identity.

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1 George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26(1) *Federal Law Review* 1, 1 ('Popular Sovereignty and Constitutional Continuity'), earlier published as George Winterton, 'Popular Sovereignty and Constitutional Continuity' in Charles Sampford and Carol-Anne Bois (eds), *Sir Zelman Cowen: A Life in the Law* (Prospect Publishing, 1997) 42.

2 Winterton, 'Popular Sovereignty and Constitutional Continuity' (n 1) 4.

3 *Australia Act 1986* (Cth); *Australia Act 1986* (UK).

4 Winterton, 'Popular Sovereignty and Constitutional Continuity' (n 1) 1–5.

5 Ibid 5.

6 Ibid.

7 Ibid 9. See also at 5–8.

II The Constitutional Empowerment of Popular Sovereignty

In his *We the People* trilogy,[8] Bruce Ackerman has emphasised the role of the American people not only in creating, but also in sustaining and changing, the *United States Constitution*. Ackerman has portrayed American constitutional history in terms of popular movements in which 'constitutional moments' have led the people to engage in 'higher lawmaking', sometimes leading to formal constitutional amendment but oftentimes leading to informal, yet no less enduring, constitutional change.[9] In a similar vein, Akhil Reed Amar has chronicled the contributions of generations of Americans in fulfilling the founding-era vision of the *United States Constitution* as profoundly democratic for its time, despite what can be seen in retrospect to have been its original shortcomings and problematic history.[10]

The form of popular sovereignty empowered by the *Australian Constitution* is more integrated. In its terms, the *Australian Constitution* makes provision not just for its own amendment in constitutional moments of higher lawmaking, but also for the development of the democratic principles it embodies during non-constitutional periods of ordinary lawmaking.

The *Australian Constitution*, as I have noted in the past,[11] refers to 'the people' in two manifestations. The first is 'the people' acting as nation-builders in rare and important moments of constitutional time. In that manifestation, the people are those described in the preamble to the *Constitution* as having 'agreed to unite in one indissoluble Federal Commonwealth' and who, since becoming so united, have on rare occasions agreed in referenda to make alterations to the constitutional text. The second is 'the people' whose government is regulated and sustained by the *Constitution*. In that manifestation, the people are those by whom the constitutional text requires the senators and members of the House of Representatives to be directly chosen in periodic elections and to whom the two Houses of Parliament are by those means directly accountable.

Despite providing in ss 7 and 24 for senators and members of the House of Representatives to be 'directly chosen by the people' and in s 128 for a proposed law for the alteration of the *Constitution* to be 'submitted to the electors', the *Constitution* left much that is important to Australian democracy to be developed legislatively from time to time by the Commonwealth Parliament. It did so through repeated use of the expression 'until the Parliament otherwise provides' combined with empowerment by s 51(xxxvi) of the Commonwealth Parliament to make laws with respect to 'matters in respect of which this *Constitution* makes provision until the Parliament otherwise provides'.

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8 See Bruce Ackerman, *We the People: Foundations* (Harvard University Press, 1993); Bruce Ackerman, *We the People: Transformations* (Harvard University Press, 2000); Bruce Ackerman, *We the People: The Civil Rights Revolution* (Harvard University Press, 2018).

9 Ackerman, *We the People: Foundations* (n 8) ch 1.

10 See, eg, Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books, 2012) ch 7.

11 Stephen Gageler, 'Foreword' in Benjamin B Saunders, *Responsible Government and the Australian Constitution: A Government for a Sovereign People* (Hart Publishing, 2023) v.

By s 30, until the Commonwealth Parliament otherwise provided, the qualification of electors of members of the House of Representatives would be in each State that which was prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of that State. And by s 8, the qualification of electors of senators was to be that prescribed as the qualification of electors of members of the House of Representatives. Sections 9 and 31 made corresponding transitional provision for the Parliament of each State to make laws prescribing the 'method of choosing senators' for that State and for laws in force in each State 'relating to elections' for the more numerous House of the Parliament of the State to apply to elections in the State of members of the House of Representatives. Section 41, a transitional provision[12] of significance having regard to women's suffrage having been secured by Federation in South Australia and Western Australia but not yet in other States, provided that no adult person having a right to vote at elections for the lower house of a State Parliament was to be prevented by any Commonwealth law from voting at elections for either house of the Commonwealth Parliament.[13]

Inherent in the transitional nature of these provisions was that the development of the franchise and of the method of choosing senators and members of the House of Representatives would be taken up by the Commonwealth Parliament after its coming into existence. This approach emerged in response to the original form of s 30 proposed at the 1891 National Australasian (Constitutional) Convention in Sydney. In its original form, the clause was described by Sir Samuel Griffith as having adopted 'the American system' according to which the qualification of electors of the national legislature was left to the States.[14] In response, Edmund Barton proposed that the clause 'operate for the first election' after which the Commonwealth Parliament was to be 'competent ... to take its own course as to this matter'.[15] Barton remarked that 'if you are going to trust the Parliament of the Commonwealth at all, you must trust it to fix its own franchise'.[16] Barton's proposal was ultimately reflected in the revised form of the clause submitted to the 1897 Australasian Federal (Constitutional) Convention and in the enacted text of s 30 of the *Constitution*.

The design of the electoral system through which 'the people' would act in constitutive and routine manifestations was accordingly entrusted to the Commonwealth Parliament. So, the form of popular sovereignty empowered by the *Australian Constitution* to be government by 'the people' was framed to be dynamic and self-sustaining.

III The Outworking of Popular Sovereignty

Around the same time George Winterton was writing about popular sovereignty and constitutional continuity, David Malouf was speaking in his Boyer Lectures about

12 See *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254.
13 *Australian Constitution* s 41.
14 *Official Report of the National Australasian Convention Debates*, Sydney, 2 April 1891, 613 (Sir Samuel Griffith).
15 Ibid 619 (Edmund Barton).
16 Ibid.

the making of the Australian consciousness.[17] The features of Australian society that Malouf then identified as 'visibly alive in the present' yet so much taken for granted that 'we fail sometimes to see how rare they are' included what he described as 'the saving grace of lightness and good humour, the choice of moderation over the temptation to any form of extreme'.[18] 'Consider', he said, 'the atmosphere in which election days are celebrated here'.[19] His description of that atmosphere was as follows:

> Voting for us is a family occasion, a duty fulfilled, as often as not, on the way to the beach, so that children, early, get a sense of it as an obligation but a light one, a duty casually undertaken. And it can seem casual. But the fact that voters so seldom spoil their vote, either deliberately or by accident, in a place where voting is compulsory and voting procedures are often extremely complicated, speaks for an electorate that has taken the trouble to inform itself because it believes these things matter, and of a citizenship lightly but seriously assumed.[20]

Developing much the same theme in an institutional context, Adrienne Stone drew attention in her 2022 High Court of Australia Public Lecture to the existence of a distinctive 'Australian constitutional identity' entailing an 'inclusive', if 'incomplete', approach to the franchise.[21] Features of the electoral system she identified as contributing to that distinctively Australian constitutional identity included Saturday voting, compulsory voting, preferential voting, continuous direct updating of the electoral rolls, as well as the establishment of an independent Electoral Commission.[22] Notably, none of those features is to be found in the text of the *Australian Constitution*. All have emerged within the framework of the *Constitution* through developments and innovations enacted by the Commonwealth Parliament.

Arranged chronologically, the main developments and innovations can be seen to have occurred across three periods. The first period was in the immediate post-Federation era, marked by a consciousness on the part of the architects of the relevant developments of the solemn constitutional function entrusted to the Commonwealth Parliament for the design of the electoral system along with an innovative and inclusive exercise of that function. The second period, from 1911 to 1924, saw momentous building out of government by the people through reforms originally framed and presented as mere 'machinery' measures and debated and enacted with corresponding and distinctive mundanity. The third period, taking place from 1948 through to 1983, realised in fact the Federation-era vision of a profoundly inclusive system and contributed to the perception of a paradigm shift to popular sovereignty, which Winterton preferred to explain as the outworking of 'constitutional destiny'.[23]

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17 David Malouf, *A Spirit of Play: The Making of the Australian Consciousness* (Boyer Lecture Series, Lecture 6, 20 December 1998).

18 David Malouf, *A Spirit of Play: The Making of the Australian Consciousness* (ABC Books, 1998) 111.

19 Ibid.

20 Ibid 112.

21 Adrienne Stone, 'More Than a Rule Book: Identity and the *Australian Constitution*' (2024) 35(2) *Public Law Review* 127, 133.

22 Ibid.

23 Winterton, 'Popular Sovereignty and Constitutional Continuity' (n 1) 13.

A *The Immediate Post-Federation Period*

As Barton had foreshadowed in 1891, the newly established Commonwealth Parliament came to enact the *Commonwealth Franchise Act 1902* (Cth) ('*Franchise Act*') a year after it was first summoned to meet, terminating the operation of the transitional provisions in ss 8 and 30 of the *Constitution* by establishing a national uniform franchise. The inaugural Parliament had been elected in 1901 according to the rules in force at that time in the various States. As recounted by Marian Simms in her edited volume *1901: The Forgotten Election*, that meant that only South Australian and Western Australian women were entitled to vote, while a property qualification continued to apply in Tasmania.[24] Tasmania voted according to its unique 'Hare-Clark' form of preferential voting; a 'contingent vote' form of preferential voting was used in Queensland (effectively a two-round run-off election); while a first-past-the-post system prevailed in the remaining States.[25] The 1901 poll was taken on two separate days across the nation: in New South Wales, Victoria, Tasmania and Western Australia on Friday 29 March and in South Australia and Queensland the following day.[26] This patchwork of electoral administration formed the backdrop to the enactment of the *Franchise Act*.

The Bill for the *Franchise Act* was presented to the Senate by Richard O'Connor. In the second reading speech, O'Connor noted the Constitutional Conventions to have 'determined that there should be a National House representing the whole of the people of Australia entitled to vote, and a States House representing the same people voting on the same franchise but grouped together as States'.[27] He emphasised that it was 'an essential part of that plan that the basis of the representation should be uniform throughout Australia'.[28] He recorded that '[w]e are often asked — "Why cannot you leave things as they are; both Houses have been elected upon the State franchises, why not leave them alone?"'.[29] His response to that frequently asked question was to say that

> [i]f that implies that it is the duty of this Parliament under the *Constitution* to leave the election of senators and members of the House of Representatives to be conducted on the existing franchises for all time, it is an absolutely mistaken view of our duty as representing the people of the Commonwealth.[30]

The *Franchise Act* provided for a uniform franchise throughout the Commonwealth on a sweeping scale. Section 3 declared as 'entitled to vote at the election of Members of the Senate and the House of Representatives': all persons not under 21 years of age whether male or female, married or unmarried, who had lived in Australia for six months continuously, who were natural born or naturalized subjects of the King, and whose names were on the electoral roll for any electoral

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24 Marian Simms, 'Voting and Enrolment Provisions' in Marian Simms (ed), *1901: The Forgotten Election* (University of Queensland Press, 2001) 28.

25 Joan Rydon, 'Electoral Methods' in Marian Simms (ed), *1901: The Forgotten Election* (University of Queensland Press, 2001) 21.

26 See generally Marian Simms, 'Election Days: Overview of the 1901 Election' in Marian Simms (ed), *1901: The Forgotten Election* (University of Queensland Press, 2001) 1.

27 Commonwealth, *Parliamentary Debates*, Senate, 9 April 1902, 11450 (Richard O'Connor).

28 Ibid.

29 Ibid.

30 Ibid.

division. Having been framed against the backdrop of the women's suffrage movements of the 1880s and 1890s in New Zealand, South Australia and Western Australia, O'Connor remarked in his address to the Senate that 'the question of reform in the direction of women's suffrage has already won its way'.[31] Responding to another Senator pointing to the unsuccessful movements in New South Wales and Victoria, O'Connor noted that a Bill extending the franchise to women had passed the Legislative Assembly of each State but had been rejected by its Legislative Council, each of which O'Connor noted to be 'a nominated body'.[32] He argued that women's suffrage would then have been law in nearly all the States but for what he described as 'a certain hesitancy to march with reform' found 'in all the Upper Houses in Australia'.[33] Returning to the function of the *Franchise Act*, O'Connor pointed out that there were then three-quarters of a million women in the Commonwealth, who in South Australia or Western Australia would be entitled to vote, but who were 'disfranchised in the other States'[34] and that 'uniformity [could] only be brought about by extending the franchise to all women'.[35] The result, he predicted, '[would] be infinitely to strengthen the means by which we shall get a true record of the real opinions of Australia upon all the different questions that will come up for settlement'.[36]

Marian Sawer has pointed out that the immediate effect of the *Franchise Act* was to double the electorate across much of the country.[37] Yet the inclusive vision was impaired and lamentably would remain so for more than half a century. The marginal note to s 4 of the *Franchise Act*, titled '[d]isqualification of coloured races', provided that '[n]o [A]boriginal native of Australia Asia Africa or the Islands of the Pacific except New Zealand' was entitled to be enrolled. That was so despite Indigenous Australians having been entitled to vote at the 1901 Election, most States having by then enfranchised them.

The *Commonwealth Electoral Act 1902* (Cth) ('*1902 Electoral Act*') complemented the *Franchise Act* by establishing the nationally uniform electoral system according to which the broad national uniform franchise would be exercised. Part II of the Act established an electoral office to be administered by the Chief Electoral Officer for the Commonwealth, responsible to the Minister administering the Act. Functions to be performed by the office included: preparing and keeping electoral rolls of the electors in each State; facilitating the taking of the poll including by administering polling places; and ascertaining the result of the polling by scrutiny. Although the electoral office would not be reconstituted as a statutory body formally independent of the Executive Government of the Commonwealth until 1984, it has been observed that among the 'continuities ... of federal electoral administration' following the establishment of the electoral office under an ordinary departmental

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31 Ibid 11452.
32 Ibid.
33 Ibid.
34 Ibid 11451.
35 Ibid 11452.
36 Ibid 11451.
37 Marian Sawer, 'Enrolling the People: Electoral Innovation in the New Australian Commonwealth' in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003) 52, 56 ('Enrolling the People').

structure was 'the degree of independence' that prevailed.[38] The establishment of the electoral office in 1902 facilitated the early development of what Marian Sawer described as 'professionalism of electoral administration'.[39] She referred to the enrolment in 1903 of '[a]lmost two million names ... believed to be some 96 per cent of the adult population' as 'undoubtedly the most comprehensive enrolment of any nation up to that time ... undertaken by a fledgling government with only a skeleton public service'.[40] The enrolment of the national uniform electorate enfranchised by the *Franchise Act* in the absence of sophisticated administrative architecture was facilitated instead by the enlistment, pursuant to a proclamation made under the *1902 Electoral Act*, of State police forces to canvass the continent door to door.

One function not conferred on the electoral office was electoral distribution and redistribution. The *1902 Electoral Act* instead made provision in Pt III for the Governor-General to appoint one person in each State to be the Commissioner for the purpose of electoral distribution. Although the Commissioner would hold office during the pleasure of the Governor-General,[41] without any formal guarantee of independence, this basic structure for distribution stood in contrast to the approach in comparable jurisdictions, including the United States where districting was then and has since remained largely the responsibility of legislatures themselves. Graeme Orr has observed that assigning responsibility for electoral distribution and redistribution to non-parliamentary commissioners mitigated the risk that inheres in such responsibility being assigned to legislatures precisely because the legislators who comprise those legislatures are subject to the ultimately controlling influence of the electoral choice that is distributed and redistributed through its performance.[42] The *1902 Electoral Act* also prescribed the decision-making process of the Commissioners in making any distribution, which was to be constrained by a quota of electors to be ascertained by dividing the whole number of electors in a State by the number of members of the House of Representatives to be chosen in that State, with a very small margin of allowance for departure.[43] By this means, the Act added explicit protections against manipulation of electoral distribution and redistribution to the institutional protections which arose from assigning the function to non-parliamentary commissioners.

B *1911 to 1924*

A decade on from Federation, accumulation of experience in electoral administration had exposed a range of imperfections in the system. The professionalisation of electoral administration facilitated by the establishment of the electoral office came over the ensuing decade to inform legislative developments framed to address some of those imperfections.

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38 Colin A Hughes, 'The Independence of the Commissions: The Legislative Framework and the Bureaucratic Reality' in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003) 205, 205–6.

39 Sawer, 'Enrolling the People' (n 37) 62–3. See also Marian Sawer, 'Pacemakers for the World?' in Marian Sawer (ed), *Elections: Full, Free and Fair* (Federation Press, 2001) 1, 16.

40 Sawer, 'Enrolling the People' (n 37) 52–3.

41 *Commonwealth Electoral Act 1902* (Cth) ('*1902 Electoral Act*') s 14.

42 Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2nd ed, 2019) 35.

43 *1902 Electoral Act* (n 41) ss 15, 16.

In a paper prepared by the Chief Electoral Officer in 1911, the system established by the *1902 Electoral Act* was noted 'not [to] permit of the adoption of a continuous system of compulsory enrolment'.[44] The door-to-door canvassing across the continent during the immediate post-Federation period was said to have introduced 'a considerable degree of compulsion ... without reference to Parliament'.[45] According to the Chief Electoral Officer,

> [t]he existing system of voluntary enrolment during the currency of a Roll, supplemented by official action to remedy errors and omissions … [was] inherently weak, in that it create[d] something in the nature of a divided responsibility [leading] many people to believe that it [was] the duty of the Electoral Administration to follow them from place to place …[46]

The opinion of the Chief Electoral Officer was accordingly that 'a thoroughly efficient Roll can only be continuously preserved under a system of compulsory enrolment'.[47]

The opinion of the Chief Electoral Officer was presented to the Senate by Sir George Pearce in October 1911 in support of an Act to amend the *1902 Electoral Act* to make provision for a system of compulsory enrolment, among other measures. The reform was submitted by Pearce to be 'a machinery measure',[48] as if following inexorably from the Chief Electoral Officer's 'official view'.[49] Within the ensuing parliamentary debate, the 'question of compulsion' was considered primarily in terms of 'the administrative advantages it was designed to achieve'.[50] Pearce, however, articulated his 'own reasons for the change' at the level of principle.[51] Although he emphasised that the question of compulsory voting was not itself before the Parliament, he ventured to say that 'in a country like Australia, where we recognise that every man and woman should have the right to vote, that right becomes more than a privilege — it becomes a duty'.[52] The outcome was that the *1902 Electoral Act* was amended to provide for the Governor-General, by proclamation, to 'declare that ... new Rolls shall be prepared under a system of compulsory enrolment'.[53]

Another imperfection in the electoral system which had by then become apparent was that of three or more candidates resulting in 'vote-splitting' and leading to unrepresentative outcomes, as an incident of the first-past-the-post form of simple majority voting. Whilst the original form of the Bill for the *1902 Electoral Act* had provided for a form of preferential voting for both Houses designed to avoid such outcomes, the relevant provisions had then been amended in favour of first-past-the-

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44 Chief Electoral Officer, *Compulsory Enrolment* (Government of the Commonwealth of Australia, Parliamentary Paper No 27, 1911) 1.
45 Neil Gow, 'The Introduction of Compulsory Voting in the Australian Commonwealth' (1971) 6(2) *Politics* 201, 201.
46 Chief Electoral Officer (n 44) 2.
47 Ibid.
48 Commonwealth, *Parliamentary Debates*, Senate, 6 October 1911, 1176 (George Pearce).
49 Ibid 1178 (George Pearce).
50 Gow (n 45) 203. See also at 205.
51 Commonwealth, *Parliamentary Debates*, Senate, 6 October 1911, 1178 (George Pearce).
52 Ibid 1179 (George Pearce).
53 See *Commonwealth Electoral Act 1911* (Cth) s 7.

post voting both for the House of Representatives and the Senate after the preferential voting provisions failed to gain widespread support.[54]

The issue of vote-splitting was considered in 1915 by the Royal Commission upon the Commonwealth Electoral Law and Administration, appointed by Sir Joseph Cook's Liberal Government against the backdrop of what Benjamin Reilly has described as '[t]he increasing incidence of minority Labor candidates beating a divided field of conservatives'.[55] Although attention had thus been drawn to the issue 'more by considerations of partisan advantage than by the finer points of electoral theory',[56] the Royal Commission reported that in principle

> [t]here must necessarily be many shades of political opinion, which, in a democratic country, should be given expression to in the freest possible manner [and] [i]n order that public opinion may be portrayed in distinct broad tones of thought, we strongly urge the adoption of preferential voting for the House of Representatives.[57]

The recommendation to adopt preferential voting for the House of Representatives was one of a suite of reforms enacted in the *Commonwealth Electoral Act 1918* (Cth) ('*1918 Electoral Act*'), which superseded the *Franchise Act* and the *1902 Electoral Act*. The form of preferential voting then introduced was that described by political scientists as the 'alternative vote' model, as distinct from the other differing forms adopted historically in Queensland and Tasmania. Although the alternative vote model is well familiar to us more than a century later, the terms in which the reform was introduced by Patrick Glynn bear repeating:

> The preferential method ... provides a remedy for a party split, gives the result of a second poll of the same voters, and scope for the expression of wider electoral opinion ... The significance of this method is that the elector declares in advance his choice in each of the possible contingencies. In advance he says 'These are my contingent choices.' Where three candidates are standing for one seat the elector says in effect 'Number 1 is my choice of the three; I prefer him, but if Number 1 is not in the running I shall give my vote to Number 2.' ... The candidate is returned by an absolute majority of operative votes, and he then represents the majority of the division.[58]

The *1918 Electoral Act* prescribed a form of ballot paper for the House of Representatives on which electors would record their order of preference and also contained specific commands relating to scrutiny under the new preferential system, including that

> [i]f no candidate has received an absolute majority of first preference votes ... the candidate who has received the fewest first preference votes shall be

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54 See generally David M Farrell and Ian McAllister, '1902 and the Origins of Preferential Electoral Systems in Australia' (2005) 51(2) *Australian Journal of Politics and History* 155; David M Farrell and Ian McAllister, *The Australian Electoral System: Origins, Variations and Consequences* (UNSW Press, 2006) 30–36 ('*The Australian Electoral System*').

55 Benjamin Reilly, 'Preferential Voting and Its Political Consequences' in Marian Sawer (ed), *Elections: Full, Free and Fair* (Federation Press, 2001) 78, 85. See also Farrell and McAllister, *The Australian Electoral System* (n 54) 36–40.

56 Reilly (n 55) 78, 85.

57 *Report from the Royal Commission upon the Commonwealth Law and Administration* (1915) 7 [11].

58 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 October 1918, 6678 (Patrick Glynn).

> excluded, and each ballot-paper counted to him shall be counted to the candidate next in the order of the voter's preference [a process which was to] be repeated until one candidate has received an absolute majority of votes …[59]

It has been observed that, in combination with the convention of government being formed by the party or parties having majority support in the House of Representatives, the alternative vote would thereafter function to ensure that the party or parties with majority support in the most electoral divisions nationwide formed government.[60]

Another imperfection exposed by the accumulation of experience in electoral administration was low voter turnout. The historically low turnout of 58% at the 1922 General Election proved to be the catalyst for change. While the Royal Commission upon the Commonwealth Electoral Law and Administration had considered compulsory voting to be 'a natural corollary of compulsory enrolment',[61] the reform had yet to be taken up at the federal level. It had, however, been introduced in Queensland in 1914. Anne Twomey has noted how '[t]he experiment of compulsory voting ... in Queensland had proved so successful in creating a culture of voting that over 82% of electors in Queensland voted at the 1922 [F]ederal [E]lection, without legal compulsion'.[62] That statistic was seized upon when a Bill to establish compulsory voting was presented to the Senate in 1924.[63] The Bill was introduced by Herbert Payne, a backbencher in the Senate, as a private Member's Bill. It passed through both Houses on the voices without significant debate. In the words of Geoffrey Sawer, '[n]o major departure in the federal political system had ever been made in so casual a fashion'.[64]

But whilst what little debate there was can fairly be described as mundane – the introduction of compulsory voting having been submitted to be 'the natural corollary to compulsory enrolment' – more than just a hint of principle can be discerned. Given that 'Parliament is supposed to be a reflex of the mind of the people', argued Senator Payne, 'a Parliament elected by less than one-half of the electors ... surely is a travesty on democratic government'.[65] Steering the Bill through the House of Representatives, backbencher Edward Mann provided a principled answer to what he identified as a principled objection that compulsory voting was an interference with liberty. He did so by adopting the distinction drawn by James Bryce between 'individual liberty' ('consist[ing] in exemption from legal control') and 'political liberty' ('consist[ing] in participation in legal control').[66]

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59 *1918 Electoral Act* s 136(6) (as made 21 November 1918).

60 Patrick Dunleavy, Mark Evans, Harry Hobbs and Patrick Weller, 'Situating Australian Democracy' in Mark Evans, Patrick Dunleavy and John Phillimore, *Australia's Evolving Democracy: A New Democratic Audit* (LSE Press, 2024) 33, 45.

61 *Report from the Royal Commission upon the Commonwealth Law and Administration* (n 57) 10 [31].

62 Anne Twomey, 'Compulsory Voting in a Representative Democracy: Choice, Compulsion and the Maximisation of Participation in Australian Elections' (2013) 13(2) *Oxford University Commonwealth Law Journal* 283, 287. See also Lindsay Smith, 'Compulsory Voting in Australia' in Richard Lucy (ed), *The Pieces of Politics* (Macmillan, 3rd ed, 1983) 235, 240.

63 See Commonwealth, *Parliamentary Debates*, Senate, 17 July 1924, 2179–80.

64 Geoffrey Sawer, *Australian Federal Politics and Law 1901–1929* (Melbourne University Press, 1956) 237.

65 Commonwealth, *Parliamentary Debates*, Senate, 17 July 1924, 2180 (Herbert Payne).

66 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1924, 2448, quoting James Bryce, *Modern Democracies* (Macmillan, 1921) vol 1, 55.

'Individual liberty', Mann argued, 'is less likely to be invaded when the legal control is that exercised by a real majority of the people'.[67]

A constitutional challenge to compulsory voting as introduced in 1924 was unanimously rejected by the High Court of Australia two years later. The Commonwealth Parliament, as the 'community organised', Isaacs J then said, 'being seised of the subject matter of parliamentary elections and finding no express restrictions in the *Constitution*, may properly do all it thinks necessary to make elections as expressive of the will of the community as they possibly can be'.[68]

By the middle of the interwar period, the Commonwealth Parliament had thus exercised its legislative power to build out the form of popular sovereignty empowered by the *Australian Constitution* by establishing a system of preferential and compulsory voting according to which 'the people' would be both empowered and required to make an effective choice of government through the ranking of their preferences for candidates for election to the House of Representatives. Neither development featured quite the controlling presence of conscious statecraft or awareness of such ordinary lawmaking operating on a higher plane as the enactment of the *Franchise Act*. In each, mundanity combined with innovation in a distinctively Australian way.

C *1948 to 1983*

The aftermath of the Second World War saw impetus both to reform the system of voting for the Senate and to continue the expansion of the electorate towards universal adult suffrage, which had been imperfectly realised in 1902.

Writing in 1910, Harrison Moore had observed with evident dismay that 'no scheme of "proportionate representation"' in the Senate had then 'received favourable consideration' and that the first-past-the-post system enacted by the *1902 Electoral Act* was 'open to the objection that it enable[d] an organized plurality of voters to secure the whole representation, though it [had] only a small majority of votes, or, even in the case of a large number of candidates, [was] an actual minority of the electors voting'.[69] Amendment of the *1918 Electoral Act* in 1919[70] to introduce preferential voting in the Senate in the form of 'block voting' was seen only to exacerbate 'the so-called "windscreen-wiper effect", which delivered almost all contested Senate seats in each state to whatever political party achieved a majority'.[71] The Royal Commission on the Constitution of the Commonwealth in 1929 reported that this state of affairs was 'undesirable' and that 'the Senate would be better qualified to act as a chamber of revision if senators were elected under a system of proportional representation'.[72]

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67 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1924, 2448.

68 *Judd v McKeon* (1926) 38 CLR 380, 385.

69 W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Sweet & Maxwell, 2nd ed, 1910) 115.

70 *Commonwealth Electoral Act 1919* (Cth).

71 John Uhr, 'Why We Chose Proportional Representation' in Marian Sawer and Sarah Miskin (eds), *Representation and Institutional Change: 50 Years of Proportional Representation in the Senate* (Department of the Senate, Papers on Parliament No 34, 1999) 13, 16.

72 *Report of the Royal Commission on the Constitution* (1929) 267.

However, it was not until 1948 that the Chifley Government, facing electoral defeat at an impending general election, introduced the Bill for the amending Act that ultimately introduced proportionate representation for the Senate.[73] In the second reading speech for the Bill, Dr Evatt said:

> The great defect, from the representation aspect, of both the old "first past the post" and the more recently used "block majority" is that at an election, generally all seats in a State are won by candidates of the one party, leaving a minority of between 40 to 50 per cent of the electors without any representation at all in the Senate. … It has [been] decided that, in relation to the election of senators, where each State votes as one electorate, the fairest system and the one most likely to enhance the status of the Senate is that of proportional representation.[74]

The 'single transferrable vote' form of preferential voting introduced by the 1948 amending Act involved voters ranking candidates in order of preference on the ballot paper in the same manner as the alternative vote with scrutiny proceeding by dividing the number of seats contested to establish a quota of votes needed to elect a single candidate, treating candidates achieving the quota as elected and then redistributing preferences, both from the surplus votes of elected candidates and from candidates with the least votes, until all seats were filled.[75]

Unlike the alternative vote in elections for the House of Representatives, which had from 1918 functioned to ensure that the party or parties with majority support in the most electoral divisions nationwide formed government in the House of Representatives, the single transferable vote in elections for the Senate would function from 1948 to match party votes within each State with Senate seats for each State.[76] The enduring outcome, as John Uhr summed it up, has been that 'the Senate which from its beginnings has represented the minor States now also represents minorities within the States: within the big States as well as smaller ones'.[77]

By 1949, Indigenous Australians could vote only if they were otherwise entitled to do so for State elections or if they had served, or were serving, in the Australian military.[78] This meant that the many civilian Indigenous Australians in Queensland, Western Australia and the Northern Territory still could not vote.[79] National organisations such as the Federal Council for Aboriginal Advancement, as well as State-based groups such as the Aborigines Advancement League in Victoria and the Aborigines and Torres Strait Islanders' Advancement League in Queensland, campaigned to extend the franchise to all Indigenous Australians.[80] With domestic

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73 *Commonwealth Electoral Act 1948* (Cth).

74 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 April 1948, 965 (Dr Herbert Evatt).

75 *Commonwealth Electoral Act 1948* (Cth) (n 73) s 3. See also *Day v Australian Electoral Officer (SA)* (2016) 261 CLR 1, 9 [10].

76 Dunleavy et al (n 60) 45–6.

77 Uhr (n 71) 42.

78 *Commonwealth Electoral Act 1949* (Cth) s 3.

79 Will Sanders, 'Delivering Democracy to Indigenous Australians: Aborigines, Torres Strait Islanders and Commonwealth Electoral Administration' in Marian Sawer (ed), *Elections: Full, Free and Fair* (Federation Press, 2001) 158, 159.

80 See John Chesterman, *Civil Rights: How Indigenous Australians Won Formal Equality* (Queensland University Press, 2005) 62–3.

and international comparisons being made to apartheid in South Africa,[81] the campaign reached a crescendo in 1961 when the House of Representatives established the Select Committee on Voting Rights of Aboriginals. On 19 October 1961, the Select Committee finally recommended that the national franchise be so extended.[82]

The amending Act which implemented that recommendation the following year was spare in its terms.[83] The second reading speech noted, however, that while it was a short piece of legislation, its implications were 'of the greatest significance' in that it 'would proclaim to the world that the representatives of all sections of the Australian community are determined to ensure that the [A]boriginal people of Australia enjoy complete political equality with the rest of the community'.[84] Under the heading '[p]ersons entitled to enrolment and to vote', the critical provision simply stated that '[s]ection thirty-nine of the [*1918 Electoral Act*] is amended by omitting sub-section (6)',[85] sub-section (6) having contained the express disqualification of Indigenous Australians from entitlement to enrol — a disqualification which had persisted since the *1902 Electoral Act*. Indigenous Australians would accordingly be entitled to enrol and, if in fact enrolled, would be subject to the provision for compulsory voting in the *1918 Electoral Act*. The arc of Indigenous Australian enfranchisement was finally completed in 1983 when compulsory enrolment was legislated for Indigenous Australians,[86] as it had been for other Australians almost 70 years beforehand.

Another broadening of the franchise during this period was the lowering of the minimum voting age. Since the enactment of the *Franchise Act*, the age of eligibility had been set at 21 years, reflecting that of most comparable jurisdictions. While there had been murmurs about lowering the voting age since the First World War, it was the Second World War which led to palpable agitation towards a lower voting age, as many Australian military personnel were younger than 21. In response, the Parliament first enacted the *Commonwealth Electoral (War-time) Act 1943* (Cth), which extended the right to vote to active and discharged military personnel who had served overseas and who were under 21. With the coming of the Vietnam War and the introduction of compulsory national service, calls for lowering the voting age to 18 grew louder still. The rationale was pithily captured in the slogan: 'Old enough to fight, old enough to vote'.[87] But calls persisted for the voting age to be lowered for all citizens, not simply those who had served in the military. By 1971, the United Kingdom, the United States and Canada, for instance, had all lowered the voting age to 18. Ultimately, in 1973 during the period of the Whitlam

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81 Ibid 63–4.

82 House of Representatives Select Committee on Voting Rights of Aboriginals, Parliament of Australia, *Report from the Select Committee on Voting Rights of Aborigines* (Part I — Report and Minutes of Proceedings, October 1961).

83 *Commonwealth Electoral Act 1962* (Cth).

84 Commonwealth, *Parliamentary Debates*, Senate, 2 May 1962, 1050–51 (Harrie Wade).

85 *Commonwealth Electoral Act 1962* (Cth) (n 83) s 2.

86 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) ('*1983 Amendment Act*').

87 See Ian McAllister, 'The Politics of Lowering the Voting Age in Australia: Evaluating the Evidence', (2014) 49(1) *Australian Journal of Political Science* 68, 73.

Government, Australia followed suit: legislation to amend the *1918 Electoral Act* was passed unanimously by the Commonwealth Parliament, without debate.[88]

A little over a decade later, following the election of the Hawke Government and the establishment and reporting of the Joint Select Committee on Electoral Reform, a comprehensive package of amendments came to be made to the electoral legislation by the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) ('*1983 Amendment Act*'). That Act provided, among other things, for the registration of political parties, the printing of their names on ballot papers, and the division of the Senate ballot paper by a line allowing the option of above-the-line voting for political parties or groups and below-the-line voting for individual candidates.

The *1983 Amendment Act* also introduced compulsory enrolment of Indigenous Australians together with mobile polling booths. As Senator Gareth Evans noted during the parliamentary debates, arrangements for mobile polling booths were part of the set of 'provisions to enable people to vote who were previously disenfranchised'.[89] Like Saturday voting, the legislative requirement for which had been introduced in 1911 at the same time as the introduction of compulsory enrolment,[90] mobile polling booths were aimed at making voting easier.[91] For Saturday voting, that ease was through reducing what an economist would call the opportunity cost of voting as more people could readily access voting without needing to arrange for time off work or other responsibilities during the working week. Similarly, mobile polling would reduce what an economist would call the transaction costs of voting as it became more readily accessible.

Another important reform introduced by the *1983 Amendment Act* was the establishment of the Australian Electoral Commission ('AEC') as an independent statutory authority which would be 'seen to operate independent of political influence'.[92] The AEC was to exercise functions which included those of the Australian Electoral Office, the most recent incarnation (as a statutory office since 1973)[93] of the electoral office originally set up by the *1902 Electoral Act*. The AEC was also to assume responsibility for electoral redistribution, meaning that 'for the first time the electoral commissioners [would] be totally independent' in securing 'fair' redistributions.[94] An AEC-appointed Redistribution Committee for each State would determine redistributions to commence 'whenever the Electoral Commission so direct[ed]'.[95] Moreover, proposed redistributions by the Redistribution Committee had to be justified with reasons and then the proposed electoral map(s) together with the reasons and other materials were required to be publicly displayed and objections able to be lodged by any person or organisation.[96] An 'augmented'

88 *Commonwealth Electoral Act 1973* (Cth).
89 Commonwealth, *Parliamentary Debates*, Senate, 30 November 1983, 3062 (Gareth Evans).
90 *Commonwealth Electoral Act 1911* (Cth) (n 53) s 12.
91 See Lisa Hill, 'Australia's Electoral Innovations' in Jenny M Lewis and Anne Tiernan (eds), *The Oxford Handbook of Australian Politics* (2021) 75, 83–4.
92 Joint Select Committee on Electoral Reform, Parliament of Australia, *First Report* (September 1983) 39 [2.30]. See also *1983 Amendment Act* (n 86) s 7.
93 See *Australian Electoral Office Act 1973* (Cth).
94 Commonwealth, *Parliamentary Debates*, Senate, 30 November 1983, 2990 (Michael Macklin).
95 *1983 Amendment Act* (n 86) s 9, substituting new pt IIIA and see especially s 25K.
96 Ibid ss 25L, 25T, 25U, 25V.

composition of the AEC was then required to determine any objections lodged against any proposed redistribution.[97]

Yet another function of the AEC established by the *1983 Amendment Act* which bears emphasis in its support of representative government was the express statutory function to promote public awareness of electoral and parliamentary matters through 'education and information programs' as well as other means.[98] An active educative function was viewed by the Joint Select Committee as essential to inform the people 'as to their rights, responsibilities and entitlements as electors'.[99] Greater voter education was viewed as a means of informing people both as to their right to vote and, perhaps more significantly given the compulsory enrolment of all adult Australians following the 1983 amendments, enabling 'improved' voting in the sense that electors would better understand how to vote, which would in turn lead to fewer informal votes being cast.[100]

The cumulative effect of compulsory enrolment, compulsory voting and voter education as part of the constitutional process of empowering Australians to act as 'the people' can be seen in contemporary statistics. As at 31 December 2024, around 98% of eligible Australians were enrolled to vote.[101] In the 2022 Federal Election, around 90% of those enrolled turned out to vote.[102] By way of international comparison, the most recent enrolment and turnout figures for Canada were around 95%[103] and 63%[104] respectively, and for New Zealand were around 89%[105] and 77%[106] respectively. For the United Kingdom, the comparable figures were as low as 86%[107] and 60%[108] respectively. In the United States, around 64% of the eligible voting population voted in the most recent Presidential election.[109]

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97 Ibid s 25W.

98 *1983 Amendment Act* (n 86) s 9, substituting new s 7A(1)(c).

99 Joint Select Committee on Electoral Reform (n 92) 41 [2.38].

100 Commonwealth, Parliamentary Debates, Senate, 30 November 1983, 2981.

101 Australian Electoral Commission, 'Enrolment Statistics' (Web Page, 23 January 2025) <https://www.aec.gov.au/enrolling_to_vote/enrolment_stats/>.

102 Australian Electoral Commission, 'Voter Turnout – Previous Events' (Web Page, 7 November 2023) <https://www.aec.gov.au/Elections/federal_elections/voter-turnout.htm>.

103 Elections Canada, 'National Register of Electors – Updates: November 2024 Annual Lists of Electors' <https://www.elections.ca/content.aspx?section=pol&document=index&dir=ann/upd&lang=e>.

104 Elections Canada, 'Voter Turnout at Federal Elections and Referendums' <https://www.elections.ca/content.aspx?section=ele&dir=turn&document=index&lang=e>.

105 See Electoral Commission (Te Kaitiaki Take Kōwhiri) (New Zealand), 'Enrolment by General Electorate' (31 December 2024) <https://www.elections.nz/stats-and-research/enrolment-statistics/enrolment-by-general-electorate/>.

106 See Electoral Commission (Te Kaitiaki Take Kōwhiri) (New Zealand), '2023 General Election: Voter Turnout Statistics' (Web Page, 2023) <https://elections.nz/democracy-in-nz/historical-events/2023-general-election/voter-turnout-statistics/>.

107 See Office for National Statistics (UK), 'Estimates of the Population for the UK, England, Wales, Scotland, and Northern Ireland' (8 October 2024) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/datasets/populationestimatesforukenglandandwalesscotlandandnorthernireland>; Office for National Statistics, 'Dataset: Electoral Statistics for the UK' (11 April 2024) <https://www.ons.gov.uk/peoplepopulationandcommunity/elections/electoralregistration/datasets/electoralstatisticsforuk>.

108 'UK General Election 2024: What Happened and What's Next?', *Reuters* (6 July 2024) <https://www.reuters.com/world/uk/uk-election-what-happened-2024-07-05/>.

109 James M Lindsay, 'The 2024 Election by the Numbers', *Council on Foreign Relations* (18 December 2024) <https://www.cfr.org/article/2024-election-numbers>.

IV Conclusion

The *Australian Constitution* empowered a form of popular sovereignty in which 'the people' as 'electors' sustain and are sustained by a system of representative government. It expressly left the contours of the electoral system — pursuant to which 'the people' were to exercise that sovereignty — to the Commonwealth Parliament to develop by ordinary legislation.

The democratic and inclusive Federation-era vision for the form of popular sovereignty empowered by the *Constitution* has been realised through Commonwealth legislation which has shaped and reshaped our national electoral system in a process which has both reflected and contributed to the representative nature of the Commonwealth Parliament and which has both reflected and contributed to a constitutional dimension of our distinctive national identity. The liberty the Australian people nurture, to repeat the words of James Bryce, is 'political liberty'. An Australian is an 'elector': to be Australian is to vote.