## Contents

**CONSTITUTIONAL LAW**  
ANU College of Law Special Issue

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The High Court and Constitutional Interpretation</td>
<td>2</td>
</tr>
<tr>
<td>The High Court and the Rule of Law</td>
<td>2</td>
</tr>
<tr>
<td>The Communist Party case</td>
<td>3</td>
</tr>
<tr>
<td>Limits on the Authority of the Courts</td>
<td>3</td>
</tr>
<tr>
<td>Conclusion</td>
<td>4</td>
</tr>
<tr>
<td>Constitutional Limitations on State and Commonwealth Parliaments</td>
<td>4</td>
</tr>
<tr>
<td>Express Limitations</td>
<td>5</td>
</tr>
<tr>
<td>Implied Limitations</td>
<td>5</td>
</tr>
<tr>
<td>Limitations on the Commonwealth Parliament</td>
<td>5</td>
</tr>
<tr>
<td>Express Limitations</td>
<td>5</td>
</tr>
<tr>
<td>Implied Limitations</td>
<td>5</td>
</tr>
<tr>
<td>Limitations on State Parliaments</td>
<td>6</td>
</tr>
<tr>
<td>Express Limitations</td>
<td>6</td>
</tr>
<tr>
<td>Implied Limitations</td>
<td>6</td>
</tr>
<tr>
<td>Conclusion</td>
<td>7</td>
</tr>
<tr>
<td>The Constitutional Protection of Commonwealth Voting Rights:</td>
<td>7</td>
</tr>
<tr>
<td>The Case of Rowe V. Electoral Commissioner</td>
<td>7</td>
</tr>
<tr>
<td>Introduction</td>
<td>7</td>
</tr>
<tr>
<td>How Has Interpretation of the Phrase ‘Directly Chosen By the People’</td>
<td>8</td>
</tr>
<tr>
<td>Provided Constitutional Protection for the Right to Vote?</td>
<td>8</td>
</tr>
<tr>
<td>What Happened in Rowe V. Electoral Commissioner?</td>
<td>8</td>
</tr>
<tr>
<td>The Decision: How Was the Phrase ‘Directly Chosen By the People’ Used</td>
<td>9</td>
</tr>
<tr>
<td>To Enhance the Protection of Voting Rights in Practice?</td>
<td>9</td>
</tr>
<tr>
<td>Conclusion</td>
<td>10</td>
</tr>
<tr>
<td>The Capacity of the States to Refer Law-Making Power to the Commonwealth Parliament and Examples of Referrals</td>
<td>11</td>
</tr>
<tr>
<td>Constitutional Framework</td>
<td>11</td>
</tr>
<tr>
<td>A Short History of Referrals</td>
<td>11</td>
</tr>
<tr>
<td>The Options</td>
<td>12</td>
</tr>
<tr>
<td>Cooperative Federalism</td>
<td>13</td>
</tr>
<tr>
<td>From Suffrage to Citizenship: A Republic of Equals</td>
<td>13</td>
</tr>
<tr>
<td>Women and Suffrage</td>
<td>13</td>
</tr>
<tr>
<td>Legal Update</td>
<td>15</td>
</tr>
<tr>
<td>Walmart Women</td>
<td>15</td>
</tr>
<tr>
<td>Tobacco Companies v. Australian Government</td>
<td>15</td>
</tr>
<tr>
<td>The price of Justice</td>
<td>15</td>
</tr>
<tr>
<td>Do the Crime pay the Price</td>
<td>15</td>
</tr>
<tr>
<td>Media Watch</td>
<td>15</td>
</tr>
<tr>
<td>Make Sure That Justice Is Not Put in Jeopardy</td>
<td>15</td>
</tr>
<tr>
<td>Changing the Law Must Not Enable Abuse by the State</td>
<td>15</td>
</tr>
</tbody>
</table>

---

*Legaldate* is published and distributed by:  
Warringal Publications PO Box 166 East Kew VIC 3102 • Telephone (03) 9857 0253 • Facsimile (03) 8678 1118  
Website www.warringalpublications.com.au  
Subscription information: Full-rate subscription $65.00 per annum • ISSN 1835-5048 • Copyright 2011
The High Court And Constitutional Interpretation

By Fiona Wheeler
ANU College of Law, ANU

Who determines what the Australian Constitution means and how it applies in particular situations? This is an important question as our Constitution provides the overarching framework for government, but does so in language that, for the most part, is broad and general. When is a Commonwealth law one that is relevant to ‘external affairs’ in s 51(xxix) of the Constitution? Can the Commonwealth or a state parliament validly ban election advertising when the Constitution, in ss 7 and 24, requires that members of the Senate and House of Representatives be ‘chosen by the people’? Can one state restrict the sale, on environmental grounds, of beer produced in another state when s 92 of the Constitution says that trade between the states ‘shall be absolutely free’? The body with primary responsibility for resolving these, and other, difficult issues of constitutional interpretation is our highest court—the High Court of Australia.

STUDENT ACTIVITIES

1. Why is it necessary for the High Court to interpret the Constitution when somebody feels he or she has been treated unfairly?
2. Give an example of a case in which the High Court found it necessary to interpret ‘external affairs’ in order to reach a decision.
3. Can the Commonwealth or a state parliament validly ban election advertising when the Constitution, in ss 7 and 24, requires that members of the Senate and House of Representatives be ‘chosen by the people’? Explain.
4. Can one state restrict the sale, on environmental grounds, of beer produced in another state when s 92 of the Constitution says that trade between the states ‘shall be absolutely free’? Explain.

The High Court And The Rule Of Law

Interestingly, the Constitution does not state, in express terms, which body has the final say on the meaning of the words within the Constitution. The framers of the Australian Constitution could, at least in theory, have designed a system under which the Commonwealth Parliament, as opposed to the courts, determined the scope of its own law-making power. In favour of such a system, it could be argued that the Commonwealth Parliament is the body best placed to know the ambit of its own authority and, since the Commonwealth Parliament is elected by the people, this would be a very democratic way of interpreting the Constitution. It might also be a very efficient system, in the sense that it would minimise the situations in which the validity of legislation could be effectively challenged.

It has been taken to be ‘axiomatic’, however, that the courts are the authoritative interpreters of the Australian Constitution.1 This is for several reasons. The historical records left by the colonists who drafted the Constitution indicate that they envisaged that the courts, especially the High Court, would determine the meaning of the Constitution in decided cases. This is reinforced by a number of provisions of the Constitution, notably in Chapter III dealing with ‘The Judicature’, which strongly suggest that the courts are intended to have the function of constitutional interpretation.2

Deeper reasons of principle also support this outcome. In particular, our liberal-democratic traditions support the view that the task of constitutional interpretation—and legal adjudication generally—should be exercised by independent courts, as opposed to parliament or the executive, in order to safeguard the rule of law. Under s 72 of the Constitution, judges of the High Court, and other federal courts, enjoy guaranteed tenure and cannot be arbitrarily dismissed from their positions by the government of the day. This, in turn, reflects the fact that courts are bound to exercise their decision-making functions in a strictly impartial manner, detached from all partisan interests.3

The courts thus serve as a dispassionate ‘check’ on the other branches of government, ensuring that the law, including the Constitution, is not applied in a self-serving fashion.4 In this way, the courts play a vital role in protecting the legal rights of all Australians.

1 Australian Communist Party v Commonwealth (‘Communist Party Case’) (1951) 83 CLR 1, 262 (Fullagar J).
2 The points in this paragraph are also made in George Williams, ‘Judicial review’ in Tony Blackshield, Michael Coper and George Williams (eds), The Oxford Companion to the High Court of Australia (2001) 376, 377.
independent courts.8 The High Court struck down the attempt by and thus subjects government activity to limits applied by with our history and collective values, of the rule of law, in Australia, however. Rather, as Dixon J emphasised in his unconstitutional.

A majority of the High Court, however, said that the Commonwealth Parliament could not simply assert that a law enacted by it was relevant to defence or national security and hence within its power. As Fullagar J said:

The validity of a law … cannot be made to depend on the opinion of the law-maker [the Commonwealth Parliament] … that the law … is within the constitutional power upon which the law in question itself depends for its validity.6

Fullagar J pointed out that if the Commonwealth Parliament itself could determine whether or not a law enacted by it fell within a grant of power in s 51, then the Commonwealth Parliament’s authority would potentially be unlimited, allowing it to pass any law it liked.7 This was not the position in Australia, however. Rather, as Dixon J emphasised in his judgment, the Constitution assumes the existence, consistently with our history and collective values, of the rule of law, and thus subjects government activity to limits applied by independent courts.8 The High Court struck down the attempt by the Commonwealth Parliament to ban the Communist Party as unconstitutional.

5  (1951) 83 CLR 1. For a full account of this case in historical setting, see George Winterton, ‘The Communist Party Case’ in H P Lee and George Winterton (eds), Australian Constitutional Landmarks (CUP, 2003) 108.
6  (1951) 83 CLR 1, 258.
7  Ibid 258–65.
8  Ibid 193.
11 See generally ibid 19–67.
12 Coper, above n 9, 562, 569–70.

Limits On The Authority Of The Courts

The High Court’s ability to find that legislation passed by an elected parliament is contrary to the Constitution and is invalid—what has been described as an “awesome power”9—draws attention to the limits on its own authority and that of other courts. In particular, the legitimacy of the High Court’s role as arbiter of the meaning of the Constitution is contingent on it engaging in legal reasoning in interpreting and applying the Constitution, rather than making political judgments. If the High Court’s decisions, and those of other courts, were not based on legal analysis, but rather reflected assessments based on policy or political grounds alone, then the courts would be supplanting, not supporting, the rule of law.10 Debates over whether the High Court has, on occasion, engaged in so-called ‘judicial activism’ in the interpretation of the Constitution are, in essence, debates about these limits on its authority. While the distinction between legal and policy-based reasoning might superficially appear obvious, in reality the distinction, especially as applied to the Constitution, can, at times, be less than clear. As pointed out above, much of the language of the Constitution is broad and general. History and precedent are relevant to ascertaining its meaning, but may, for example, provide little guidance on novel interpretative dilemmas thrown up by changing times or, alternatively, may suggest contradictory outcomes. In this wider interpretative context, policy considerations can, and sometimes do, intrude as an element in the High Court’s reasoning. The extent to which they can legitimately do so, however, is the subject of considerable disagreement and lies at the heart of the judicial ‘activism’ versus ‘restraint’ debate.11 That debate, which is ultimately about different philosophies of judging,12 is likely to be an ongoing one.
Our system by which the courts are the authoritative interpreters of the Australian Constitution may not be immune from criticism, but the question remains whether a different system would better protect legal rights in Australia. The three interpretative questions posed at the outset of this paper all come from actual constitutional cases decided by the High Court in recent decades. Readers are encouraged to investigate the answers given by the High Court in those cases in their own time. However, whether one agrees or disagrees with those answers, the critical inquiry is, would our society be better off if a different body were to decide what the Constitution means?

13 See, respectively, Commonwealth v Tasmania (‘Tasmanian Dam Case’) (1983) 158 CLR 1; Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106; Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436.
**Implied Limitations**

In designing the institutions and processes of federal government, the framers also provided a platform for the judicial development of additional limitations arising by way of implication from those institutions and processes. These restrictions are implied limitations. They are not expressly set out in the Constitution, but have been interpreted by the High Court as arising by implication from the constitutional system of government.

In exploring these express and implied limitations, it is helpful to separately identify the limitations that apply (i) to the Commonwealth Parliament and (ii) to the state parliaments. The limitations at each level will then be broken down further into express and implied limitations.

**STUDENT ACTIVITIES**

3. How do you think limitations on the power of the Commonwealth and the states would provide the glue that keeps the federal system operating successfully?
4. Investigate the reasons for and against a bill of rights being included in our Constitution. Give a reasoned argument why you think the founding fathers would have chosen not to include a bill of rights in our Constitution.
5. List three express rights that are included in our Constitution.
6. What are implied rights?

**Limitations On The Commonwealth Parliament**

**Express Limitations**

As mentioned, the Constitution creates a federal system of government with a federal parliament to pass laws in a range of federal areas. The framers of the Constitution were wary of giving too much power to the Commonwealth Parliament. The colonies prior to federation had reached a point where the colonial parliaments enjoyed a significant degree of self-government and autonomy. Many of the delegates were skeptical about relinquishing this power of self-government to a new federal parliament.

To preserve the continuing existence and place of the states in the system of government, the delegates assigned a defined list of powers to the Commonwealth Parliament. The intention was to preserve most areas of law-making for the state parliaments, and permit the Commonwealth Parliament to pass laws in limited areas of national interest or concern. This vision of the federal system has not, in fact, eventuated. The High Court has been instrumental in interpreting the Constitution to allow a very expansive view of federal legislative power.

To further protect the role of the states, there is a range of express limitations operating to confine the reach of federal power. So, for example, s 116 of the Constitution prevents the Commonwealth Parliament from enacting a law establishing a religion or prohibiting the free exercise of religion. Religious matters were intended to remain within state control. The High Court will soon consider a challenge to the federal government funding of chaplains in public schools, partly on the basis of s 116. Furthermore, s 80 of the Constitution requires federal criminal offences to be tried by juries consisting of members drawn from the state in which the offence is committed. Thus, the state community retains a measure of control over the administration of justice within that state.

A range of express limitations on the Commonwealth Parliament were also included to prevent it from favouring one state over another in the laws that it enacts. So, for example, the power to impose taxation under s 51(ii) cannot be used to discriminate between states, and s 99 prohibits the giving of a preference to one state over another in federal laws of trade, commerce or revenue. These limitations operate to facilitate and encourage national unity and cohesion, as does s 92 of the Constitution, which was designed to protect free trade, and s 117 which prevents discrimination against a person on the basis of his or her state of residence.

Some of these limitations (ss 80, 116 and 117) have been identified as provisions that protect individual rights. So too has s 51(xxxi) that prevents the Commonwealth Parliament from compulsorily acquiring property without paying fair compensation.

**STUDENT ACTIVITIES**

7. Why do you think it was decided to only give limited rights to the Commonwealth Parliament?
8. Examine ss 116 and 80 and explain why these two sections may be relevant to the funding of chaplains in schools.
9. Explain how the law-making power of the states is protected.

**Implied Limitations**

The Constitution also creates federal institutions of government. For example, Ch I of the Constitution creates the Commonwealth Parliament, with the members of each house of parliament to be chosen ‘directly … by the people’. The High Court has held that these words give rise to implied limitations that protect political communication about federal political matters, and the entitlement to vote in federal elections, from undue federal regulation. These are important limitations that strengthen the system of representative government at the federal level.
Another implied limitation arises from the division of federal governmental power into three arms of government: the legislature (Ch I), the executive (Ch II) and the judiciary (Ch III). The High Court has said that the division of power in this way gives rise to the principles that federal judicial power can only be exercised by courts, and that courts can only exercise judicial power. These are important limitations that help to protect the independence of the judiciary and the rule of law.

Before moving to the limitations on state parliaments, one final implied limitation on federal legislative power should be emphasised. The High Court has held that the federal system is built on the assumption that separate state government will continue to exist. Consequently, the Commonwealth Parliament cannot legislate in a way that will threaten their continued existence. This limitation operates to safeguard our federal system.

**Limitations On State Parliaments**

**Express Limitations**

The enhancement of national unity can also be undermined by state parliaments. For example, state laws that favour or protect trade or commercial activity originating in that state can operate to frustrate the goals of economic integration. Social integration in Australia would also be undermined if states were allowed to discriminate, in their laws or in the provision of their services, against people living in other states. Therefore, the prohibitions discussed above in ss 92 and 117 apply equally to the states.

In drafting the Constitution, the delegates decided that certain things should be done exclusively by the Commonwealth Parliament. For example, the imposition of taxes on the importation of goods from overseas (customs duties) was considered to be a power that should only be exercised by the Commonwealth Parliament. To give effect to this intention, s 90 of the Constitution prohibits the states from imposing such taxes. Other examples of similar limitations include s 114 which prohibits the states from having a defence force and s 115 which prevents states from coining money.

One final express limitation should be emphasised. In a federal system of government where parliaments at the federal and state levels can enact laws on the same topics, there is potential for a conflict or clash between the two laws to arise. For example, federal legislation might require a person to wear a blue coat on Mondays, but state legislation might instead require the person to wear a red coat on that same day. What colour coat should the person wear? Section 109 of the Constitution provides the tie-breaker: federal laws are to prevail and state laws become invalid. The operation of s 109 is obviously important not only to the federal and state governments, but also to the individual who needs to work out which law to comply with.

**Implied Limitations**

In addition to express limitations that can be found in the Constitution, there are also implied limitations that limit the power of state parliaments. As mentioned earlier, the High Court has said that communication about federal political matters is to have constitutional protection. That protection operates not only against federal laws, but state laws too. State laws can also impact on our communication relevant to the federal government and are affected by the same constitutional limitation. Whether the constitutional protection extends to political communication about state governments is a matter still to be decided.

The final limitation to be discussed is one that has only been recognised by the High Court since 1996. In the case of *Kable v Director of Public Prosecutions (NSW)*, the High Court had to consider the validity of NSW legislation that authorised the NSW Supreme Court to order the continuing detention of a particular person upon his release from prison if, in the Court’s view, he would pose a risk to the community. The High Court held that state parliaments cannot confer powers or functions on state courts if they would undermine the court’s independence or impartiality. The High Court considered that the NSW Parliament in this case was using the Supreme Court as a rubber stamp on a decision that had been taken by the NSW government to keep Kable in prison. That, the High Court thought, undermined the Supreme Court’s independence.

This *Kable* principle has continued to be refined and developed by the High Court in subsequent cases like *Fardon v Attorney-General (Qld)*, *Forge v Australian Securities and Investments Commission*, *International Finance Trust* and *South Australia v Totani*, and is one of the current burning issues in constitutional law.

---

The Constitutional Protection Of Commonwealth Voting Rights: The Case Of Rowe V. Electoral Commissioner

By Dominique Dalla-Pozza
ANU College of Laws, ANU

Introduction
The High Court of Australia has held that the Commonwealth Constitution establishes a system of ‘representative government’. Amongst the sections which the High Court has identified as providing for this system of government are ss 7 and 24.1 These sections indicate that both the members of the Senate and the House of Representatives must be ‘directly chosen by the people’.2 In the absence of an effective express guarantee in the Constitution that protects the right of Australians to vote,3 the High Court has determined that some level of constitutional protection of the voting rights of Australians can be implied from the phrase ‘directly chosen by the people’.4 At the end of 2010, the High Court released its reasons in Rowe v. Electoral Commissioner,5 the most recent case to interpret the meaning of that phrase in the Constitution. This article will outline the decision of the majority in that case and focus on one aspect of it: the fact that the majority of the High Court has emphasised the importance of assessing the practical impacts of Commonwealth laws which affect the extent to which elections allow federal representatives to be ‘directly chosen by the people’.6

Conclusion
The constitutional limitations discussed in this article are central features of our constitutional system of government. They impose limitations on the Commonwealth and state parliaments to divide power between the two levels of government, and ensure that each level of government acts in a way that facilitates national economic and social integration. The limitations also operate to ensure the integrity and effectiveness of the institutions of federal government created by the Constitution. The role of the judiciary in Australia is significant, as is the power of judicial review, which is exercised by the courts. The judiciary defines the extent of these limitations and keeps the Australian parliaments within them.

STUDENT ACTIVITIES
18. Investigate the case of Australian Capital Television Pty Ltd v. The Commonwealth of Australia (No.2) (1992) 66 ALJR 695 (HC) and answer the following questions:
(a) What occurred in this case?
(b) Explain the implied right to communication to political communication.
19. Explain the case of Kable v Director of Public Prosecutions (NSW). How did this case act as a limitation on the power of the NSW Parliament?
20. Investigate the cases of Fardon v Attorney-General (Qld), Forge v Australian Securities and Investments Commission, International Finance Trust and South Australia v Totani, and comment briefly about how these cases continue to provide limitations on state power.

1 See for example Lange v. Australian Broadcasting Corporation (1997) 189 CLR 520, 557.
2 Constitution ss 7 and 24.
3 The phrase ‘right to vote’ is included as part of s 41 of the Constitution. However, the High Court’s interpretation of this provision has meant that it has a limited operation. See further Keven Booker and Arthur Glass, ‘The Express Rights Provisions: Form and Substance (or Opportunities Taken and Not Taken?)’ in H P Lee and Peter Gerangelos (eds) Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton (The Federation Press, 2009) 155, 159–60; Anne Twomey, ‘Review of High Court Constitutional Cases 2007’ (2008) 31 University of New South Wales Law Journal 215, 232.
5 (2010) 273 ALR 1 (‘Rowe’). The decision in the case was handed down on 6 August 2010.
In the Commonwealth of Australia, the Constitution (Cth) 1900 sets out the provisions for the right to vote in federal elections. This section of the Constitution stipulates that all adult Australian citizens are entitled to vote.10 However, ‘at least from the 1930s until 1983 a practice developed where the upcoming election was announced some seven days pass between the ‘issuing of the writs’ and the close of nominations.17 (The writs are documents the Electoral Commissioner provides to candidates.)

### How Has Interpretation Of The Phrase ‘Directly Chosen By The People’ Provided Constitutional Protection For The Right To Vote?

Interestingly, many of the features of Australian electoral system are not contained in the Constitution. Instead, many of these details are located in Commonwealth legislation.7 Currently, the Commonwealth Electoral Act 1918 (Cth) sets out what qualifications Australians must meet before they can vote in federal elections. Essentially, and subject to some exceptions, all Australian citizens who are 18 years old (or older) are entitled to have their name placed on the electoral roll, and in so doing become entitled to vote.8

The fact that the scope of the ‘electoral franchise’ (the people who are eligible to vote in elections) is detailed in legislation might suggest that the right to vote in such elections is not protected by the Constitution. However, in 2007 in the case of Roach v. Electoral Commissioner,9 a majority of the High Court held that, in order for members of the Commonwealth Parliament to be held to be ‘chosen by the people’, the voting system, by which that choice is made, has to be one where ‘all adult citizens’ are (basically) entitled to vote.10

This decision represented an important limitation on the laws that the Commonwealth Parliament can enact in relation to restrictions on the people who are eligible to vote in federal elections.11 It has also been seen as an important advance in the level of constitutional protection of voting rights.12 As Gleeson CJ noted, it is no longer constitutionally permissible for the Commonwealth Parliament to make laws which ‘remove[d] universal adult suffrage’.13 Nevertheless, the High Court also accepted that the Commonwealth Parliament still retained the power to make some laws excluding some people from being eligible to vote. However, in order for such laws to be valid there needed to be a ‘rational connection [between the exclusion and] the identification of community membership or with the capacity to exercise a free choice’.14 Alternatively, as Gummow, Kirby and Crennan JJ termed it, the reason underlying a law which excluded people from voting must be a ‘substantial reason’ that is a reason that is ‘reasonably appropriate and adapted to serve an end which is consistent with the maintenance of the constitutionally prescribed system of representative government’.15

### What Happened In Rowe V. Electoral Commissioner?

Another important feature of the electoral system established by the Commonwealth Electoral Act is that it is compulsory for ‘every person who is entitled to be enrolled’ to take the necessary steps to ensure they become enrolled to vote.16 Until 1983 the electoral laws stated that no new names could be entered on the electoral roll after the day on which the ‘writs’ were issued.17 (The writs are documents the Constitution stipulates must be issued once a federal election is called).18 However, ‘at least from the 1930s until 1983 a practice developed where the upcoming election was announced some days before the writs were issued.’19 This meant that people who were eligible to be enrolled to vote (but had neglected to enrol) had an opportunity to do so before the ‘rolls closed’.

After the federal election in 1983, the Commonwealth Parliament changed the provisions of the Commonwealth Electoral Act. Under this change the legislation required that seven days pass between the ‘issuing of the writs’ and the close of nominations.

---

7  This point was made by French CJ in Rowe (2010) 273 ALR 1, 6. See also Graeme Orr, The Voting Rights Ratchet: Rowe v. Electoral Commissioner (2011) 22 Public Law Review 83, 83.
8  Commonwealth Electoral Act 1918 (Cth) s 93.
9  Roach (2007) 233 CLR 162. See also Graeme Orr, above n 7, 83–84 who notes that the decision in Roach was preceded by a series of cases from 1975–2006 where the protection ss 7 and 24 afforded voting rights was ‘crafted’.
10  Ibid 198 (Gummow, Kirby and Crennan JJ); see also 174 (Gleeson CJ).
13  Roach (2007) 233 CLR 162, 173
14  Ibid.
15  Ibid 199.
16  Commonwealth Electoral Act 1918 (Cth) s 101.
18  See for example, Constitution s 32, and for a broader discussion of the writs, Orr, above n 7, 84.
20  Orr, above n 7, 84.
of the rolls. This state of affairs continued until 2006, when the Commonwealth Parliament again amended the Commonwealth Electoral Act. These later amendments (contained in the Electoral and Referendum Amendment ( Electoral Integrity and Other Measures) Act 2006 (Cth)) moved the point in time at which the electoral roll would be ‘closed’ to people who had not previously been enrolled forward to ‘8.00 p.m. on the day the writs were issued’.23

On Saturday 17 July 2010 it was announced that a federal election would be held on 21 August 2010. The writs for that election were issued on Monday 19 July 2010. Under the 2006 Act this meant that people who were not enrolled to vote (and were otherwise eligible) had until 8.00 p.m. on that day to lodge their claims to be enrolled. Shannen Rowe (the first plaintiff) had turned 18 approximately 1 month before the 2010 election was announced. She was an Australian citizen who met the other eligibility criteria to allow her to enrol to vote, but who did not lodge a completed form requesting that she be enrolled until Friday 23 July 2010. As such, she was unable to have her details entered on the electoral roll, and became ineligible to vote in the 2010 election. Ms Rowe challenged the validity of these aspects of the 2006 Act.27

**STUDENT ACTIVITIES**

6. Explain the changes that occurred in relation to how many days a person had to register on the electoral rolls between the issuing of writs once a federal election has been called and the close of roles, between the 1930s and 2006.

7. What was the amendment in relation to the time allowed contained in the Electoral and Referendum Amendment ( Electoral Integrity and Other Measures) Act 2006 (Cth)?

8. Why did these changes affect Shannen Rowe?

---

The Decision: How Was The Phrase ‘Directly Chosen By The People’ Used To Enhance The Protection Of Voting Rights In Practice?

By a narrow majority (4:3) the High Court upheld her claim that these provisions were constitutionally invalid. The majority judges held that these aspects of the 2006 Act infringed the requirement that Commonwealth electoral laws ensure that federal elections allow for parliaments to be ‘directly chosen by the people’. Two of the judges confirmed that this phrase sets out a requirement that is ‘constitutional bedrock’. This requirement was also described as a constitutional ‘mandate … to which all electoral laws must respond’. According to French CJ, laws that effect the ‘narrowing of the range of opportunities [to enrol to vote], purportedly in the interests of better effecting choice by the people, will be tested against that objective’. To assess whether these aspects of the 2006 Act met this ‘mandate’ the majority judges considered the ‘practical’ effect of the provisions. They found that the provisions ‘exclude[ed] persons (otherwise legally eligible) from the right to vote and the right to participate in choosing parliamentary representatives’. The High Court judges then applied the test set forward in Roach and looked to see if there was a ‘substantial reason’ underpinning the aspects of the 2006 Act which would justify excluding the ability of these people to be eligible to vote.

One of the reasons the respondents (the Electoral Commissioner and the Commonwealth) argued that the laws were justified was because they helped to prevent electoral fraud (by ensuring that the electoral roll accurately listed all those who were

---

22 The ‘2006 Act’.
24 Ibid 30 (Gummow and Bell JJ).
25 Ibid.
26 Ibid 41 (French CJ), 26–7 (Gummow and Bell JJ), 81 (Crennan J).
27 Rowe (2010) 273 ALR 1, 4, 10, 26 (French CJ); 36, 43 (Gummow and Bell JJ), 94–95 (Crennan JJ).
28 The phrase is from Roach (2007) 233 CLR 162, 198 (Gummow, Kirby and Crennan JJ). It is confirmed in Rowe by French CJ and Crennan J see Rowe (2010) 273 ALR 1, 4 and 83.
29 Rowe (2010) 273 ALR 1, 10 (French CJ) See also the comments of Gummow and Bell JJ at 41.
30 Rowe (2010) 273 ALR 1, 10 (French CJ).
31 Rowe (2010) 273 ALR 1, 4, 26 (French CJ), 41–43, 45 (Gummow and Bell JJ), 92–3 (Crennan J).
32 Rowe (2010) 273 ALR 1, 4, 26 (French CJ), 41–43, 45 (Gummow and Bell JJ), 92–3 (Crennan J).
33 This was the way that Crennan J phrased her conclusion see Rowe (2010) 273 ALR 1, 94. However, the other majority judges came to similar conclusions, see 4 (French CJ) and 42 (Gummow and Bell JJ).
34 Rowe (2010) 273 ALR 1, 11 (French CJ) 43, 45 (Gummow and Bell JJ), 93–95 (Crennan JJ). See also Orr, above n 7, 86.
entitled to be listed on it). However, the High Court judges accepted the evidence, which suggested that this type of electoral fraud presented ‘no compelling practical problem or difficulty in the … electoral system’ as it presently operated. These judges compared this with what French CJ called the ‘immediate practical impact’ of the 2006 laws: namely that people who, prior to 2006 would have had a period of time after the announcement of a federal election to place themselves on the electoral roll, were denied this opportunity and thus were ineligible to vote. In French CJ’s view this ‘immediate practical impact … was disproportionate to the benefits of a smoother and more efficient electoral system’.

### STUDENT ACTIVITIES

9. How was the phrase ‘directly chosen by the people’ used to enhance the protection of voting rights in practice?

10. What reason did the Electoral Commission give for the passing of the 2006 act?

---

### Conclusion

The decision in *Rowe* is useful because it confirms and applies much of the reasoning in the *Roach* case which indicated that the phrase ‘directly chosen by the people’ in ss 7 and 24 of the *Constitution* do provide constitutional protection for voting rights. This brief article has only been able to concentrate on one way in which the majority judgments in *Rowe* applied the protection afforded by this phrase: the emphasis placed on assessing the practical effect of laws that impact upon whether ‘the people’ are eligible to vote. However, there are other aspects of this decision, and the comments made by the majority shed light on the way in which the phrase in ss 7 and 24 may impact upon the development of Commonwealth electoral law beyond this basic protection of the right to vote. The extent of this protection still requires exploration.

---

### STUDENT ACTIVITIES

11. Identify the reason for the decision in the Rowe case. Explain the main elements of the ratio decidendi.

12. Why do you think the protection of the right to vote in federal elections provided by the interpretation of the cases referred to above still requires further exploration?

---

### LEGAL STUDIES STUDY PACKS

**AVAILABLE ONLINE**

**VCE Law-Making Unit 3—only $14.25**

Covers three areas of study:
- Parliament and the Citizen
- Constitution and the protection of rights
- Role of courts

Also included:
- Exam questions and suggested solutions
- Short answer questions and suggested solutions
- Multiple choice questions and answers
- Suggested answers to questions relating to definitions of key words

Includes Study Cards

**VCE Dispute Resolution Unit 4—only $14.25**

Covers two areas of study:
- Criminal cases and civil cases
- Court processes and procedures

Part three of the book consists of:
- Exam questions and suggested solutions
- Short answer questions and suggested solutions
- Multiple choice and questions and answers
- Suggested answers to questions relating to definitions of key words

Includes Study Cards

**HSC: Law and Society—only $16.25**

This book has been designed to deal with the most current issues related to:

Part 1: Law and Justice
Part 2: Human Rights

Sample questions and structured responses are developed which cover in detail the areas of content and issues required.

Also includes Study Cards

**HSC: Crime Focus Study—only $14.25**

Designed specifically to assist students in their preparation for the NSW High School Certificate Examination. This book has been designed to deal with the most current issues related to crime.

- Key legal concepts and features of the legal system
- Legal issues and remedies
- Morality, ethics and commitment to the law
- Effectiveness of the law
- Law reform

Study Cards included

**AVAILABLE ONLINE AT:** [www.warringalpublications.com.au](http://www.warringalpublications.com.au)
Governments often have to deal with the fact that neither the states nor the Commonwealth has the ability to comprehensively legislate in a certain area, particularly so as to achieve national uniformity. However, this eventuality was not unforeseen by the founding fathers and the Constitution provides a solution by giving the states the capacity to refer their law-making power to the Commonwealth Parliament.

**Constitutional Framework**

The Constitution does not confer on the Commonwealth Parliament the power to make laws on all subjects. In contrast, the states have what is generally termed ‘plenary power’, which allows them to legislate within their jurisdictions with respect to a much broader range of subject matters.

The Constitution lists the subjects about which the Commonwealth Parliament can make laws. This list of powers is, for the most part, found in ss 51 and 52. Apart from the few areas listed in s 52, and some areas of power in s 51 that are later made exclusive to the Commonwealth, these powers are not exclusive to the Commonwealth; they are shared (concurrent powers). However, if a state law and a Commonwealth law are in conflict, the Commonwealth law prevails pursuant to s 109 of the Constitution.

Given the states have much broader law-making powers than the Commonwealth, they have the ability to refer some of this power to the Commonwealth under s 51(xxxvii) of the Constitution. Section 51(xxxvii) states that the Commonwealth Parliament has power to make laws with respect to ‘matters referred to the Parliament of the Commonwealth by the parliament or parliaments of any state or states, but so that the law shall extend only to states by whose parliaments the matter is referred, or which afterwards adopt the law’.

This power, often called the ‘referral’ power, broadly allows states to refer ‘matters’ to the Commonwealth that are otherwise outside the scope of Commonwealth legislative power so that the Commonwealth can make laws about those matters.

Unlike most other Commonwealth laws that operate throughout Australia, to the extent that a Commonwealth law relies on this power, the law only extends to those states that have referred power or afterwards adopted the law.

**STUDENT ACTIVITIES**

1. Give an example of a concurrent power and an exclusive power in the Constitution.
2. What is the meaning of residual power?
3. Why do you think there may be a need for a state to refer law-making power to the Commonwealth?
4. Give an example of a law-making power that was originally left with the states and was subsequently referred to the Commonwealth Parliament.
5. How do laws made under a referral of power from a state differ from most other Commonwealth laws?

**A Short History Of Referrals**

Numerous laws have been supported by referrals. The broad subject matters (and the years in which various states have referred power) include:

- War time powers over railways (1915)
- Air Navigation (1920–1921)
- War time powers (1942–1943)
- Air transport (1950–1952)
- Family law (1986–1990)
- Industrial relations (1996)
- Corporations (2001)
- De facto relationships (2003–2009)
- Fair Work (2009)
- Personal Property Securities (2009–2010)
- Consumer Credit (2009–2010)

At the time of writing, the most recent referral is the Vocational Education and Training referral. The Vocational Education
and Training (Commonwealth Powers) Act 2010 (NSW) was enacted on 7 December 2010 and the National Vocational Education and Training Regulator Act 2010 (Cth) was enacted on 12 April 2011. These acts are yet to commence operation.1 Public consultations are also underway for the National Business Names Registration Project.2 As s 51( xxxvii) expressly provides, to the extent that a Commonwealth law is based on a referral, it ‘shall extend only to states by whose parliaments the matter is referred, or which afterwards adopt the law’. On rare occasions only one or two states refer power to the Commonwealth. Only New South Wales referred war time powers over railways to the Commonwealth in 1915 and only Queensland and Tasmania referred air transport powers to the Commonwealth in 1950–1952.

Other referrals have brought about greater national uniformity. For example, all of the states referred power to the Commonwealth in relation to corporations and terrorism. Each of the referral laws were in the same terms. The only recent High Court case in which referrals were discussed is Thomas v Mowbray.3 This case was concerned with the federal terrorism offences based on the 2003 terrorism referrals. However, the Court did not need to decide any questions about the referrals.

**STUDENT ACTIVITIES**

6. Investigate two examples of the power to make laws that was referred to the Commonwealth Parliament by all (or most) of the state parliaments.
   (a) State the area of law-making in each case.
   (b) Name the act in each that was passed by the Commonwealth Parliament accepting the referral of powers.
   (c) Comment on the reasons for the referral of power.

**The Options**

Broadly, the states can refer a particular subject matter to the Commonwealth (known as a ‘subject matter referral’) or a particular text (a ‘text referral’).

An example of a subject matter referral is the referral in relation to de facto relationships provided by New South Wales, Queensland, Victoria, Tasmania and South Australia. The referrals gave the Commonwealth Parliament the power to make laws concerning:

(a) financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of different sexes

(b) financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of the same sex.4

An example of a text referral is the referral provided by all states in relation to corporations. The mechanism by which the ‘text’ was referred is explained in the following definitions:

‘referred provisions’ means the tabled text to the extent to which that text deals with matters that are included in the legislative powers of the Parliament of the State.

‘tabled text’ means the text of the following proposed Bills for Commonwealth Acts …:

(a) Corporations Bill 2001,
(b) Australian Securities and Investments Commission Bill 2001.

Text referrals also make specific provision for amendments of the law in the future (i.e. they include an ‘amendment referral’). This means that a separate ‘power’ is referred to the Commonwealth to enable the Commonwealth to amend the law. For example, s 4(1)(b) of the Terrorism (Commonwealth Powers) Act 2002 (NSW) refers to the Commonwealth:

the matter of terrorist acts, and actions relating to terrorist acts, but only to the extent of the making of laws with respect to that matter by making express amendments of the terrorism legislation or the criminal responsibility legislation.

In addition, s 51( xxxvii) contemplates that states can afterwards adopt a Commonwealth law that was previously enacted on the basis of a referral from at least one state (this is known as an ‘adoption’). However, this means that the law is ‘frozen’ in the form in which it is adopted.

The Commonwealth and states have recently developed an approach that has practical and process advantages. After a lead state refers power to the Commonwealth, other states can enact what have been called ‘hybrid referrals’. These referrals are hybrid in nature given a State simultaneously adopts a previously enacted Commonwealth law and gives an amendment referral.

An example of a Commonwealth act which relies on hybrid referrals is the National Consumer Credit Protection Act 2009 (Cth). This act was passed after Tasmania enacted the Credit (Commonwealth Powers) Act 2009 (Tas). It was later adopted by the other five states, which also referred to the power to amend the law to the Commonwealth.6

**STUDENT ACTIVITIES**

7. Explain the difference between a subject matter referral and a text referral. Give an example of each.
8. What is a hybrid referral? How does this type of referral streamline the process of states referring power to the Commonwealth?
9. Explain why the new consumer credit laws were an example of hybrid referrals.

---

1. Section 2 of the Vocational Education and Training (Commonwealth Powers) Act 2010 (NSW) provides that the Act ‘commences on a day or days to be appointed by proclamation: see s 2.
5. See, eg, Corporations (Commonwealth Powers) Act 2001 (NSW) s 3(1).
Cooperative Federalism

In order to settle the terms of a national law based on referrals, the Commonwealth and participating states need to work closely together. Quite a few of the recent referral schemes that are under negotiation, including the Business Names Registration Project, were initiated by the Council of Australian Governments. Intergovernmental agreements have also been relied on to support cooperative arrangements. These agreements describe the scope of the particular referral and set out consultation processes.

Without such a degree of cooperation between the Commonwealth and the states, referrals, which are an effective tool for ensuring national uniform regulation, would not be possible.

STUDENT ACTIVITIES

10. Investigate the role of the Council of Australian Governments.
11. Who does this council comprise of?
12. Briefly outline an area of law-making that has been considered by the Council of Australian Governments.

---

From Suffrage To Citizenship: A Republic Of Equals

By Kim Rubenstein

ANU College of Law, ANU*

Women And Suffrage

Section 41 of the Constitution is often identified by people enthusiastic about finding a reference to rights in the foundation to our legal system. It reads as follows:

No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

It is this section that reminds us of women’s involvement in the framing process. The first stage in the process of building a constitutional system was the holding of a series of Constitutional Conventions in 1891, 1897 and 1898. Women were not merely underrepresented in this process they were effectively not represented at all. At the 1891 Convention, attended by all colonial legislatures and New Zealand, no women were present, and, as none were eligible to vote in colonial elections, none could contribute to the process by electing the delegates.

STUDENT ACTIVITIES

1. Investigate when women gained the right to vote in each state. Make a list of each year for each state. Compare this with when women gained the right to vote in New Zealand.
2. Find the year women gained the right to vote in four other countries.
3. How did this inability to vote affect women’s rights to be involved in the Constitutional Conventions between 1891 and 1898?

In 1894, South Australia introduced universal suffrage, so South Australian women contributed to the 1897 Convention process by electing their representatives, with one particularly bold woman even standing for office. When Catherine Spence stood for election to the 1897 Convention as a South Australian delegate, she was the first woman to seek political office in Australia; but, despite being named in the Liberal organisation’s list of ‘10 Best Men’, and polling a ‘creditable’ 7383 votes, her bid was unsuccessful. Catherine Spence partly attributed her failure to comments by the South Australian Premier Charles Kingston, who cast doubt on her eligibility to stand because she was a woman. This was an attitude in keeping with the prevailing legal doctrine in which married women had (along with lunatics and children) no civil legal capacity under common law. At the 1897 Convention, Western Australia appointed its delegates, who were all men; in New South Wales and Victoria where only men could vote and stand, only men were elected; and Queensland did not attend. No women were present in 1897, nor were they there in 1898.

Those women who did have the right to vote at the time of the Constitutional Conventions, did have some influence over the wording of the Constitution. The South Australian women had threatened that, if they lost their vote at federation, they would not support the move to federation. Their delegates were the people who were involved with the drafting of what became s 41. In order to ensure that those women would be entitled to vote in the Commonwealth elections, s 41 precluded the Commonwealth from legislating to prevent them from voting.

---


* This is an extract from Professor Kim Rubenstein’s Dymphna Clark Lecture: the full paper is at: http://manningclark.org.au/papers/suffrage-citizenship-republic-equals with footnotes to sources for this extract.
Women throughout the Commonwealth finally obtained the vote in federal elections (in Victoria it took until 1908 for women to obtain the right to vote) The *Commonwealth Franchise Act 1902*, at the same time as introducing white woman’s right to vote, took away Indigenous women’s right to vote. That act also had an impact on the meaning and interpretation of s 41.

**Figure 1: Catherine Helen Spence (31 October 1825 – 3 April 1910)**

Source: Wikipedia Commons

**STUDENT ACTIVITIES**

4. Who was the first women to stand for parliament in Australia?
5. Why do you think Australian Premier Charles Kingston doubted her eligibility to stand?
6. How did some women have influence over the wording of s 41 of the Constitution?
7. How did the *Commonwealth Franchise Act 1902* affect women’s right to vote?

The most significant High Court decision about s 41 is an interesting example of law and politics. Not only does the judgment show a lack of concern for those with less power in the community, but the case also highlights how the High Court was able to both use, and misuse, the setting within which our *Constitution* was framed in its interpretation of s 41 of the *Constitution*. The majority decision of *R v Pearson; Ex parte Sipka* interpreted the guarantee in s 41 as a transitional guarantee only. According to them, that guarantee ceased to exist after 12 June 1902, the date on which the *Commonwealth Franchise Act* came into force.

The majority relied upon the historical story of the constitutional framing process. It is in this context that we can see the stories of women and their lack of involvement with the drafting of the *Constitution*. While s 41 was inserted to voice South Australian women’s desire for a fuller, more democratic electoral system – a system that would properly represent the will of the people, including women – the majority of the High Court chose to look at the section within the narrow formal context of its insertion, and used background of this insertion to read down the section. Because of its interpretation of events, the Court chose to limit its impact to just the period until the *Commonwealth Franchise Act 1902* came into effect. Given that s 41 was inserted to respond to the South Australian women’s desire not to lose the vote, and this right of white women was provided for in the *Commonwealth Franchise Act 1902*, from that time on, s 41 was spent – it had no more relevance to its original need.

The Court also held that, if a more general right was upheld, it would give the states the power to destroy the Commonwealth’s power to create a uniform franchise. For instance, each state could determine its own franchise, so that there would be an inequality of voting between states. The majority of the High Court was concerned with power as an issue between the states and the Commonwealth; it took no account of the individuals who would be affected. The High Court interpreted the successful fight of the South Australian women as one concerned with the protection of state legislative power, rather than with the individual rights of women.

8. Explain how the case of *R v Pearson; Ex parte Sipka* lead to a change in the way s 41 was interpreted.
9. Why do you think the High Court saw s 41 as spent after the passing of the *Commonwealth Franchise Act 1902*?
10. Investigate the following and write a report on women’s representation in parliament:
    (a) Who was the first women to win an election in an Australian parliament?
    (b) Name two other women who won an election in an Australian parliament in the 1940s.
11. To what event is there equal representation of women in parliaments in Australia and countries around the world? Discuss. In your discussion, comment on women’s share in parliaments in Sweden, Norway, New Zealand, United Kingdom, Ireland and Japan.

Legal Update

By Beth Wilson
Health Services Commissioner

Walmart Women

A group of women asked the United States Supreme Court to determine if they could take out a class action against United States retail giant Walmart alleging systematic discrimination on the grounds of gender relating to their working conditions. If the action had been allowed to proceed it would have been the biggest civil rights action ever and could have cost the company billions of dollars. On 21 June 2011 the Court rejected the claim in a huge victory for Walmart, the publicity generated by the case forced the company to make many changes in the way it treats its female employees.

Tobacco Companies v. Australian Government

The Australian Government’s proposals to make plain tobacco packaging compulsory have angered international tobacco companies and alarmed some other manufacturers. The Australian has reported that ‘intellectual property experts’ have warned plain packet tobacco regulation could set a precedent for government to step in and regulate other products such as alcohol and junk food. (The Australian 10 June 2011). The Director of the Institute of Public Affairs has expressed concerns that if plain packet tobacco labelling is upheld by courts then other property rights could be extinguished. The tobacco labelling issue has also been raised at a meeting in Geneva of the Council for TRIPS, the Agreement on Trade Related Aspects of Intellectual Property Rights.

The price of justice

The Federal Attorney-General Robert McClelland has launched the Australian Law Reform Commission’s proposals to overhaul the Federal Court’s civil; litigation procedures. The proposals have the potential to save millions of dollars and end what the Attorney described as ‘the farce that arises when the process of discovery is taken to extremes and used as a ploy to add costs and delay proceedings’.

Do the Crime pay the price

Western Australia, in common with some other jurisdictions, has tough criminal property confiscation laws. On 8 June 2011 the High Court of Australia, in a landmark decision rejected a murderer’s attempt to regain $135,000 seized from him. Gary White, a bikie, had been convicted of the ‘cold blooded execution’ of another man and appealed the decision to seize his assets arguing it had not been established that the money had been used for criminal purposes. The High Court disagreed and upheld a decision of the WA Supreme Court that there had been criminal use of the property.

Media Watch

By Margaret Beazer

Make Sure That Justice Is Not Put In Jeopardy

Editorial, Friday 3 June 2011, The Age

Changing the law must not enable abuse by the state

A LAW that has lasted 800 years may be thought to have proved its worth. And the common-law prohibition of double jeopardy, which prevents people being tried twice for the same offence, has certainly done that. A bulwark against the abuse of state power, its observance has been one of the marks distinguishing constitutional states in the common-law tradition, which do not countenance relentless police harassment of individuals, from despotic states that do. Some nations that share the inheritance of the common law, such as the United States and Canada, have entrenched the ban on double-jeopardy among the rights recognised in their constitutions. But in recent decades momentum to abandon
the ban has grown in several common-law jurisdictions, including the fount of the tradition, Britain itself.

Since 2005, people in England and Wales who have been tried and acquitted of one or more of 30 grave crimes, including war crimes, murder, rape and the most serious drug offences, may be tried again if the Court of Appeal determines that ‘new and compelling’ evidence of their guilt has been discovered since the first trial. Among Australian states, New South Wales and Queensland have also weakened double-jeopardy protection, and, as we report today, Victoria’s Attorney-General, Robert Clark, has announced that the Baillieu government intends to implement its election promise to do the same.

Since the government holds majorities in both houses of Parliament, it may be assumed that it will encounter no obstacle to achieving this aim. The Age has long held serious reservations about proposals to allow double jeopardy, although we have also recognised that developments in forensic technology, especially in the assessment of DNA evidence, have shed new light on some cases that can now be seen to have resulted in an unjust verdict, whether by acquittal or conviction. These present the strongest grounds for a change in the law, and if double jeopardy is to be allowed it is this kind of ‘new and compelling’ evidence that should warrant a new trial, or proof that a crucial witness committed perjury, or that jurors were bribed or intimidated.

The challenge is to ensure that the removal of double-jeopardy protection does not result in the lifelong pursuit of accused but not convicted persons, which the common-law ban was intended to prevent. Some restrictions are obvious: there should only be an option for one retrial, and it should be allowed only in cases involving the most serious crimes, such as murder. Above all, the decision to try an accused person for a second time must not be taken by the government of the day, or even the Director of Public Prosecutions. A second trial should not be an opportunity to make up for mistakes made during the prosecution of the first trial.

The most important protection against abuse, which fortunately Mr Clark appears willing to accept, is that the decision to quash an acquittal should, as in England and Wales, be made by the Court of Appeal. Even this risks weakening the presumption of innocence: juries will hardly be uninfluenced by the fact that the state’s highest court has determined that there is ‘new and compelling’ evidence of an accused’s guilt. Nonetheless, it is far better for such decisions to rest with the court than with the government – especially a government that, like the Baillieu government, seeks advice on sentencing reform from a newspaper’s online polls.

The government’s plans will inevitably arouse speculation about cases that may be reopened, and Mr Clark has conceded that the Walsh Street police killings may be among them. The fact that a witness in that case, Wendy Peirce, was subsequently convicted of perjury might justify a review of the acquittals, but, as The Age has argued before, hearsay evidence from prisoners should not. Removing the ban on double jeopardy for some crimes is not licence for dismantling other protections of the law


**STUDENT ACTIVITIES**

1. Explain the common law prohibiting double jeopardy.
2. Do you think the double jeopardy law prevents relentless police harassment of individuals that have been accused and acquitted of a crime? Explain.
3. Discuss the advantages and disadvantages of the law prohibiting double jeopardy.
4. How have the changes to the double jeopardy law in the UK affected the rights of a person who has been found not guilty of a crime?
5. Why do you think the Victorian Government feels it is time to change the law on double jeopardy?
6. What restrictions do you think there should be on this change in the law?
7. How could this change in the law weaken the presumption of innocence? Discuss.