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## TOPIC 5: REPRESENTATIVE GOVERNMENT, THE FRANCHISE, AND ELIGIBILITY

This topic covers three related issues: (1) whether the Constitution requires equal voting power; (2) the implied right to vote and its limits under *Roach/Rowe/Murphy*; and (3) disqualification of federal parliamentarians under s 44.

**Exam focus:** *The franchise cases (Roach, Rowe, Murphy) are frequently tested as problem questions. Know the two-part test: (1) substantial reason, (2) proportionality. For s 44, know the citizenship (Canavan/Gallagher) and office of profit (Sykes, Lambie) rules precisely.*

### 5.1 The Constitutional Basis: Sections 7, 24 and 'Directly Chosen by the People'

Sections 7 and 24 of the Constitution require that the Senate and House of Representatives be 'directly chosen by the people.' This phrase has come to impose substantive limits on electoral legislation. Parliament has broad power to make electoral laws under s 51(xxxvi) but those laws must be consistent with this requirement.

Express structural limits: HoR must be approximately twice the size of the Senate (s 24); Senate must have equal representation for each original State (s 7); electoral divisions cannot cross State lines (s 29); method of electing senators must be uniform across States (s 9); a person cannot sit in both Houses simultaneously (s 43).

### 5.2 Equal Vote, Equal Value? Electoral Distribution

The cases consistently hold that ss 7 and 24 do NOT require mathematical equality of electorates, but leave open that grossly disproportionate distributions could be unconstitutional.

#### Attorney-General (Cth); Ex rel McKinlay v Commonwealth (McKinlay) (1975)

<b>Facts</b>	Commonwealth Electoral Act did not require equal distribution of population per electorate. Plaintiffs argued this infringed s 24's 'directly chosen by the people'.
<b>Held</b>	Majority rejected an implied guarantee of equality. Barwick CJ: s 24 does not contain a principle of equality; Parliament was granted power to determine the franchise and distribution. Mason J: 'chosen by the people' is not infringed by 'some, or even marked, variation', but grossly disproportionate distributions could raise a question.
<b>Principle</b>	No implied guarantee of equal voting power. However, 'grossly disproportionate' distributions may eventually fail the 'directly chosen by the people' test, this remains an unresolved threshold.

#### McGinty v Western Australia (1996)

<b>Facts</b>	Disproportionate electoral distribution in WA (metropolitan seats far larger than rural, e.g., Wanneroo 26,580 enrolled vs Ashburton 9,135 enrolled). Argument: ss 7 and 24 apply to State elections, or alternatively the WA Constitution's own 'directly chosen by the people' requires equality.
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<b>Held</b>	Both arguments rejected. Brennan CJ: no free-standing principle of representative democracy; implications must be derived from actual text and structure. Gummow J: grossly disproportionate distributions could deny ultimate popular control, but balanced against good reasons (geographic size, minority representation) and current evolutionary understanding.
<b>Principle</b>	ss 7 and 24 do not apply to State elections. The WA Constitution's 'directly chosen by the people' does not require equal distribution, but Toohey and Gaudron JJ (dissenting) would have required substantial justification for departures from equality. The door remains open to future argument.

### 5.3 The Implied Right to Vote

**Section 41:** No adult who has the right to vote at State level shall be prevented by any Commonwealth law from voting at federal elections. Held in *Ex parte Sipka* (1983) to be TRANSITIONAL, spent once Commonwealth enacted its own franchise legislation in 1902. It does not give a continuing right to vote at Commonwealth level.

The implied right to vote is found instead in ss 7 and 24 themselves.

*“The words in ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote.”*  
 , Gleeson CJ, *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174

Universal adult citizen suffrage is now constitutionally mandated. The phrase 'directly chosen by the people' evolves over time to reflect the common understanding of the period, informed by 'durable legislative developments' of the franchise (French CJ, Rowe). This produces the 'ratchet principle': once Parliament has enacted a durable provision that expands the franchise, it cannot later retreat without substantial justification.

**Two-Part Test for Exclusions from the Franchise (Roach; Rowe; Murphy)**

**Substantial reason:** There must be a substantial reason for the exclusion, rationally connected to representative government. Examples: citizenship (membership in civic community); mental competence; repudiation of civic responsibility through serious criminal offending; treason. Examples that FAIL: religion (Gleeson CJ, Roach, no rational connection).

**Proportionality (reasonably appropriate and adapted):** The means must be proportionate to the legitimate end. Courts consider: how many people are affected; whether the law retreats from a durable legislative development; whether evidence supports the claimed purpose; whether less burdensome alternatives existed. NOTE: Parliament is NOT required to maximise participation (Keane J, Murphy).

**Roach v Electoral Commissioner (2007)**

<b>Facts</b>	The 2006 Electoral Integrity Act extended prisoner disenfranchisement from those serving 3+ years to ALL persons serving any sentence of imprisonment. Vicki Roach (Aboriginal Australian, imprisoned for smash-and-grab) was disenfranchised.
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## TOPIC 8: NON-STATUTORY EXECUTIVE POWER

Section 61 vests executive power in the Crown. Beyond statutory powers, the executive has non-statutory power from three sources: prerogative powers, capacities derived from legal personality (contracting/spending), and the 'nationhood power'. Each has different characteristics and different limits.

**Exam focus:** Know the displacement principle (*De Keyser*), the two-limbed nationhood power test (*AAP Case*), and the *Williams No 1* rule on spending. The *Tampa/CPCF/M68* line of cases on detention/exclusion of aliens is often tested.

### 8.1 Prerogative Powers

Prerogative powers are the rights, powers, privileges and immunities which the relevant government possesses at common law (*DHA Case (1997)*). They are determined by examining the common law, not statute.

View	Definition	Implication
Blackstone (narrow)	Powers necessary to maintaining government and NOT shared with private citizens, a definable list	Accepted by Gageler J in Plaintiff M68 at [133]
Dicey (broad)	'A residue of discretionary or arbitrary authority', every act the executive can lawfully do without statutory authority	Accepted in <i>AG v De Keyser's Royal Hotel (1920, HL)</i>

**Evatt J's categories of prerogatives:** (1) Executive prerogatives, execute treaties, declare war, coin money, pardon offenders, confer honours, appoint ministers, detain aliens; (2) Immunities and preferences, priority of Crown debts; (3) Proprietary prerogatives, Crown's right to precious metals, royal fish, treasure (remain with States unless transferred to Commonwealth).

#### General Limits on Non-Statutory Executive Power

- **Cannot authorise breach of law:** 'The executive has no power to authorise a breach of the law and it is no excuse for an offender to say that he acted under the orders of a superior officer' (*Gibbs CJ, A v Hayden (1984)*). 'The incapacity of the executive government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy' (*Brennan J*).
- **Cannot impose taxes or create offences:** Executive power cannot impose taxation or create criminal offences without statutory authority.
- **Subject to legislative abrogation:** All non-statutory power is vulnerable to displacement by legislation.

#### The Displacement Principle

*"When a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament."*

, *McHugh, Gummow and Hayne JJ, Jarratt v Commissioner of Police (NSW) (2005) 224 CLR 44, 69-70*

### Attorney-General v De Keyser's Royal Hotel (1920)

<b>Facts</b>	During WWI, the British Government requisitioned De Keyser's hotel under defence regulations requiring compensation. The Government asserted a prerogative power to requisition without compensation.
<b>Held</b>	Prerogative displaced by the statutory scheme, compensation must be paid. 'If the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules' (Lord Dunedin). 'What use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on prerogative?'
<b>Principle</b>	Displacement by statute operates by express words or necessary implication ('covering the ground'). Where legislation covers the same area as a prerogative power, the executive must act in accordance with the statutory scheme. The Crown cannot use prerogative to avoid statutory limitations.

### Cadia Holdings Pty Ltd v New South Wales (2010)

<b>Facts</b>	The Crown claimed prerogative proprietary rights under the Case of Mines (1568) to gold intermingled with Cadia's copper ore. The Royal Mines Act 1688 had provided: 'no mine of copper ... shall hereafter be adjudged, reputed, or taken to be a royal mine, although gold or silver may be extracted out of the same.'
<b>Held</b>	The prerogative had already been abridged by the 1688 Act before the common law was received in NSW. The copper (and intermingled gold) was privately owned. The 1688 Act clearly addressed the prerogative: the prerogative 'is not displaced except by express words or by necessary implication', but the 1688 Act satisfied this test.
<b>Principle</b>	Displacement by statute can occur long before the relevant dispute arises. The prerogative as received in Australian law must be assessed in light of its status in the common law at the time of reception, not at the time of original grant.

## 8.2 Nationhood Power

*"To engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation."*

, Mason J, *Victoria v Commonwealth (AAP Case) (1975) 134 CLR 338, 397, the canonical test*

The nationhood power is a component of s 61, supported by s 51(xxxix) (the incidental legislative power). Two scenarios: (1) the executive acts directly under the nationhood power without legislation; (2) Parliament enacts legislation claiming support from s 51(xxxix) as facilitating the exercise of s 61.

### Nationhood Power, Two-Limbed Test and Limits

**Limb 1, Peculiarly adapted to the government of a nation:** The activity must be one that a national (as opposed to State) government is uniquely positioned to undertake, e.g., national bicentenary celebration (Davis), fiscal stimulus during GFC (Pape). Not just convenient for the Commonwealth, it must be a genuinely national enterprise.