

# FOCUS

## COMMERCIAL LITIGATION



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## HIGH COURT STRIKES DOWN COMMONWEALTH LEGISLATION DISQUALIFYING PRISONERS FROM VOTING

A High Court ruling will mean some prisoners will gain the right vote in a federal election

The High Court has upheld a challenge to the validity of amendments made in 2006 to the *Commonwealth Electoral Act 1918* (Cth) that disqualified all prisoners from voting. However, the court upheld the validity of the previous legislative regime, which denied the vote to prisoners serving sentences of three years or more. The case was brought by Ms Vickie Lee Roach, an indigenous Victorian prisoner. Partner Peter O'Donahoo and lawyer Peter Haig, members of the Allens Arthur Robinson team who represented Ms Roach, report on the High Court's decision.

### HOW DOES THIS AFFECT YOU?

- The High Court decision involves consideration of important questions of constitutional principle, particularly regarding the system of representative government mandated by the Constitution. The case has implications beyond the Commonwealth's power to prescribe the franchise, and brings into focus the extent to which the text and structure of the Constitution restricts the Commonwealth's legislative power more broadly.

### BACKGROUND COMMONWEALTH LEGISLA- TION DISENFRANCHISING PRISONERS

Since 1902, Commonwealth legislation has always barred some prisoners from voting. Prior to the 2006 amendments, the exclusion was of convicted persons serving a sentence of imprisonment of three years or longer (the **three-year ban**). In 2006, Parliament enacted section 93(8AA) of the the *Commonwealth Electoral Act 1918* (Cth) (the **Electoral Act**), which provides that a person who is serving a sentence of imprisonment for an offence against the law of



the Commonwealth or of a state or territory is not entitled to vote at any federal election (the **blanket ban**).

## THE PLAINTIFF

Ms Roach is serving a total effective sentence of six years imprisonment following her conviction in 2004 for various robbery and driving-related offences under the *Crimes Act 1958* (Vic). Under the blanket ban, Ms Roach and approximately 20,000 other individuals were prohibited from voting in any federal election while serving a term of imprisonment.

## THE CHALLENGE TO THE LEGISLATION

Ms Roach challenged the blanket ban, contending that constraints derived from the text and structure of the Constitution rendered the blanket ban invalid.<sup>1</sup> Proceedings were commenced in the original jurisdiction of the High Court seeking, among other things, declaratory relief to that effect.

## DECISION OF THE HIGH COURT

### THE MAJORITY DECISION

By a 4-2 majority, the High Court upheld the plaintiff's challenge to the validity of the blanket ban. Consequential issues then arose as to the identification and effect of surviving provisions of the Electoral Act in their unamended form. The majority, which comprised Chief Justice Gleeson and Justices Gummow, Kirby and Crennan<sup>2</sup>, held that the legislation in place prior to the 2006 amendments was valid and continues to apply. Accordingly, an Australian citizen who is serving a sentence of three years or longer for an offence against the law of the Commonwealth or of a state or territory, or has been convicted of treason or treachery and has not been pardoned, is not entitled to vote at any federal election. Justices Hayne and Heydon delivered separate dissenting judgments.

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1. As well as challenging the validity of s93(8AA) of the Electoral Act, the plaintiff challenged the validity of s208(2)(c), which was enacted at the same time as s93(8AA) and operated to exclude from the certified lists of voters (as prepared by the Electoral Commissioner) those voters to whom s93(8AA) applied. This provision was also held to be invalid.

2. Justices Gummow, Kirby and Crennan delivered a joint judgment.

## A 'CONSTITUTIONAL PROTECTION OF THE RIGHT TO VOTE'?

Chief Justice Gleeson concluded that ss 7 and 24 of the Constitution, which require that Senators and members of the House of Representatives be 'directly chosen by the people', mandated universal adult suffrage. While this may not have been the case at federation, his Honour held that representative government has evolved in such a way as to render ss 7 and 24 'a constitutional protection of the right to vote'. This is not to say that all exceptions to universal adult suffrage are impermissible, rather that the Parliament's power to define such exceptions is constrained by the wording of ss 7 and 24 of the Constitution.

## THE POWER TO RESTRICT THE FRANCHISE

Although the majority judges found that the Commonwealth has some power to limit the franchise, the judgments of Chief Justice Gleeson and that of the joint majority each set out a different test for determining the constitutional validity of such limitations. Ultimately, the determining factor behind the blanket ban's invalidity under both tests was its reliance on the criterion of serving a sentence of imprisonment as the method of identifying serious criminal conduct warranting disenfranchisement.

As discussed below, each test concluded that the blanket ban lacked the necessary nexus between the disqualification criterion and conduct evincing culpability incompatible with participation in the electoral process.

### **Chief Justice Gleeson's test for determining the validity of limitations on the franchise**

Chief Justice Gleeson cited the centrality of the franchise to representative government and to the concepts of community participation and citizenship, holding that 'disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.' His Honour held that any exclusion from the franchise would require a rational connection between the definition of the excluded class or group and either:

- the capacity to exercise free choice; or
- the identification of community membership.



As no such rational connection existed here between the definition of the excluded class and the capacity to exercise free choice, it came down to whether the definition of the excluded class had a rational connection with the identification of community membership.

***The joint majority judgment's test for determining the validity of limitations on the franchise***

Like Chief Justice Gleeson, the joint majority judgment emphasised the centrality of the franchise to the constitutional concept of representative government and the 'notions of citizenship and membership of the Australian federal body politic'. Such notions survive the fact of imprisonment. Of the various alternative grounds of invalidity asserted by the plaintiff, the joint majority judgment identified the appropriate ground for the decision as being whether the impugned legislation impermissibly limits the operation of the system of representative government which is mandated by the Constitution. A disqualification is only permissible if it exists for a 'substantial' reason.

Rather than defining a 'substantial' reason by reference to notions of 'rational connection' between the definition of the excluded class and the right to participate in political membership of the community, the joint majority judgment defined a 'substantial' reason as being a disqualification that is reasonably appropriate and adapted (or 'proportionate') to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government.

***The two tests in application***

Chief Justice Gleeson viewed the deprivation of the right to vote of persons who have been imprisoned for serious criminal offences as permissible. Such persons have suffered a temporary suspension of their connection with the community and can, 'consistent with our constitutional concept of choice by the people', be temporarily disqualified from the franchise. As it is 'for Parliament, consistently with the rationale for exclusion, to decide the basis upon which to identify incarcerated offenders whose serious criminal wrongdoing warrants temporary suspension of a right of citizenship', the previous disqualification legislation was therefore valid.

His Honour considered, however, that the 2006 amendments had gone too far in removing any 'attempt to identify prisoners who have committed serious crimes by reference to

either the term of imprisonment imposed or the maximum penalty for the offence'.

While the test set out in the joint majority judgment was expressed differently to that propounded by Chief Justice Gleeson, the same considerations were held to render the impugned provisions invalid. In the joint majority judgment, the fact that the 2006 amendments introduced a disqualification regime that operates without regard to culpability 'other than that which can be attributed to prisoners in general' necessitated a conclusion that '[t]he net of disqualification is cast too wide'. The blanket ban was held to be 'beyond what is reasonably appropriate and adapted (or 'proportionate') to the maintenance of representative government'.

In striking down the blanket disenfranchisement of prisoners, both the joint majority judgment and the judgment of Chief Justice Gleeson cited the prevalence of short-term prison sentences and other practical realities as evidencing that the mere fact of imprisonment does not necessarily indicate criminal conduct sufficiently serious to warrant the exclusion from one of the political rights of citizenship.

***Burdening the implied freedom of political communication***

While Chief Justice Gleeson did not consider it necessary to address the plaintiff's contention that the impugned provisions impermissibly burdened the implied freedom of political communication (or of political participation), the joint majority judgment addressed this asserted ground of invalidity in passing, stating that 'what is at stake on the plaintiff's case is not so much a freedom to communicate about political matters but participation as an elector in the central processes of representative government'.

***The dissenting view (Justices Hayne and Heydon)***

In upholding the validity of the impugned legislation, Justice Hayne (with whom Justice Heydon agreed) interpreted s30 of the Constitution, which permits the Commonwealth to legislate for the qualification of electors, as conferring upon the Commonwealth a broad power to determine which persons should be afforded the vote.

Justice Hayne considered that the drafting history of s30, along with other textual indications, require that the expression 'directly chosen by the people' in ss 7 and 24 be seen as an expression of generality that was 'not

intended to convey a requirement for universal adult suffrage'. Whereas the majority considered the legislative development of representative government since federation affected the scope of the Commonwealth's power to set the franchise, Justice Hayne focused on the state legislation which, at federation, prescribed the qualification of electors for the more numerous houses of the state parliaments. His Honour saw this legislation, all of which excluded some prisoners from voting, as indicating the content that is to be given to the expression 'directly chosen by the people'. His Honour firmly rejected the notion that the content to be afforded to the expression might be informed either by reference to 'common understanding' or 'generally accepted Australian standards'

## CONCLUSION

The High Court's decision not only has important consequences for those prisoners now able to vote in the upcoming federal election, but also provides a significant addition to the jurisprudence concerning the system of representative government mandated by the Constitution. The Commonwealth's power to make laws affecting the extent of the franchise, as with laws affecting other fundamentals of our system of representative government, are subject to limitations. The majority decision in this case supports a view that these limitations, though derived from the text and structure of the Constitution, are themselves capable of evolution.



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