

THE DISENFRANCHISEMENT OF PRISONERS

Roach v Electoral Commissioner & Anor
— modernity v feudalism

DAVID BROWN

David Brown takes a road trip to Canberra for the Roach fixture at the High Court, where modernity is attempting a fight-back against the resurrection of civil death.

The backdrop

Australia's first electoral legislation following federation included a provision which disqualified from voting those convicted and under sentence 'for any offence punishable by imprisonment for one year or longer'.¹ This position continued until 1983 when the franchise for prisoners was expanded by disqualifying for all offences punishable by more than five years imprisonment, and in 1995 it was further extended by changing the disqualification from potential to actual sentence being served.

In 1989 and 1995, under the Hawke and Keating governments, the ALP put up draft legislation to give all prisoners the vote. In 1989 the measure was defeated in the Senate, and in 1995 it was withdrawn after a media and political blitz of the 'Killers to Get the Vote'² sort. By 1999 the ALP, fearful of the 'wedge' potential of the issue in a law and order climate, abandoned its advocacy of complete enfranchisement of prisoners and — in response to the Howard government's attempt to remove the vote entirely — argued for a three-year-sentence threshold, which was then enacted in 2004. In 2006, relying on their new majority in the Senate, the Howard government finally disenfranchised all serving prisoners with the passage of the *Electoral and Referendum (Electoral Integrity and other Measures) Act 2006* which came into force in June 2006.³

In a decade and a half Australia moved from all prisoners serving less than five years being eligible to vote and draft legislation removing any restriction on prisoner voting, to a policy of total disenfranchisement, taking us back to the situation prior to federation. There are currently 25 000 prisoners in Australia of whom 5 000 are on remand. The former three-year disenfranchisement law barred approximately 11 000 prisoners from voting; the new complete disenfranchisement blocks another 9 000 from participating.

Head out on the highway

Queen's birthday Monday, hitting the highway to Canberra for the *Roach* fixture at that coliseum, the High Court, where universal suffrage, democracy and modernity are the key players in the clash with opponents selective suffrage, feudalism and

the resurrection of civil death. A fine day after the violent storms and floods as the Forrester eats up the kilometres to the sounds of The Pogues' *If I should Fall from Grace with God*, Bob Dylan's *Modern Times* and Lisa Miller's *Morning in the Bowl of Night*. I hope Lisa is right: 'There's got to be an upside to this upside down'.

'A moment of madness'

Book in to University House in the twilight and, feeling like a figure in an urban landscape painting by Jeffrey Smart, walk in to town to catch a bit of the local derby between the Dragons and the Sharks at The University Bar. Result seemed settled once Dragons forward, Adam Peek, was sent off for a late, high, elbow to Adam Dykes' head, a shot described the next day as a 'moment of madness'⁴ Once the video referee had reported, match referee Tony Archer wasted few words: 'Elbow, connected to the head, late. Go'. But game tight until the end; wondered if this was a foretaste of things to come.

Back to room in time for *Four Corners* and second part of special on torture. Seems to have been a lot of work off the ball on Habib and others who were 'rendered' to Egypt and elsewhere in an 'outsourcing of torture', to use the words of one ex-CIA man.

Four Corners reported that in February 2002 two ASIO agents travelled to Egypt and, on the strength of their discussion with Egyptian intelligence, DFAT wrote to Habib's wife Maha saying that it had obtained 'credible advice' that Habib was 'well and being treated well'. Australian Attorney-General Philip Ruddock said in March 2005: 'We were seeking access to him, if he was there. It was never obtained, and I think that's the end of the matter. We have no knowledge of him being there.'⁵ In legal circles this is known as pleading in the alternative — he wasn't there but if he was there he was 'well and being treated well'.

Manuel's 'I know nothing' refrain from *Fawlty Towers* has become a staple Ministerial response from Tampa to torture via the AWB and back. *Four Corners* does not have the authority of the video referee so Ruddock and Downer are not sent off. It is up to 'the people' (electors) to do this later this year. Unless Vickie Lee Roach — a Victorian Aboriginal woman prisoner serving a sentence, enrolled in Kooyong electorate but disenfranchised at the forthcoming federal election — wins this clash, she and all serving prisoners will get no say.

REFERENCES

1. See *The Commonwealth Franchise Act 1902*, s 4.
2. Graeme Orr, 'Ballotless and Behind Bars: The Denial of the Franchise to Prisoners' (1998) 26 *Federal Law Review* 55, 72 quoting *The Sunday Mail* (Brisbane), 9 July 1995, 1.
3. See generally Jennifer Fitzgerald and George Zdenkowski, 'Voting Rights of Convicted Persons' (1987) 11 *Criminal Law Journal* 11; Graeme Orr, above n 2; Jerome Davidson, 'Inside Outcasts: Prisoners and the Right to Vote in Australia' (*Current Issues Brief No 12 2003–04*, Australian Parliamentary Library, 2004) 2 <<http://www.aph.gov.au/library/pubs/CIB/2003-04/04cib12.pdf>> at 16 August 2007; Melinda Ridley-Smith and Ronni Redman, 'Prisoners and the Right to Vote', in David Brown and Meredith Wilkie (eds), *Prisoners as Citizens* (2002) 283; Ronni Redman, David Brown and Bryan Mercurio, 'The Politics and Legality of Prisoner Disenfranchisement in Australian Federal Elections' in Alec Ewald and Brandon Rottinghaus (eds), *Democracy and Punishment: International Perspectives on Criminal Disenfranchisement* (forthcoming, 2008).
4. Andrew Stevenson, 'Gutsy Sharks snuff out 12-man Dragons' charge', *Sydney Morning Herald* (Sydney) 12 June 2007.
5. ABC Television, 'Ghost Prisoners' *Four Corners*, 11 June 2007 <<http://www.abc.net.au/4corners/content/2007/s1947389.htm>> at 16 August 2007.

In a decade and a half Australia moved from all prisoners serving less than five years being eligible to vote ... to a policy of total disenfranchisement, taking us back to the situation prior to federation.

The warm up

Over breakfast a quick scan of the newspapers. Items to catch my eye included a Report to the ACT and Commonwealth governments by the Winnunga Nimmityjah Aboriginal Health Service recommending that inmates should have access to clean needles, condoms, medical specialists, and voluntary testing for blood-borne viruses, and that the Commonwealth should 'reinstate prisoners voting rights and treat ex-inmates as a highly disadvantaged group in the job market'.⁶ Amen.

Also a news report headlined 'Insider reveals how PM reins in bureaucrats',⁷ on the way secretaries of government departments are increasingly brought to heel through performance bonuses and short term contracts. Before I had time to feel glad to be an academic rather than a bureaucrat (although with current academic administration loads and compliance tasks any difference may be slight) I noticed an item headed 'Uni pair suspended over disabled thesis'⁸ about two academics who had been suspended without pay for six months for criticising a thesis that poked fun at disabled people. It seemed that prisoners were not the only ones in need of the implied right to freedom of political discourse.

On the way to the Cauldron

On the way to 'the Cauldron', *The Law Report* on Radio National covered Vickie Lee Roach's forthcoming challenge, with an interview with Philip Lynch, Director of the Human Rights Law Resource Centre in Melbourne, which had organised the sizeable team of pro bono lawyers working on the case, many from Allens, led onto the field by Ron Merkel QC. This is the lesser known side of the legal profession: hundreds if not thousands of hours put in for no fee. Philip Lynch outlined the game plan and a letter was read by Indigenous broadcaster and consultant, Wanda Braybrook, from plaintiff, Vickie Lee Roach.⁹

Previous encounters at this venue

It is a very cold morning and the High Court forecourt is deserted. Previous fixtures spring to mind, the first being the opening of the High Court on 26 May 1980 by the Queen. Amidst a fairly large gathering of onlookers and protesters, mainly republicans, 'Doc' Caplehorn and I held aloft the NSW Prisoners Action Group large 'STOP POLICE VERBAL' banner. Not sure if the Queen noticed as she planted a tree (which seems to

have disappeared since) and even if she did, not sure whether she would have known what Police Verbal was. The High Court was learning, ever so slowly, and one year later in *McKinney and Judge*¹⁰ a majority was finally created out of previous Deane J dissents, to require a warning to the jury of the dangers of convicting on an uncorroborated confessional statement made by an accused while involuntarily held in police custody without access to a lawyer. Several elderly ladies shouted at us to 'go back to Moscow' and one even asked us how much 'Moscow gold' we were receiving.

Last visit to the Cauldron was for the *Wik* case when Gladys Tybingoompa danced in the forecourt after the judgment was handed down. Would Vickie Lee be dancing in her cell in a few months time? Sad Ronni didn't live to see this.¹¹

Through the turnstile

The attendants at the door of the High Court are friendly and helpful, handing out a match program in the form of a *Visitors' Guide to Oral Argument* and a précis of the case which includes a map setting out which judges are sitting where and what the basic points in the appeal are. The line up on the bench was: The Chief in the middle (Murray Gleeson CJ — not the other "Chief", Paul Harragon) flanked on his left by Kirby and Heydon JJ and on the right by Gummow, Hayne and Crennan JJ. The *Visitors' Guide* explains that the 'Justices take their places on the Bench in order of seniority' with 'seniority being determined by the date of their appointment to the High Court'. Callinan J was absent and I wondered why, until I recalled that he was nearing retirement, so perhaps was not sitting on new cases. Each judge had a tipstaff sitting behind them to hand up the law reports as authorities were discussed by counsel.

The Bar Table was packed with a team of three for each of the five parties, together with a larger number of instructing solicitors at the tables behind and some spilling over into the public gallery. The fixture was set down for two days, truly a 'game of two halves', or 'stanzas'. The plaintiff had day one and the more numerous defendants — the Australian Electoral Commissioner and the Commonwealth of Australia, joined by the Solicitors General of WA and NSW as intervenors supporting the Commonwealth position — day two. The judges trooped in and we all stood and bowed. There were very few observers and no sign of anyone from the media.

6. Danielle Cronin, 'Call to have condoms and voting in jail', *The Canberra Times* (Canberra), 12 June 2007.

7. Mark Davis, 'Insider reveals how PM reins in bureaucrats', *Sydney Morning Herald* (Sydney), 12 June 2007.

8. AAR, "Uni pair suspended over disabled thesis", *The Canberra Times* (Canberra) 12 June 2007.

9. ABC Radio National, 'Should prisoners be allowed to vote', *Law Report*, 12 June 2007 <<http://www.abc.net.au/rn/lawreport/stories/2007/1945622.htm>> at 16 August 2007.

10. (1991) 171 CLR 468.

11. Friend and colleague to many at UNSW and elsewhere, Ronni Redman died in January 2007. She was co-author of two book chapters on prisoners' voting rights (see note 2) and felt passionately about this and other human rights issues. She is greatly missed.

Kick off

Ron Merkel led for the plaintiff, softly spoken, calm and without histrionics. He outlined the argument he was going to traverse over the course of the day. There were, he said four 'pathways' to invalidity.

- The first was that the 2006 amendments to the *Commonwealth Electoral Act 1918* which disenfranchised all prisoners were invalid, being contrary to ss7 and 24 of the *Constitution* which provide for members of the House of Representatives and the Senate to be 'directly chosen by the people' of the Commonwealth and the States respectively. Prisoners have become entitled to vote as members of 'the people' and any law which seeks to disqualify them is not consistent with the Constitutional system of representative government.
- The disenfranchising amendments were invalid because they are beyond the legislative power of the Commonwealth conferred by ss 51 (xxxvi) and 30 of the *Constitution*, not falling within the limitations on disqualification connected with representative democracy.
- The disenfranchisement of prisoners amounts to punishment, contrary to ch III of the *Constitution* and the prohibition there on the Commonwealth punishing for breaches of State law.
- The disqualifying provisions were invalid as being contrary to the implied freedoms of political communication and political participation established in *Lange* and *ACTV*.¹²

Merkel QC argued that each of the four 'pathways' lead to the conclusion that there is no 'compelling justification' for the disenfranchisement or, alternatively, that the disenfranchisement is not 'appropriate and adapted' to a legitimate end.

The softening-up period

Merkel QC then proceeded to try to take the Court through the arguments in more detail. I say 'try', because at least some of the judges were frequently interjecting in an attempt to test the argument, so that it was difficult to keep to the game plan.

Heydon and Crennan JJ, the 'bookends' at either end of the bench, were largely silent and thus very difficult to read. The Chief was incisive and measured in his questions; Kirby J, as ever, was courteous and urbane. This bloke is the Andrew Johns of the code (without the drug intake), a legend with all the skills, not just a Justice in name but actually imbued with it. He seemed to be acting as devil's advocate trying to highlight weak points in the argument, one assumed in the hope that these might be repaired.

Gummow J was harder to see over the bench than the others, but made up for a lack of stature with more oblique interventions which seemed designed to identify patches of sticky ground. Hayne J was the most animated in terms of facial gestures, glancing around at the other judges when he had made what he obviously thought was a punishing tackle. I was reminded of Adam Peek the night before, wondering if some of the

shots were a little late and high; there may even have been a bit of elbow in there.

As the going got tough up the middle I though Merkel lifted and got into stride, rather like Pricey or Petero for Queensland in the first Origin, making the hard yards and breaking the line. He drew on recent decisions in Canada, the European Union and South Africa in the *Sauvé*, *Hirst* and *NICRO* cases which all held that prisoner disenfranchisement provisions were invalid,¹³ highlighting the approach of other comparable leading courts and demonstrating that the government was both going against the flow and resuscitating aspects of civil death.

Who is among 'the people'?

The category of 'the people' entitled to vote has expanded since 1901 to include non-European migrants in 1961; Indigenous Australians in 1962; those aged between 18 and 21 in 1973 with the reduction in the minimum voting age; and the expansion in the voting rights of prisoners in 1983. Current disqualifications include persons under 18, holders of a temporary visa, unlawful non-citizens, a person who 'by reason of unsound mind is incapable of understanding the nature and significance of enrolment and voting', a person convicted of treason or treachery and, now, all serving prisoners.¹⁴

Much of the action at this point revolved around the Judges putting examples to Ron Merkel: could women be disenfranchised constitutionally, or people of a particular race or religious group or political party, or bankrupts, or people between 18 and 21, or people over 70? This continued the following day when David Bennett QC, Solicitor-General, was putting the Commonwealth case. There was substantial agreement between the parties that women, Indigenous people and particular racial, ethnic or political groups, could not be disenfranchised constitutionally, but disagreement over whether prisoners could, and uncertainty in relation to bankrupts and age limitations. What was not so clear was the legal test that made some disqualifications constitutionally permissible and others not. For Merkel the disqualification had to be 'rational' or 'non-arbitrary' or 'non-discriminatory' while Bennett adopted a 'multifactorial approach' which sounded a little like 'intuitive synthesis', a way of avoiding the clear articulation of a test.

The arbitrary nature of the disqualification

The plaintiff had put in a 'Special Case' in order to demonstrate that the disqualification of prisoners was 'arbitrary' in having no connection with the nature and seriousness of the offence committed and thus constituting an additional punishment. A deal of criminological and statistical material about sentencing provisions, incarceration rates and recidivism across Australia was put forward.

While Merkel put the argument that disenfranchisement had no connection to the nature or seriousness of the offence *in summary*, relying on the detail in the written submissions, I thought I detected a judicial unease with

12. *Lange* (1997) 189 CLR 520; *ACTV* (1992) 177 CLR 106.

13. *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519; *Hirst v the United Kingdom (No. 2)* [GC], no 74025/01, ECHR 2005; *Minister of Home Affairs v National Institute for Crime Prevention (NICRO)* (2004) 5 BCLR 445 (CC).

14. Section 93 *Commonwealth Electoral Act 1918*.

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this sort of empirical argument: the Judges seemed happier debating constitutional principle and powers and the history of previous decisions. This unease with the empirical and statistical was more than manifest in the Commonwealth’s submissions, which stated baldly that ‘the statistical information included in the Special Case is irrelevant to any of the issues before this Court.’¹⁵ At 4pm the Chief blew the whistle and players retired to the sheds.

Day 2: the warm up

Breakfast and a quick scan of the papers to see if there had been any coverage of the case but couldn’t find any. There were a number of letters responding to the *Four Corners* torture special, expressing outrage at the Australian government’s denial of knowledge about Habib’s rendition to Egypt for torture, and Foreign Minister Alexander Downer’s denial of any deception.¹⁶ An editorial in *The Australian* even argued that it was time to shut down Guantanamo Bay.¹⁷ And a report that the Research Co-ordinator (sorry Union Boss) of my union, the NTEU, had rejected the call for academics to monitor students on behalf of security agencies to be ‘canvassed’.¹⁸ As if we didn’t have enough to do without part time Stasi being added to the job description.

Kick off for the second stanza

Back at the stadium for the second stanza and Peter Hanks QC kicked off for the first defendant, the Australian Electoral Commissioner, who was only on the field for 15 minutes, supporting the Commonwealth position. Kirby J immediately got stuck in, asking why shouldn’t the Electoral Commissioner be above the partisan fray? Hanks’ response that the Commissioner was ‘presuming the validity of the legislation’ sounded a bit weak, and his Honour clearly thought so too. At one point Kirby J referred to the Australian electoral system as a ‘pride of the Commonwealth’, no doubt silently comparing it with the shambles in the USA where there is no federal electoral agency, no uniform ballot paper, and the conduct of the elections is left in the partisan hands of state governors and their political machines; one state governor, infamously in Florida in the 2000 Presidential election, being the brother of one of the candidates. If it happened anywhere else we would be talking banana republic.

Commonwealth Solicitor-General hits the ball up

The response for the second defendant, the Commonwealth, was taken up by Commonwealth Solicitor-General, David Bennett QC. Bennett’s game plan was to argue that parliament could legitimately place qualifications on the franchise but must not do so in such a way as to prevent the election being directly ‘chosen by the people’. The requirements and limitations made under ss 7 and 24 of the *Constitution* control the making of laws with respect to the qualifications of voters but only in so far as ‘the voting system as a whole must not be so distorted as not to answer the broad identification ... of ultimate control by periodic popular election.’¹⁹ This question is one of degree, and there

is no fixed test, capable of consistent application at all times and to all circumstances, for determining whether the voting system is so distorted as not to answer the broad identification required.²⁰

It was here that Bennett’s ‘multifactorial’ test (the judges had some fun with this term) came in, and it seemed to mean that there are lots of factors to take into account and the result will differ from time to time and depend on the circumstances.

Further it was argued, contrary to Merkel’s submission, there was no requirement that a characterisation of a law made under s 51 of the *Constitution* is to be determined by reference to concepts such as ‘irrationality’, ‘arbitrariness’ or ‘discrimination’.²¹ In the alternative, Bennett argued, if there was such a requirement, the rational connection was provided because denial of the vote to prisoners while serving their sentences ‘serves an object which has a rational connection with the system of representative government established by the Constitution’²².

On the implied freedom of political communication argument, I thought that the second row feed was being pushed a bit far when the Solicitor-General argued that ‘voting’ itself was not a communication protected by the implied freedom, which only extended to ‘the communication that is necessary to place the elector in a position to make an informed choice’.²³ On the freedom of political participation argument the Commonwealth submitted there is ‘no such implied freedom’ in this context which went beyond existing Constitutional provisions such as ss 7 and 24 or, again in the alternative, if there was then the

15. Written Submissions of the Second Defendant, 23 May 2007, para 74.

16. Natalie O’Brien, ‘Downer denies any deception on Habib’, *The Australian* (Sydney), 13 June 2007.

17. Editorial, ‘Time to Shut Down Guantanamo Bay’, *The Australian* (Sydney), 13 June 2007.

18. Brendan O’Keefe, ‘Lecturers slam spy call’, *The Australian* (Sydney), 13 June 2007.

19. Written submission of the Second Defendant, 23 May 2007 para 12 quoting *McCinty v Western Australia* (1996) 186 CLR 140, 285 per Gummow J.

20. *Ibid* para 16.

21. *Ibid* 47–52.

22. *Ibid* 53.

23. *Ibid* 62.

disenfranchisement is 'appropriate and adapted' to the legitimate objectives of the legislation.²⁴

Objectives of the legislation

In earlier written submissions the Commonwealth had identified five objects or ends of the disenfranchising legislation. Someone had had to put a bit of work into this, as these ends had not been clearly articulated by government members in the debate over the ironically named *Electoral and Referendum (Electoral Integrity and other Measures) Act 2006*. I say 'ironically' because it is difficult to see how limiting electoral participation by hastening the closure of the rolls, reducing transparency by increasing the threshold for secret donations to political parties, and excluding prisoners, increase the 'integrity' of the electoral system.

Absent from government contributions to the 2004 and 2006 debates was any reference to the importance of the franchise as a manifestation (indeed under the *Electoral Act*, a 'duty') of citizenship, a basic human right, and a mechanism of participation in a democratic polity. It was left largely to independent country-based MP, Peter Andren²⁵, and to the leader of the Greens, Senator Bob Brown²⁶, to raise these broader arguments.

The objects of the disenfranchisement spelt out in the Commonwealth submissions similarly made no mention of democracy or citizenship or universal suffrage.

But the Basil Fawly 'it's bleeding obvious' type of government justification in the parliamentary debates had been dressed up a bit. Thus the disenfranchisement was argued to:

- support civic responsibility by preventing persons who have broken the social compact by committing a serious breach of a law of the Commonwealth or a State or Territory from voting in a federal election or referendum
- support respect for, and obedience to, the law ...
- support an important aspect of representative democracy, namely acceptance of, respect for and obedience to the laws enacted by Australia's elected representative institutions ...
- encourage recognition that the rights and obligations of community participation are correlative
- support the integrity of the electoral system by excluding from voting ... persons who by reason of their full-time detention, are less able to participate in political communications and political matters.²⁷

In reverse order, the last seemed to have been drafted by someone who, quite apart from the matter of principle, had never heard of newspapers, radio, television and education programs. The plaintiff Vickie Roach for example, had completed a Masters degree in prison, was hoping to start a PhD, and is active in prison-based education programs and in mentoring other prisoners in relation to a whole range of issues including political and governmental policies affecting them.

The fourth point was, as argued by the plaintiff, largely rhetorical. That leaves the first three points, which were generally characterised at the hearing and in submissions as different formulations of

'the social compact end', but which I thought was better characterised as the 'forfeit' argument — a characterisation perhaps avoided because of its association with the notion of 'civil death' and a feudal, pre-modern mentality.

'Social compact' or 'social contract' seems an extraordinarily vague basis on which to base this 'forfeit'. First, which of the many versions of 'social contract' theory was being relied on, I wondered? Presumably not the 'social compact' which encompasses the notion of a 'social wage' in the form of governmental provision and safety nets, or its 'accord' version practiced by the Hawke government? Secondly, assuming its existence, presumably the compact could be broken in various ways, for example by taking the country to war based on a falsehood, or paying whacking great bribes to the enemy regime? Obscene executive salaries do not exactly enhance the 'social compact'. Citizens sent to prison are hardly the only, or even the most obvious, 'social compact' breakers. And thirdly, how do you teach people the virtues, benefits and responsibilities entailed in a democratic system by totally excluding them from it? This is the 'we are going to teach you that human life is sacred by killing you' type of reasoning, which I have always found a tad self-defeating, undermining the very values it purports to uphold.

Just such an argument has been thrice rejected recently, in *Sauvé*, *Hirst* and *NICRO* in Canada, Europe and South Africa. As the Canadian Supreme Court held in *Sauvé*:

With respect to the first objective of promoting civic responsibility and respect for the law, denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than enhance those values. The legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility.²⁸

The close of play

Once the Commonwealth Solicitor-General finished, there were brief run-on appearances by his WA and NSW colleagues, both of whom were intervening on behalf of their respective Attorneys-General in support of the Commonwealth position. Kirby J quickly asked them both 'why?' — what was their governments' interest in a total disenfranchisement of prisoners? The WA presence made more sense in that WA, being in such a rush to mimic the Howard government that they couldn't even wait for this case to be heard, had earlier in the year followed the Commonwealth and disenfranchised prisoners entirely from voting in WA state elections, after previously allowing the vote to prisoners serving less than one year.²⁹ The answer, provided by R M Mitchell for the WA AG, was that the WA *Constitution* contained a similar provision (*Constitution Act 1889 (WA) 73(2)(c)*) providing that members be 'chosen directly by the people'), so that the WA disenfranchisement might also be impugned if this case succeeded.

24. Ibid 63–5.

25. Commonwealth, *Parliamentary Debates*, House of Representatives, 10 August 2004.

26. Commonwealth, *Parliamentary Debates*, Senate, 12 August 2004.

27. Notice dated 13 April 2007; Reproduced in the Written submission of the plaintiff, 86.

28. [2002] 3 SCR 519, 4–5.

29. *Electoral Legislation Amendment Act 2006 (WA)* which came into force on 3 March 2007.



By contrast, prisoners in NSW serving less than one year are still entitled to vote in NSW state elections. So what was the NSW Solicitor-General doing there waving a banner for the Howard government — why not let the Commonwealth defend its own politics of exclusion? I had asked NSW Solicitor-General, Michael Sexton QC, the same question at half time the previous day, albeit in a rather leading and aggressive form: ‘What is your position Michael, are you appearing for democracy and modernity, or for feudalism?’. He blushed and answered in kind that he was appearing ‘for the forces of darkness’. Indeed.

In response to Kirby J’s more polite version of the same question, the answer seemed to be that NSW supported the power of the Commonwealth to so legislate (as distinct from supporting the particular legislation), and that such an exercise of power was not invalid for ‘while the content of the abstraction “the people” will change from time to time ... that content has not changed to a general acceptance that “the people” now includes persons serving prison sentences’ so that the disenfranchisement was ‘consistent with the constitutionally-mandated system of representative government’.³⁰ It is a sad state of affairs when governments of all persuasions seem keen to so crimp the *Constitution*.

The Chief extended play by 10 minutes extra time to permit a brief response from Merkel QC for the plaintiff and then blew the final whistle.

Day 3 Head home from the match

Back to University House to watch State of Origin 2 (disappointing for Blues supporters) and on the way happened upon a recent copy of *The New York Review of Books* which contained an extended review essay by Jason De Parle on three recent prison books, one being *Locked Out: Felon Disenfranchisement and American Democracy*.³¹ The reviewer argues that ‘civic reintegration’ is not the reason to give felons the vote. Rather ‘the reason is that to do otherwise — to exclude 5.3 million people from the rolls — is to offend the principle of universal suffrage and undermine democratic legitimacy’.³²

De Parle points out that in the US, if felons had been allowed to vote, the US would have had a different President. In the 2000 election in Florida alone, if just ex-felons (those released from prison — some US States bar those convicted of felonies from voting for life) had been allowed to vote Al Gore would have carried the State by 30 000 votes and won the election. (I began to envisage the flow on effects — the invasion of Iraq might not have happened, the world might be a much safer place, climate change may have been addressed earlier — this line of thought became too distressing so I stopped.) Felony disenfranchisement laws in the US effect a massive racial gerrymander, disenfranchising 2.4 per cent of voters nationally but 8.4 per cent of voting age blacks, and in five states disenfranchising more than 20 per cent of black voters.

Scan morning papers before departing and yet again no coverage of the case. Prisoners don’t seem to rate, whereas there is evidently great media interest in the High Court’s overturning of the jury in the defamation case involving *Sydney Morning Herald* restaurant reviewer, Matthew Evans, and the limoncello oysters at the *Coco Roco*.³³ Free speech for food critics; I wondered what Vickie Lee Roach was eating that night and wished her well. When I turned on the ignition *The Pogues’ Fairytale of New York* kicked in and Shane MacGowan’s voice croaked through the speakers: ‘I can see a better time/When all our dreams come true’. We can only hope.

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Editor’s note:

On 30 August the High Court issued a statement that, “The Court, by majority, upholds [Roach’s] challenge to the 2006 amendment ... Reasons for the decision will be published at a later date.”

30. Submission of the Attorney General for NSW, Intervening 30 May 2007, 4.5.

31. Jason DeParle, ‘The American Prison Nightmare’, *The New York Review of Books*, 12 April 2007, 33–6; Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (2006)

32. *Ibid* 36

33. *John Fairfax Publications Pty Ltd v Gacic* [2007] HCA 26 14 June 2007