

IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY

No M19 of 2007

B E T W E E N

**VICKIE LEE ROACH**

Plaintiff

and

**IAN CAMPBELL, AUSTRALIAN  
ELECTORAL COMMISSIONER**

First Defendant

and

**THE COMMONWEALTH OF  
AUSTRALIA**

Second Defendant

**OUTLINE OF PLAINTIFF'S  
SUBMISSIONS ON THE APPLICATION TO SHOW CAUSE**

**a. WHY THE MATTER SHOULD NOT BE REMITTED TO ANOTHER  
COURT**

1. This matter should not be remitted to another court for the reasons set out below.

***Question of Constitutional Law***

2. This matter concerns the constitutional validity of s 93(8AA) of the *Commonwealth Electoral Act 1918 (the Act)*. That section 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 Senate election or House of Representatives election.

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Date of document: 5 March 2007

Filed on behalf of: the Plaintiff

**Human Rights Law Resource Centre Ltd** DX 38227 Flagstaff  
Level 1 Tel (03) 9225 6695  
550 Lonsdale Street Fax (03) 9225 6686  
Melbourne VIC 3000 Ref

Contact Name: Philip Lynch

3. Section 208(2)(c) is also challenged on the basis that it is the provision giving operative effect to s 93(8AA). Relevantly, s 208(1) and (2) provides that

- (1) The Electoral Commissioner must arrange for the preparation of a list of voters for each Division and must certify the list.
- (2) The list must include the name of each person who:
  - (a) is on the Roll for the Division; and
  - (b) will be at least 18 years old on polling day; and
  - (c) is not covered by subsection 93(8AA) (sentences of imprisonment).

Pursuant to s 231 of the Act, the presiding officer or polling official at a federal election shall hand a ballot paper to a person only if that person's name is on the certified list of voters.

4. The Plaintiff has standing to seek the relief sought in the Summons because she will be serving a sentence of imprisonment on a full-time basis as at 19 January 2008, the latest possible date for the next federal election for the House of Representatives or combined House of Representatives and Senate election and, by virtue of ss 93(8AA) and 208(2)(c), she will be deprived of her entitlement to vote at that election.

5. The validity of ss 93(8AA) and 208(2)(c) are challenged on three grounds. That they:

- (a) are contrary to ss 7 and 24 of the Constitution; and/or
- (b) are beyond the legislative powers of the Commonwealth conferred by ss 51(xxxvi) and 30 of the Constitution; and/or
- (c) burden one or more of the following rights or freedoms that are implied in the Constitution:
  - (i) the freedom of political participation;
  - (ii) the freedom of political communication;

and are not reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government.

6. These issues are questions of law concerning constitutional interpretation and raise no disputed questions of fact. This Court is the appropriate jurisdiction to resolve such questions.

***No Disputed Questions of Fact***

7. To the extent that any factual matters are relevant to the questions of law that are to be determined, those facts are primarily of a statistical nature and can be presented from sources such as the Australian Bureau of Statistics, the Australian Institute of Criminology and state sentencing advisory bodies. Examples of such facts include:

- (a) the number of prisoners in Australia;
- (b) the length of sentences of prisoners in Australia for various crimes;  
and
- (c) the demographics of the prison population.

8. The factual matters set out in (a), (b) and (c) above are published statistics in recognised sources. There is no reason why there would be a factual dispute in respect of these matters. Accordingly, there is no need for remittal in order to determine questions of fact. On that basis, this Court is unlikely to be substantially assisted in its ultimate determination of the matters by a remission.

9. Other relevant factual matters are matters which need not be formally proved. These include:
  - (a) different maximum penalties for the same crime in different states in the Commonwealth; and
  - (b) the operation of sentencing discretions resulting in different sentences being imposed for the same conduct.

10. The proceeding ought to proceed by way of a special case in which the parties can be expected to agree on the relevant facts that are to be put before the Court as agreed facts.

***Urgency***

11. The matter is urgent in that it should be determined before the next federal election. If it is not, and the provision is ultimately found to be invalid,

- (a) approximately 20,000 persons who would otherwise be eligible to vote will have invalidly been deprived of their entitlement to vote at the next federal election; and
- (b) the legality of the outcome of the next federal election may be put into question.

12. Unless there is a double dissolution, the earliest possible date for a combined House of Representatives and Senate election (***a General Election***) is 4 August 2007. If the Government decided to hold a General Election on 4 August 2007, writs for the election of Members of the House of Representatives and for Senators must be issued by the Governor General and Governors of each state, respectively, on 1 July 2007. Apart from 17 year olds turning 18 before polling day and people becoming citizens before polling day, the issuing of the writs freezes the electoral roll and, hence, the certified list of voters.

13. The latest possible date for a General Election is 19 January 2008.

14. To remit the matter to a lower court, and raise the possibility of an appeal to this Court following a decision, would delay the matter unnecessarily and risk a final decision not being made before the next federal election.

***Important Issues***

15. The issues raised by this proceeding are important issues of constitutional significance including:

- (a) parliament's entitlement to deprive persons who would otherwise be entitled to vote from so doing; and

- (b) the extent to which voting can be considered an incident of implied freedoms of political communication or of political participation.

Neither of these questions has yet been determined by this Court. These questions will ultimately require this Court's intervention. It is, therefore, appropriate that the matter be dealt with now by the High Court.

16. A further reason why this matter should be dealt with by this Court is that it is concerned with the fundamental human right of those who are to be represented in a representative democracy to determine those who will represent them.

**b. FURTHER STEPS THAT SHOULD BE TAKEN IN THE COURT AND THE TIMES FOR TAKING THOSE STEPS**

1. The matter proceed by way of a special case under Rule 27.08 of the *High Court Rules* 2004. In that regard:
- (a) By 4 April 2007, the Plaintiff provide the Defendants with details of the facts that she seeks to have included in a special case.
- (b) By 26 April 2007, the Defendants provide the Plaintiff with details of the facts that they seek to have included in a special case.
- (c) The parties negotiate with a view to finalizing their draft of a special case that can be referred to the Full Court by 16 May 2007.
2. The proceedings be referred to the Full Court for determination of the issues raised in the application.

**c. ORDERS SOUGHT**

The Plaintiff seeks the orders set out in the Summons.

**DATE:** 5 March 2007

**R MERKEL QC  
M PEARCE SC  
F FORSYTH**