

BETWEEN:

VICKIE LEE ROACH

Plaintiff

AND:

ELECTORAL COMMISSIONER

First Defendant

THE COMMONWEALTH OF AUSTRALIA

Second Defendant

WRITTEN SUBMISSIONS OF THE PLAINTIFF

PART I: CONCISE STATEMENT OF ISSUES

1. The Special Case raises the following issues:

- 10 (a) Are ss 93(8AA) and 208(2)(c) of the *Commonwealth Electoral Act 1918* (Cth) (**the Act**) invalid because they are contrary to ss 7 and 24 of Constitution (**ss 7 and 24**)?
- (b) Are ss 93(8AA) and 208(2)(c) of the Act invalid because they are beyond the legislative power of the Commonwealth conferred by ss 51(xxxvi) and 30 of the Constitution (**ss 51(xxxvi) and 30**) or any other head of legislative power?
- (c) Are ss 93(8AA) and 208(2)(c) of the Act invalid because they are contrary to:
- 20 (i) the implied freedom of communication in relation to political and government matters (**freedom of political communication**); or
- (ii) a freedom of participation, association and communication in relation to federal elections implied in the Constitution (**freedom of political participation**)?

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Date of document: 9 May 2007

Filed on behalf of: the Plaintiff

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**PART II: SECTION 78B NOTICES**

2. Notices under section 78B of the *Judiciary Act 1903* (Cth) were given on 7 March 2007 [SCB 5 – 8]. The Plaintiff does not consider that any further notices should be given under section 78B.

**PART III: MATERIAL FACTS**

3. The material facts are set out in the Special Case [SCB 16 - 43]. In summary, the facts particular to the Plaintiff are as follows.
4. The Plaintiff is an Australian citizen of indigenous descent aged over 18 years of age. She is entitled<sup>1</sup> and required<sup>2</sup> to be enrolled to vote, and is enrolled to vote in the Federal Division of Kooyong [SCB 18 at [13] and SCB 23 at [45] and SCB 79 – 80].
5. She is currently serving a full-time sentence of imprisonment for breach of State law and will be serving that sentence at the date of the next federal election [SCB 20 at [28]]. Accordingly, by reason of ss 93(8AA) and 208(2)(c) of the Act (**the impugned provisions**) the Plaintiff will not be entitled to vote at that election.

**PART IV: STATEMENT OF ARGUMENT**

**A. SUMMARY**

6. Sections 7 and 24 provide for the members of the House of Representatives and the Senate to be “directly chosen by the people” of the Commonwealth and the States, respectively. An exercise of the power of the Parliament to provide for the qualification of electors under ss 30 and 51 (xxxvi) is subject to the Constitution and hence subject to ss 7 and 24 and the system of representative democracy for which those, and other, sections provide (**representative democracy**).<sup>3</sup>
7. The Plaintiff and other prisoners who are Australian citizens over the age of 18 years are entitled and required to be enrolled to vote under the Act. For the purposes of ss 7 and 24, and in accordance with contemporary standards, such persons have become, and have been accepted by the Parliament as being, entitled to vote in their capacity as, “members of the people” (**qualified members of “the people”**). By the impugned provisions they have been disqualified from voting.

<sup>1</sup> Sections 93(1)(a) and (b)(11), 96, 97 and 98 of the Act.

<sup>2</sup> Section 101 of the Act.

<sup>3</sup> It may be accepted that representative democracy is not a free standing principle to which the Court gives effect. Nonetheless, certain sections of the Constitution, of which the most significant are ss 7, 24 and 128, make provision for a system of government that may, as a convenient shorthand, be described as one providing for representative democracy (see, eg, *McGinty v Western Australia* (1996) 186 CLR 140 at 168 (Brennan CJ), 233 (McHugh J); *Lange v Australian Broadcasting Corporation* 189 CLR 520 at 567). Accordingly, the system of representative democracy provided for by the Constitution, and the right of the people to participate in that system, is relevant to the discrete issue arising in the present case including the criteria or principles that are to be applied in determining the nature of, and limits upon, a specific exercise of Parliament's power to disqualify members of the people from voting. This is because ss 7, 24 and 128, and the express and implied requirements of those sections, are of direct relevance to that power. The exercise of a power to qualify or disqualify electors must satisfy those sections.

8. A law that disqualifies qualified members of "the people" from voting will be contrary to ss 7 and 24 if the disqualification is not either in furtherance of, or rationally connected and not consistent with, representative democracy (**the representative democracy criteria**).
9. The sole criterion for disenfranchisement under the impugned provisions is that the person happens to be serving a sentence of imprisonment on the date of the election. Such an arbitrary disenfranchisement to vote is not in furtherance of, rationally connected with or consistent with representative democracy.
- 10 10. For the same reasons, the impugned provisions are invalid as they do not fall within the limitations on disqualification set out in paragraph 8 and are, therefore, beyond the power conferred on the Parliament by ss 51(xxxvi) and 30.
11. The impugned provisions are also invalid by reason of being contrary to the freedoms of political communication<sup>4</sup> and political participation.<sup>5</sup>
- 11.1 The impugned provisions are directed at controlling political communication and participation. Accordingly, they must be "necessary for the attainment of some overriding public purpose"<sup>6</sup> and they require "compelling justification".<sup>7</sup>
- 11.2 Alternatively, the impugned provisions impose a burden on the freedoms of political communication and participation. Accordingly, they must be reasonably appropriate and adapted to furthering a legitimate objective in a manner that is compatible with the system of representative democracy.<sup>8</sup>
- 20 11.3 The impugned provisions do not meet the requirements for validity set out in either 11.1 or 11.2.
12. Alternatively, the power conferred by ss 30 and 51(xxxvi) is a purposive power, namely a power to prescribe the qualification of electors for the purpose of implementing representative democracy, particularly as provided for in ss 7 and 24. The impugned provisions are not reasonably appropriate and adapted, or proportionate, to that purpose.
- 30 13. The above arguments are strongly supported by recent decisions in Canada, the European Union and South Africa, which found that prisoner disenfranchisement provisions were invalid.<sup>9</sup> Although the decisions in those jurisdictions are based

<sup>4</sup> See *Lange* (1997) 189 CLR 520.

<sup>5</sup> *ACTV* (1992) 177 CLR 106 at 227 (McHugh J).

<sup>6</sup> *Levy v Victoria* (1996) 189 CLR 579 at 619 (Gaudron J). See also *Coleman v Power* (2004) 220 CLR 1 at 30-32 (Gleeson CJ); *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1 at 76-77 (Deane and Toohey JJ).

<sup>7</sup> *ACTV* (1992) 177 CLR 106 at 143 (Mason J), 325 (McHugh J); and see *Coleman* (2004) 220 CLR 1 at 123 (Heydon J).

<sup>8</sup> *Lange* (1997) 189 CLR 520 at 567; *Coleman* (2004) 220 CLR 1 at 51 (McHugh J), 77-78 (Gummow and Hayne JJ).

<sup>9</sup> Less recently, this issue has also been considered by the United States (US) Supreme Court, but because of a specific provision in the US Constitution dealing with the disenfranchisement of prisoners the decisions of US courts are of limited relevance to the Australian situation. Under Article 1(2) of the US Constitution, the qualification of electors is that applying to the most numerous house of the State legislature. Article 2 of the 14<sup>th</sup> Amendment to the United States Constitution contemplates that states may disqualify from voting persons who have participated in 'rebellion or other crime'. In *Richardson v Ramirez* 418 U.S. 24 (1974) the Supreme Court upheld a

on different constitutional provisions, they are sufficiently analogous for the decisions to be drawn on in support of the Plaintiff's case. These decisions are summarized in Plaintiff's Annexure 1: Comparative Jurisprudence on Disenfranchisement of Prisoners.

## **B. THE LEGISLATIVE REGIME**

- 10 14. The Act provides comprehensively for elections for the Commonwealth Parliament. To that end, it establishes the method of voting, the mechanisms by which polling is to be conducted and the qualifications and disqualifications for candidates and for electors for elections for the Senate and the House of Representatives.

### **B1. The Act's provisions for enrolment and voting**

15. Part VI provides for there to be electoral rolls for each State and Territory.
16. Part VII provides for qualification and disqualification for enrolment and for voting.

16.1 Section 93(1) provides that a person is entitled to enrolment under Part VIII if they are:

- (a) over 18 years of age; and
- (b) an Australian citizen or a person to whom s 93(1)(b)(ii) applies.<sup>10</sup>

16.2 A person is not entitled to enrolment if he or she is:

- 20
- (a) the holder of a temporary visa (within the meaning of the *Migration Act 1958* (Cth) (s 93(8));
  - (b) an unlawful non-citizen (within the meaning of the *Migration Act 1958* (Cth));
  - (c) is of unsound mind; or
  - (d) has been convicted of treason or treachery.

16.3 A person whose name is on the roll is entitled to vote (s 93(2))<sup>11</sup> unless:

- (a) he or she has not turned 18 by the date of the election (ss 93(3) and 93(4)); or
- (b) he or she or she is of unsound mind (s 93(8)); or
- (c) he or she has been convicted of treason or treachery (s 93(8)); or

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life-time ban on voting by persons convicted of a felony, finding that 'the exclusion from felons of the right to vote has an affirmative sanction in Article 2 of the 14<sup>th</sup> Amendment' (at 54).

<sup>10</sup> Certain persons are permitted to enrol in anticipation of becoming entitled to vote at a future date (see eg s 99B concerning non-citizens, s 100 concerning persons of 17 years of age).

<sup>11</sup> Section 221 provides that the electoral rolls shall be taken as conclusive evidence of the entitlement to vote of each person enrolled thereon, with the exception of people enrolled under s 100 or people covered by s 93(8AA), unless the person shows by his or her answers to questions that he or she is not entitled to vote.

(d) he or she is serving a sentence of imprisonment as described in s 93(8AA) and s 4(1A) (hereafter "prisoner"<sup>12</sup>).

17. Part VIII provides for enrolment of persons. Section 96A provides that a person serving a sentence of imprisonment is entitled to enrol or to remain enrolled. Section 101 provides for compulsory enrolment of those entitled to enrol (subject to certain exceptions that are not presently relevant).
18. Sections 109 and 208(c) operate to ensure that prisoners who are serving a sentence of imprisonment on the date of the issue of the writs for an election are not placed on the certified list of voters for the election.
- 10 19. Section 208 provides for the Electoral Commissioner to arrange for the preparation of a certified list of voters for each Division. A certified list must include the name of each person who is:
  - (a) on the roll;
  - (b) will be at least 18 on polling day; and
  - (c) is not covered by s 93(8AA).
20. Sections 224-227 provide for mobile polling booths to be provided in hospitals, prisons and remote locations.
21. Section 229 provides for certain questions to be put to a voter which relate to the voter's identity.
- 20 22. Section 231 provides for a ballot paper to be given to:
  - (a) a person whose name is on the certified list of voters for the polling place and the person's answers to the prescribed questions show that the person is entitled to vote; or
  - (b) a person who claims to vote under the absent voting provisions and who complies with those provisions.
23. Section 245 states that it is the duty of every elector to vote and provides for a penalty notice to be sent to electors<sup>13</sup> who fail to vote. However, no penalty notice need be sent if the elector was ineligible to vote at the election (s 245(4)).
24. Part XVI provides for the conduct of the polling.
- 30 25. Part XIV provides for nominations of representatives. Relevantly, s 163 requires that a person is not entitled to be nominated if that person is not an elector who is entitled to vote at an election or qualified to become such an elector.<sup>14</sup>

<sup>12</sup> In its plain meaning, "prisoner" is apt to include persons imprisoned other than those serving a sentence of imprisonment for breach of a law of the Commonwealth or a State (for example, persons on remand). In these submissions, however, the term "prisoner" is used to refer solely to those persons falling within ss 93(8AA) and 4(1A).

<sup>13</sup> "Elector" means any person whose name appears on a roll as an elector: s 4.

<sup>14</sup> Cf section 44(ii) of the Constitution, which provides a disqualification for membership of the House of Representatives or of the Senate of a person who is under a sentence or subject to be sentenced for an offence punishable by imprisonment for one year or longer.

## B2. The Act's provisions in relation to prisoners

26. The effect of the Act in relation to prisoners who are Australian citizens over the age of 18 years<sup>15</sup> is as follows:

26.1 they are entitled to enrol (ss 93, 96A);

26.2 they are required to enrol (s 101);

26.3 they are electors (s 4);

26.4 they are not entitled to vote if they are serving a sentence of imprisonment on the date of the election (s 93(8AA)), regardless of the nature and seriousness of the offence of which they were convicted or the term of their imprisonment (ss 93(8AA), 109);

26.5 if they leave prison prior to the election, they are entitled to vote,<sup>16</sup> regardless of the nature and seriousness of the offence of which they were convicted or the term of their imprisonment (unless they were convicted of treason or treachery).<sup>17</sup>

27. So, for example:

27.1 a person convicted of a serious electoral fraud or terrorism related offences who served a substantial sentence but who is released from prison immediately prior to the election would be entitled to vote; but

27.2 a person convicted of begging<sup>18</sup> or failing to pay a fine<sup>19</sup> who is serving a short term of imprisonment on the day of the election would not be entitled to vote.

<sup>15</sup> Subject to ss 93(7) and 93(8) and Part VIII.

<sup>16</sup> The practical operation of the Act in relation to the date of disenfranchisement is not entirely clear, but it appears that it precludes a person from voting if that person is a prisoner on the day of the election, rather than on the day the writs are issued. The name of a person who is a prisoner on the day the certified lists are prepared will not appear on the relevant certified list; and such a person may be released from prison prior to the election. It would appear that such a person could cast a provisional vote under s 235 of the Act and that the electoral roll would provide conclusive evidence of that person's right to vote, a right that would not then be affected by s 93(8AA) of the Act.

<sup>17</sup> No person has been convicted of treason or treachery since federation.

<sup>18</sup> Begging is an offence punishable by a term of imprisonment in several states: see, eg, *Victorian Summary Offences Act 1966* (Vic), s 49A; *Queensland Summary Offences Act 2005* (Qld), s 8. .

<sup>19</sup> Failure to pay a court fine may result in a term of imprisonment in all jurisdictions. Generally, the imprisonment provisions will not be invoked until an offender fails to pay the relevant fine and, additionally, has not performed or is deemed unable to perform an alternate order for community service as directed by the Court. See *Infringements Act 2006* (Vic); *Criminal Law (Sentencing Act) 1988* (SA); *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA); *Penalties and Sentences Act 1992* (Qld); *Monetary Penalties Enforcement Act 2005* (Tas); *Magistrates Court Act 1930* (ACT); *Fines and Penalties Recovery Act 2007* (NT).

### C. A BLANKET DISENFRANCHISEMENT OF PRISONERS IS ARBITRARY

28. The Special Case includes facts relating to electoral enrolment, the prison population, reporting of crime, sentencing and appeals. The facts demonstrate that the disqualification of prisoners from voting is arbitrary.<sup>20</sup>

28.1 The disqualification of prisoners operates without regard to the nature or seriousness of the offence committed or the length of the term of imprisonment of the individual prisoner.

10 28.2 A large proportion of prisoners (35% as at 30 June 2006) serve a sentence of two years or less [SCB 25 – 26 at [50] and SCB 89]. Whether such prisoners lose the vote depends on the timing of their imprisonment and where it falls in the three year federal electoral cycle.<sup>21</sup> The arbitrary impact of the impugned provisions given the timing and length of sentences of imprisonment is even more apparent when considering the ability to vote in a referendum.<sup>22</sup>

20 28.3 Sentences for the same or comparable offences vary significantly between different States and Territories. For example, persons convicted of fraud under federal law in the Northern Territory or South Australia are more likely to be imprisoned than persons convicted of fraud in Victoria or New South Wales [SCB 32 at [62] and SCB 554]. There are also discrepancies in the type and length of the sentence imposed in different States and Territories for comparable offences.<sup>23</sup> The Australian Law Reform Commission in its report *Same Crime, Same Time* stated that in respect of sentences for federal offences, there was “compelling evidence of inconsistency in the sentencing of federal offenders across Australia”.<sup>24</sup>

28.4 Offences punishable by a period of imprisonment vary from State to State, so that whether a person will be disenfranchised by virtue of conviction for a particular offence will vary depending on the state in which the offence was committed.<sup>25</sup> Sentencing and parole criteria are also not uniform between the various States and Territories.<sup>26</sup>

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<sup>20</sup> This is consistent with the views expressed in other jurisdictions in relation to comparable disenfranchisements of prisoners: see Plaintiff’s Annexure 1: Comparative Jurisprudence on Disenfranchisement of Prisoners.

<sup>21</sup> Federal elections have been held on average about every two years and four months <http://www.aec.gov.au/content/When/history/index.htm>. The effect of such timing was an influential factor in the first instance decision in *Belczowski v Canada* [1991] 3 FC 151 at 173 (Strayer J).

<sup>22</sup> Voting qualifications for referenda are the same as those for federal elections (s 128 of the Constitution).

<sup>23</sup> See Plaintiff’s Annexure 3: Penalties for Similar Conduct in Different States.

<sup>24</sup> (April 2006, rep no 103) at 2 [SCB 316].

<sup>25</sup> See Plaintiff’s Annexure 3: Penalties for Similar Conduct in Different States.

<sup>26</sup> See Plaintiff’s Annexure 2: Sentencing and Parole Variations. A recent comparative study of suspended sentences concluded that throughout Australia “[t]here is great variation in the degree of legislative constraint on the circumstances in which suspended sentences may be imposed and the test for doing so”: Bartels, “The Use of Suspended Sentences in Australia: Unsheathing the Sword of Damocles” (2007) 31 *Criminal Law Journal* 113 at 120. The study revealed, using ABS data in 2004-5, that 48% of all sentences imposed in the higher courts of South Australia were wholly suspended compared to 11% in Queensland and a national average of 17% (at 115).

28.5 Indigenous Australians are imprisoned at a rate 13 times higher than non-indigenous Australians [SCB 25 at [50] and SCB 85] and females tend to receive more lenient sentences than men [SCB 37 – 40 at [68] – [71] and SCB 600, 610, 611 and 613]. Indigenous Australians and men are therefore disproportionately disqualified from voting.

10 28.6 Principles of sentencing discretion inevitably result in persons who have committed crimes of comparable moral culpability being given different sentences<sup>27</sup> (for example, imprisonment, suspended sentences,<sup>28</sup> community based orders or fines) depending on matters unrelated to the seriousness or nature of the offence such as family circumstances, age, infirmity or other hardship of the offender.<sup>29</sup>

28.7 Incarceration rates vary throughout Australia.<sup>30</sup> This reinforces the conclusion that the likelihood of imprisonment is higher in some parts of the Commonwealth than in others.

29. The facts in the Special Case also demonstrate that the disqualification of prisoners does not have the consequence that those people who have committed a serious offence are disqualified from voting.

29.1 A significant amount of serious crime goes unreported [SCB 30 – 31 at [58] – [60] and SCB 374, 382, 432, 457 and 467].

20 29.2 A significant amount of crime is not able to be resolved by conviction and imprisonment. Only a small percentage of people convicted of a crime punishable by imprisonment are in fact imprisoned [SCB 32 – 40 at [62] - [71] and SCB 554, 539, 546, 564, 557, 574, 576, 600, 610, 611, 613].<sup>31</sup>

<sup>27</sup> *Lowndes v R* (1999) 195 CLR 665 at 672 [15]; and see, eg, *Pearce v R* (1998) 194 CLR 610 at 624 [46] (McHugh, Hayne and Callinan JJ); *Ryan v R* (2001) 206 CLR 267 at 307 [136] (Hayne J); *Wong v R* (2001) 207 CLR 584 at 611-2 [74] - [76] (Gaudron, Gummow and Hayne JJ); *Markarian v R* (2005) 215 ALR 213 at 223-5 [36] – [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>28</sup> See, eg, *Dinsdale v R* (2000) 202 CLR 321 at 326-8 [11] – [16] (Gleeson CJ and Hayne J) at 344-9 [74] – [87] (Kirby J); *R v Richards* (2006) 160 A Crim R 120 at 131- 3 [57] – [59]. But note the recent amendment to s 27(1A) of the *Sentencing Act 1991* (Vic) imposing a requirement of exceptional circumstances for suspending a sentence for serious offences: *Sentencing (Suspended Sentences) Act 2006* (Vic).

<sup>29</sup> See, e.g., *Maslen and Shaw* (1995) 79 A Crim R 199 at 208-9 (Hunt CJ); *Thi Nga Nguyen v R* (2001) 118 A Crim R 519 at 521 (Malcolm CJ), at 531-2 (Wallwork J); *York v R* (2006) 221 ALR 541 esp at 546 [23], 549 [32] (McHugh J), 550 [38] (Hayne J), at 557 [68] (Callinan and Heydon JJ); *R v Richards* (2006) 160 A Crim R 120 at 125 [27], 128-30 [43] – [49] (Sulan J). See, e.g., *R v Kim Dung Thi Carmody* (1998) 100 A Crim R 41 at 45 (Tadgell JA).

<sup>30</sup> The Northern Territory's prison population is three times its proportion of the total population; cf Victoria, whose prison population is a smaller percentage than its proportion of the total population [SCB 26 – 29 at [52] – [54] and 93, 143, 206 and 251]. Analysis of data has shown that regional variations in prison rates are not solely attributable to differences in crime rates. In Freiberg & Ross, *Sentencing Reform and Penal Change – The Victorian Experience* (1999) at 53-62 the authors devised a "punitiveness ratio" by comparing the crime rate (measured by recorded offences per 100,000 population) with the imprisonment rate (number of prisoners per 100,000 population). Table 4.2 on page 61 shows a difference of a factor of almost five between the most punitive jurisdiction (the Northern Territory) and the least (Tasmania). Even the second most punitive jurisdiction (Queensland) was only about half as punitive as the Northern Territory. At pages 79-84 the authors conclude that the most likely explanations for these regional variations are the rates of indigenous population and prison capacities.

<sup>31</sup> For example, AIC data show, that of 1,000 alleged crimes, 400 are reported to police, 320 are recorded by police as offences, 64 are "cleared up", 43 persons are convicted and only one is

29.3 A significant number of those convicted of a criminal offence are successful on appeal against conviction or sentence [SCB 41 – 42 at [72] – [74] and SCB 627, 629, 650, 678, 717 – 718].<sup>32</sup> This means that on any given day there will be people in jail who have been wrongly convicted or whose sentence is likely to be reduced on appeal.

29.4 A sentence of imprisonment can be imposed for crimes that should not be regarded in the present context as “serious”, such as public order offences,<sup>33</sup> road traffic and motor vehicle regulatory offences,<sup>34</sup> begging and failure to pay a fine.<sup>35</sup>

10 29.5 Persons convicted of a serious offence can vote if they have been released prior to the date of the election.

30. Accordingly, the impugned provisions do not disqualify *all* persons who have committed a serious offence. Nor do they *only* disqualify persons who have committed a serious offence. They are thus both over- and under-inclusive if, as the Commonwealth (but not the Plaintiff) is suggesting, a “serious offence” criteria is permissible.

20 31. When considered in its totality, the evidence demonstrates that the disenfranchisement has no connection to the nature or seriousness of the offence committed. Rather, the impugned provisions impose an additional punishment<sup>36</sup> on prisoners because they happen to be serving a sentence in prison on the date of election.

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imprisoned: Brown, Farrier, Neil & Weisbrot, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4<sup>th</sup> ed, 2006) at 53-4 [2.1.9] and see also SCB 31 – 32 at [61] and SCB 471.

<sup>32</sup> For example, in NSW in 2004, there were 1145 appeals against conviction from the District Court and the Supreme Court of which 31.9% were successful. There were 4445 appeals against severity of sentence, of which 58.3% were successful. In 2005 there were 1350 appeals against conviction of which 450 (33.3%) were upheld for all matters and 5062 appeals against severity of sentence of which 2993 (59.1%) were upheld for all matters [SCB 42 at [74] and 678 and 717 – 718].

<sup>33</sup> ABS statistics note the presence in prison of 234 persons for public order offences (Special Case Annexure 9 at 16 – [SCB 96]).

<sup>34</sup> ABS statistics note the presence in prison of 1,382 persons for road traffic and motor vehicle regulatory offences (Special Case Annexure 9 at 16 [SCB 96]). These are defined as “offences relating to vehicles and most forms of road traffic offences, including offences pertaining to the licensing, registration, roadworthiness or use of vehicles, bicycle offences and pedestrian offences” (at 61) [SCB 141].

<sup>35</sup> In relation to begging see Plaintiff’s Annexure 3: Penalties for Similar Conduct in Different States . In relation to failure to pay a fine, see n 20, above.

<sup>36</sup> The Commonwealth has not sought to justify the impugned provisions on the grounds of punishment. This is not surprising given that the Commonwealth does not have the power to punish for anything other than Commonwealth crimes.

## D. LIMITS ON PARLIAMENT'S POWER IN RELATION TO THE QUALIFICATION AND DISQUALIFICATION OF ELECTORS

32. This case raises three specific questions not previously determined by the Court:

- 10
- (a) Is Parliament's power to determine the qualification or disqualification of electors unconfined or is it confined by the provisions of the Constitution that provide for representative democracy, in particular by the requirement in ss 7 and 24 that representatives be directly chosen by the people?
  - (b) If Parliament's power is so confined, what are the limitations on Parliament's power to disqualify from voting qualified members of "the people"?
  - (c) Do the limits on Parliament's power preclude it from disqualifying qualified members of "the people" from voting solely by reason of the fact that they are serving a sentence of imprisonment on the day of the election?

33. Those questions do not require the Court to determine the outer limits of Parliament's power in relation to the qualification or disqualification of electors. Rather, they require the Court to consider the constitutional limitations on Parliament's power to disqualify persons who, but for the disqualification, are, as set out above, qualified members of "the people" and are, as such, entitled and obliged to enjoy the right or privilege of voting.

### 20 D1. Evolution of the Commonwealth Franchise

34. Under transitional provisions of the Constitution (e.g. ss 30, 31, 41),<sup>37</sup> until the Parliament otherwise provided, the State electoral regimes were to be used for elections to the Federal Parliament. At the time of federation, relevantly, those regimes provided as follows:

34.1 Only Tasmania excluded all prisoners from voting.<sup>38</sup> In Queensland, South Australia and Western Australia, only persons serving a sentence for treason, a felony or an "infamous offence" were disqualified from voting.<sup>39</sup> New South Wales also included disqualification for conviction for other specified offences including being an "incorrigible rogue" and bribery or intimidation at any election and offences which might result in the death penalty or "penal servitude"; and Victoria disqualified persons subject to "legal incapacity".<sup>40</sup>

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<sup>37</sup> This Court has held that s 41 is a transitional provision whose operation is now spent. *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 260 (Gibbs CJ., Mason and Wilson JJ), 274-278 (Brennan, Deane and Dawson JJ). Similarly, ss 30 and 31 can be considered to be transitional in nature and not offering specific assistance in determining the scope of the power of parliament to provide for elections and the franchise. Cf *ACTV* (1992) 177 CLR 106 at 188 (Dawson J); *McGinty* (1996) 186 CLR 140 at 243 (McHugh J).

<sup>38</sup> *Constitution Amendment Act 1900* (Tas) s 6(2).

<sup>39</sup> *Elections Act 1885* (Qld) s 8(2); *Electoral Code 1886* (SA) s 17; *Constitution Acts Amendment Act 1899* (WA). This reflected the provisions of Part IV of the *British Australian Colonies Government Act 1850*.

<sup>40</sup> *Parliamentary Electorates Act 1893* (NSW) s 23(4). Under the *Constitution Act 1890* (Vic) s 128, those subject to "legal incapacity" were not permitted to vote (though there was no explicit provision dealing with prisoners). "Legal incapacity" was not defined.

34.2 More generally, as at federation there were restrictions on the franchise in various states applying to women,<sup>41</sup> indigenous people,<sup>42</sup> persons in receipt of charitable aid,<sup>43</sup> members of the navy, army and police forces<sup>44</sup> and persons without the specified property qualifications.<sup>45</sup> Age and unsound mind qualifications also applied.

35. After the first Parliament was constituted, the Commonwealth enacted the *Commonwealth Franchise Act 1902* (Cth) (the **Franchise Act**) and provided for uniform franchise.

10 36. Fewer disqualifications applied under the Franchise Act than had applied under State regimes. The disqualifications that remained included: (i) persons under 21 years of age;<sup>46</sup> (ii) people of unsound mind;<sup>47</sup> (iii) indigenous people (unless permitted to vote under s 41);<sup>48</sup> (iv) natives of Asia, Africa or the Islands of the Pacific (except New Zealand) (unless permitted to vote under s 41);<sup>49</sup> (v) people who were not natural born or naturalized subjects of the King who had lived in Australia for 6 months continuously;<sup>50</sup> and (vi) people convicted of treason or treachery.<sup>51</sup>

37. The franchise has since expanded.

37.1 The vote was given to non-European migrants (who fulfilled the other qualifications) in 1961.<sup>52</sup>

20 37.2 The vote was given to indigenous Australians in 1962.<sup>53</sup>

37.3 The minimum voting age was reduced to 18 in 1973.<sup>54</sup>

37.4 Voting rights for prisoners were expanded in 1983 (see [38.2]).

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<sup>41</sup> Women could only vote in SA under *Elections Code 1896* (SA) and in WA under *Constitution Acts Amendment Act 1899* (WA) s 26.

<sup>42</sup> *Constitution Amendment Act 1899* (WA) s 26; *Elections Act 1885* (Qld) s 6; *Elections Code 1896* (SA) s 16. In other states indigenous Australians were affected by the "in receipt of aid" provisions.

<sup>43</sup> *Parliamentary Electorates and Elections Act 1893* (NSW) s 23; *Elections Act 1885* (Qld) s 8; *Constitution Acts Amendment Act 1899* (WA) s 28; *Constitution Act Amendment Act 1890* (Vic) s 142 (inmate of an eleemosynary or charitable institution).

<sup>44</sup> *Parliamentary Electorates and Elections Act 1893* (NSW) s 23; *Elections Act 1885* (Qld) s 8.

<sup>45</sup> *Constitution Amendment Act No 2 1896* (Tas). Plural voting was also permitted in some states to give property owners additional representation. *Constitution Acts Amendment Act no2 1899* (WA) s 26; *Elections Act 1885* (Qld) s 6; *Constitution Amendment Act No 2 1896* (Tas) s 4.

<sup>46</sup> *Commonwealth Franchise Act*, s 3.

<sup>47</sup> *Commonwealth Franchise Act*, s 4.

<sup>48</sup> *Commonwealth Franchise Act*, s 4.

<sup>49</sup> *Commonwealth Franchise Act*, s 4.

<sup>50</sup> *Commonwealth Franchise Act*, s 3.

<sup>51</sup> *Commonwealth Franchise Act*, s 4. The *Security Legislation (Terrorism) Act 2002* (Cth) widened the classes of conduct defined as treasonous and includes conduct "assisting by any means whatever, with intent to assist, an enemy" (see Schedule 1).

<sup>52</sup> *Commonwealth Electoral Act 1961* (Cth), s 4.

<sup>53</sup> *Commonwealth Electoral Act 1962* (Cth), s 2.

<sup>54</sup> *Commonwealth Electoral Act 1973* (Cth), ss 3-7. Voting age was also lowered in war time.

38. In relation to prisoners:

38.1 In 1902, section 4 of the *Commonwealth Franchise Act 1902* (Cth) disqualified from voting those convicted and under a sentence “for an offence punishable by imprisonment for one year or longer”.<sup>55</sup> This disqualification remained until 1983.

38.2 In 1983 the franchise was expanded and only those serving sentences for an offence “punishable ...by imprisonment for five years or longer” were disqualified.<sup>56</sup>

10 38.3 In 1995 the Act was amended so as to disqualify persons “serving a sentence of five years or longer for an offence against a law of the Commonwealth or of a State or territory”.<sup>57</sup>

38.4 In 2004, the Act was amended to disqualify persons serving a sentence for “three years or longer for an offence against a law of the Commonwealth or of a State or territory”.<sup>58</sup>

38.5 In 2006 the impugned provisions were enacted so as to disqualify all prisoners serving a sentence, regardless of the term of their sentence.

20 39. Current legislative regimes in the States and Territories, other than South Australia, disqualify certain prisoners from voting, but, save for Western Australia, the disqualification is determined by the period of their imprisonment.<sup>59</sup> No State or Territory other than Western Australia currently disqualifies persons on the basis of a blanket prohibition imposed on all prisoners serving a sentence.

40. Aside from prisoners, there are two examples of the franchise being restricted, rather than expanded, since 1902.

40.1 The *Commonwealth Electoral (War-time) Act 1917* barred those born in enemy territory from voting. The Act operated only for the duration of the war and for 6 months afterwards.

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<sup>55</sup> And see s 39(4) of the Act as enacted in 1918.

<sup>56</sup> *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), s 23.

<sup>57</sup> *Electoral and Referendum Amendment Act 1995* (Cth), item 5 of Schedule 1 (amending s 93(8)(b) of the Act).

<sup>58</sup> *Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004* (Cth), item 1 of Schedule 1 (amending s 93(8)(b) of the Act).

<sup>59</sup> *Parliamentary Electorates and Elections Act 1912* (NSW) s 21(b) – one year; *Electoral Act 1992* (Qld) s 62(1)(a) – three years; *Electoral Act 1992* (ACT) and *Electoral Act 2004* (NT) s 21 – three years; *Electoral Act 2004* (Tas) s 31(2) – three years; *Constitution Act 1975* (Vic) s 48(2) – five years. Following the amendments to s 98(8AA) of the Act, the WA Government amended its law in line with the Commonwealth provisions, disentitling all prisoners from voting; *Electoral Act 1907* (WA) s 18(c). Previously only persons serving a sentence of one year or more were disentitled from voting. Under the *Electoral Act 1985* (SA), provided a person fulfills the other requirements, they are not disqualified from voting.

40.2 In 1932, s 30FD of the *Crimes Act 1914 Cth* was enacted, which banned executives or committee members of declared unlawful associations from enrolling to vote.<sup>60</sup>

41. Finally, in 1981 citizenship was introduced as a qualification for voting (with a modified British subject provision).<sup>61</sup>

## D2. Judicial Interpretation of ss 7 and 24 of the Constitution

### Relevance of contemporary standards in the interpretation of ss 7, 24 and 128

10 42. Several members of the Court have observed that attention must be directed to contemporary standards in interpreting ss 7 and 24, particularly in the context of considering whether what was constitutionally permissible in 1901 in giving effect to ss 7, 24 and 128 is constitutionally permissible today.

43. In *Attorney-General (Cth); Ex rel McKinlay v Commonwealth*<sup>62</sup> McTiernan and Jacobs JJ observed:<sup>63</sup>

20 The words "chosen by the people of the Commonwealth" fall to be applied to different circumstances at different times and at any particular time the facts and circumstances may show that some or all members are not, or would not in the event of an election, be chosen by the people within the meaning of these words in s. 24. At some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of degree. It cannot be determined in the abstract. It depends in part upon the common understanding of the time on those who must be eligible to vote before a member can be described as chosen by the people of the Commonwealth. For instance, the long established universal adult suffrage may now be recognized as a fact and as a result it is doubtful whether, subject to the particular provision in s. 30, anything less than this could now be described as a choice by the people.

44. This passage has been referred to with approval subsequently.<sup>64</sup> For example, in *McGinty v Western Australia* Gummow J stated:<sup>65</sup>

30 I would, with respect, also agree with the point made by McTiernan and Jacobs JJ in *McKinlay* that, when it arises, such a question is to be determined by reference to the particular stage which then has been reached in the evolution of representative government. By way of example, for both Commonwealth and State elections, provision has been made for

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<sup>60</sup> Section 30A of the *Crimes Act 1914 (Cth)* defines "unlawful association" and, *inter alia*, refers generally to associations with the aim to overthrow the Constitution or the Government by unlawful means or which have seditious intention. This provision is still in force.

<sup>61</sup> *Statute Law (Miscellaneous Amendments) Act 1981 (Cth)*, s 32.

<sup>62</sup> (1975) 135 CLR 1.

<sup>63</sup> (1975) 135 CLR 1 at 36.

<sup>64</sup> See *Kruger* (1996) 190 CLR 1 at 93 (Toohey J); *McGinty* (1996) 186 CLR 140 at 201 (Toohey J), 218-9, 221 (Gaudron J), 286-7 (Gummow J); *Langer v Commonwealth* (1995) 186 CLR 302 at 342-3 (McHugh J). And see *Mulholland v Australian Electoral Commissioner* (2004) 220 CLR 181 at 261 (Kirby J), where a similar view was expressed though McTiernan and Jacobs JJ were not cited.

<sup>65</sup> (1996) 186 CLR 140 at 286-287.

more than 20 years for 18 as the minimum age for voters. An even plainer example is the now long-established universal adult suffrage. This has become a characteristic of popular election of senators and members of the House of Representatives which could not be abrogated by reversion to the system which operated in one or more colonies at the time of federation. In my opinion, this is so notwithstanding that ss 8 and 30 of the Constitution, subject to the prevention of plural voting, permitted the qualification of electors to be ascertained in that way, until the federal Parliament otherwise provided.

- 10 45. Such an approach may be analogised with this Court's general approach to constitutional interpretation,<sup>66</sup> and with the approach adopted in *Cheatle v R* to the interpretation of s 80 of the Constitution.<sup>67</sup>

20 It may be that there are certain unchanging elements of that feature or requirement such as, for example, that the panel of jurors be randomly or impartially selected rather than chosen by the prosecution or the State. The restrictions and qualifications of jurors which either advance or are consistent with it may, however, vary with contemporary standards and perceptions. The exclusion of women and unpropertied persons was, presumably, seen as justified in earlier days by a then current perception that the only true representatives of the wider community were men of property. It would, however, be absurd to suggest that a requirement that the jury be truly representative requires a continuation of any such exclusion in the more enlightened climate of 1993. To the contrary, in contemporary Australia, the exclusion of females and unpropertied persons would itself be inconsistent with such a requirement.

#### Requirements of Sections 7 and 24

46. The key feature of ss 7 and 24 for present purposes is the requirement that members of each house be "directly chosen by the people".
- 30 47. One early view of this phrase concluded that it required no more than that elections be direct and not through the mechanism of an electoral college, as was used in the United States.<sup>68</sup> On this view there would be no limit on the Parliament's power to provide for elections and for the franchise other than that election must be direct and that flowing from s 41 (which is spent).<sup>69</sup>

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<sup>66</sup> See, eg, *New South Wales v Commonwealth (The WorkChoices Case)* (2006) 231 ALR 1 at 40, 59 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Singh v Commonwealth* (2004) 209 ALR 355 at 360-1 (Gleeson CJ), 371-4 (McHugh J), 403-4 (Gummow, Hayne and Heydon JJ), 426-7 (Kirby J); *The Grainpool of Western Australia* (2000) 202 CLR 479 at 496 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

<sup>67</sup> *Cheatle v R* (1993) 177 CLR 541 at 560.

<sup>68</sup> *Attorney-General (Cth); Ex rei McKinlay v Commonwealth* (1975) 135 CLR 1 at 21 (Barwick CJ), 44 (Gibbs J). And see *McGinty* (1996) 186 CLR 140 at 180-1 (Dawson J). Note, however, that even Barwick CJ in *McKinlay* (1975) 135 CLR 1 saw some requirement in these words of "popular election", though what this might require was not explored by his Honour. And cf *Mulholland* (2004) 220 CLR 181 at 189 (Gleeson CJ).

<sup>69</sup> See, eg, *Fabre v Ley* (1972) 127 CLR 665 at 669 (Barwick CJ, McTiernan, Menzies, Walsh, Gibbs, Stephen and Mason JJ).

48. However, this approach is inconsistent with other jurisprudence on ss 7 and 24. In *McKinlay, Jacobs and McTiernan JJ* stated:<sup>70</sup>

10 The people is the body of subjects of the Crown inhabiting the Commonwealth regarded collectively as a unity or whole, and the sum of those subjects regarded individually. To say that "people" means "electors" or "enfranchised subjects" is erroneous because it takes account only of the enfranchised subjects regarded individually but no account of the body of subjects regarded collectively as a unity. It is an accurate description only so long as the franchise is wide enough to satisfy the description "popular" but it would be nonsense to speak of a choice by a few who happened to be enfranchised (the foundation of an oligarchy) as a choice by the people (the foundation of a democracy). Since the substitution of the word "electors" for the word "people" is only valid if certain circumstances exist, there is no point in the substitution.

20 Nevertheless, it is important to state that "chosen by the people" does not mean "chosen by all the persons individually who regarded collectively are the people". If it meant that, perhaps a unanimous choice of all would be required and that cannot be correct; but without going that far it would mean that all subjects inhabiting the Commonwealth would need to participate in the choice of members and a choice by any number of persons less than the sum of the individuals would not be a choice by the people. That is not intended. Common sense tells us that babes and young children at least cannot participate in the choice and the Constitution in, e.g., ss. 30, 31 and 41 envisages that all persons need not participate or be eligible to participate in the choosing. However, to argue from this that "people" merely means "electors" is to subtract an essential feature from the constitutional requirement if thereupon it is argued that s. 24 in its opening words says no more than that choosing of members shall be by direct vote of electors. The section says much more than this.

30 In the same case, Murphy J said:<sup>71</sup>

*'Chosen by the People.* The literal and commonsense construction of this important constitutional provision is a choosing by all people capable of choosing, only excluding those incapable, such as minors and those of unsound mind.

40 It may have been accepted in 1900 that "chosen by the people" could exclude women and people without certain property. Women were then deprived of the vote in certain States and this was referred to obliquely in s. 128 of the Constitution. Because of the silent operation of constitutional principles, this is no longer so. In 1975, any law of the Parliament which deprived persons of a right to representation or to vote on the ground of sex or lack of property would be incompatible with the command that the House of Representatives be directly "chosen by the people". It would contravene s. 24 and be thus unconstitutional.'

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<sup>70</sup> (1975) 135 CLR 1 at 35-36

<sup>71</sup> (1975) 135 CLR 1 at 68-69

49. The approach articulated by McTiernan and Jacobs JJ to ss 7 and 24 has been adopted in later cases. In *McGinty*, Gaudron J stated:<sup>72</sup>

10 As with s 7, s 24 makes no reference to electors, elections or to persons being elected, but to members being "chosen by the people". This is of some significance in a constitutional context where there are separate provisions with respect to elections, the franchise and the numbers of senators and members of the House of Representatives to be chosen in each State. In that context, particularly when regard is had to the indications that the Constitution tolerates some inequality, the expression "chosen by the people" must be seen as mandating a democratic electoral system and not as requiring a particular electoral system or that it have some particular feature. This notwithstanding, it is clear that there is a requirement in ss 7 and 24 that senators and members of the House of Representatives be "chosen by the people". And that requirement is not satisfied merely by the holding of elections. For example, the Parliament could not legislate pursuant to s 34 of the Constitution to make membership of a particular political party the qualification for election to the House of Representatives. Such a law would so deprive the electorate of choice that persons elected pursuant to it could not be described as "chosen by the people".

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It follows from what has been said that there may be some feature of the electoral system or, as Stephen J acknowledged in *McKinlay*, "there may be absent some quality which is regarded as so essential to representative democracy" that it cannot be said that persons elected pursuant to it are "chosen by the people". The problem is to identify the process by which it may be determined whether or not that is so.

...

30 Notwithstanding the limited nature of the franchise in 1901, present circumstances would not, in my view, permit senators and members of the House of Representatives to be described as "chosen by the people" within the meaning of those words in ss 7 and 24 of the Constitution if the franchise were to be denied to women or to members of a racial minority or to be made subject to a property or educational qualification.

50. As observed above, Gummow J noted that in determining the meaning of "chosen by the people" reference should be made to the particular stage reached in the evolution of representative government and that universal adult suffrage could not now be abrogated to the system which operated in one or more colonies at the time of federation.<sup>73</sup>

51. Similarly, in *Langer v The Commonwealth*<sup>74</sup> Toohey and Gaudron JJ stated:<sup>75</sup>

40 When regard is had to the absence of any reference in ss 7 and 24 to electors, elections or persons being elected, the limited nature of the franchise which existed at the time of federation, the separate constitutional

<sup>72</sup> (1995) 186 CLR 140 at 220 – 222.

<sup>73</sup> (1995) 186 CLR 140 at 286-7; but cf pages 282-3 and 279-181.

<sup>74</sup> (1995) 186 CLR 302.

<sup>75</sup> (1995) 186 CLR 302 at 332-333.

provisions concerned with the franchise and the numbers of senators and members of the House of Representatives, the requirement that senators and members of the House of Representatives be "chosen by the people" must be taken as primarily mandating a democratic electoral system and as bearing on the features of that system only in the sense that it prohibits any feature that prevents it being said that the Senate or the House of Representatives is, or would, in the event of an election, be composed of persons "chosen by the people".

52. In the same case McHugh J said:<sup>76</sup>

10 Yet to read the words "the people" as always being equivalent to the eligible electors would be to miss the high purpose of s 24. That purpose is to ensure representative government by insisting that the Parliament be truly chosen in a democratic election by that vague but emotionally powerful abstraction known as "the people", a term whose content will change from time to time. In the light of the extension of the franchise during this century, for example, it would not now be possible to find that the members of the House of Representatives were "chosen by the people" if women were excluded from voting or if electors had to have property qualifications before they could vote.

20 53. More recently, in *Mulholland v Australian Electoral Commissioner*,<sup>77</sup> Gummow and Hayne J observed that:<sup>78</sup>

30 ... care is called for in elevating a "direct choice" principle to a broad restraint upon legislative development of the federal system of representative government. Undoubtedly examples may be given of extreme situations. One is provided in the judgment of Gaudron J in *McGinty v Western Australia*. Section 34 of the Constitution sets out the qualifications of a member of the House of Representatives which are to apply "[u]ntil the Parliament otherwise provides". In *McGinty*, her Honour said that the requirement of ss 7 and 24 was not satisfied merely by the holding of elections and continued :

"For example, the Parliament could not legislate pursuant to s 34 of the Constitution to make membership of a particular political party the qualification for election to the House of Representatives. Such a law would so deprive the electorate of choice that persons elected pursuant to it could not be described as 'chosen by the people'."

Gaudron J added that there may be some feature of the electoral system which means that it cannot be said that those elected by it are "chosen by the people", but that "[t]he problem is to identify the process by which it may be determined whether or not that is so".

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<sup>76</sup> (1995) 186 CLR 302 at 342-343.

<sup>77</sup> (2004) 220 CLR 181.

<sup>78</sup> (2004) 220 CLR 181 at 237-238.

54. In the same case, Kirby J stated that:<sup>79</sup>

Over the course of a century, the requirements for election to the Federal Parliament have changed as the Parliament and this Court have given new meaning to the nominated constitutional expressions. This Court has said that it would not be acceptable today to deny a vote for the Federal Parliament to an adult citizen or to female citizens or to citizens disqualified on the ground of race. ...

10 What might in 1901 have been regarded as acceptable for a Parliament "directly chosen by the people" might not pass muster today. In particular circumstances, if a majority in the Parliament endeavoured to disqualify women voters or citizens of Asian ethnicity or to entrench its power in a disproportionate way, to the electoral disadvantage of candidates of other political parties, the requirement of direct election by the people might well afford protection against the offending electoral law.

55. These statements, though dicta, are consistent with the approach adopted by the Court to ss 7 and 24 in *Lange v Australian Broadcasting Corporation*:<sup>80</sup>

20 Sections 7 and 24 of the Constitution, read in context, require the members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively. This requirement embraces all that is necessary to effectuate the free election of representatives at periodic elections. What is involved in the people directly choosing their representatives at periodic elections, however, can be understood only by reference to the system of representative and responsible government to which ss 7 and 24 and other sections of the Constitution give effect.

30 That the Constitution intended to provide for the institutions of representative and responsible government is made clear both by the Convention Debates and by the terms of the Constitution itself. Thus, at the Second Australasian Convention held in Adelaide in 1897, the Convention, on the motion of Mr Edmund Barton, resolved that the purpose of the Constitution was "to enlarge the powers of self-government of the people of Australia".

Sections 1, 7, 8, 13, 24, 25, 28 and 30 of the Constitution give effect to the purpose of self-government by providing for the fundamental features of representative government. As Isaacs J put it:

"[T]he Constitution is for the advancement of representative government."

40 56. Sections 7 and 24 have, together with other sections of the Constitution that provide for representative and responsible government, been the source of the implied freedom of political communication developed by this Court. That implied freedom is discussed in Part E, below; but it would be anomalous if Parliament's power to limit political communication is restricted by implication, but its power to

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<sup>79</sup> (2004) 220 CLR 181 at 261 [232] – [233].

<sup>80</sup> (1997) 189 CLR 520 at 557-558.

deprive sections of the Australian people of the right or privilege to vote is unrestricted.

57. Moreover, it is the principle of representative democracy that protects individual rights in the community in the absence of a bill of rights. In his seminal work *The Constitution of the Commonwealth of Australia*, Harrison Moore stated:<sup>81</sup>

Fervid declarations of individual right, and the protection of liberty and property against the government, are conspicuously absent from the Constitution; the individual is deemed sufficiently protected by that share in government which the constitution ensures him.

10 If “the people” of Australia do not need a bill of rights because their rights are protected through their “share in government”, then any diminution of that share should, at the least, satisfy the representative democracy criteria.

58. Thus, while the provisions of the Constitution as such may not have guaranteed universal adult suffrage,<sup>82</sup> it does not follow that Parliament’s power to provide for the qualification and disqualification of electors is unlimited.

Limits on Parliament’s power in respect of qualification and disqualification

20 59. As outlined in Part D1, above, the federal franchise has gradually been expanded since 1901 so that many categories of people who could not vote in 1901 are entitled and obliged to vote now. Members of the Court have, from time to time, identified certain changes to the franchise and electoral system and expressed the view that the franchise could not now be wound back. Thus, it has been suggested that Parliament may not:

- (a) disenfranchise women or indigenous people;<sup>83</sup>
- (b) raise the minimum voting age from 18;<sup>84</sup>
- (c) reintroduce a property requirement for voting;<sup>85</sup>
- (d) reintroduce an educational requirement for voting;<sup>86</sup>
- (e) remove the secret ballot;<sup>87</sup>
- (f) limit the qualification for candidates for election to members of one political party,<sup>88</sup> or

<sup>81</sup> (2<sup>nd</sup> ed, 1910) at 78; quoted with approval in *ACTV* (1992) 177 CLR 106 at 229 (McHugh J); see also Mason CJ at 135-6.

<sup>82</sup> See, eg, *McKinlay* (1975) 135 CLR 1 at 62 (Mason J); *ACTV* 177 CLR 106 at 137 (Mason CJ), 185 (Dawson J); *Theophanous v The Herald & Weekly Times Limited & Anor* (1993) 182 CLR 104 at 201 (McHugh J); *McGinty* (1996) 186 CLR 140 at 243 (McHugh J)

<sup>83</sup> *McKinlay* (1975) 135 CLR 1 at 68-9 (Murphy J); *McGinty* (1996) 186 CLR 140 at 222 (Gaudron J) ; *Langer* (1995) 186 CLR 302 at 342 (McHugh J); *Mulholland* (2004) 220 CLR 181 at 256 (Kirby J).

<sup>84</sup> *McGinty* (1996) 186 CLR 140 at 286 (Gummow J).

<sup>85</sup> *McKinlay* (1975) 135 CLR 1 at 68-9 (Murphy J); *McGinty* (1996) 186 CLR 140 at 222 (Gaudron J); *Langer* (1995) 186 CLR 302 at 342 (McHugh J).

<sup>86</sup> *McGinty* (1996) 186 CLR 140 at 222 (Gaudron J).

<sup>87</sup> *Mulholland* (2004) 220 CLR 181 at 261 (Kirby J).

(g) create a marked numerical inequality between electorates.<sup>88</sup>

The introduction of a maximum voting age has also been queried.<sup>90</sup>

60. The above observations necessarily raise the issue of implicit requirements of ss 7 and 24 and implicit limitations on the power conferred by ss 30 and 51(xxxvi).
61. The Plaintiff contends that, from this sometimes conflicting jurisprudence, the following propositions may be drawn in relation to the implicit limitations on the Parliament's power to prescribe who may and who may not vote in the system of representative democracy.
- 10 62. While the Constitution may not provide for universal suffrage (though this has not yet been determined, particularly in the context of contemporary standards<sup>91</sup>), and provides Parliament with considerable latitude in relation to elections and the franchise, ss 7 and 24 necessarily limit Parliament's ability to impose quantitative and qualitative restrictions on the franchise.
63. Quantitative limitations are reflected in the cases concerning numerical equality between electorates, and in the inability of the Parliament to disenfranchise any significantly large group of Australian citizens, such as women, in so far as such legislation would result in the members of a House of Parliament not being chosen by the people, viewed in the context of contemporary standards.
- 20 64. Qualitative limitations, such as those based on characteristics such as race or gender, raise more complex issues. Such category-based exclusion from the franchise may also offend the first limitation if the size of the group is sufficiently large; but the group need not be large for its exclusion from the franchise to be impermissible (for example, members of a minority race, religion or political group). This raises the question of the scope of the restriction on Parliament's power to impose qualitative limitations.
- 30 65. A plainly permissible category of qualitative limitation concerns a person's capacity to choose. A power to restrict the franchise based on capacity to choose derives directly from the terms of ss 7 and 24. Implicit in the requirement that Parliament be "chosen by the people" is that "the people" have the capacity to choose. Parliament can, therefore, on a qualitative basis, restrict those entitled to vote to those who according to contemporary standards are capable of choosing their representatives. This is reflected in the age and unsound mind requirements currently provided for in the Act (ss 93(1)(a) and 93(8)(a)).
66. A "capacity to choose" principle may also provide a historical rationale for previous restrictions on voting based on age, sex, race or educational requirements, restrictions which would be unacceptable today. Thus, this principle will not permit the disqualification of persons on the basis of race, age,

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<sup>88</sup> *McGinty* (1996) 186 CLR 140 at 220 (Gaudron J); *Mulholland* 220 CLR 181 at 237 (Gummow and Hayne JJ). And see *ACTV* 177 CLR 106 at 227-8 (McHugh J).

<sup>89</sup> *McKinlay* (1975) 135 CLR 1 at 35 (McTiernan and Jacobs JJ), 61 (Mason J); *McGinty* (1996) 186 CLR 140 at 279, 286 (Gummow J).

<sup>90</sup> *Mulholland* (2004) 220 CLR 181 at 191 (Gleeson CJ).

<sup>91</sup> See *Mulholland* (2004) 220 CLR 181 at 191 (Gleeson CJ).

sex or educational qualifications that are not rationally based on capacity to choose judged by contemporary standards.<sup>92</sup>

67. A second arm of the qualitative limitation, which is particularly relevant in respect of disqualification, is that Parliament may have the power to provide for and limit the franchise if such a limit satisfies the representative democracy criteria.
68. Restricting the vote based on such a basis is consistent with the implications recognised by the Court to be drawn from ss 7 and 24. Accepting that there is a limitation on the power of Parliament to qualify or disqualify, and recognizing that that limitation must be derived primarily from ss 7 and 24, a limitation requiring a rational link between the restriction on the franchise and the furtherance of representative democracy provided for by those sections is both logical and necessary.
69. The Court has recently accepted that for a law to be within a certain power in the Constitution, particularly a law which takes away rights, that law should not be inconsistent with the place of that power within the constitutional structure.<sup>93</sup> In addition, in relation to burdens on implied freedoms, the Court has required that for a law to be valid, it must operate in a manner which is consistent with the maintenance of representative democracy.<sup>94</sup>
70. This analysis is not one that treats the provisions of the Constitution as imposing a requirement of universal adult suffrage on the Parliament. Rather, it applies contemporary standards in determining the meaning of “the people” in order to ascertain the ambit of the discretion conferred on the Parliament by ss 30 and 51(xxxvi).<sup>95</sup>
71. The Plaintiff contends that there is an “irreducible minimum”<sup>96</sup> core of persons comprising “the people” who, under contemporary standards, must be permitted to vote; but beyond that irreducible core Parliament may expand and contract the franchise from time to time. It remains, then, to articulate that irreducible core. The Plaintiff contends that the current irreducible core of people who, subject to the criteria stated, must be permitted to vote if the Houses of Parliament are to be understood as “directly chosen by the people”, are those Australian citizens who are qualified members of “the people”. If a person is within that irreducible core, the only basis for disqualification from voting is an exclusion that satisfies the representative democracy criteria.

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<sup>92</sup> To put it another way, the connotation of the phrase “chosen by the people” is that group of Australians capable of choosing their representatives. In 1900, the denotation of that phrase excluded indigenous Australians and persons under 21, and possibly women, as it may have been thought that such persons lacked the capacity to choose their representatives; but in 2007 the connotation of the phrase includes indigenous Australians, women and persons under 21 within the ambit of “the people”.

<sup>93</sup> *Bodrudazza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14 at [53]. There the Court was considering the validity of a law relating to section 75(v) of the Constitution which imposed time limits on the availability of judicial review and constitutional writs under that section.

<sup>94</sup> *Coleman* (2004) 220 CLR 1 at 30-31 (McHugh J, with whom Gummow and Hayne JJ agreed on this issue).

<sup>95</sup> In ascertaining the meaning of “the people” in accordance with contemporary standards, it may be relevant to consider international human rights norms, which are outlined in Plaintiff’s Annexure 1: Comparative Jurisprudence on Disenfranchisement of Prisoners.

<sup>96</sup> Gleeson CJ referred to the “irreducible minimum content” of representative government in *Mulholland* (2004) 220 CLR 181 at 185.

72. This formulation does not impede the parliamentary expansion of the franchise to permit additional persons to vote. For example, persons over the age of 16 or permanent residents could be permitted to vote. It also allows for Parliament to exclude from voting those persons for whom there may be a basis for exclusion that is rationally connected with representative democracy. For example:

72.1 persons convicted of treason or treachery or some other offence that involves an attack on the very existence of the polity; or

72.2 persons convicted of electoral fraud, about whom there is a rational concern that their qualification to vote may undermine the integrity of the electoral system.

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73. Given that the Plaintiff, and many other prisoners, are adult citizens of Australia with the capacity to choose their representatives, obliged to enrol as electors (and undeniably have a direct and immediate interest in the policies of those representatives and a capacity to engage in communications with and about those representatives and their policies), the question is then whether there is any rational basis for their disqualification from voting.

74. The lack of any rational basis for the impugned provisions is demonstrated by the arbitrary nature of the exclusion described in Part C, above. Further, even if the historical exclusion based on serious crime were to be accepted, the impugned provisions do not ensure that people who have committed a serious criminal offence do not vote; nor do they ensure that people who have "broken the social compact" (assuming that phrase has some meaning different from "committed a serious criminal offence") do not vote; and they operate in a discriminatory fashion. The provisions simply ensure that people who happen to be serving a term of imprisonment on the day of the election do not vote. This is an irrational basis for exclusion and thus is contrary to ss 7 and 24 of the Constitution. Alternatively, and for the same reasons, it is not within the power conferred by ss 51(xxxvi) and 30 of the Constitution.

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**E. SECTIONS 93(8AA) AND 208(1)(c) ARE CONTRARY TO THE IMPLIED FREEDOMS**

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Implied freedom of political communication and freedom of participation

75. The Court has discerned from ss 7 and 24 a freedom of political communication: *Lange*.<sup>97</sup> The rationale for that freedom also necessarily embraces a freedom of communication, association and participation in relation to federal elections. That formulation should be recognised as a matter of both logic and consistency: If the representatives are to be chosen by the people, those people must be able to communicate, associate and participate in the process by which that choice occurs. Moreover, the recognised freedom of political communication necessarily presupposes the freedom of political participation because the freedom of communication, along with other freedoms such as that of association, exist to enable people to effectively participate in the political process.

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<sup>97</sup> (1997) 189 CLR 520.

76. The freedom of political participation was discerned in the Constitution from the earliest times.<sup>98</sup> It has also been more lately recognized.<sup>99</sup> In *McGinty* Toohey J observed:<sup>100</sup>

Once it appears, as recent decisions of the Court make clear, that the Australian Constitution established a system of representative democracy, it is apparent that more is involved than freedom of political communication.

77. In *ACTV v Commonwealth*<sup>101</sup> McHugh J said that ss 7 and 24 “carried with them more than the right to cast a vote” and that they refer to a “process” which:<sup>102</sup>

10 includes all those steps which are directed to the people electing their representatives – nominating, campaigning, advertising, debating, criticizing and voting. In respect of such steps the people possess the right to participate, the right to associate and the right to communicate.

78. In the same case, Brennan CJ suggested that the freedom of communication might be “an incident of the individual right to vote”,<sup>103</sup> referring to *Judd v McKeon*<sup>104</sup> where Isaacs J and Rich J recognised the right to vote. In *Kruger v Commonwealth*<sup>105</sup> McHugh J again said that the freedom discerned in ss 7 and 24 “must extend, at the very least, to such matters as voting.”

20 79. If there is a freedom of political communication or participation, it must logically include the right to vote. Voting is the most fundamental act of political participation. It is the very act to which the implied freedoms are directed.

80. Recognition of the right to vote as ancillary to a freedom of political participation is consistent with the recognition that sections 7 and 24 mean much more than simply providing for a system of direct election, as discussed above. Without the requirement that “the people” undertake the act of voting, the words of section 7 and 24 have little meaning. This much is acknowledged in the jurisprudence on the freedom of political communication

30 81. The posited freedom of political participation, and the ancillary right to vote in a federal election, are to be understood as either part of a specific sub-category of the freedom of political communication or as a discrete freedom in relation to federal elections. The freedom does not create individual rights; rather, it limits the power of Parliament by preventing Parliament from legislating in a manner inconsistent with the freedom. So understood, the test of invalidity of a law for being inconsistent with the freedom should be the same as for the freedom of

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<sup>98</sup> See Quick & Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) at 450; Harrison Moore, *The Constitution of the Commonwealth of Australia* (2<sup>nd</sup> ed, 1910) at 78.

<sup>99</sup> See, eg, *ACTV* (1992) 177 CLR 106 at 227-9 (McHugh J); *Kruger v The Commonwealth of Australia* (1996) 190 CLR 1 at 142 (McHugh J), at 157 cf (Gummow J) (freedom of association); *Levy v Victoria* (1997) 189 CLR 579 at 622 (McHugh J); cf *Mulholland* (2004) 220 CLR 181 at 295 [326] (Callinan J).

<sup>100</sup> *McGinty* (1996) 186 CLR 140 at 202.

<sup>101</sup> (1992) 177 CLR 106

<sup>102</sup> (1992) 177 CLR 106 at 230-232.

<sup>103</sup> (1992) 177 CLR 106 at 150.

<sup>104</sup> (1926) 38 CLR 380 at 385, 390.

<sup>105</sup> (1996) 190 CLR 1 at 142.

political communication, as stated in *Lange*<sup>106</sup> and modified in *Coleman v Power*.<sup>107</sup>

- 10 82. It is plain that the impugned provisions do effectively burden the posited implied freedoms. They prevent a class of persons, numbering up to about 20,000, from voting, and therefore lawfully participating in the political process. Casting a vote in an election is also undoubtedly an act of political communication: the voter tells the Electoral Commissioner whom he or she chooses to represent him or her in Parliament. Marking a ballot paper is probably the best example of communication of a political nature.<sup>108</sup> Voting is the ultimate act of communication by "the people". The people's voice and opinion on political matters are most clearly and ultimately expressed and communicated through the ballot box.
- 20 83. Considering the vote as an incident of the freedom of political communication is also consistent with the jurisprudence that recognised that freedom. The freedom of political communication owes its existence largely to the word "chosen" in ss 7 and 24. The Court has unanimously acknowledged that for Parliament and the Senate to have the legitimacy they derive from the principles of representative democracy, the "choice" of the people must be "free" and "informed".<sup>109</sup> It would, therefore, be artificial for the freedom of political communication to be protected to facilitate free choice, but for the expression of that very choice to lack the same (or be an incident of the same) constitutional protection.
84. If voting is an exercise of political communication, then preventing a class of persons from making such a communication, as the impugned provisions do, plainly burdens the freedoms of political communication and political participation.
85. The issues then become whether the impugned provisions are:
- 30 (a) reasonably appropriate and adapted to serve a legitimate end in a manner which is consistent with the system of representative and responsible government for which the Constitution provides;<sup>110</sup> or
- (b) directed at controlling political communication and participation, in which case they are valid only if they are "necessary for the attainment of some overriding public purpose"<sup>111</sup> and require "compelling justification".<sup>112</sup>

<sup>106</sup> (2004) 220 CLR 181 at 567-8.

<sup>107</sup> (2004) 220 CLR 1 at 51 [95], [96] (McHugh J), 77-8 [196] (Gummow and Hayne JJ). And see *Levy* (1997) 189 CLR 579 at 646 (Kirby J).

<sup>108</sup> See *Mulholland* (2004) 220 CLR 181 at 219-21 (McHugh J), cf 195-6 (Gleeson CJ), at 277 (Kirby J), 304-5 (Heydon J).

<sup>109</sup> *Lange* (2004) 220 CLR 181 at 560.

<sup>110</sup> *Lange* (2004) 220 CLR 181 at 567-8 and modified in *Levy* (1997) 189 CLR 579 at 646 (Kirby J) and in *Coleman* (2004) 220 CLR 1 at 51 [95], [96] (McHugh J) and at 77-8 [196] (Gummow and Hayne JJ).

<sup>111</sup> *Levy* (1997) 189 CLR 579 at 617-619 (Gaudron J). See also *Coleman* (2004) 220 CLR 1 at 30-32 (Gleeson CJ); *Nationwide News* (1992) 177 CLR 1 at 76-77 (Deane and Toohey JJ).

<sup>112</sup> *ACTV* (1992) 177 CLR 106 at 143 (Mason J); 325 (McHugh J); and see *Coleman* (2004) 220 CLR 1 at 122-124 (Heydon J).

Are the impugned provisions directed to legitimate ends?

86. The Commonwealth has articulated five objects or ends in its notice dated 13 April 2007. These are expressed as follows:

5.1 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.

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5.2 Support respect for, and obedience to, the law 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.

5.3 Support an important aspect of representative democracy, namely acceptance of, respect for and obedience to the laws enacted by Australia's elected representative institutions, by preventing persons who have committed a serious breach of a law of the Commonwealth or a State or Territory from voting in a federal election or referendum.

5.4 Encourage recognition that the rights and obligations of community participation are correlative.

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5.5 Support the integrity of the electoral system by excluding from voting in a federal election or referendum persons who, by reason of their full-time detention, are less able to participate in political communications and political matters.

87. The initial question is whether those objects or ends are legitimate. The first three objects or ends are essentially different formulations of the same basic idea, that representative and responsible government is supported by denying the vote to persons who have put themselves beyond the "social compact" by committing a serious breach of the law (the '**social compact**' objects or ends). It is difficult to define such a "compact" with sufficient clarity or specificity to enable it to be tested as a legitimate object or end. It is even more difficult, however, to discern any real meaning in the fourth object or end. To say that rights and obligations of community participation are correlative is little more than rhetorical flourish. The first four stated objects or ends lack the specificity and practical content against which the terms, operation or effect of the legislation can be measured. They should therefore be rejected.

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88. The "social compact" objects or ends should also be rejected as legitimate for the further reason that, putting aside their meaning, it cannot be demonstrated that the system of representative and responsible government is supported by denying the vote to those who have put themselves beyond the social compact by being imprisoned for any offence.<sup>113</sup> Indeed, there is compelling opinion to the contrary, that is that the disenfranchisement of prisoners on such a basis actually undermines the system of representative and responsible government. The

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<sup>113</sup> Policy considerations similar to the "social compact" objects or ends were rejected by the majority of the Canadian Supreme Court when it struck down legislation disenfranchising prisoners serving sentences of two years or more as contrary to s 3 of the Canadian Charter of Rights and Freedoms in *Sauvé v Canada* [2002] 3 SCR 519 at 548-9 [41], discussed in Plaintiff's Appendix 1: Comparative Jurisprudence on Disenfranchisement of Prisoners.

disenfranchisement is indicative of the now rejected principle of “civil death”, is additional punishment and undermines the rehabilitative aims of our criminal justice system.<sup>114</sup>

10 89. The fifth object or end rests on the proposition that prisoners cannot cast an effective vote because their detention makes them less able to participate in political communication and political matters. If this object or end were to be accepted as legitimate, Parliament could deny the vote to any person or group of persons deemed by its selected standard (for example, educational qualifications) to be unable to participate fully in the political process. This could also extend to people with physical disabilities or illness, those living in remote areas, citizens living overseas or arguably even those who take no active interest in politics. In Canada, an attempt to justify prisoner disenfranchisement legislation under Article 1 of the Canadian Charter of Rights and Freedoms on the basis of a similar object or end was rejected.<sup>115</sup>

20 90. Moreover, any suggestion that prisoners are unable to be informed in relation to political matters is simply wrong. Prisoners have access to television, newspapers and other forms of media [SCB 20 – 23 at [29] – [41] and SCB 58 – 76 and 77]. They are able to undertake tertiary study and can and do communicate on political matters, particularly on issues relevant to prisoners. For example, the Plaintiff has completed a masters degree and expects to commence a PhD programme shortly. She is also actively participating in the process of communication about political and government matters relevant to women and prisons. [SCB 18 – 19 at [17] – [20]]

The impugned provisions: compelling justification or reasonably appropriate and adapted to legitimate ends?

30 91. In relation to most aspects of legislative power, Parliament is given a considerable margin within which to legislate. The remedy for the people who disagree with the legislation is to vote their representatives out at the next election. However, that argument cannot stand when the legislation takes the vote away from the people who would otherwise have had that remedy. That curtailment requires “compelling justification”.<sup>116</sup> The impugned provisions plainly do not meet this standard; nor has the Commonwealth identified any particular problems associated with entitling prisoners to vote that can demonstrate any such compelling justification.<sup>117</sup>

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<sup>114</sup> See, eg, Tribe, “The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and ‘the Purity of the Ballot Box’” (1989) 102 *Harvard Law Review* 1300; Orr, “Ballotless and behind bars: the denial of the franchise to prisoners” (1998) 26 *Federal Law Review* 55; Hill, “Precarious Persons: Disenfranchising Australian Prisoners” (2000) 35 *Australian Journal of Social Issues* 203. And see *Sauvé* [2002] 3 SCR 519, discussed in Plaintiff’s Appendix 1: Comparative Jurisprudence on Disenfranchisement of Prisoners. See also *Muir v R* (2004) 206 ALR 189 at 194 (Kirby J).

<sup>115</sup> *Belczowski v Canada* [1991] 3 FC 151 at 172 (Strayer J); [1992] 2 FC 440 at 458 (Huggesen JA). An appeal from the Court of Appeal was dismissed by the Supreme Court in *Sauvé v Canada* [1993] 2 SCR 438.

<sup>116</sup> The “compelling justification” test has been adopted by several members of this Court: see *Mulholland* (2004) 220 CLR 181 at 195 (Gleeson CJ); *Levy* (1997) 189 CLR 579 at 618-619 (Gaudron J); *ACTV* (1992) 177 CLR 106 at 143 (Mason CJ), 235 (Toohey J).

<sup>117</sup> The posted legitimate ends are best understood as symbolic. Reliance on symbolic justifications for disqualifying a class of persons from voting should not be regarded as a compelling justification. See *Belczowski* [1992] 2 FC 440 at 456; *Sauvé v Canada* [2002] 3 SCR at 540-1, discussed in Plaintiff’s Appendix 1: Comparative Jurisprudence on Disenfranchisement of Prisoners.

92. The impugned provisions should also be found to be invalid as they are not reasonably appropriate and adapted to serve any of the posited objects or ends in a manner which is consistent with the system of representative government.
93. In *Mulholland*<sup>118</sup> Gleeson CJ discerned certain helpful principles from other jurisdictions in relation to the “reasonably appropriate and adapted” limb of the test for compatibility with implied constitutional freedoms in Australia. These were:
- 10 (a) that the criterion of “proportionality” favoured in the foreign jurisprudence<sup>119</sup> may be interchangeable with the criterion of “reasonably appropriate and adapted”; and
- (b) that to meet the test of proportionality, the legislation must:
- (i) be rationally connected to the legitimate object or end, so that it does not operate arbitrarily, unfairly or irrationally; and
- (ii) be no more than is necessary to accomplish the legitimate object or end.
94. A further consideration is whether the manner in which the legislation operates is discriminatory.<sup>120</sup>
- 20 95. The Commonwealth's first three stated objects or ends concern “persons who have broken the social compact by committing a serious breach of a law of the Commonwealth of a State or Territory”. Yet the legislation is not tailored to the exclusion of such persons. The legislation does not operate to prevent persons who have committed a serious breach of the law from voting. The legislation does not disenfranchise by reference to the offence committed but rather by reference to whether the person is serving a sentence of imprisonment on the day of the election.<sup>121</sup>
- 30 96. In addition, the Commonwealth identifies its ends in terms of those persons who have committed a **serious** breach of the law. Yet, the legislation makes no attempt to tailor its application to the seriousness of the offence, instead making a blanket prohibition on voting for those serving a sentence of imprisonment on election day for “an offence”. Imprisonment on that day does not necessarily equate to punishment for a serious breach of the law. Fine defaulters can be imprisoned.<sup>122</sup> Begging is punishable by imprisonment in four out of eight jurisdictions.<sup>123</sup> As at 2006, 7.3% of the prison population was serving a sentence for a public order offence or a road traffic and motor vehicle regulatory offence.

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<sup>118</sup> (2004) 220 CLR 181 at 192-194 (Gleeson CJ).

<sup>119</sup> And see *Levy* (1997) 189 CLR 579 at 645 (Kirby J); *Mulholland* (2004) 220 CLR 181 at 266-267 (Kirby J); *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 377 (Toohey J).

<sup>120</sup> In *ACTV* (1992) 177 CLR 106 at 143, Mason CJ suggested that the discriminatory operation of legislation is a mark of incompatibility with an implied constitutional freedom.

<sup>121</sup> The arbitrary nature of the timing of the disenfranchisement was central to the Canadian courts' approach to prisoner disenfranchisement provisions: see *Sauve* [2002] 3 SCR 519, *Belczowski* [1992] 2 FC 440, discussed in Plaintiff's Appendix 1: Comparative Jurisprudence on Disenfranchisement of Prisoners

<sup>122</sup> See n 20, above.

<sup>123</sup> See Plaintiff's Annexure 3: Penalties for Similar Conduct in Different States.

17.6% of the prison population was serving a sentence of less than one year [SCB 117]. The lack of adaptation to the Commonwealth's own stated objectives is in and of itself a ground for invalidity. Further, the arbitrariness of imprisonment on election day as a criterion has been explained in Part C, above.

10 97. In summary, the statistical evidence set out in the Special Case and summarized in Part C, above, shows that only some people who breach the social compact will go to jail. However, much depends on where their crime is committed; whether it is reported; whether it is acted upon; whether they are charged; whether convicted; whether their sentence falls within the acceptable range; whether personal circumstances extraneous to their moral culpability apply; whether the sentencing discretion miscarries; when they are sent to jail; whether later successful on a conviction or sentence appeal, or on retrial; their race and their sex; and finally on parole decisions. Such factors, which are necessary aspects of the criminal justice system, ought not to be relevant to determining the franchise.<sup>124</sup>

20 98. As to the fourth and fifth objects or ends put forward by the Commonwealth, the same evidence likewise demonstrates that the legislation is not appropriate and adapted to serve them. The arbitrary operation of the legislation makes it inappropriate to any object or end concerned with recognition of correlative rights and duties (assuming that to have some practical content). Nor can the exclusion from the franchise based on those alleged to be less able to participate fully in society be justified when it disregards the capacity of prisoners to participate to the extent they choose to do so.

99. The Commonwealth has not sought to advance any evidence to justify any practical need for or benefit deriving from the blanket disenfranchisement of prisoners. For example, no adverse consequences of the previous prisoner voting regime or of prisoner voting regimes overseas have been advanced by way of evidence by the Commonwealth.

30 100. Moreover, it is doubtful that the Commonwealth can establish that the stated objects or ends could not be met by other means. Civic educational programs for prisoners would be more effective in supporting the system of representative government than denying them the vote.

101. Finally, based on the material set out in Part C, the Plaintiff contends that indigenous Australians and men are disproportionately imprisoned. The discriminatory effect of the impugned provisions is a further reason to conclude that they are not reasonably appropriate and adapted to the posited ends.

#### **F. SECTIONS 30 AND 51(xxxvi) ARE PURPOSIVE**

40 102. Further and in the alternative, the Plaintiff contends that ss 30 and 51(xxxvi) are purposive as they only exist for the purpose of giving effect to ss 7 and 24 and the system of representative democracy provided for by those and other sections. Accordingly, the appropriate test to adopt in determining whether the impugned provisions are within Parliament's power is the proportionality test.<sup>125</sup>

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<sup>124</sup> Reliance was placed on such inconsistencies by the Canadian courts in deciding that the prisoner disenfranchisement provisions in Canada were not proportionate to any legitimate ends: see Plaintiff's Annexure 1: Comparative Jurisprudence on Prisoner Disenfranchisement.

<sup>125</sup> *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1 at 28-29 (Brennan J).

103. In *Langer*, Dawson J expressed the view that s 31 (the power to provide for laws in relation to elections) and s 51(xxxvi) (the power that gave effect to that provision) were purposive in nature as those powers were not “at large”. Instead, they existed for the purpose of implementing s 24.<sup>126</sup> A similar approach was taken by Kirby J in *Mulholland*.<sup>127</sup> In *Mulholland*, Gummow and Hayne JJ and Callinan J rejected such an approach in relation to s 31.<sup>128</sup>

104. The Court has not yet considered whether s 30, read with s 51(xxxvi), is a purposive power. While similarities exist between ss 30 and 31, there is an important difference between a power to provide generally for laws in relation to elections (s 31) and a power to set the qualification for electors (s 30). The first may be regarded as a subject matter power, in respect of which a wide degree of latitude is given to Parliament. By contrast, the power conferred by s 30 to set the qualification for electors is narrow and its only role is to provide for the represented (i.e. “the people”) to choose their representatives. The power under ss 30 and 51(xxxvi) is, therefore, so closely tied to ss 7 and 24 that it only exists for the purpose of giving effect to those sections and the system of representative democracy. On that basis, a proportionality analysis ought to be applied to test the validity of the impugned provisions.

105. For the reasons set out above, the impugned provisions are clearly so disproportionate to the purpose of giving effect to ss 7 and 24 that they ought not be regarded as falling within ss 30 and 51 (xxxvi).

#### **PART V: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS**

106. The applicable constitutional and statutory provisions are set out in Plaintiff's Annexure 4: Applicable Constitutional and Statutory Provisions.

#### **PARV VI: CHRONOLOGY**

107. The chronology of relevant events is as follows:

Date	Event
22 December 1958	Plaintiff born in Newcastle, New South Wales
5 July 2004	Plaintiff pleaded guilty in the County Court of Victoria at Melbourne to five counts for various offences contrary to the <i>Crimes Act 1958</i> (Vic).
3 September 2004	Plaintiff convicted and sentenced. Plaintiff commenced serving her sentence on or about this date
21 February 2007	Plaintiff made an application for enrolment under the <i>Commonwealth Electoral Act 1918</i> (Cth).

<sup>126</sup> *Langer* (1995) 186 CLR 302 at 324-325.

<sup>127</sup> (2004) 220 CLR 181 at 261-2.

<sup>128</sup> (2004) 220 CLR 181 at 238-239 (Gummow and Hayne JJ), at 289 (Callinan J).

19 April 2007	Search of Enrolment Verification Facility confirmed that Plaintiff is currently enrolled to vote in the Federal Division of Kooyong.
4 August 2007	The earliest possible date upon which the polling for the next election may be held.
19 January 2008	Last day that can be the date fixed for the polling for the next election.
22 August 2008	Plaintiff not eligible for parole until this date.

**PART VII: ORDERS SOUGHT**

108. The questions reserved should be answered as follows:

- (1) Yes.
- (2) Yes.
- (3) Yes.
- (4) The Commonwealth.
- (5) Yes.

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Dated: 9 May, 2006



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