HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

SHANNEN ALYCE ROWE & ANOR PLAINTIFFS

AND

ELECTORAL COMMISSIONER & ANOR DEFENDANTS

Rowe v Electoral Commissioner [2010] HCA 46
Date of Order: 6 August 2010
Date of Publication of Reasons and Further Order: 15 December 2010
M101/2010

ORDER

1. *Declare that Items 20, 24, 28, 41, 42, 43, 44, 45 and 52 of Sched 1 to the* Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act *2006 (Cth) are invalid.*

2. *The second defendant to pay the plaintiffs' costs of the Further Amended Application for an Order to Show Cause.*

FURTHER ORDER

3. *Dismiss so much of the plaintiffs' application as remained after the order of this Court made on 6 August 2010.*

Representation

R Merkel QC with K L Walker, F K Forsyth and N McAteer for the plaintiffs (instructed by Mallesons Stephen Jaques)

G T Johnson for the first defendant (instructed by Australian Government Solicitor)

S J Gageler SC, Solicitor-General of the Commonwealth with G R Kennett and D F O'Leary for the second defendant (instructed by Australian Government Solicitor)

R M Mitchell SC with C S Bydder intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor's Office)

CATCHWORDS

Rowe v Electoral Commissioner

Constitutional law (Cth) – Legislative power – Franchise – Constitutional limitations upon power of Parliament to regulate exercise of entitlement to enrol to vote – Date for close of Electoral Rolls in *Commonwealth Electoral Act* 1918 (Cth) amended – Amendments precluded consideration until after election of claims for enrolment received after 8 pm on date of writs and of claims for transfer of enrolment received after 8 pm on third working day after date of writs – Whether denial of enrolment effected by amendments contravened constitutional requirement that representatives be "directly chosen by the people" – Whether amendments operated as disqualification from entitlement to vote and, if so, whether disqualification for substantial reason – Relevance of *Roach v Electoral Commissioner* (2007) 233 CLR 162.

Words and phrases – "directly chosen by the people", "disqualification", "substantial reason".

Constitution, ss 7, 8, 9, 10, 24, 30, 31, 51(xxxvi).
Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth), Sched 1 Items 20, 24, 28, 41, 42, 43, 44, 45, 52.
Commonwealth Electoral Act 1918 (Cth), ss 93, 94A(4), 95(4), 96(4), 101, 102(4), 102(4AA), 155.

FRENCH CJ.

Introduction

1 The Constitution requires that members of Parliament be "directly chosen by the people"[1]. That requirement is "constitutional bedrock"[2]. It confers rights on "the people of the Commonwealth" as a whole[3]. It follows, as Isaacs J said in 1912, that[4]:

> "The vote of every elector is a matter of concern to the whole Commonwealth".

Individual voting rights and the duties to enrol and vote are created by laws made under the Constitution in aid of the requirement of direct choice by the people.

2 An electoral law which denies enrolment and therefore the right to vote to any of the people who are qualified to be enrolled can only be justified if it serves the purpose of the constitutional mandate. If the law's adverse legal or practical effect upon the exercise of the entitlement to vote is disproportionate to its advancement of the constitutional mandate, then it may be antagonistic to that mandate. If that be so, it will be invalid. Laws regulating the conduct of elections, "being a means of protecting the franchise, must not be made an instrument to defeat it"[5]. As the Court said in *Snowdon v Dondas*[6]:

> "The importance of maintaining unimpaired the exercise of the franchise hardly need be stated."

3 The laws under challenge in this case would have disentitled persons otherwise qualified to be enrolled as electors before the election conducted on

---

1 Constitution, ss 7 and 24.

2 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 198 [82] per Gummow, Kirby and Crennan JJ; [2007] HCA 43.

3 *Langer v The Commonwealth* (1996) 186 CLR 302 at 343 per McHugh J; [1996] HCA 43.

4 *Smith v Oldham* (1912) 15 CLR 355 at 362; [1912] HCA 61.

5 An observation made by Isaacs J about the ballot in *Kean v Kerby* (1920) 27 CLR 449 at 459; [1920] HCA 35.

6 (1996) 188 CLR 48 at 71; [1996] HCA 27, immediately thereafter quoting the remark of Isaacs J in *Kean v Kerby* (1920) 27 CLR 449 at 459.

21 August 2010 from recording a vote at all or from recording a vote for the district in which they lived. That disentitlement would have flowed from the failure by those persons to lodge claims for enrolment before the issue of the writs or for transfer of enrolment before the close of the Rolls. A statutory grace period of seven days for claims to be made after the issue of the writs had existed since 1983. Until 1983 an effective, albeit non-statutory, grace period had existed in all elections called since the 1930s by reason of the executive practice of announcing an election some days before the issue of the writs. The statutory grace period was effectively removed for new enrolments and significantly abridged for transfers of enrolment by the impugned amendment of the *Commonwealth Electoral Act* 1918 (Cth) ("the CEA") in 2006. On 6 August 2010, I joined in a majority of the Court in making a declaration that the relevant provisions of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth) ("the Amendment Act") were invalid. My reasons follow.

The declaration claimed and the grounds for the claim

4 The plaintiffs claimed a declaration in the following terms:

> "A declaration that items 20, 24, 28, 41, 42, 43, 44, 45 and 52 of Schedule 1 of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) are invalid and of no effect."

5 The grounds for relief were that:

> "The items referred to in paragraph 1 of the prayer for relief are:
>
> (c) contrary to ss 7 and 24 of the Constitution;
>
> (d) beyond the legislative powers of the Commonwealth conferred by ss 51(xxxvi) and 30 of the Constitution or any other head of legislative power; and
>
> (e) beyond what is reasonably appropriate and adapted, or proportionate, to the maintenance of the constitutionally prescribed system of representative government;
>
> and are therefore invalid and of no effect."

The constitutional provisions

6 Section 7 of the Constitution of the Commonwealth requires that the senators for each State be "directly chosen by the people of the State". Section 24 requires that the members of the House of Representatives be "directly chosen by the people of the Commonwealth".

7 When the Commonwealth Constitution came into effect in January 1901, the qualification of electors of members of the House of Representatives was, by operation of s 30, that prescribed by State law as the qualification of electors of the more numerous House of Parliament of each State. Section 8 prescribed that the qualification of electors of members of the House of Representatives was the qualification of electors of senators. There was a transitional "constitutional franchise"[7]. Section 30 was to apply until the Commonwealth Parliament otherwise provided. In addition, by ss 10 and 31, until the Parliament of the Commonwealth otherwise provided, the laws in force in each State relating to elections for the more numerous House of the Parliament of the State, as nearly as practicable, applied to elections of senators for the State and of members of the House of Representatives. The Parliament of the Commonwealth was also empowered to make laws prescribing the method of choosing senators, but so that such method should be uniform for all States[8].

8 The words "[u]ntil the Parliament otherwise provides" in ss 10, 30 and 31 attract the power conferred upon the Parliament by s 51(xxxvi) to make laws "with respect to … matters in respect of which this Constitution makes provision until the Parliament otherwise provides". Read with s 30, s 51(xxxvi) empowers the Parliament to make laws providing for the qualification of electors of members of the House of Representatives. By operation of s 8 those qualifications are also the qualifications of the electors of senators. Read with ss 10 and 31, s 51(xxxvi) also empowers the Parliament to make laws relating to the election of senators and members of the House of Representatives. Those powers are exclusive to the Commonwealth[9]. Isaacs J characterised the power to make laws with respect to elections as a "plenary power over federal elections"[10]. To say that of the power under s 51(xxxvi) is to say what is true of every power conferred by s 51[11]. It is a power subject to the limitations imposed by the Constitution. The exercise of that power is in issue in this case.

9 Parts II and III of Ch I of the Constitution contain other provisions relating to elections for the Senate and the House of Representatives, including provision

---

7 *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 278 per Brennan, Deane and Dawson JJ; [1983] HCA 6.

8 Constitution, s 9.

9 *Smith v Oldham* (1912) 15 CLR 355 at 358 per Griffith CJ, 360 per Barton J.

10 *Smith v Oldham* (1912) 15 CLR 355 at 363.

11 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 604-605 per Gummow J; [1997] HCA 38.

for the issue, by the Governor-General, of writs for general elections of members of the House of Representatives[12] and for the issue by State Governors of writs for elections of senators for the States[13]. Section 41 protected the electors for the more numerous Houses of Parliament of the States from being prevented, by any law of the Commonwealth, from voting at elections for either House of the Parliament of the Commonwealth. That provision, however, has no effect on the present case as it only protects rights to vote which were in existence at Federation[14].

The statutory franchise

10 Under the Constitution, the Commonwealth Parliament was to decide whether and when to pass laws defining the qualifications of electors and the methods of election. This it did by enacting the *Commonwealth Franchise Act* 1902 (Cth) and the *Commonwealth Electoral Act* 1902 (Cth). By the former Act it created a "statutory franchise"[15] which replaced the constitutional franchise. Having defined the qualifications of electors, the Parliament could validly impose conditions upon the exercise of the right to vote which were incidental to or in aid of the laws defining the qualifications or embodied in laws relating to the election of senators and members of the House of Representatives.

11 The *Commonwealth Franchise Act* 1902 and the *Commonwealth Electoral Act* 1902 and their successor statutes were enacted against the background of colonial laws defining the franchise, identifying those entitled to exercise it and providing for the conduct of elections. Not surprisingly those laws and their provision for voter enrolment as a condition of the right to vote were inspired by the electoral laws of the United Kingdom.

12 The registration and listing of qualified electors on an electoral roll or list, as a condition of the exercise of the right to vote, was introduced in England and Wales by the *Representation of the People Act* 1832[16]. Until 1832 a person wishing to vote "appeared at the poll, tendered his vote, and then and there swore an oath prescribed by statute to the effect that he had the requisite

---

12 Constitution, s 32.

13 Constitution, s 12.

14 *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 261 per Gibbs CJ, Mason and Wilson JJ, 278-279 per Brennan, Deane and Dawson JJ.

15 *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 278 per Brennan, Deane and Dawson JJ.

16 2 & 3 Will IV c 45, s 26.

qualification"[17]. The 1832 Act was also the first step in a process of simplification and extension of what was a complex and restrictive franchise[18]. That complexity generated delays in electoral processes caused by the need, absent an electoral roll, to verify the identity and qualification of persons claiming to be entitled to vote. The purpose of registration therefore was "not so much to prevent fraud or to secure the rights of the bona fide electors, as to decrease the expense of elections"[19]. Legislative changes were made after 1832[20]. Further reform statutes were passed in 1865 and 1867[21]. Loss of voting rights for failure to comply with registration requirements was substantial. Registration was evidently a burdensome process and from the point of view of some electors: "the privilege of voting was not worth the pains"[22]. A common register was established in 1878 for parliamentary and municipal electors[23]. By the *Registration Act* 1885[24] the process of registration in counties was assimilated to that of boroughs and a uniform system put in place[25]. The system operated more smoothly after that time[26]. As appears from the history, the purpose of registration was practical and directed to dealing with the consequences of the complicated and diverse qualifications required for a person to become an elector.

13 The relationship of registration to the franchise and the franchise to the qualification to vote was viewed in different ways by constitutional scholars. Sir William Anson characterised registration as "a condition precedent to the

---

17 Maitland, *The Constitutional History of England*, (1908) ("Maitland") at 355.

18 There were distinct county and borough franchises: see Anson, *The Law and Custom of the Constitution*, 4th ed (1909), vol 1 ("Anson") at 101-103, 105-109; Maitland at 351-357.

19 Seymour, *Electoral Reform in England and Wales*, (1915) ("Seymour") at 107.

20 Seymour at 118.

21 *County Voters Registration Act* 1865 (28 & 29 Vict c 36); *Representation of the People Act* 1867 (30 & 31 Vict c 102); Seymour at 160.

22 Seymour at 163.

23 Seymour at 375-376.

24 48 & 49 Vict c 15.

25 Seymour at 376; Anson at 132-133.

26 Seymour at 380-381.

exercise of the right to vote" and as "preliminary to the enjoyment of the franchise"[27]. He applied the term "the Franchise" to the right to vote for members of the House of Commons[28]. He acknowledged that the term was also applied to the qualification which confers the right to vote. Maitland, on the other hand, said that "the only qualification that (in strictness) entitles one to vote is the fact that one is a registered elector"[29]. Quick and Garran, summarising the "qualifications of electors" under State laws at Federation, applied the term primarily to requirements such as gender, age and status as a natural-born or naturalised British subject but at one point appeared to include enrolment as a qualification[30]. The *Commonwealth Franchise Act* 1902 defined the class of persons entitled to vote by reference to age, residence, status as a natural-born or naturalised British subject, and enrolment for the Electoral Roll for any Electoral District[31]. The proposition that a person enrolled fell within the statutory term "qualified to vote" and was thereby entitled to sign an election petition was endorsed by Brennan ACJ in *Muldowney v Australian Electoral Commission*[32]. The right to vote conferred by s 93 of the CEA was then, as it is now and has been since the *Commonwealth Franchise Act* 1902, dependent upon enrolment[33]. Mason CJ in *Re Brennan; Ex parte Muldowney*[34] thought s 93 prescribed "qualifications to be enrolled and to vote respectively". What Brennan ACJ said in *Muldowney v Australian Electoral Commission* was endorsed in *Snowdon v Dondas*[35].

---

27 Anson at 134.

28 Anson at 101.

29 Maitland at 355.

30 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 469-470. The authors made a distinction between qualification and enrolment in their summary of the laws of New South Wales, Queensland and Western Australia, but elided the distinction in the summary relating to South Australia.

31 *Commonwealth Franchise Act* 1902, s 3.

32 (1993) 178 CLR 34 at 40; [1993] HCA 32. The term "qualified to vote" appears in s 355(c) of the CEA, which defines the entitlement to sign a petition disputing an election.

33 (1993) 178 CLR 34 at 39 per Brennan ACJ.

34 (1993) 67 ALJR 837 at 839; 116 ALR 619 at 623; [1993] HCA 53.

35 (1996) 188 CLR 48 at 72.

14 The Australian colonies enjoyed a faster evolution towards democratisation than the United Kingdom[36]. Universal manhood suffrage was adopted in South Australia with the introduction of responsible government[37]. Victoria and New South Wales followed suit in 1857 and 1858[38]. The same franchise was introduced in Queensland in 1885 and Western Australia in 1893[39]. Tasmania introduced it in 1901[40]. The franchise was extended to women in South Australia in 1895 and Western Australia in 1900[41]. Soon after Federation women in the remaining States also acquired the franchise[42]. The *Commonwealth Franchise Act* 1902 provided for universal adult franchise but excluded "aboriginal native[s] of Australia Asia Africa or the Islands of the Pacific except New Zealand", save for those entitled to vote by virtue of s 41 of the Constitution[43]. It also excluded persons of unsound mind, persons attainted of treason and persons under sentence or subject to be sentenced for any offence punishable by imprisonment for one year or more.

15 The electoral laws of the Australian colonies in the 19th century replicated important elements of the British system. A distinction between the qualification of electors and the requirements of listing, enrolment or registration was a common feature of such laws. The qualifications of electors were, for the most part, to be found in early colonial Constitutions, although sometimes they were

---

36 McMinn, *A Constitutional History of Australia*, (1979) at 62, cited in *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 194-195 [69] per Gummow, Kirby and Crennan JJ.

37 *Constitution Act* 1856 (SA), s 16.

38 *Abolition of Property Qualification Act* 1857 (Vic); *Electoral Act* 1858 (NSW), s 9.

39 *Elections Act* 1885 (Q), s 6; *Constitution Act Amendment Act* 1893 (WA), s 21.

40 *Constitution Amendment Act* 1900 (Tas), s 5.

41 *Constitution Amendment Act* 1894 (SA); *Constitution Acts Amendment Act* 1899 (WA), ss 15-17 and 26.

42 *Women's Franchise Act* 1902 (NSW); *Constitution Amendment Act* 1903 (Tas); *Elections Acts Amendment Act* 1905 (Q), s 9; *Adult Suffrage Act* 1908 (Vic).

43 *Commonwealth Franchise Act* 1902, s 4. Section 127 of the Constitution, providing that Aborigines were not to be counted in reckoning the numbers of the people of the Commonwealth, was repealed by the *Constitution Alteration (Aboriginals)* 1967 (Cth).

repeated in electoral statutes[44]. Registration or enrolment requirements were found in statutes made under the Constitutions.

16 The position at Federation was that the electoral laws of each of the Australian colonies conditioned the right to vote in an election upon enrolment on the relevant Electoral Roll[45]. Those electoral laws also provided for closure of the Electoral Rolls to new enrolments or transfers prior to polling day, although with variations in their cut-off dates[46].

17 Having regard to the historical origins and purpose of voter registration and the mixed usage of the term "qualification" evidenced in Quick and Garran, it might be thought that if enrolment is a qualification in the constitutional sense, it is at best ancillary to those qualifications which otherwise define the franchise. The history of registration laws in the United Kingdom and in Australia provide support for that characterisation. In any event, all laws of the Commonwealth Parliament providing for enrolment and for the conduct of elections must operate within the constitutional framework defined by the words "directly chosen by the people".

Chosen by the people

18 The content of the constitutional concept of "chosen by the people" has evolved since 1901 and is now informed by the universal adult-citizen franchise which is prescribed by Commonwealth law. The development of the franchise was authorised by ss 8 and 30 of the Constitution, read with s 51(xxxvi). Implicit in that authority was the possibility that the constitutional concept would acquire,

---

44 *Australian Constitutions Act* 1842 (Imp) (5 & 6 Vict c 76), ss 5-7; *Constitutional Act* 1854 (Tas), ss 6 and 17-19; *New South Wales Constitution Act* 1855 (Imp) (18 & 19 Vict c 54), Sched 1, s 11; *Constitution Act* 1855 (Vic), ss 5 and 12; *Constitution Act* 1856 (SA), ss 6 and 16; *Constitution Act* 1889 (WA), ss 39 and 53. The *Constitution Act* 1867 (Q) provided that members of the Legislative Assembly would be elected by inhabitants of the colony having qualifications mentioned in the Electoral Act for the time being: s 28.

45 *Parliamentary Electorates and Elections Act* 1893 (NSW), s 80; *Constitution Act Amendment Act* 1890 (Vic), s 241; *Elections Act* 1885 (Q), s 40; *Electoral Code* 1896 (SA), ss 36, 116 and 126; *Electoral Act* 1899 (WA), ss 21, 87 and 104; *Electoral Act* 1896 (Tas), s 57.

46 *Parliamentary Electorates and Elections Act* 1893 (NSW), ss 47-51; *Constitution Act Amendment Act* 1890 (Vic), ss 97 and 186; *Elections Act* 1885 (Q), s 40; *Electoral Code* 1896 (SA), ss 51, 52 and 57; *Electoral Act* 1899 (WA), ss 37 and 44; *Electoral Act* 1896 (Tas), s 57.

as it did, a more democratic content than existed at Federation. That content, being constitutional in character, although it may be subject to adjustment from time to time, cannot now be diminished. In *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[47] its evolution was linked in the judgment of McTiernan and Jacobs JJ to "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"[48]. Their Honours said[49]:

> "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."

19 The term "common understanding", as an indication of constitutional meaning in this context, is not to be equated to judicial understanding. Durable legislative development of the franchise is a more reliable touchstone. It reflects a persistent view by the elected representatives of the people of what the term "chosen by the people" requires.

20 Gleeson CJ adverted to the irreversible evolution of "chosen by the people" in *Roach v Electoral Commissioner*[50] when he answered in the negative the question: "Could Parliament now legislate to remove universal adult suffrage?"[51] The reason for that negative answer was to be found in ss 7 and 24 of the Constitution. Although those sections did not require universal adult suffrage in 1901, it had become, as McTiernan and Jacobs JJ had said in *McKinlay*, a "long established" fact[52]. The Chief Justice concluded that "in this respect, and to this extent, the words of ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote"[53].

---

47 (1975) 135 CLR 1; [1975] HCA 53.

48 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 36.

49 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 36.

50 (2007) 233 CLR 162.

51 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 173 [6].

52 (1975) 135 CLR 1 at 36.

53 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7]. See also *Langer v The Commonwealth* (1996) 186 CLR 302 at 342 per McHugh J.

21 It may be accepted, having regard to the narrower view of the franchise that subsisted in 1901, that the term "the people" in ss 7 and 24 of the Constitution is not limited to those who are qualified to vote. However, the adoption of universal adult-citizen franchise has caused the two concepts to converge. The people who choose are the electors. The non-inclusion of non-citizens, minors and incapable persons and persons convicted of treason or treachery, or serving sentences of imprisonment of three years or more for offences against Commonwealth, State or Territory law leaves little relevant room for distinguishing between "the people" and those entitled to become electors.

22 While the term "directly chosen by the people" is to be viewed as a whole, the irreversibility of universal adult-citizen franchise directs attention to the concept of "the people". Analogous considerations may apply to the term "chosen" and to the means by which the people choose their members of Parliament. Where a method of choice which is long established by law affords a range of opportunities for qualified persons to enrol and vote, a narrowing of that range of opportunities, purportedly in the interests of better effecting choice by the people, will be tested against that objective. This is not to suggest that particular legislative procedures for the acquisition and exercise of the entitlement to vote can become constitutionally entrenched with the passage of time. Rather, it requires legislators to attend to the mandate of "choice by the people" to which all electoral laws must respond. In particular it requires attention to that mandate where electoral laws effect change adverse to the exercise of the entitlement to vote. In this case it is the alteration of a long-standing mechanism, providing last-minute opportunities for enrolment before an election, that is in issue.

Criteria of validity

23 The validity of a provision of the CEA disqualifying as voters persons serving any sentence of imprisonment for an offence against a Commonwealth or State law was in issue in *Roach*[54]. The section, which was held invalid, operated by way of an exception to universal adult-citizen franchise. The decision in *Roach* is not therefore directly applicable to this case. The general approach of the majority in *Roach* is, however, instructive. It informs, by close analogy, the approach which should be taken in this case to the challenged law in light of the constitutional mandate. Gleeson CJ observed in his judgment in *Roach* that[55]:

---

54 (2007) 233 CLR 162.

55 (2007) 233 CLR 162 at 174 [7] (footnote omitted).

> "Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people."

Exceptions to universal adult-citizen franchise required "a rational connection with the identification of community membership or with the capacity to exercise free choice"[56].

24 Gummow, Kirby and Crennan JJ also spoke of the need for a "substantial reason" to justify an exception to universal adult-citizen franchise. That requirement would be satisfied by an exception "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government"[57]. That formulation, their Honours said, approached the notion of "proportionality", for[58]:

> "What upon close scrutiny is disproportionate or arbitrary may not answer to the description reasonably appropriate and adapted for an end consistent or compatible with observance of the relevant constitutional restraint upon legislative power."

The present case concerns an electoral law of a procedural or machinery character. It does not in terms carve out an exception to the franchise. It does, however, have a substantive effect upon entitlements to vote and so affects the exercise of the franchise.

25 While "common understanding" of the constitutional concept of "the people" has changed as the franchise has evolved, "the people" is not a term the content of which is shaped by laws creating procedures for enrolment and for the conduct of elections. If such a law denies the right to vote to any class of person entitled to be an elector, it denies it to that class of "the people". Such a law may be valid. But the logic of the constitutional scheme for a representative democracy requires that the validity of such a law be tested by reference to the constitutional mandate of direct choice by "the people". Where, as in the present case, the law removes a legally sanctioned opportunity for enrolment, it is the change effected by the law that must be considered. It is not necessary first to

---

56 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [8].

57 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85], referring also to Gleeson CJ in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200 [39]-[40]; [2004] HCA 41.

58 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85].

determine some baseline of validity. Within the normative framework of a representative democracy based on direct choice by the people, a law effecting such a change causes a detriment. Its justification must be that it is nevertheless, on balance, beneficial because it contributes to the fulfilment of the mandate. If the detriment, in legal effect or practical operation, is disproportionate to that benefit, then the law will be invalid as inconsistent with that mandate, for its net effect will be antagonistic to it. Applying the terminology adopted in *Roach*, such a law would lack a substantial reason for the detriment it inflicts upon the exercise of the franchise. It is therefore not sufficient for the validity of such a law that an election conducted under its provisions nevertheless results in members of Parliament being "directly chosen by the people".

26 The Solicitor-General of the Commonwealth drew by analogy upon a distinction, made in this Court, between laws intended to impose a direct burden upon the implied freedom of political communication and those which restricted communication as part of a broader scheme of regulation[59]. The plaintiffs, it was submitted, failed at the threshold because the impugned laws were directed to keeping the Electoral Rolls up to date. Save for certain exceptional cases[60], persons who complied with the duties imposed under s 101 of the CEA would not need to enrol or vary their enrolment when an election was called. The submission rested upon the premise that a change in a procedural or machinery law relating to elections which removes a pre-existing opportunity for enrolment by qualified persons does not require substantial justification. The premise, for the reasons already outlined, is not accepted. The submission must be rejected.

27 The Commonwealth, nevertheless, sought to support the amendments as procedural laws "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government". The fixing of some cut-off date for enrolment consequent upon the issue of writs for an election was appropriate and

---

59 *Coleman v Power* (2004) 220 CLR 1 at 52 [98] per McHugh J; [2004] HCA 39; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40] per Gleeson CJ, citing *Levy v Victoria* (1997) 189 CLR 579 at 618-619 per Gaudron J; [1997] HCA 31.

60 Persons who turn 18 between the issue of the writs and polling day who could, in any event, have applied under s 100 and have three days after the issue of the writs to enrol pursuant to s 102(4AB); persons granted citizenship between the issue of the writs and polling day who in any event may apply under ss 99B and 102(4AA) up to three days after the issue of the writs; persons who have recently moved and become entitled to transfer enrolment under s 99(2) between the close of Rolls and polling day.

adapted to that end. The Commonwealth relied upon the legislative scheme in which the cut-off provisions find their place and which provides for:

- the imposition of the duty of enrolment;
- the precondition to enrolment requiring satisfaction on the part of the Electoral Commissioner that a person claiming to be entitled to be enrolled is so entitled;
- the elaborate procedure for the conduct of an election consequent upon the issue of the writs, which procedure is premised upon the prior closure and substantial correctness of the Rolls; and
- a bar on any challenge to an election based on an allegation of incorrectness of the Rolls.

The Commonwealth submitted that the choice of one date rather than another as the cut-off date for enrolment following the issue of writs for an election was not something which would take the legislative scheme outside the bounds of what is appropriate and adapted to the relevant end.

28 For the reasons already given, the characterisation of an electoral law as procedural, or in the nature of electoral machinery, does not of itself justify collateral damage to the extent of participation by qualified persons in the choice of their parliamentary representatives. The detriment, even if contributed to by the failure of those persons to fulfil their duties under the CEA, is still a detriment "of concern to the whole Commonwealth".

29 It must be accepted, in considering the validity of the impugned laws, that Parliament has a considerable discretion as to the means which it chooses to regulate elections and to ensure that persons claiming an entitlement to be enrolled are so entitled. It is not for this Court to hold such a law invalid on the basis of some finely calibrated weighing of detriment and benefit. Nor is it the function of the Court to hold such a law beyond the power of the Parliament simply because the Court thinks there might be a better way of achieving the same beneficial purpose. What Latham CJ said in the *First Uniform Tax Case* is of general application and applies to this case[61]:

> "It is not for this or any court to prescribe policy or to seek to give effect to any views or opinions upon policy. We have nothing to do with the wisdom or expediency of legislation. Such questions are for Parliaments and the people."

---

61 *South Australia v The Commonwealth* (1942) 65 CLR 373 at 409; [1942] HCA 14.

If a law subject to constitutional challenge is a law within the legislative competency of the Parliament that enacts it, the question whether it is a good law or a bad law is a matter for the Parliament and, ultimately, the people to whom the members of the Parliament are accountable. But where the Constitution limits the legislative power of a Parliament in any respect and where a question of the validity of a law is raised and has to be answered in order to determine a matter before the Court, then the Court must decide whether constitutional limits have been exceeded.

30 It is necessary at this point to refer to the events which have led to these proceedings.

Factual and procedural history

31 On Saturday, 17 July 2010, the Prime Minister announced her intention to call a general election for the Senate and the House of Representatives. On the same day, her Excellency, the Governor-General, acting upon the advice of the Prime Minister, prorogued the Parliament from 4.59 pm on Monday, 19 July until Saturday, 21 August 2010[62]. Writs were issued on 19 July for the election of members of the House of Representatives for the States and Territories and for the election of senators for the Territories by the Administrator in Council and for the election of senators for the States by their respective vice-regal representatives.

32 The writs fixed 22 July 2010 for the closing of the Rolls, 29 July 2010 for the closing of nominations, 21 August 2010 for polling and on or before 27 October 2010 for the return of the writs.

33 The plaintiffs are both students. Both are Australian citizens. The first plaintiff, Shannen Rowe, turned 18 on 16 June 2010. At the time the election was announced she was not enrolled to vote. A completed form was not lodged on her behalf until Friday, 23 July 2010. By operation of s 102(4) of the CEA, her claim for enrolment, having been lodged after 8 pm on the day of the issue of the writs, could not be considered until after the close of polling at the election. The second plaintiff, Douglas Thompson, was 23 years of age and was enrolled to vote for the Division of Wentworth at an address in that Division. However, in March 2010 he had moved to a new address in the Division of Sydney. Following an abortive attempt to lodge electronically a claim for transfer of his enrolment pursuant to s 101 of the CEA, he completed a form which he signed on 22 July and which was lodged by facsimile transmission with the AEC by his

---

62 *Commonwealth of Australia Gazette*, S136, 19 July 2010.

solicitor. By virtue of s 102(4AA) of the CEA, however, his claim for transfer, having been lodged after 8 pm on the date of the close of the Rolls, could not be considered until after the close of polling at the election.

34 Ms Rowe and Mr Thompson commenced proceedings in this Court on 26 July 2010 on their own behalf and as representative parties claiming a declaration that ss 102(4), 102(4AA) and 155 of the CEA are invalid. They also sought an order to show cause why writs of mandamus should not issue directed to the Electoral Commissioner in effect requiring that they be included on the Electoral Rolls for their respective Divisions.

35 On 29 July 2010, Hayne J made an order pursuant to r 25.03.3(b) of the High Court Rules 2004 referring the proceedings for further hearing by a Full Court on Wednesday, 4 August 2010. The plaintiffs continued the proceedings on their own behalf and not in a representative capacity. They filed an amended application by leave. The parties also filed a statement of agreed facts.

The *Commonwealth Electoral Act* 1918

36 The long title of the CEA is "An Act to Consolidate and Amend the Law relating to Parliamentary Elections and for other purposes". The provisions under challenge must be considered in the context of the legislative scheme of which they form part.

37 The Act establishes the Australian Electoral Commission ("the AEC"), comprising a Chairperson, the Electoral Commissioner and one other member[63]. Among the functions of the AEC are[64]:

> "to provide information and advice on electoral matters to the Parliament, the Government, Departments and authorities of the Commonwealth".

The AEC is required to prepare and forward to the Minister each year a report of its operations for the year ended 30 June[65]. Annual Reports of the AEC for the years 1998-1999 to 2008-2009 inclusive were referred to in the statement of agreed facts, which forms part of the Application Book. The AEC has also, from time to time, made submissions to the Joint Standing Committee on Electoral Matters ("the JSCEM"). A number of those submissions were also included in the Application Book in relation to inquiries conducted by the JSCEM into federal elections in 1998, 2004 and 2007. By the agreed facts, the authenticity of

---

63 CEA, s 6(1) and (2).

64 CEA, s 7(1)(d).

65 CEA, s 17(1).

the reports and the submissions were accepted, as was, by specific agreement, the correctness of certain factual statements and tables contained in them. Reference to these reports and submissions in these reasons is made within the framework of the agreements about their use between the parties[66].

38 The Electoral Commissioner is the chief executive officer of the AEC[67]. There is an Australian Electoral Officer for each State[68]. There is a Divisional Returning Officer for each Electoral Division, whose duty it is to give effect to the Act "within or for the Division subject to the directions of the Electoral Commissioner and the Australian Electoral Officer for the State"[69].

39 Under Pt IV of the Act each State and the Australian Capital Territory are "distributed into Electoral Divisions" with one member of the House of Representatives to be chosen for each Division[70]. There is a provision for the redistribution of the Divisions in a State or the Territory[71] and a requirement for monthly assessments of the number of persons enrolled in each Division, the average divisional enrolment and the extent to which the number of electors enrolled in each Division differs from that average[72]. A mini-redistribution can be undertaken after the issue of the writs for an election where the number of Divisions in a State differs from the number of members to which the State is entitled[73]. That process involves a consideration of the number of electors enrolled in the various Divisions within the State. The Rolls therefore have an important part to play in the redistribution process.

40 Part VI of the CEA provides for a Roll of electors for each State and for each Territory[74]. Each of those Rolls is made up of the Rolls for the Divisions

---

66 Set out in the statement of agreed facts in the Application Book and a supplementary statement of agreed facts filed on 5 August 2010.

67 CEA, s 18.

68 CEA, s 20(1).

69 CEA, s 32(1); see also ss 18(3) and 20(3).

70 CEA, ss 56 and 57.

71 CEA, s 73.

72 CEA, s 58(1).

73 CEA, s 76.

74 CEA, s 81(1).

within the State or Territory[75]. The Rolls are to contain the name and address of each elector and such further particulars as are prescribed[76]. Rolls can be inspected[77] and information contained in them must be made available to specified classes of persons and organisations[78]. The AEC must conduct reviews of the Rolls with a view to ascertaining such information as is required for their preparation, maintenance and revision[79].

41 The AEC has, since 1999, used a process of data-matching, designated "Continuous Roll Update" ("CRU"), to maintain the Electoral Roll. By this process personal information on electors held by the AEC is matched with external data from other agencies and from some utility companies. Where data-matching indicates that an elector has become eligible or has changed his or her address, the AEC sends a letter to or visits the elector. This process can result in an enrolment or a transfer of enrolment occurring. Non-response to attempted communication can lead to the removal of the elector from the Roll under the objection process for which Pt IX provides[80].

42 The scale of the CRU undertaking is indicated by the fact that between 2000-2001 and 2004-2005 the AEC each year processed about four million records showing a change of address or likely eligibility to enrol. Targeted mail was sent to 2.8 million addresses each year. Field visits were made to 330,000 habitations annually. This activity generated about 850,000 enrolments annually. The result of the activity was more complete Electoral Rolls. There was, however, a much lower rate of return, in terms of enrolments, having regard to extra expenditure in 2007, compared with the return in 2004.

43 During 1997, the AEC introduced enhancements to its computerised Roll Management System ("RMANS") in order to detect and deter fraudulent enrolment. The RMANS Address Register separately identifies each known

---

75 CEA, s 82(4).

76 CEA, s 83(1). Save for eligible overseas electors and itinerant electors, whose addresses are not required: s 83(2).

77 CEA, s 90A.

78 CEA, ss 90B-91B.

79 CEA, s 92(2).

80 The CRU process was described in a report dated 21 April 2010 prepared by the Australian National Audit Office on the AEC's preparation for, and conduct of, the 2007 federal general election. The contents of the report were agreed by the parties as an accurate statement of the AEC's CRU activities during the period described.

address, based on known streets and localities, and lists a range of attributes for the address, including whether the address is habitable and valid for enrolment. The Register is then used to assess the validity of addresses listed on enrolment claims.

44 Qualifications and disqualifications for enrolment and for voting are dealt with in Pt VII of the CEA. A key provision of Pt VII is s 93. It sets out conditions upon which persons "shall be entitled to enrolment"[81]. They are persons who have attained 18 years of age and who are Australian citizens[82]. Also entitled are non-citizens who would have been British subjects within the meaning of the relevant citizenship law had it continued in force and whose names were, before 26 January 1984, on a Roll[83]. An "Elector" is defined in s 4(1) as "any person whose name appears on a Roll as an elector" and whose name is on the Roll for a Division. An elector is "entitled to vote at elections of Members of the Senate for the State that includes that Division and at elections of Members of House of Representatives for that Division"[84].

45 Some classes of persons are not entitled to enrolment or to vote. The holders of temporary visas under the *Migration Act* 1958 (Cth) and unlawful non-citizens under that Act are not entitled to enrolment[85]. Persons who, by reason of being of unsound mind, are incapable of understanding the nature and significance of enrolment and voting and persons convicted of treason or treachery and not pardoned are not entitled to enrolment or to vote at any Senate election or election for the House of Representatives[86]. Also disqualified are persons serving a sentence of imprisonment of three years or longer[87].

46 Persons resident in Australia who are leaving Australia may be included on the Roll as eligible overseas electors[88]. Persons who have ceased to reside in

---

81 CEA, s 93(1).

82 CEA, s 93(1)(a) and (b)(i).

83 CEA, s 93(1)(b)(ii).

84 CEA, s 93(2).

85 CEA, s 93(7).

86 CEA, s 93(8).

87 CEA, s 93(8)(b) as it stood before its repeal in 2006 by amendments held invalid in *Roach v Electoral Commissioner* (2007) 233 CLR 162.

88 CEA, s 94.

Australia and intend to resume residence within six years of ceasing may apply for enrolment and be enrolled[89]. Spouses, de facto partners and children of eligible overseas electors may apply for enrolment[90]. There is also provision for the enrolment of itinerant electors, a class which includes homeless persons[91]. There are cut-off provisions, preventing consideration of the enrolment of persons in some of these categories, which operate from 8 pm on the day that the writs have issued for an election[92]. The validity of the amendments which introduced these provisions was challenged by the plaintiffs in their further amended application. That was a necessary consequence of their challenge to the cut-off provisions affecting them, which are to be found in Pt VIII of the CEA. No objection was taken to their standing to do so. It was accepted that the cut-off provisions introduced by the Amendment Act would stand or fall together.

47 Section 93 is made under two heads of constitutional power. The first is the power to make laws to prescribe the qualifications of electors[93]. The second is the power to make laws relating to the election of senators and members of the House of Representatives[94]. The two heads of legislative power are logically distinct. Nevertheless, laws prescribing electoral processes may validly impinge upon the entitlement to vote at an election. As already explained, the only proper purpose of such processes is to provide the means by which "the people" may choose the members of their Parliament. That statement of purpose is a generalisation of the rationale offered by Griffith CJ in *Smith v Oldham* for laws regulating the conduct of persons with regard to elections[95]:

> "The main object of laws for that purpose is, I suppose, to secure freedom of choice to the electors."

48 The logical distinction between the two heads of power was acknowledged by Gibbs CJ, Mason and Wilson JJ in *R v Pearson; Ex parte*

---

89 CEA, s 94A.

90 CEA, s 95.

91 CEA, s 96.

92 CEA, ss 94A(4), 95(4) and 96(4). These cut-offs were introduced by Items 20, 24 and 28 in Sched 1 to the Amendment Act.

93 Constitution, s 51(xxxvi) read with ss 8 and 30.

94 Constitution, s 51(xxxvi) read with ss 10 and 31.

95 (1912) 15 CLR 355 at 358.

Sipka[96]. The provision of the CEA there under consideration, to the extent that it impinged upon voting rights said to be protected by s 41 of the Constitution, was s 45(a). The latter section provided a cut-off for claims for enrolment and transfers of enrolment upon issue of the writs for an election. It was characterised by their Honours as a law relating to elections for members of the House of Representatives and senators[97]. It does not appear from the joint judgment of Brennan, Deane and Dawson JJ that their Honours, as the Commonwealth submitted in this case, treated s 45(a) as an aspect of the definition of the Commonwealth franchise under ss 8 and 30. The Commonwealth submitted that in any event the subject matters of qualification of electors and elections are not mutually exclusive. That may be accepted. A law may be a law with respect to both subject matters. But the class of law which defines the qualifications of electors, even if it extends to laws making enrolment a condition of entitlement to vote, does not extend to procedural laws prescribing cut-off dates for the lodgement of claims for enrolment or transfer of enrolment.

49 Part VIII of the CEA sets up a system of compulsory enrolment. Every person who is entitled to be enrolled for any Subdivision, whether by way of enrolment or transfer of enrolment, and whose name is not on the Roll, is required to "forthwith fill in and sign a claim and send or deliver the claim to the Electoral Commissioner"[98]. The requirement does not apply to persons applying to be treated as eligible overseas electors under s 94 or their spouses, de facto partners or children. It does not apply to itinerant electors, nor to persons who have turned 16 and who are thereby eligible under s 100 of the CEA to lodge a claim in advance of turning 18.

50 By operation of s 98AA[99], certain classes of prospective electors, including those making claims as itinerant or overseas electors, are required to supply evidence of their identity. The methods of proof available are specified in sub-s (2) and in regs 11A and 12 of the Electoral and Referendum Regulations 1940 (Cth).

51 Subject to an immaterial exception, a person whose name is not on the Roll on the expiration of 21 days from the date upon which the person became so

---

96 (1983) 152 CLR 254.

97 (1983) 152 CLR 254 at 265.

98 CEA, s 101(1).

99 Section 98AA was inserted into the CEA by the Amendment Act (Item 29 in Sched 1) but was repealed and its present form substituted by the *Electoral and Referendum Amendment (Modernisation and Other Measures) Act* 2010 (Cth) (Item 6 in Sched 2).

entitled is guilty of an offence unless he or she proves that the non-enrolment was not the result of a failure to send a completed claim to the Electoral Commissioner[100]. There is also an offence committed when a person changes his or her address within a particular Subdivision and does not give notice of the new address within 21 days to the Electoral Commissioner[101]. Failure to comply with the obligations under s 101 constitutes an offence punishable on conviction by a fine not exceeding one penalty unit. There is, however, a saving provision in s 101(7), which provides:

> "Where a person sends or delivers a claim for enrolment, or for transfer of enrolment, to the Electoral Commissioner, proceedings shall not be instituted against that person for any offence against subsection (1) or (4) committed before the claim was so sent or delivered."

The obligations imposed by s 101 apply to first-time claimants for enrolment on any Roll, persons effecting transfer of enrolment from one Subdivision to another and persons changing their address within one Subdivision. The offence provisions are an incentive to enrolment and to discharge of the statutory duty to enrol and ultimately to vote. Their primary character as an incentive is apparent from the immunity from prosecution conferred by s 101(7) when a person has sent or delivered a claim for enrolment or transfer of enrolment to the Electoral Commissioner. They are designed not to punish, but to encourage maximum participation by persons qualified to vote.

52 Where the Electoral Commissioner receives a claim for enrolment or transfer of enrolment and the claim is in order, the Commissioner is required by s 102(1)(b) to enter the name of the claimant on the Roll together with other necessary particulars. The claimant is also to be notified in writing of the enrolment. Sub-sections (4) and (4AA) of s 102 apply in the present case to the first and second plaintiffs respectively. The validity of the amendments to the CEA which introduced those sub-sections is under challenge. The sub-sections are in the following terms:

> "(4) If a claim by a person for enrolment under section 101 … is received during the period:
>
> (a) beginning at 8 pm on the date of the writ or writs for an election for the Division to which the claim relates; and
>
> (b) ending at the close of the polling at the election;

---

100 CEA, s 101(4).

101 CEA, s 101(5) and (6).

then the claim must not be considered until after the end of the period.

(4AA) If a claim by a person for transfer of enrolment under section 101 … is received during the period:

(a) beginning at 8 pm on the date of the close of the Rolls for an election for the Division to which the claim relates; and

(b) ending at the close of the polling at the election;

then the claim must not be considered until after the end of the period."

Where a claim is delayed by reason of delay in the delivery of mail caused by an industrial dispute, then the claim shall be regarded as having been received before the commencement of the cut-off periods referred to in sub-s (4) or sub-s (4AA) as the case requires[102].

53 Sub-sections (4) and (4AA) of s 102 are to be read in the light of Pt XIII of the CEA, which is concerned, inter alia, with the issue of writs for elections, the dates for the close of the Rolls, nomination, polling and the return of the writs. The close of the Rolls is dealt with by s 155:

"**155 Date for close of Rolls**

(1) The date fixed for the close of the Rolls is the third working day after the date of the writ.

(2) In this section:

working day means any day except:

(a) a Saturday or a Sunday; or

(b) a day that is a public holiday in any State or Territory."

The validity of the 2006 amendment to s 155 is challenged in these proceedings.

54 The date fixed for nomination of the candidates is required to be not less than 10 days nor more than 27 days after the date of the writ[103]. The date fixed

---

102 CEA, s 102(4A) and (4B).

103 CEA, s 156(1).

for polling is to be not less than 23 days nor more than 31 days after the date of nomination[104]. The date fixed for the return of the writ is to be not more than 100 days after the issue of the writ[105]. The effect of s 102(4) is that a person lodging a claim for enrolment cannot have the claim considered until after the election if it was lodged after 8 pm on the day that the writs issued. The effect of s 102(4AA), read with s 155, is that a person seeking transfer of enrolment because of a change of address has three days only from the date of the issue of the writs to lodge his or her claim.

55 Part IX of the Act provides for objections to be made to the enrolment of a person on the Electoral Roll[106]. The Electoral Commissioner, however, cannot remove an elector's name from the Roll during the period between 8 pm on the date of issue of the writs for an election and the close of polling for that election[107]. The Commonwealth in its submissions pointed to the effects of the pre-amendment law on the Electoral Commissioner's ability to process objections. In this connection it should be noted that s 106 empowers the Electoral Commissioner, at any time between the date of issue of the writ for an election for a Division and before the close of polling at that election, to remove from the Roll the name of a person who secured enrolment pursuant to a claim in which the person made a false statement. That power does not depend upon the application of the objection process.

56 It is now necessary to review briefly the history of cut-off provisions prior to the Amendment Act.

Enrolment cut-offs: 1902-2006

57 The *Commonwealth Electoral Act* 1902 was described in its long title as "An Act to regulate Parliamentary Elections". It conferred the entitlement to enrolment on "[a]ll persons qualified to vote at any Election for the Senate or House of Representatives, or who would be qualified so to vote if their names were upon a Roll"[108]. There was a cut-off provision in s 64. Claims for enrolment and transfer of enrolment lodged before the issue of the writs for an

---

104 CEA, s 157.

105 CEA, s 159.

106 CEA, s 114.

107 CEA, s 118(5). This provision was altered by the Amendment Act. Prior to amendment, the period during which the removal of names from the Rolls was precluded ran from seven days after the date of the writs.

108 *Commonwealth Electoral Act* 1902, s 31.

election could be processed after the issue of the writs but otherwise no addition or alteration was to be made to the Rolls between the issue of the writs and the close of polling.

58 As enacted the CEA, which consolidated and amended the law relating to parliamentary elections, contained a similar although not identical cut-off provision. Claims for enrolment or transfer which were received after 6 pm on the day of the issue of the writs for an election would not be registered until after close of polling[109].

59 Until 1983 the CEA continued to provide that the Electoral Rolls closed on the date of issue of the writs. There was, however, an executive practice, which developed at least from the 1930s, of announcing the election some days before the Governor-General was asked to dissolve Parliament and issue writs for the election of the members of the House of Representatives[110]. The time between the announcement and the issue of the writs varied, after 1934, from a minimum of five days in 1949 to a maximum of 63 days in 1958. In 1983 there was a departure from that practice. The election was announced on the afternoon of the day before the issue of the writs. It was that late announcement, coupled with the operation of s 45(a) (the cut-off provision of the CEA then in force), that led to the litigation in this Court in *R v Pearson; Ex parte Sipka*[111]. Murphy J referred to the background in his dissenting judgment[112]:

> "The effect of the circumstances in which this election was called is that many persons who were entitled to be but were not enrolled on the Commonwealth roll by 6 pm on 4 February 1983 are, apart from s 41 of the Constitution, prevented from enrolling and voting in this election because of s 45(a) of the *Commonwealth Electoral Act*."

60 The CEA was amended by the *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth). The cut-off point for consideration of claims for enrolment or transfer of enrolment was extended beyond the date of issue of the writs to the date of close of the Rolls[113]. The date fixed for close of the Rolls was to be seven days after the date of issue of the writs[114]. The Second Reading

---

109 CEA, s 45(a) (as enacted in 1918).

110 Constitution, s 32.

111 (1983) 152 CLR 254.

112 (1983) 152 CLR 254 at 266-267.

113 *Commonwealth Electoral Legislation Amendment Act* 1983, s 29.

114 *Commonwealth Electoral Legislation Amendment Act* 1983, s 45.

Speech for the amending legislation described one of its objectives as "to make it easier for electors to get on the rolls and stay on the rolls … For example, the Bill provides that there must be a sufficient time between the announcement of an election and the close of rolls for that election."[115] The seven-day period of grace then introduced operated for eight subsequent federal elections until the amendments under challenge in these proceedings.

61 Before it was amended in 2006, s 102 of the CEA precluded consideration, until after the close of polling, of a claim for new enrolment received after 8 pm on the day on which the Rolls for the election were to close. Section 155, as it then stood, provided that the date fixed for the close of the Rolls was seven days after the date of the writs. The effect of s 102, read with s 155, was that a person, qualified as an elector, had seven days after the issue of the writs to lodge a claim for enrolment and thus be placed on the Roll. The position of a person seeking a transfer of enrolment was the same.

62 The challenged amendments were effected by s 3 of the Amendment Act, read with various items specified in Sched 1 to that Act. The amendment, by repeal and substitution, of s 102(4) and the insertion of s 102(4AA) were effected by Item 41 in Sched 1. The amendment of s 155 was effected by repeal and substitution under Item 52 in Sched 1.

Operation of the cut-off: 1983-2006

63 AEC records for the period 1993-2006 show the number of new enrolments, re-enrolments and transfers of enrolment undertaken during the grace period after the issue of the writs. The number of such transactions represented well in excess of 350,000 electors in each of the 1993, 1996, 1998 and 2001 elections. For each of the 1998 and 2001 elections the number of new enrolments and re-enrolments increased daily during the seven-day period (save for Saturdays and Sundays). In 2004, the close-of-Rolls transactions represented 17.5 per cent of total enrolment activity for the 2004-2005 financial year. Of 520,086 close-of-Rolls transactions, 265,513 enrolment cards were received from voters whom the AEC had contacted in the 12 months prior to the election.

64 Following the Amendment Act the post-announcement grace period for the 2007 election was three days for new enrolments and nine days for updating existing enrolments. There were in those periods 279,469 enrolment transactions. Some 100,370 people lodged their claims for enrolment or transfer of enrolment after the close of the Rolls.

---

115 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 November 1983 at 2216.

65 The AEC reported to the Australian National Audit Office ("the ANAO"), following the 2007 election, that it had faced a far greater challenge in 2007 due to the shortened close of the Rolls. It was not able to rely upon its previous strategy, used in 2004, which involved advertising when the election was called and drawing attention to the seven-day close-of-Rolls period. The AEC also reported that in 2007 it had achieved "a small gain in enrolment efficiency measured by transaction". The gain was expensive. About $36 million was spent on enrolment activity, including advertising, before the 2007 election. The marginal cost of each of the net additional 118,885 enrolments in 2007 was over $216, nearly seven times the unit cost per additional enrolment in 2004.

66 As to the problem of electoral fraud, the AEC stated, in a submission to the JSCEM in October 2000, that "identity fraud is not a significant problem in the federal electoral system". The AEC observed:

> "Apart from the lack of evidence available to the AEC of any widespread and organised conspiracy involving identity fraud … it must be acknowledged that there are very significant difficulties in organising an identity fraud conspiracy of sufficient magnitude to affect the result in a federal Division".

In the event, it was not submitted for the Commonwealth that the justification for the amendments, so far as it was based upon the prevention of fraud, was other than prophylactic. That is to say, the amendments were not introduced as a reaction to an existing problem of identity fraud in connection with enrolments.

67 It is apparent from the agreed facts that, as would be expected, the effect of the cut-off provisions enacted in 2006 was greater with respect to newly qualified electors than electors in older age groups. The percentage of eligible persons in the age range 18-25 who were not enrolled as at 30 June 2006 and 30 June 2007 was significantly greater than the percentage of the total number of eligible voters who were not enrolled at those dates. As at 15 April 2010, there were approximately 430,000 eligible young people who were not enrolled to vote.

68 It was also an agreed fact that people living in remote and rural areas of Australia may have difficulty enrolling because of limited access to the facilities and services necessary for enrolment.

69 Other agreed facts were before the Court in relation to claims for enrolment in connection with the 2010 election. They were set out in an affidavit sworn by Paul Dacey, Deputy Electoral Commissioner in the AEC:

1. 508,000 claims for enrolment and transfer of enrolment were received after the announcement of the election and before the deadlines for

enrolment claims. Those claims were processed onto the Rolls by 27 July 2010.

2. There were estimated to be approximately 100,000 claims for enrolment received after the cut-off deadlines, but before the date for the closing of the Rolls prior to the Amendment Act. That estimate was based on preliminary advice from State Managers at close of business on 27 July 2010, albeit it was subject to a considerable margin of uncertainty.

70 Mr Dacey indicated that if a requirement to process late claims for enrolment and transfer of enrolment were made known to the AEC by 6 August 2010, it would be able to process them. It would have to deploy additional staff and the deployment would cause some level of disruption. An electronic version of the Roll would be able to be completed by 18 August 2010. The AEC would write to electors who had made late claims once their applications had been processed onto the Roll and advise that they would be able to cast a provisional vote at a polling place on polling day. Their names would not appear on the certified lists, which are the printed lists of voters for each Division required by s 208 of the CEA. Those lists would have been finalised and sent for printing. This would not prevent electors who enrolled late from exercising their vote, nor would it interfere with processes of preliminary scrutiny of declaration votes[116] as those requirements could be met by utilising the electronic Roll.

The justification for the Amendment Act

71 The Bill which became the Amendment Act was said, in the Second Reading Speech, to contain "reform measures arising from some of the government supported recommendations of the Joint Standing Committee on Electoral Matters' report on the 2004 federal election, which was tabled in the parliament in October 2005, and additional reform measures considered a priority by the government"[117]. The Speech did not otherwise set out the objectives or rationale of the amendment. The Explanatory Memorandum did not add anything relevant for present purposes.

---

116 Declaration votes comprise postal votes, pre-poll declaration votes, absent votes and provisional votes: CEA, s 4(1).

117 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 December 2005 at 19.

72 The report of the Joint Standing Committee on Electoral Matters on the 2004 federal election[118] ("the JSCEM Report"), referred to in the Second Reading Speech and the Explanatory Memorandum, contained a number of recommendations. One was that s 155 be amended to provide that the date and time fixed for the close of the Rolls be 8 pm on the day of the writs[119]. The objective of and rationale for the amendment was set out at pars 2.112 to 2.126 of the Committee's report. In those paragraphs, the Committee made the following points:

(i) The AEC had processed approximately 17.5 per cent of enrolment transactions in 2004-2005 during the close of Rolls for the 2004 federal election, a period representing only three per cent of the available working time for the year[120].

(ii) The volume of transactions during the close-of-Rolls period limited the AEC's ability to conduct the thorough and appropriate checks required to ensure that the Rolls were updated with integrity[121].

(iii) If electors had enrolled or changed their enrolment details at the time that their entitlement changed, 60.5 per cent of enrolment transactions during the close-of-Rolls period would not have been required[122].

(iv) The seven-day close-of-Rolls period for federal elections actually encouraged electors and potential electors to neglect their obligations in respect of enrolment, believing they could play "catch up" during the close-of-Rolls period. It thereby decreased the accuracy of the Rolls[123].

(v) A significant number of electors failed to update enrolment details in the 12 months before the 2004 election writs were issued despite contact and prompting from the AEC up to 12 months before the election was announced. These electors were later responsible for a large proportion of

---

118 Australia, The Parliament, Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, (2005).

119 JSCEM Report at 36 [2.127].

120 JSCEM Report at 34 [2.112].

121 JSCEM Report at 34 [2.113].

122 JSCEM Report at 34 [2.114].

123 JSCEM Report at 35 [2.116]-[2.117].

the enrolment transactions that the AEC was required to process during close of Rolls[124].

(vi) AEC statistics indicated that, despite AEC efforts and significant taxpayer funds expended in contacting electors prior to elections being announced, that pattern was repeated election after election[125].

(vii) Electors act unlawfully in not enrolling when entitled and also cause wastage of a significant amount of taxpayer funds expended on postage and other measures in repeated attempts to persuade them to update their details on the Electoral Roll[126].

(viii) Current close-of-Rolls arrangements present an opportunity for those who seek to manipulate the Rolls to do so at a time where little opportunity exists for the AEC to undertake the thorough checking required to ensure Roll integrity[127].

(ix) The fundamental issue was to prevent such fraud before it was able to occur. Failure to do so would amount to neglect[128].

(x) The change, along with the introduction of proof of identity and address measures for enrolment and provisional voting would ensure the Electoral Roll retained a high degree of accuracy and integrity, while reminding electors that the responsibility for ensuring that the Electoral Roll is updated in a timely manner rests with them[129].

Contentions and conclusions

73 The principal Commonwealth submissions in respect of validity, which assumed no relevant distinction between a disqualifying electoral law and a "procedural" electoral law, may be summarised as follows:

---

124 JSCEM Report at 35 [2.118].

125 JSCEM Report at 35 [2.119].

126 JSCEM Report at 35 [2.120].

127 JSCEM Report at 35 [2.121].

128 JSCEM Report at 35 [2.123].

129 JSCEM Report at 36 [2.126].

1. The issue in relation to the validity of the impugned provisions was in substance, according to the Commonwealth, whether their effect on the ability of some persons to cast a vote in an impending election was disproportionate to the end that they served. In light of the preceding discussion that submission is not controversial.

2. It was not a necessary condition of the validity of the impugned provisions, so the submission went, that there be evidence of a pre-existing mischief, such as electoral fraud, to which they were directed. That submission can be accepted. However the presence or absence of evidence of an existing mischief may be relevant in ascertaining whether the detriment imposed by a law which disentitles qualified persons from enrolment is disproportionate to the benefit to be derived in terms of the constitutional mandate.

3. The benefits derived from the earlier cut-off dates were said to include the smooth and efficient conduct of elections effected by:

   (i) enhancement of the accuracy of the Roll between elections by encouraging timely enrolment and updating;

   (ii) consequential saving of AEC resources otherwise spent on attempts to persuade people to enrol; and

   (iii) consequential reduction of the diversion of AEC resources into processing of late claims for enrolment and transfer.

   The possibility that the amendments could yield such benefits can be accepted.

4. The Constitution, it was submitted, has always allowed the executive a degree of control over the time that elapses between the announcement of an election and the issue of the writs. The impugned provisions, it was said, do not affect that power. That submission can also be accepted. However, a key difficulty in this case is that the impugned provisions remove a statutory grace period incapable of being affected by the executive discretion as to the timing of the announcement of the election.

5. The Commonwealth also submitted that, on the plaintiffs' argument, either the pre-1983 provisions were invalid or their validity was somehow conditioned upon executive practice. It is not clear that the plaintiffs' argument has that consequence. In any event, when attention is focussed, as it ought to be, upon the alterations effected by the law to existing opportunities to enrol and to update enrolment rather than the search for a baseline of validity, the Commonwealth's submission is beside the point.

6. The integrity of the Rolls was said to be enhanced by the impugned provisions in two ways:

   (i) ensuring that people who should be on the Roll are on it; and

   (ii) ensuring that people who should not be on the Roll are not included.

   The Commonwealth submitted that the latter aspect of the integrity of the Rolls is enhanced because the AEC would have more time to process enrolment applications before polling day. Again, these benefits may be accepted as outcomes to which the amendments are directed.

7. The Commonwealth submitted that differential effects of the impugned provisions on different sections of the community neither affect characterisation of the impugned provisions nor indicate a purpose of disenfranchising those sections. The defining characteristic of those excluded was said to be that they failed to comply with their obligations to enrol and effect transfer of their enrolments. In my opinion there is no basis for inferring any discriminatory purpose underlying the Amendment Act. Moreover, it is not necessary to the disposition of this case to consider the significance of the differential operation of the impugned provisions upon particular groups. This does not exclude the possibility that operational discrimination, effected by an electoral law, in relation to the acquisition and exercise of voting entitlements could be relevant to the validity of such a law.

8. The Commonwealth also contended that differential effects of the impugned provisions on people living in remote areas were simply one aspect of the difficulties that face people living in such areas and would not affect characterisation of the impugned provisions. The cut-off for itinerant and homeless people, it was said, had not been shown to impose a "significantly different burden" on them from that imposed on other persons. So much can be accepted but the effect of the earlier cut-off upon people living in remote areas and itinerant and homeless people is to be considered as one of the practical consequences of the impugned provisions.

74 The plaintiffs in reply to the Commonwealth contended that the statements made by the JSCEM in its report were not a substitute for evidence and could not establish a legitimate end for the impugned provisions when the material from independent authorities such as the AEC and the ANAO were to the contrary. This submission must be rejected. The rationale advanced by the JSCEM for amendment to the law was, in effect, incorporated by reference into the Second Reading Speech for the Amendment Act. To the extent that the purposes identified in the report fell within the scope of the constitutional mandate, it is

not a condition of the validity of the legislation that those recommendations were based upon findings or assumptions of fact. The ends identified by the JSCEM were legitimate in terms of the constitutional mandate. But for the reasons already given that conclusion does not end the inquiry as to validity.

75 Importantly, there was nothing to support a proposition, and the Commonwealth did not submit otherwise, that the impugned provisions would avert an existing difficulty of electoral fraud. Nor was there anything to suggest that the AEC had been unable to deal with late enrolments. Indeed, it had used the announcement of an election, coupled with the existence of the statutory grace period, to encourage electors to enrol or apply for transfer of enrolment in a context in which its exhortations were more likely to be attended to and taken seriously than at a time well out from an election.

76 The plaintiffs, in their submissions, pointed to existing mechanisms to ensure the integrity and accuracy of the Rolls. These included the CRU process, the RMANS Address Register and more stringent proof-of-identity requirements introduced in connection with the 2006 amendments and reflected in s 98AA of the CEA and regs 11A and 12 of the Electoral and Referendum Regulations 1940.

77 The constitutional legitimacy of measures calculated to ensure that people who are not entitled to vote do not vote was, of course, accepted by the plaintiffs. They pointed, however, to the absence of any evidence of the existence prior to the Amendment Act of a significant number of persons voting who were not entitled to vote. They contrasted that absence with the evidence of the effect of the impugned provisions in preventing an estimated 100,000 citizens from being enrolled or transferring their enrolment.

78 The legal effect of the impugned provisions is clear. They diminish the opportunities for enrolment and transfer of enrolment that existed prior to their enactment. These were opportunities that had been in place as a matter of law for eight federal elections since 1983. They were consistent with an established executive practice which provided an effective period of grace for nearly 50 years before 1983. The practical effect of the Amendment Act was that a significant number of persons claiming enrolment or transfer of enrolment after the calling of an election could not have their claims considered until after the election. That practical effect cannot be put to one side with the observation, which is undoubtedly correct, that those persons were so affected because of their own failures to claim enrolment or transfer of enrolment in accordance with their statutory obligations. The reality remains that the barring of consideration of the claims of those persons to enrolment or transfer of enrolment in time to enable them to vote at the election is a significant detriment in terms of the constitutional mandate. That detriment must be considered against the legitimate purposes of the Parliament reflected in the JSCEM Report. Those purposes addressed no compelling practical problem or difficulty in the operation of the

electoral system. Rather they were directed to its enhancement and improvement. In my opinion, the heavy price imposed by the Amendment Act in terms of its immediate practical impact upon the fulfilment of the constitutional mandate was disproportionate to the benefits of a smoother and more efficient electoral system to which the amendments were directed.

79 For the preceding reasons, I joined in the order made on 6 August 2010. I agree also that the application should be otherwise dismissed.

80 GUMMOW AND BELL JJ. This proceeding in the original jurisdiction of the Court was instituted on 26 July 2010, seven days after the issue of writs for a general election to be held on Saturday 21 August 2010. The first plaintiff, Ms Rowe, is an Australian citizen who attained the age of 18 years on 16 June 2010 and desires to vote in the general election. The second plaintiff, Mr Thompson, is an Australian citizen aged 23 who was enrolled to vote at an address in the Electoral Division of Wentworth in the State of New South Wales. In March 2010 he moved to an address in the Electoral Division of Sydney but, prior to 22 July 2010, did not advise the Australian Electoral Commission ("the Commission") and seek the transfer of his enrolment. He also wishes to vote at the general election and to do so in the Electoral Division of Sydney.

81 The second defendant is the Commonwealth of Australia and the first defendant the Electoral Commissioner, who is the chief executive officer of the Commission, pursuant to the provisions of the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act"). The Commission is established by s 6 of that statute.

82 The term "Elector" is defined in s 4(1) as a person whose name appears as an elector on an Electoral Roll. Part VI (ss 81-92) of the Electoral Act provides that there be a Roll of electors for each State and for each of the Territories (s 81), with a Roll for each Electoral Division for the election of a member of the House of Representatives[130], and for each Subdivision of an Electoral Division (s 82)[131]. A central feature of the system for the polling established by Pt XVI (ss 202A-245) of the Electoral Act is the receipt by the elector of a ballot paper and the marking of the vote in private (ss 231-233). The secrecy which attends this system makes the description "compulsory attendance" more appropriate than "compulsory voting", though the latter often is used. Part XVI also provides for provisional votes (s 235) and Pt XV (ss 182-200) provides for postal voting.

83 Amendments were made to the Electoral Act by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth) ("the 2006 Act")[132]. Each plaintiff would be entitled to vote at the pending

---

130 See definition of "Division" in s 4(1).

131 There are currently no Subdivisions in use. However, s 4(4) of the Electoral Act provides that where a Division is not divided into Subdivisions, a reference in the Electoral Act to a Subdivision shall be read as a reference to a Division.

132 The 2006 Act (Sched 1, Items 102-139) also repealed and substituted or amended provisions of the *Referendum (Machinery Provisions) Act* 1984 (Cth). No challenge is made by the plaintiffs to the validity of any of these provisions of the 2006 Act.

general election if named on the relevant Electoral Roll maintained under the Electoral Act (s 93(1), (2)). Neither plaintiff was so named on Monday 19 July 2010 when the writs for the general election were issued but both sought to rectify the position by claiming enrolment and transfer of enrolment, respectively, within the seven day period after the issue of the writs. Their claims would have been well made under the provisions of the Electoral Act as the statute stood before the 2006 Act. However, the provisions of the Electoral Act as they have stood since the amendments made by the 2006 Act, if they are valid, would operate to close the Electoral Roll against the plaintiffs pending the holding of the general election on 21 August 2010. The Roll closed at 8pm on Monday 19 July for claims to new enrolments and at 8pm on Thursday 22 July for claims to transfers of enrolment.

84 The evidence given for the Electoral Commissioner estimated that possibly as many as 100,000 claims for enrolment were in the same position as those made by the plaintiffs.

85 In this Court the plaintiffs sought to establish the invalidity of the repeal effected by the relevant provisions of the 2006 Act. By order of a Justice of this Court made on 29 July 2010 the proceeding was referred for further hearing by the Full Court on a Statement of Agreement Facts. At the hearing on 4 and 5 August 2010 the Attorney-General for the State of Western Australia intervened in support of the validity of the legislation.

86 At 12 noon on 6 August 2010 the Court, by majority, declared that certain Items[133] of Sched 1 to the 2006 Act are invalid. These Items were expressed to repeal particular provisions of the Electoral Act then in force. The effect of the declaration of invalidity is that those Items were ineffective to achieve that repeal so that the statute, as it stood before that ineffective repeal, has remained in force[134]. The Court ordered that the Commonwealth pay the costs of the plaintiffs.

87 The evidence on behalf of the Electoral Commissioner, and submissions by counsel, indicated that if the declaration were made by the Court on 6 August the expectation would be that the electronic roll referred to in s 111 of the Electoral Act would be completed by 18 August and the postal and provisional voting systems utilised as the need arose for the conduct of the polling on

---

133 Items 20, 24, 28, 41, 42, 43, 44, 45 and 52.

134 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 202-203 [96]-[97]; [2007] HCA 43.

21 August. Accordingly, and the contrary was not suggested, there was utility in the Court making the declaration on 6 August.

88 What follows are our reasons for joining in the making of that order.

The electoral structure

89 Further consideration of the circumstances giving rise to the litigation requires attention to several provisions of the Constitution and of the Electoral Act. Section 5 of the Constitution provides that by Proclamation the Governor-General may prorogue the Parliament and dissolve the House of Representatives and that after any general election the Parliament shall be summoned to meet not later than 30 days after the day appointed for the return of the writs.

90 Section 32 is an important provision for the setting of the steps in the conduct of a general election. It states:

> "The Governor-General in Council may cause writs to be issued for general elections of members of the House of Representatives.
>
> After the first general election, the writs shall be issued within ten days from the expiry of a House of Representatives or from the proclamation of a dissolution thereof."

Section 32 thus so operates that from one general election to another the period between the proclamation of a dissolution and the issue of the writs may vary, and with that variation, so also the period for an immediate appreciation by the public of the pendency of a general election. It appears that in 1914 the writs were issued on the same day as the proclamation of the dissolution, that this occurred again in 1983, and that on other occasions there have been longer intervals[135]. As will appear below, in the case of the general election called for 21 August 2010, the interval was that between Saturday 17 July and Monday 19 July.

91 In their submissions the plaintiffs sought to attach some stigma to the exercise of power by the Governor-General in Council under s 32 to achieve a shorter rather than a longer interval between proclamation of a dissolution and the issue of writs. That which the Constitution plainly permits cannot be a subversion of its operation. Any consideration of what is required of the Parliament in enacting legislation to provide for chambers "directly chosen by the

---

135 See *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 266; [1983] HCA 6.

people" must allow for the exercise by the executive of the authority conferred by s 32 in accordance with its terms.

92 Section 32 deals with general elections for members of the House. With respect to the Senate the issue of writs depends partly upon the Constitution and partly upon legislation. Section 12 of the Constitution relevantly states:

> "The Governor of any State may cause writs to be issued for elections of senators for the State."

The practice is for those Governors to fix times and polling places identical with those for elections for the House of Representatives, the writs for which having been issued by the Governor-General in Council under s 32 of the Constitution[136].

93 Section 43 of the Electoral Act requires that an election for the senators for the Australian Capital Territory and for the Northern Territory ("the Territories") be held at the same time as each general election. Section 13 of the Constitution provides a system for rotation of senators for the States and requires that an election to fill vacant places be held within one year before they become vacant and that the term of service of these senators begin on 1 July following the date of the election. The term of service of a senator for the Territories commences on the day of election and expires at the close of the day immediately before the polling day for the next general election (s 42 of the Electoral Act).

94 Section 151 of the Electoral Act states:

> "(1) The Governor-General may cause writs to be issued for elections of Senators for Territories.
>
> (2) The writs for the elections of Senators for Territories in accordance with section 43 shall be issued within 10 days from the expiry of the House of Representatives or from the proclamation of a dissolution of the House of Representatives."

In this way, s 151 of the Electoral Act, with respect to senators for the Territories, synchronises the system for the issue of writs with that prescribed by s 32 of the Constitution for general elections for members of the House of Representatives.

---

136 *Odgers' Australian Senate Practice*, 12th ed (2008) at 94.

95 Section 47 of the Constitution states:

> "Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises."

The Parliament makes such provision by Pt XXII (ss 352-381) of the Electoral Act, which establishes the Court of Disputed Returns. Section 361(1) requires that the Court not inquire "into the correctness of any Roll", although it may "inquire into the identity of persons, and whether their votes were improperly admitted or rejected, assuming the Roll to be correct".

96 It is this electoral structure, created partly by the terms of the Constitution itself and partly by legislation, which provided the foundation for the taking of the steps now described for the conduct of a general election for 21 August 2010.

The calling of the general election for 21 August 2010

97 On Saturday 17 July 2010, Her Excellency the Governor-General, acting under s 5 of the Constitution, issued a proclamation under the Great Seal of Australia, counter-signed by the Prime Minister. The proclamation prorogued the Parliament from 4.59pm on Monday 19 July 2010 until Saturday 21 August 2010 and dissolved the House of Representatives with effect at 5.00pm on Monday 19 July 2010[137].

98 On Monday 19 July 2010, Her Excellency the Governor of New South Wales, having assumed the administration of the government of the Commonwealth under s 4 of the Constitution[138] and acting as Administrator in Council pursuant to the Constitution and under the Electoral Act, issued writs for the election of members of the House of Representatives for the States and the Territories and for the election of senators for the Territories[139]. For the purposes of those elections Her Excellency fixed the following dates:

---

137 *Commonwealth of Australia Gazette*, S136, 19 July 2010.

138 *Commonwealth of Australia Gazette*, S137, 19 July 2010.

139 *Commonwealth of Australia Gazette*, S139, 20 July 2010.

For the close of rolls	22 July 2010
For the nominations	29 July 2010
For the polling	21 August 2010
For the return of the writs	On or before 27 October 2010

99 Section 152(1) of the Electoral Act stipulated that the writs fix the dates for the close of the Electoral Rolls maintained under that statute, and for the nomination, the polling and the return of the writ. Succeeding provisions space the times which may be fixed for each of these steps.

100 Item 52 of Sched 1 to the 2006 Act, the validity of which has been successfully challenged in this litigation, purported to insert a new s 155 into the Electoral Act which fixed the date for the closing of the Rolls as the third working day after the date of the relevant writ. Item 41, the validity of which also was successfully challenged, repealed s 102(4) and inserted provisions which required the deferral until after the election of claims to enrolment received during the period beginning at 8pm on the date of the writ, and of claims for transfer of enrolment received during the period beginning at 8pm on the date for the close of the Rolls.

101 Sections 156 and 175 provide for the closing of nominations at 12 noon not less than 10 days nor more than 27 days after the date of the writ. The date of polling must be a Saturday which is not less than 23 days nor more than 31 days after the date of nomination (ss 157 and 158). The writs must be returned not more than 100 days after issue (s 159). As already indicated, s 5 of the Constitution requires that the meeting of the new Parliament must occur not later than 30 days after the day appointed for the return of writs.

102 On 19 July 2010, that is to say on the same day as Her Excellency the Administrator issued writs for the election of members of the House of Representatives and for the Territory senators, Vice Regal representatives in each of the States fixed dates for the election of State senators[140]. The spacing of and the dates for the steps for each election, beginning with the issue of the writ,

---

140 *New South Wales Government Gazette*, SS93, 19 July 2010; *Victoria Government Gazette*, S286, 19 July 2010; *Queensland Government Gazette*, E101, 19 July 2010; *South Australian Government Gazette*, EG47, 19 July 2010; *Western Australian Government Gazette*, S140, 20 July 2010; *Tasmanian Government Gazette*, No 21 074, 19 July 2010.

corresponded with that already indicated for the election of members of the House of Representatives and senators for the Territories.

103 By force of s 152(2) of the Electoral Act and s 37 of the *Acts Interpretation Act* 1901 (Cth), the writs issued on 19 July 2010 were deemed to have been issued on that day at 6pm on the standard or legal time in the State or part of the Commonwealth in which they were issued.

104 The writs were addressed, as required by Sched 1 to the Electoral Act, to the Australian Electoral Officer for each State (in the case of State senators), the Australian Electoral Officer for each Territory (in the case of Territory senators) and the Electoral Commissioner (in the case of elections for the House of Representatives) and each commanded these officials to ensure that the election in question "be made according to law".

105 Provision for the offices held by these officials is made by Pt II (ss 5-38) of the Electoral Act. There is an Australian Electoral Officer for each State (s 20), and an Australian Electoral Officer for the Australian Capital Territory appointed for the purposes of each election (s 30). The Australian Electoral Officers for each State are subject to the directions of the Electoral Commissioner (s 20(1)). There is also a Divisional Returning Officer for each Division who is subject to the directions of the Electoral Commissioner and, in the case of each State, to the directions of the Australian Electoral Officer for the State (s 32).

106 The effect of the declaration made by this Court is that if the relevant officials are to ensure that the elections identified in the writs issued on 19 July are to "be made according to law" as the writs require, this must be on the footing that the date fixed for the close of the Rolls was not 22 July 2010, as stated in the writs, but seven days after the date of the issue of the writs.

107 Part XIX (ss 283-286) of the Electoral Act deals with the return of the writs after the ascertainment of the result of the relevant election. Section 285 provides for the remedy by proclamation of "errors" in the preparation of rolls, writs, ballot papers and voter lists. Section 286 empowers the person causing a writ to be issued to make provisions, by notice published in the *Gazette*, meeting any difficulty which might otherwise interfere with the due course of the election; any provision so made shall be valid and sufficient and any date provided in lieu of a date fixed by the writ shall be deemed to be the date so fixed.

Direct choice by the people, qualification of electors and method of choice – the Constitution

108 With respect to the Senate, s 7 of the Constitution stipulates that it:

> "shall be composed of senators for each State, directly chosen by the people of the State"[141].

With respect to the House, s 24 stipulates that it:

> "shall be composed of members directly chosen by the people of the Commonwealth".

109 Sections 8, 30 and 51(xxxvi) of the Constitution provide, subject to the Constitution, for the making by the Parliament of laws respecting the qualification of electors in Senate and House of Representatives elections. Sections 9, 31 and 51(xxxvi) of the Constitution provide, subject to the Constitution, for the making by the Parliament of laws respecting "the method of choosing" senators and members of the House of Representatives.

110 Part VII (ss 93-97) of the Electoral Act deals with qualifications for, and disqualifications from, enrolment and voting and Pt VIII (ss 98AA-112) with enrolment. The legislative scheme apparent in Pt VII and Pt VIII entwines the method adopted for the choice of representatives (a secret ballot of enrolled electors) with the necessary qualifications of electors with respect to such matters of status as age and citizenship. The provisions of the Electoral Act thus have a duplicate or sequential character.

111 The plaintiffs complain of "disenfranchisement" in the sense that by reason of the provisions of the 2006 Act they have been denied what otherwise would be the effect of their status as persons qualified to vote at the election on 21 August 2010. They also complain that while legislation of this character must be directed to the selection of members and senators who are chosen by the people, the provisions of the 2006 Act adopt a method which is not reasonably appropriate and adapted to serve the making of the electoral choice of which ss 9 and 31 of the Constitution speak.

112 The central submission by the plaintiffs is that the Parliament in choosing the means to achieve the integrity of the Roll necessary to give effect to popular

---

141 With senators representing the Northern Territory and the Australian Capital Territory, s 40(1) of the Electoral Act speaks of their being "directly chosen by the people of the Territory".

choice within the meaning of ss 7 and 24 of the Constitution must select a means which is no more than necessary to preserve that integrity and must not legislate to deny unreasonably the opportunity to enrol and vote.

113 The requirement for enrolment has been entwined with the requirements for status since the *Commonwealth Franchise Act* 1902 (Cth). Section 3 provided that subject to the provisions for disqualification in s 4, adults not under 21 years of age, who were natural born or naturalised subjects of the King and had lived in Australia for six months continuously, and who were enrolled, were entitled to vote.

114 Section 93 of the Electoral Act as it now stands selects from among the population all persons who are not disqualified and have attained 18 years of age and are either Australian citizens or members of a closed class of British subjects who were enrolled immediately before 26 January 1984; if enrolled they are entitled to vote.

115 While the course of the legislation since 1902 has conditioned the exercise of the franchise upon enrolment in the manner described, there has been significant change in the selection by the Parliament of those among the population who are to be taken to answer the constitutional expressions in ss 7 and 24 respectively "by the people of the State" and "by the people of the Commonwealth".

116 This reflects the development of Australian citizenship law, which in turn followed the emergence of national status with the winding-up of the Empire[142]. It also reflects changing views of the role in Australian society of young persons, even if still of secondary school age in many cases, who have attained the age of 18 years, in matters of the franchise as well as of testamentary and contractual competence, service in the armed forces, and the like.

The constitutional setting

117 By the tersely worded provisions of ss 7, 8, 9, 24, 30, 31 and 51(xxxvi), the Constitution was drawn with an appreciation of both past and future development of a democratic system of government representative of, and reflective of the wishes of, "the people". In the immediate past lay the development of representative government in the Australian colonies. This had

---

142 *Sue v Hill* (1999) 199 CLR 462 at 487-488 [51]-[52]; [1999] HCA 30; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 398-401 [2]-[7], 465-468 [222]-[234]; [2001] HCA 51; *Singh v The Commonwealth* (2004) 222 CLR 322 at 382 [149]-[150]; [2004] HCA 43.

two presently relevant aspects. The first was a rapid growth in the development of universal and uniform adult male suffrage divorced from property qualifications, and direct election for the lower houses of the legislatures[143]. In the United Kingdom, on the other hand, at the beginning of the 20th century, it was possible to distinguish seven species of franchise, those identified as the property, freemen, university, occupation, household, lodger and service franchises[144].

118 The second striking Australian development had been the adoption of the secret ballot as the method of choice for the exercise of the franchise. Indeed, the facilitation of popular election in the Australian colonies by secret ballot had been influential in the enactment in the United Kingdom of the *Ballot Act* 1872 (UK), ss 4 and 20. The House of Lords had been impressed by tabled reports by the Governor of Tasmania[145] and the Governor of South Australia[146] as to the "perfect tranquillity" of the conduct of such elections, and the "mitigating influence" of the ballot upon "the occurrence of popular excitement and the discussion of disturbing topics"[147]. By 1901 the secret ballot, or "Australian ballot" as it was known, had been adopted in 40 of the then 45 States of the United States of America as a response to bribery and intimidation associated with *viva voce* polling methods[148].

119 Quick and Garran wrote, with respect to the Senate[149]:

> "The principle of popular election, on which the Senate of the Commonwealth is founded, is more in harmony with the progressive instincts and tendencies of the times than those according to which the

---

143 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 194-195 [69].

144 Blewett, "The Franchise in the United Kingdom 1885-1918", (1965) 32 *Past and Present* 27 at 31.

145 Sir Charles Du Cane, Governor of Tasmania 1869-1874.

146 Sir James Fergusson, Governor of South Australia 1869-1873.

147 *House of Lords Debates*, 10 June 1872, vol 211, c1423.

148 "Elections", in *Encyclopaedia Britannica*, 10th ed (1902), vol XXVIII at 3.

149 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 418.

> Senate of the United States[150] and the Senate of Canada are called into existence. In the Convention which drafted the Constitution of the Commonwealth not a single member was found in favour of a nominated Senate. It was generally conceded, not only that a chamber so constituted would be of an obsolete type and repugnant to the drift of modern political thought, but that, as a Council of States, it would be an infirm and comparatively ineffective legislative body."

This emphasis by Quick and Garran (who dedicated their work to "the people of Australia") upon the progressive instincts and tendencies of modern political thought retains deep significance for an understanding of the text and structure of the Constitution.

120 It has been well said that one of the assumptions as to "traditional conceptions" upon which the Constitution was framed was the rule of law[151]. The law included not only the English common law which the colonies had received, and which, of its nature, can never be wholly static, but also the enacted law. What is of enduring and immediate significance is that, whatever else it involves, "the rule of law" posits legality as an essential presupposition for political liberty and the involvement of electors in the enactment of law. In the 19th century vast changes had been wrought by legislation influenced by the utilitarian movement associated with Jeremy Bentham, and the Constitution was framed in the belief that these "progressive instincts" would animate members of legislative chambers which were chosen by the people. By this means the body politic would embrace the popular will and bind it to the processes of legislative and executive decision making.

121 The significance of developments in the period before the adoption of the Constitution is further considered in the reasons of Crennan J, under the headings "Britain – 'chosen by the people'" and "The Australian colonies – 'chosen by the people'". We agree that the term "chosen by the people" had come to signify the share of individual citizens in political power by the means of a democratic franchise.

---

150 The Senate of the United States was elected by the State legislatures until direct election was provided with the proclamation in 1913 of the 17th Amendment to the Constitution; this speaks of election "by the people" of each State.

151 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193; [1951] HCA 5; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [31], 513 [103]; [2003] HCA 2.

122 The Constitution (ss 8 and 30) denied plural voting; this was then a subject of continuing debate in the United Kingdom, where it has been estimated that in 1911 there were probably more than 500,000 plural voters, some seven percent of the electorate[152]. However, subject to s 41[153], the Constitution left for provision to be made by the Parliament what were then thorny issues of the female franchise and racial disqualification[154]. These matters of qualification for the franchise and of the methods of choice to be made by the electors were, by s 51(xxxvi), left by the Constitution, in the phrase used by Barwick CJ in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[155], to "the confidence reposed" in the Parliament. But legislative development always was to be overseen by the imperative of popular choice found in ss 7 and 24 of the Constitution.

123 One result is explained in the following passage from the reasons of Gleeson CJ in *Roach v Electoral Commissioner*[156]:

> "In *McKinlay*[157], McTiernan and Jacobs JJ said that 'the long established universal adult suffrage may now be recognised as a fact'. I take 'fact' to refer to an historical development of constitutional significance of the same kind as the developments considered in *Sue v Hill*. Just as the concept of a foreign power is one that is to be applied to different circumstances at different times, McTiernan and Jacobs JJ said that the words 'chosen by the people of the Commonwealth' were to be applied to different circumstances at different times. Questions of degree may be involved. They concluded that universal adult suffrage was a long established fact, and that anything less could not now be described as a choice by the people. I respectfully agree. As Gummow J said in *McGinty v Western Australia*[158], we have reached a stage in the evolution

---

152 Blewett, "The Franchise in the United Kingdom 1885-1918", (1965) 32 *Past and Present* 27 at 46.

153 See *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254.

154 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 195 [70].

155 (1975) 135 CLR 1 at 25; [1975] HCA 53. See also *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 380-381 [88]; [1998] HCA 22.

156 (2007) 233 CLR 162 at 174 [7].

157 (1975) 135 CLR 1 at 36.

158 (1996) 186 CLR 140 at 286-287; [1996] HCA 48.

> of representative government which produces that consequence. I see no reason to deny that, in this respect, and to this extent, the words of ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote."

His Honour continued:

> "That, however, leaves open for debate the nature and extent of the exceptions. The Constitution leaves it to Parliament to define those exceptions, but its power to do so is not unconstrained. Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people[159]. To say that, of course, raises questions as to what constitutes a substantial reason, and what, if any, limits there are to Parliament's capacity to decide that matter."

With respect to the provisions of the 2006 Act which were held invalid in *Roach*, Gleeson CJ concluded[160]:

> "The step that was taken by Parliament in 2006 of abandoning any attempt to identify prisoners who have committed serious crimes by reference to either the term of imprisonment imposed or the maximum penalty for the offence broke the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people."

124 With respect to the method of choice adopted by the Electoral Act in its form since the 2006 Act, the statement by Isaacs J in *Kean v Kerby*[161] is appropriate:

> "For centuries parliamentary elections were conducted by open voting. Freedom of election was sought to be protected against intimidation, riots, duress, bribery, and undue influence of every sort. Nevertheless it was found necessary to introduce the ballot system of voting. *The essential point to bear in mind in this connection is that the ballot itself is only a*

---

159 cf *McGinty v Western Australia* (1996) 186 CLR 140 at 170 per Brennan CJ.

160 (2007) 233 CLR 162 at 182 [24].

161 (1920) 27 CLR 449 at 459; [1920] HCA 35.

> *means to an end, and not the end itself.* It is a method adopted in order to guard the franchise against external influences, and the end aimed at is the free election of a representative by a majority of those entitled to vote. Secrecy is provided to guard that freedom of election." (emphasis added)

125 Authorities including *McKinlay*[162], *McGinty v Western Australia*[163], *Langer v The Commonwealth*[164] and *Mulholland v Australian Electoral Commission*[165] indicate that the authority placed in the Parliament by s 51(xxxvi) of the Constitution carries a considerable measure of legislative freedom as to the method of choice of the members of the Parliament. The first two of these cases concerned the methods for distribution of electors between Electoral Divisions, the third the method of marking ballot papers and the proscription of the distribution of material encouraging electors to vote informally, and the fourth the naming on ballot papers of political parties only if they were registered parties. In *Langer*[166], McHugh J observed that a member is "chosen by the people" even if elected by a system which requires electors to indicate a preference between multiple candidates or, indeed, if elected unopposed.

126 Nevertheless, the method for the conduct of the ballot is not an end in itself but the means to the end indicated in ss 7 and 24 of the Constitution, namely the election of legislative chambers "directly chosen by the people" of the respective States (in the case of the Senate) and of the Commonwealth (in the case of the House). The secret ballot of enrolled electors is the method chosen by the Parliament to give effect to the franchise of qualified electors. Hence the statement by the Court in *Snowdon v Dondas*[167] that the importance of maintaining unimpaired the exercise of the franchise need hardly be stated.

The method of choice and the Electoral Act

127 As noted above when outlining the relevant provisions of the Constitution, s 93 of the Electoral Act deals with the entitlement of persons to enrolment and to vote. The scheme of the section is to identify those "entitled to enrolment"

---

162 (1975) 135 CLR 1.

163 (1996) 186 CLR 140.

164 (1996) 186 CLR 302; [1996] HCA 43.

165 (2004) 220 CLR 181; [2004] HCA 41.

166 (1996) 186 CLR 302 at 341.

167 (1996) 188 CLR 48 at 71; [1996] HCA 27.

(s 93(1)). The plaintiffs are both qualified, being Australian citizens who have attained 18 years of age and are not otherwise disqualified. Entitlement to vote is then limited to electors whose names are on the relevant Roll (s 93(2)). Provision is also made for enrolment from outside Australia (s 94A) and the eligibility of spouses, de facto partners and children of eligible overseas electors (s 95), and for persons identified as itinerant electors (s 96).

128 Section 102 prescribes the steps to be taken by the Electoral Commissioner upon receipt of a claim for enrolment or transfer of enrolment. Section 106 provides for the removal from the Roll of persons securing enrolment by a false statement; the removal may be made at any time between the date of issue of the relevant writ and the close of polling.

129 Section 245(1) states that it "shall be the duty of every elector to vote at each election". This legislatively stated duty furthers the constitutional system of representative government by popular choice. The duty is supported by s 245(15), which renders an elector who fails to vote at an election guilty of an offence.

130 Enrolment of qualified persons is encouraged by s 101, which deals with compulsory enrolment and compulsory transfer of enrolment. The section imposes a criminal sanction for failure to comply within 21 days of entitlement to placement upon the Roll for any Subdivision of an Electoral Division, whether by way of initial enrolment (as in the case of the first plaintiff) or by way of transfer of enrolment (as in the case of the second plaintiff).

131 However, common experience suggests a range of causes of human conduct, beyond careless disregard of civic responsibility, which may lead to untimely enrolment or transfer of enrolment. Hence, s 101(7) is an important provision in this compulsory system. A provision to this effect was first introduced by s 28 of the *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth) ("the 1983 Act"). Section 101(7) provides:

> "Where a person sends or delivers a claim for enrolment, or for transfer of enrolment, to the Electoral Commissioner, proceedings shall not be instituted against that person for any offence against subsection (1) or (4) committed before the claim was so sent or delivered."

The plaintiffs are in that position, having made late claims, and proceedings may not be instituted against them for any offence under s 101.

132 The validity of the forerunner of the compulsory voting requirement in s 245[168] was upheld in *Judd v McKeon*[169]. Isaacs J referred to the phrase "method of choosing" in s 9 of the Constitution and concluded that a method of choosing which involves compulsory voting is valid so long as it preserves the freedom of choice of possible candidates[170]. His Honour also said[171]:

> "[Parliament] may demand of a citizen his services as soldier or juror or voter. The community organized, being seised of the subject matter of parliamentary elections and finding no express restrictions in the Constitution, *may properly do all it thinks necessary to make elections as expressive of the will of the community as they possibly can be*." (emphasis added)

The above statement by Isaacs J in *Judd* is consistent with the point earlier made by Isaacs J in *Kean v Kerby*[172] and set out above, namely that the legislative selection of the ballot system of voting and provisions for the efficacy of that system is not an end in itself but the means to the end of making elections as expressive of the will of the majority of the community as proper practical considerations permit. It is that understanding which explains the force of the phrase "directly chosen by the people" in ss 7 and 24 of the Constitution, and is determinative of the issues in this litigation.

133 That expression of community will cannot be expected to be wholly effective and the phrase "chosen by the people" in ss 7 and 24 of the Constitution must be read so as to allow for this. Where the legislatively selected method of choice is a compulsory ballot of enrolled electors it is to be expected that there will be no perfect correspondence between those enrolled and those otherwise enfranchised. Further, the efficacy of the administrative means available to facilitate the composition and accuracy of the Roll will depend upon the

---

168 Section 128A, added by s 2 of the *Commonwealth Electoral Act* 1924 (Cth). Compulsory voting had been required for the "conscription" plebiscites conducted during World War I: *Wong v The Commonwealth* (2009) 236 CLR 573 at 583-584 [27]-[30]; [2009] HCA 3. Compulsory enrolment had been introduced by s 7 of the *Commonwealth Electoral Act* 1911 (Cth).

169 (1926) 38 CLR 380; [1926] HCA 33.

170 (1926) 38 CLR 380 at 385.

171 (1926) 38 CLR 380 at 385.

172 (1920) 27 CLR 449 at 459.

resources made available by the legislation and the assistance given by changes in technology.

134 Section 111 of the Electoral Act (first introduced by s 35 of the 1983 Act as s 51A and later renumbered) provides for the use by the Commission of computer records relating to the Roll. In contrast, s 33 of the *Commonwealth Electoral Act* 1902 (Cth) had required State police officers, among others, to furnish information for the preparation and revision of lists of all persons qualified or entitled to be enrolled; using these means, almost two million names were entered on the Roll in 1903, some 96 percent of the adult population[173].

135 Since 1999 the Commission has maintained the Roll by a process of data-matching authorised by s 92 of the Electoral Act and referred to as Continuous Roll Update or "CRU". Between June 1980 and June 2008 there was an increase in enrolments from 8.9 million persons to 13.8 million persons, and the net average increase in enrolment was 173,000 people per annum. This was significantly lower than the estimated 195,000 growth per annum in the estimated number of resident citizens based on census data.

136 With respect to the accuracy of the entries on the Rolls, a report upon the integrity of the Electoral Roll, made in 2002 by the Australian National Audit Office under the leadership of the Auditor-General[174], found that instances of opportunistic fraud (rather than systemic or widespread fraud), such as that which had occurred in a Queensland State by-election in 1996, were such as to be unlikely to affect the outcome of federal elections[175].

137 The resources of the Commission have been applied particularly in encouraging, by advertising and other methods, additional enrolments in the period immediately before general elections. The prompt processing of enrolments is assisted by a computerised Roll Management System conducted by the Commission and known as "RMANS". In 2007, by reason of the changes made by the 2006 Act shortening the period for the closing of the Rolls, the

---

173 Sawer, "Enrolling the People: Electoral Innovation in the New Australian Commonwealth", in Orr, Mercurio and Williams (eds), *Realising Democracy*, (2003) 52 at 52-53.

174 Section 15 of the *Auditor-General Act* 1997 (Cth) provides for the conduct of performance audits of bodies including the Commission and for the tabling of the report in each House of the Parliament.

175 Commonwealth, Auditor-General, *Integrity of the Electoral Roll: Australian Electoral Commission*, Audit Report No 42 2001-02, 18 April 2002 at 33-34.

Commission could not rely on the strategic approach it had used in previous elections of starting intensive advertising once an election had been called on the basis that there was a regime for a guaranteed seven day period before the closing of the Rolls.

138 The plaintiffs make no complaint that were it not for the changes made by the 2006 Act, the Electoral Act would not adopt means appropriate and adapted to the choice by the people of senators and members of the House.

139 It was s 45 of the 1983 Act which introduced the provision later renumbered as s 155. The text is set out below and provided that the date fixed for the close of the Rolls was to be seven days after the date of the relevant writ. Previously, s 45 of the Electoral Act had required that claims for enrolment or transfer of enrolment received after 6pm on the day of the issue of the writ for an election were not to be registered until after the close of polling. That provision was repealed by s 29 of the 1983 Act and replaced by what was later renumbered as s 102(4), which is set out below.

140 Two things are to be said respecting this legislative history. The first is that the plaintiffs make no challenge to the seven day period. It may be that developments in technology and availability of resources will support the closure of the Rolls at a date closer to election day. But this is a matter of speculation and inappropriate for further consideration here. An implication running through the submissions presented against the plaintiffs by the Commonwealth and Western Australia was that if the changes made by the 2006 Act which are challenged by the plaintiffs are invalid, then the same principles would require that the seven day period provisions they replaced also be invalid, and the plaintiffs must fail because they challenged only the 2006 Act changes. There is no self-evident contradiction in the plaintiffs' case. Whether the pre-2006 Act seven day system operated to disqualify substantial numbers of electors for what then was no substantial reason in the constitutional sense does not answer the claim made by the plaintiffs respecting the 2006 Act.

141 The second point is that in the period before the 1983 Act when the legislation required early closure of the Rolls, no challenge was made to its validity. The reasons for that state of affairs again are a matter for speculation.

142 Before further proceeding in these reasons something should be said of the facts.

Late enrolments

143 The particular operation of the enrolment provisions of the Electoral Act upon the two plaintiffs conveniently appears from pars 5-8 of the Notice dated 26 July 2010 which has been given under s 78B of the *Judiciary Act* 1903 (Cth):

"5. The First Plaintiff was not on the roll on the date that the Writs were issued, but is entitled to enrol pursuant to ss 93 and 99(1) of the Act and required to lodge a claim to enrol pursuant to s 101 of the Act. After 8pm on Monday 19 July, but before 8pm on Monday 26 July 2010, the First Plaintiff applied to have her name added to the roll pursuant to s 101(1) of the Act.

6. Section 102(4) of the Act has the effect that the Divisional Returning Officer, who pursuant to s 32(1) of the Act is subject to the direction of the First Defendant, cannot consider the First Plaintiff's claim to enrol to vote until after the Election. Thus the First Plaintiff cannot have her name added to the roll until after the Election. Section 102(4) will thus prevent the First Plaintiff from voting in the Election.

7. The Second Plaintiff was on the roll for the Division of Wentworth on the date that the writs were issued, thus entitling him to vote in relation to that Division. However, on the date that the writs were issued, the Second Plaintiff resided at a different address, entitling him to be on the roll for the Division of Sydney. After 8pm on Thursday 22 July 2010, but before 8pm on Monday 26 July 2010, the Second Plaintiff applied to transfer his enrolment pursuant to s 101(1) of the Act.

8. Sections 102(4AA) and s 155 of the Act have the effect that the Divisional Returning Officer, who pursuant to s 32(1) of the Act is subject to the direction of the First Defendant, cannot consider the Second Plaintiff's claim to transfer his enrolment until after the Election. Thus the Second Plaintiff will not have his name transferred to the roll for Sydney until after the Election. Sections 102(4AA) and 155 will thus prevent the Second Plaintiff from voting in the Election in the Subdivision in which he resides."

144 Before the commencement of the 2006 Act, s 102(4) of the Electoral Act read:

"A claim under section 101 by a person to have his or her name placed on the Roll for a Subdivision received during the period commencing at 8 pm on the day on which the Rolls for an election to be held in the Subdivision close and ending on the close of polling at the election shall not be considered until after the expiration of that period."

The date for the closing of the Rolls was prescribed by s 155 as follows:

> "The date fixed for the close of the Rolls shall be 7 days after the date of the writ."

145 The plaintiffs asserted in particular the invalidity of the repeal of s 102(4) and s 155 by the 2006 Act: Sched 1, Items 41 and 52. Item 52 repealed s 155 and substituted:

> "**Date for close of Rolls**
>
> (1) The date fixed for the close of the Rolls is the third working day after the date of the writ.
>
> Note: However, generally names are not added to or removed from the Rolls after the date of the writ.
>
> (2) In this section:
>
> ***working day*** means any day except:
>
> (a) a Saturday or a Sunday; or
>
> (b) a day that is a public holiday in any State or Territory."

Item 41 repealed s 102(4) and substituted:

> "(4) If a claim by a person for enrolment under section 101 (other than a claim that is taken, by subsection 99B(6), to be made under section 101) is received during the period:
>
> (a) beginning at 8 pm on the date of the writ or writs for an election for the Division to which the claim relates; and
>
> (b) ending at the close of the polling at the election;
>
> then the claim must not be considered until after the end of the period.
>
> (4AA) If a claim by a person for transfer of enrolment under section 101, or a claim that is taken, by subsection 99B(6), to be made under section 101, is received during the period:
>
> (a) beginning at 8 pm on the date of the close of the Rolls for an election for the Division to which the claim relates; and

(b) ending at the close of the polling at the election;

then the claim must not be considered until after the end of the period.

(4AB) A claim that is taken, by subsection 100(2), to be made under section 101:

(a) is to be treated in accordance with subsection (4AA) if the claim is made by a person who will turn 18 years old during the period:

(i) beginning at 8 pm on the date of the writ or writs for an election for the Division to which the claim relates; and

(ii) ending at the end of the polling day for the election; and

(b) otherwise – is to be treated in accordance with subsection (4)."

The plaintiffs complain in particular of the new ss 102(4) and 102(4AA), and of the new s 155.

146 Items 20, 24 and 28 of Sched 1 to the 2006 Act made changes to similar effect to the provisions dealing respectively with enrolment from outside Australia (s 94A(4)), the eligibility of spouses, de facto partners and children of eligible overseas electors (s 95(4)), and itinerant electors (s 96(4)). The Commonwealth accepted that if the provisions immediately affecting the plaintiffs be invalid then the remaining Items would be invalid by parity of reasoning or as inseverable from invalid provisions. Hence attention will be directed in these reasons first to the provisions immediately affecting the plaintiffs.

147 The agreed facts show that with respect to the general elections conducted in 1993, 1996, 1998 and 2001, the numbers of enrolments (and re-enrolments) and transfers of enrolment in the period between the issue of the writs and the closing dates for claims to enrol or transfer were, respectively, 377,769; 376,904; 355,189 and 373,732; and that the total enrolments were, respectively, 11,348,967; 11,655,190; 12,056,625 and 12,636,631. For the 2004 general election there were 423,993 enrolment transactions before the Rolls closed and 168,394 claims were lodged after they closed. For the 2007 election, when the changes made by the 2006 Act were in operation, there were 279,469 enrolment transactions before the Rolls closed and 100,370 claims lodged after they closed.

148 Day by day data on enrolment transactions in the period from the issue of the writs for the 1998 and 2001 general elections showed that the number of new claims and re-enrolments increased daily during the then applicable seven day period (except on Saturday and Sunday) and 50 percent of claims were made on the last day.

149 With respect to the general election called for 21 August 2010, approximately 508,000 claims were received between the announcement of the election and the current deadlines of 8pm on the day of issue of the writs (for new enrolments) and 8pm on the day of the close of the Rolls (in the case of transfers and other applications). As already noted, a large number of claims were received after these deadlines but within a seven day period from the date of the writs, the date for the close of the Rolls before the 2006 Act.

Validity

150 The Commonwealth accepts, as it must, that the authority of the Parliament to make laws with respect to the qualification of electors and the conduct of elections is subject to the constraints respecting popular choice placed upon its legislative power by ss 7 and 24 of the Constitution.

151 The Commonwealth also accepts that in assessing the validity of the provisions in the 2006 Act of which the plaintiffs complain regard is to be had not only to their legal but also to their practical operation. This, indeed, is what the authorities require[176]. The Commonwealth further accepts that if the legal or practical operation of a law is to disqualify adult citizens from enrolling, and thus from exercising their franchise, the consistency of that law with ss 7 and 24 of the Constitution is to be determined in accordance with the reasoning in *Roach*[177].

152 However, the Commonwealth submits that "viewed in context" the impugned provisions of the 2006 Act do not erect a disqualification from the franchise. To that end, the Commonwealth characterises the challenged provisions of the 2006 Act as in neither legal nor practical effect going "beyond matters of procedure". The distinction between matters of substance and those of procedure is recognised in various areas of the law, principally those concerned with the conduct of litigation, statutory interpretation, and classification for

---

176 *Ha v New South Wales* (1997) 189 CLR 465 at 498; [1997] HCA 34; *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 121 [197]; [2006] HCA 52.

177 (2007) 233 CLR 162.

choice of law purposes. But, as was said in *John Pfeiffer Pty Ltd v Rogerson*[178], one of the guiding principles for any distinction between substantive and procedural matters is that:

> "matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure".

153 The procedures in the challenged provisions of the 2006 Act apply to the ballot system, which is not an end in itself, but as stressed earlier in these reasons, the means adopted by the Parliament to make elections expressive of popular choice. Further, the Electoral Act is so drawn as to give these provisions substantive consequences for the exercise of the franchise.

154 The interrelation, already described, between the requirements for enrolment and those for voting entitlement is such that failure to comply with the former denies the exercise of the latter by persons otherwise enfranchised. In this way, the method of choice adopted by the legislation fails as a means to what should be the end of making elections as expressive of the popular choice as practical considerations properly permit. The requirements operate to achieve disqualification in the sense used in *Roach*.

155 The Commonwealth seeks to avoid this conclusion by first fixing upon the legal operation of the provisions of the 2006 Act. The Commonwealth points to the legal operation of the legislation in what it submits are but limited and exceptional cases. Persons who attain the age of 18 between the issue of the writs and polling day, or who are due to be granted citizenship in that period, will not be able to secure enrolment and entitlement to vote at the election unless they have made use of the early claim procedures in s 100 and s 99B respectively. With respect to transfers of enrolment, those who change their address in the month before the issue of writs and for whom the one month requirement (in s 99(2)) for the new residence expires between the three and seven day period will not be able to transfer their enrolment.

156 As to the first two of these three groups, the Commonwealth submits that their disqualification is the result of their failure to use the early claim procedures. The situation of the third group is said to be the inevitable consequence of any cut-off date with respect to transfers.

157 However, with respect to these three groups of adult citizens there will be disenfranchisement, and arguments that these groups are but limited or

---

178 (2000) 203 CLR 503 at 543 [99]; [2000] HCA 36.

exceptional cases are no answer unless the consideration upon which the Commonwealth relies supplies a substantial reason in the sense used in the reasons of the two majority judgments in *Roach*.

158 It is unnecessary to decide whether a substantial (and therefore sufficient) reason for disqualification of members of the three groups by this legal operation of the 2006 Act is the placing of permissible "cut-off" points for the operation of the enrolment system. This is because of the scope of the practical operation of the legislation to disqualify the plaintiffs and large numbers of other electors. That many persons are stimulated to claim enrolment or transfer only upon awareness of the start of the particular electoral cycle is a phenomenon that was well apparent before the enactment of the 2006 Act. And, after all, there are estimated to be some 100,000 persons in the present position of the plaintiffs.

159 The Commonwealth submits that the practical operation of the 2006 Act upon persons such as the plaintiffs is met by the existence of the prior opportunity and obligation under s 101 to claim enrolment and transfer. Western Australia also draws a distinction between those eligible but excluded, despite doing everything open to them to exercise the franchise, and those, such as the plaintiffs, who fail to comply with the prescribed method of exercising the franchise. However, as explained earlier in these reasons, with particular reference to the requirement in s 101(7) that proceedings not be instituted where a late claim for enrolment or transfer has been made, the obligation to claim enrolment and transfer is designed to facilitate maximum participation in the electoral process of those otherwise qualified to vote, not to support disenfranchisement.

160 The position then is reached that the 2006 Act has the practical operation of effecting a legislative disqualification from what otherwise is the popular choice mandated by the Constitution. It is no sufficient answer, as Western Australia submits, that *Roach* is not reached because the disqualification does not apply to those who have promptly enrolled or claimed transfer of enrolment and only applies to those who have failed to do so, and this state of affairs is the product of permissible legislative choice. Rather, the relevant starting point is to ask whether, *at the time when the choice is to be made by the people*, persons otherwise eligible and wishing to make their choice are effectively disqualified from doing so.

161 If so, the question then becomes whether, as Gleeson CJ put it in *Roach*[179], there has been broken the rational connection necessary to reconcile the

---

179 (2007) 233 CLR 162 at 182 [24].

disqualification with the constitutional imperative, and whether, as Gummow, Kirby and Crennan JJ put it in the same case[180]:

> "Is the disqualification for a 'substantial' reason? A reason will answer that description if it be reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government. When used here the phrase 'reasonably appropriate and adapted' does not mean 'essential' or 'unavoidable'[181]. Rather, as remarked in *Lange*[182], in this context there is little difference between what is conveyed by that phrase and the notion of 'proportionality'. What upon close scrutiny is disproportionate or arbitrary may not answer to the description reasonably appropriate and adapted for an end consistent or compatible with observance of the relevant constitutional restraint upon legislative power."

162 The Commonwealth accepts that formulation of principle in the joint reasons. In doing so the Commonwealth did not seek to elevate the notion of "proportionality" to a distinct criterion of legislative validity. In his reasons in *Roach*[183] Gleeson CJ saw a danger in uncritical translation into Australian constitutional law, as a criterion of validity, of the concept of proportionality as understood in other systems. Earlier, in the *Industrial Relations Act Case*[184], consideration was given to the power of legislative implementation of treaties; Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ remarked[185]:

> "It has been said that a law will not be capable of being seen as appropriate and adapted in the necessary sense unless it appears that there is 'reasonable proportionality' between that purpose or object and the

---

180 (2007) 233 CLR 162 at 199 [85].

181 See the discussion of the subject by Gleeson CJ in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200 [39]-[40].

182 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 fn 272; [1997] HCA 25.

183 (2007) 233 CLR 162 at 178-179 [17]. See also *Leask v The Commonwealth* (1996) 187 CLR 579 at 594-595 per Brennan CJ, 600-601 per Dawson J, 615-616 per Toohey J, 624 per Gummow J; [1996] HCA 29.

184 *Victoria v The Commonwealth* (1996) 187 CLR 416; [1996] HCA 56.

185 *Industrial Relations Act Case* (1996) 187 CLR 416 at 487-488.

> means adapted by the law to pursue it[186]. The notion of 'reasonable proportionality' will not always be particularly helpful. The notion of proportion suggests a comparative relation of one thing to another as respects magnitude, quantity or degree; to ask of the legislation whether it may reasonably be seen as bearing a relationship of reasonable proportionality to the provisions of the treaty in question appears to restate the basic question. This is whether the law selects means which are reasonably capable of being considered appropriate and adapted to achieving the purpose or object of giving effect to the treaty, so that the law is one upon a subject which is an aspect of external affairs."

163 Their Honours also noted that the legislative power conferred by s 51(xxix) had a "purposive aspect" where the validity of a law depended upon its purpose or object of treaty implementation[187]. So also s 51(xxxvi) may be said to be "purposive" in the sense of facilitating the method of choice by qualified electors. In neither case is the notion of proportionality a free standing criterion for assessment of validity, and the Commonwealth did not submit that it was so.

164 The Commonwealth, however, submits that the existence of a "mischief" represented by some existing level of electoral fraud is not a prerequisite for the establishment of a "substantial" reason for disenfranchisement. This is said to be because a measure does not travel beyond that which is reasonably appropriate and adapted to serve the end of choice by the people within the meaning of ss 7 and 24 of the Constitution "merely because its motivation is prophylactic rather than reactive".

165 With respect to that motivation, the Commonwealth refers to passages in the majority Report of the Joint Standing Committee on Electoral Matters of the Parliament[188]. Paragraphs 2.121-2.123 stated:

> "2.121 The Committee also agrees that the current close of roll arrangements present an opportunity for those who seek to manipulate the roll to do so at a time where little opportunity exists for the [Commission] to undertake the thorough checking required ensuring roll integrity.

---

186 *Richardson v Forestry Commission* (1988) 164 CLR 261 at 311-312; [1988] HCA 10.

187 *Industrial Relations Act Case* (1996) 187 CLR 416 at 486-487.

188 Commonwealth, Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, September 2005 at 35.

> 2.122 The Committee believes that those who argue for the retention of the seven day close of rolls and who promote the argument that there is no proof that enrolment fraud is sufficiently widespread to warrant any action, have missed the point.
>
> 2.123 The fundamental issue facing this Committee is to prevent any such fraud before it is able to occur. Failure to do so would amount to neglect."

This majority Report was referred to in general terms in the Minister's second reading speech on the Bill for the 2006 Act[189]. The minority opinion in the Report included the following[190]:

> "The [Commission] has never said that it cannot handle the volume of applications received during the seven-day period before the rolls close. In fact it has said that the seven-day period does not prevent it taking adequate measures to prevent fraudulent enrolment. The [Commission] continues its checks into the integrity of the roll in the period following the closing of the rolls to ensure people are eligible to vote, and also after the rolls close (evidence of Mr Paul Dacey, 5 August 2005). The removal of the seven-day period would therefore have little qualitative impact on the integrity of the roll.
>
> More broadly, there is no evidence that fraudulent enrolment exists on any measurable scale or has ever influenced the outcome of any federal election. No witness or submission to this Inquiry produced evidence of fraudulent enrolment."

166 It is, as Mason J emphasised in *R v Toohey; Ex parte Northern Land Council*[191], incontestable that the motives which inspire legislators are not relevant in the determination of validity. Accordingly, the term "motivation" in the submissions by the Commonwealth is better understood as used in the sense of legislative purpose. As noted above, s 51(xxxvi) of the Constitution may be described as purposive in the sense that it is facilitative of the particular method

---

189 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 December 2005 at 19.

190 Commonwealth, Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, September 2005 at 360-361.

191 (1981) 151 CLR 170 at 225-226; [1981] HCA 74.

of choice to be employed by qualified electors. Enrolment fraud is addressed by s 106 of the Electoral Act, to which reference has been made in these reasons. Whether a particular measure goes beyond the constraints which ss 7 and 24 of the Constitution place upon s 51(xxxvi) cannot depend upon the purpose attributed to the Parliament in enacting that measure. In particular, the requirement in *Roach* that any disqualification be for a substantial reason cannot be answered simply by what may appear to have been legislative purpose.

167 A legislative purpose of preventing such fraud "before it is able to occur", where there has not been previous systemic fraud associated with the operation of the seven day period before the changes made by the 2006 Act, does not supply a substantial reason for the practical operation of the 2006 Act in disqualifying large numbers of electors. That practical operation goes beyond any advantage in preserving the integrity of the electoral process from a hazard which so far has not materialised to any significant degree.

Conclusions

168 The declaration made in this case on 6 August 2010 is supported by these reasons, which largely were prepared during the pendency of the general election held on 21 August 2010 and are expressed accordingly. The plaintiffs also sought mandamus. There is no requirement for such relief, given the evidence for the Commissioner to which reference has been made. The reasoning of this Court upon the issue of invalidity has binding force in the general sense described in *Pape v Federal Commissioner of Taxation*[192].

169 An order should now be made otherwise dismissing the application.

---

192 (2009) 238 CLR 1 at 69 [158]; [2009] HCA 23.

170 HAYNE J. Each plaintiff is an Australian citizen who has attained the age of 18 years. Each is entitled[193] to be enrolled on an Electoral Roll under the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"). If enrolled, each is entitled[194] to vote at elections of senators for the State (or Territory[195]) in which she or he resides, and at elections of members of the House of Representatives for the Subdivision[196] in which she or he resides.

171 Each plaintiff is not simply *entitled* to be enrolled and vote. Each is bound[197] to claim enrolment on the appropriate roll. If enrolled, each is bound[198] to vote. Failure to perform either obligation is an offence[199].

172 Neither plaintiff made the requisite claim when obliged to do so. Neither plaintiff made that claim before the time fixed under the Act for making (in the case of the first plaintiff) a claim for new enrolment, or (in the case of the second plaintiff) a claim for transfer of enrolment, that would be given effect for the purposes of the federal election to be held on 21 August 2010. There are many who were eligible to enrol as electors but who did not make a claim for new enrolment, and many others who did not make a claim for transfer of enrolment, when they were bound to do so.

173 On Saturday, 17 July 2010, the Prime Minister announced that an election would be held on 21 August. Writs for the election were issued on the following Monday, 19 July 2010. More than 500,000 claims for enrolment were received

---

193 *Commonwealth Electoral Act* 1918 (Cth) ("the Act"), s 93(1).

194 s 93(2).

195 s 97.

196 Section 56 of the Act provides for each State and the Australian Capital Territory to be distributed into Electoral Divisions. By operation of s 55A the reference in s 56 to a State includes a reference to the Northern Territory. Section 57 provides that one member of the House of Representatives is to be chosen for each Division. Although Pt V of the Act provides for the Electoral Commission to divide a Division into Subdivisions, that has not been done. Entitlement to enrol is, however, expressed in s 99 in terms of residence in and enrolment for a Subdivision. Section 4(4) provides that where a Division is not divided into Subdivisions, references to a Subdivision are to be read as referring to the Division.

197 s 101(1).

198 s 245.

199 ss 101(4), 245(15).

after the election announcement on 17 July and before the start of periods fixed by s 102(4) and (4AA) of the Act as periods during which applications for new enrolment or transfer of enrolment may not be considered for the purposes of that election. Many others who were eligible to enrol did not make a claim before the relevant period began but made claims within seven days after the writs had issued.

174 The exact number of those who made claims after the cut-off dates fixed by the Act, but within seven days after the writs had issued, is not known. The evidence filed for the Electoral Commissioner suggested that the number may be about 100,000, but went on to say that there is a "considerable margin of uncertainty in that estimate". Be this as it may, it may reasonably be assumed that there are many who were eligible to enrol, or required to transfer enrolment, who made a claim after the times fixed by the Act. It also may reasonably be assumed that many of these persons are young people who have turned 18 since the last election, and that many are young people who have moved since becoming enrolled for a particular Division. But as these reasons will later show, the fact that many affected by the cut-off dates are young people is not relevant to the constitutional issues that arise.

175 The period fixed by s 102(4) of the Act, as the period during which claims for new enrolment may not be considered, begins at 8 pm on the date of the writ or writs for an election for the Division to which the claim relates, and ends at the close of polling at the election. The period fixed by s 102(4AA) of the Act, as the period during which claims for transfer of enrolment may not be considered, begins at 8 pm on the date of the close of the rolls (fixed by s 155(1) as the third working day after the date of the writ) and ends at the close of polling at the election. For the 2010 election, the periods began at 8 pm on Monday, 19 July 2010 (in the case of claims for new enrolment), and 8 pm on 22 July 2010 (in the case of claims for transfer of enrolment).

176 By a proceeding commenced in the original jurisdiction of this Court, claiming declaration and mandamus, the plaintiffs alleged that the provisions of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth) ("the 2006 Act"), by which what are now ss 102(4), 102(4AA) and 155 were inserted in the Act, are invalid. They alleged that an election conducted under the conditions prescribed by these provisions will not yield Houses of the Parliament that answer the description in ss 7 and 24 of the Constitution: "directly chosen by the people".

177 The plaintiffs submitted that, the present provisions of ss 102(4), 102(4AA) and 155 being invalid, the provisions of the Act as they stood before the introduction of the impugned provisions by the 2006 Act are engaged. As the Act stood before the amendments made by the 2006 Act, s 102(4) provided that claims for enrolment (whether new enrolment or transfer of enrolment) received during the period commencing at 8 pm on the day on which the rolls for an

election close, and ending on the close of polling at the election, were not to be considered until after the expiration of that period. Section 155 of the Act, as it then stood, provided that the date fixed for the close of the rolls was seven days after the date of the writs. Each plaintiff made her or his claim less than seven days after the date writs were issued for the election to be held on 21 August.

178 Reduced to its essentials, the plaintiffs' argument was that cutting off consideration of claims for new enrolment or transfer of enrolment seven days after the date of the issue of the writs for a federal election is valid, but cutting off consideration of claims for new enrolment at 8 pm on the day the writs issue, and consideration of claims for transfer of enrolment at 8 pm on the third working day after the date of the writs, is not. An election conducted according to the former scheme was said to yield Houses of the Parliament "directly chosen by the people"; an election conducted according to the provisions introduced by the 2006 Act, it was said, will not. Accordingly, the plaintiffs claimed a declaration that the provisions of the 2006 Act which inserted ss 102(4), 102(4AA) and 155 of the Act (as now in force) are invalid, and mandamus directed to the first defendant, the Electoral Commissioner, requiring the Commissioner to consider the claim for new enrolment made by the first plaintiff and the claim for transfer of enrolment made by the second plaintiff.

179 On it being pointed out in oral argument that the submissions made by the plaintiffs appeared to entail that other provisions of the 2006 Act are invalid and that it is evidently undesirable that the Electoral Commissioner, required to conduct the election to be held on 21 August "according to law", should be left uncertain about the validity of those other provisions, the plaintiffs, without objection from the Commonwealth or the Electoral Commissioner, amended their claim to seek a wider declaration.

180 On 6 August, the Court made a declaration of the kind sought by the plaintiffs in their amended application. In my opinion, the proceedings should have been dismissed. What follows are my reasons for that opinion.

181 The reasons will be seen to comprise two distinct parts: first, identification of the relevant constitutional question and consideration of why that question should be answered against the plaintiffs, and second, consideration of the questions which the plaintiffs said should be addressed and why those questions should also be answered against the plaintiffs. The first hinges about the constitutional phrase "directly chosen by the people". The second focuses upon the notion of "reasonably appropriate and adapted".

Identifying the relevant question

182 As is apparent from what has already been said in these reasons, I would describe the relevant question as: whether the impugned provisions will yield

Houses of the Parliament "directly chosen by the people". That description of the question depends upon a number of intermediate steps that should be exposed.

183 The Constitution provides for the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State to apply "as nearly as practicable" to elections of senators for the State (s 10) and elections in the State of members of the House of Representatives (s 31). Those provisions of ss 10 and 31 are engaged, in each case, "[u]ntil the Parliament otherwise provides, but subject to this Constitution". Section 51(xxxvi) gives the Parliament legislative power with respect to matters in respect of which the Constitution makes provision until the Parliament otherwise provides. That power is limited by the requirements of ss 7 and 24. Hence the question is whether the particular provisions made by ss 102(4), 102(4AA) and 155 travel beyond the limits of the power that is given by s 51(xxxvi) in its operation with respect to ss 10 and 31, because an election conducted in accordance with the Act, including those provisions, would not yield Houses that meet the constitutional description.

184 Much of the argument proceeded on the footing that the question just identified should be approached according to a two-stage inquiry founded on what was said in the plurality reasons in *Roach v Electoral Commissioner*[200]. The Commonwealth, in its submissions, described those two stages in the following way. First, is there a "disqualification from what otherwise is adult suffrage"? That is, does the impugned law detract in some significant way from the existence of a franchise that is held generally by adult citizens? Second, is that disqualification not "for a substantial reason"? A reason was said[201] by the plurality in *Roach* to be "substantial" "if it be reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government". But, as the plurality further pointed out[202], "reasonably appropriate and adapted", in the context then under consideration, did not mean "essential" or "unavoidable".

185 It should be said immediately that this case is significantly different from *Roach*, and that there can be no automatic application of what was said in *Roach* to this case. Any application of what was said there must always be linked to constitutional bedrock[203]: the requirement that each House meet the constitutional description.

---

200 (2007) 233 CLR 162; [2007] HCA 43.

201 (2007) 233 CLR 162 at 199 [85].

202 (2007) 233 CLR 162 at 199 [85].

203 cf (2007) 233 CLR 162 at 198 [82].

186 The decision in *Roach* concerned the validity of provisions disqualifying otherwise eligible persons from voting. There being a disqualification of persons who fall within the "people" identified in ss 7 and 24, the relevant question, identified in the plurality reasons[204] in *Roach*, was whether the disqualification was for a "substantial" reason. If there was no substantial reason for disqualifying from voting some of those who constitute "the people" by whom the two Houses of the federal Parliament are to be "directly chosen", it is evident that the law disqualifying those persons from voting went beyond the power given by s 51(xxxvi) in its operation with respect to s 30 (and thus s 8) that permits the Parliament to provide for the qualification of electors.

187 By contrast, the present case is not concerned with the qualification of electors. The starting point for the present proceedings is that each plaintiff is entitled to enrol and, if enrolled, is entitled to vote. This case concerns whether the impugned provisions impermissibly interfere with the exercise of those entitlements. And because the focus of attention is upon what is said to be an impermissible interference with the exercise of an entitlement, it is unhelpful and distracting to pose the issue, as the plaintiffs did, by using terms like "disenfranchise", "disentitle" or "exclude". Those terms obscure the fact that the plaintiffs had the right to enrol or transfer enrolment and were bound to do so, but through their own inaction submitted their claims after the dates fixed by the impugned provisions.

Question begging premises

188 In framing the inquiries that are to be made in deciding whether an election conducted in accordance with the Act (and in particular, the impugned provisions) would not yield Houses that meet the constitutional description, care must be taken to avoid circular reasoning. Inquiries must not be framed in a way that dictates the answers that will be given to them. There are at least three different ways in which that danger emerged in this matter.

189 The first relates to the use of what was said in *Roach*. If the first of the inquiries made by the plurality in *Roach* is to be translated and applied in this case, it is important to recognise that the immediate issue is not just: "Can the plaintiffs enrol?" The question is more complex. It has a temporal element. This case asks whether the plaintiffs, who could and should have claimed enrolment or transfer of enrolment earlier, can have their claim considered after the time fixed by the Act for the cut-off of consideration of claims. Terms like "disenfranchisement", "disentitlement" and "exclusion" mask the relevant temporal dimension to the question.

---

204 (2007) 233 CLR 162 at 199 [85].

190 Secondly, the inquiries to be made, in deciding whether an election conducted in accordance with the Act would not yield Houses that meet the constitutional description, inevitably invite comparison between the impugned provisions and the law as it stood before the 2006 Act. But it is not to be assumed that the law, as it stood before the 2006 Act, was constitutionally *required*. The plaintiffs contended, and neither the Commonwealth nor Western Australia intervening disputed, that the law as it stood before the 2006 Act was constitutionally valid. But that does not demonstrate that the previous law was constitutionally required.

191 To assume that the previous law was constitutionally required would be to assume the answer to the fundamental question in issue. It would assume that answer because the law as it stood before the 2006 Act (which required the Electoral Commissioner to consider claims lodged up to seven days after the writs had issued) would be constitutionally required (as distinct from valid) only if such a system were necessary to yield Houses meeting the constitutional description. But that is the very question for decision in this case. And, of course, the same error is made if argument proceeds (as much of the plaintiffs' argument did) from the premise that the electoral legislation must permit (or may not deny or inhibit) enrolment at any time before the last reasonably available time before polling day. The premise (whether framed positively or negatively) is flawed: it assumes the answer to the question at issue in this case.

192 Thirdly, consideration of Ch I of the Constitution, and ss 7 and 24 in particular, shows that Ch I provides for a system of representative government. It will be necessary to return in some detail to that subject. For present purposes, the point to be made is that the expression "a system of representative government" must find its relevant content in the text and structure of the Constitution. The expression (which is not used in the Constitution) is a useful description of the general nature of the form of government for which the Constitution (and Ch I in particular) provides. But the expression cannot be erected as a premise for argument about what the Constitution permits or forbids if its content is derived from sources other than the Constitution.

193 Although, as explained earlier, the question of validity of the impugned provisions turns upon the content that is given to the expression "directly chosen by the people" it is desirable to begin by considering some of what has been said by this Court about the system of representative government established by the Constitution.

Representative government

194 In *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[205], the Court (by majority) held that s 24 of the Constitution does not require that the number of people or the number of electors in electoral divisions for the House of Representatives be equal. The argument that was rejected in *McKinlay* was founded upon the requirement of s 24 that members of the House of Representatives be "directly chosen by the people of the Commonwealth". Gibbs J said[206] that "[i]f the words of s 24 are read in their natural sense, without seeking for implications or hidden meanings, they appear to have nothing whatever to do with the determination of electoral divisions within a State". In his Honour's opinion[207], the Court's duty was "to declare the law as enacted in the Constitution and not to add to its provisions new doctrines which may happen to conform to our own prepossessions". He warned of the perils of circular reasoning, saying[208] that:

> "The argument that equality of numbers within electoral divisions is an essential concomitant of a democratic system, so that in any constitution framed upon democratic principles it must have been intended to guarantee that electorates would so far as practicable contain an equal number of people or of electors, is simply incorrect – *it begs the question and ignores history*." (emphasis added)

He continued[209]:

> "No doubt most people would agree that for the healthy functioning of a democratic system of government it is desirable that the electorate should be fairly apportioned into electoral districts whose boundaries are not gerrymandered, that the ballots should be secretly and honestly conducted, that the vote should be fairly counted and that corrupt electoral practices should be suppressed, but opinions may well differ as to how these ideals should be attained. *The Constitution does not lay down particular guidance on these matters; the framers of the Constitution trusted the Parliament to legislate with respect to them if necessary*, no doubt remembering that in England, from which our system of representative

---

205 (1975) 135 CLR 1; [1975] HCA 53.

206 (1975) 135 CLR 1 at 43.

207 (1975) 135 CLR 1 at 44.

208 (1975) 135 CLR 1 at 45.

209 (1975) 135 CLR 1 at 46.

government is derived, democracy did not need the support of a written constitution." (emphasis added)

195 Recognition that the Constitution provides for a system of representative government underpinned the series of decisions[210] of the Court that culminated in *Lange v Australian Broadcasting Corporation*[211]. But in none of those cases was it necessary to examine whether the form of representative government for which the Constitution provides requires a particular form of electoral system. What was in issue in that series of decisions was the way in which the system of government worked. More particularly, did constitutional prescription of a system of representative government entail or imply a degree of freedom of communication that limited legislative power, or required some relevant development of the common law? In that context, the notion of representative government was relevantly and sufficiently expressed at a very high level of abstraction. For those purposes, its central conception is sufficiently articulated by the use of the constitutional expression "directly chosen by the people" in connection with the election of all members of both Houses of the legislature. No more particular question about the form of representative government, let alone the form of electoral system, needed to be considered in order to arrive at the conclusions expressed in that stream of authority.

196 In *McGinty v Western Australia*[212], this Court explored the content to be given to the term "representative government" when it is said that Ch I of the Constitution provides for such a system of government. All members of the Court concluded[213] that the Constitution contained no implication affecting disparities of voting power among the holders of the franchise for the election of members of a State Parliament. Several members of the Court examined what is conveyed by reference to "representative government" in connection with the federal Constitution.

---

210 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; [1992] HCA 46; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; [1992] HCA 45; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; [1994] HCA 46; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; [1994] HCA 45. See also *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39.

211 (1997) 189 CLR 520; [1997] HCA 25.

212 (1996) 186 CLR 140; [1996] HCA 48.

213 (1996) 186 CLR 140 at 175-176 per Brennan CJ, 184, 189 per Dawson J, 206-210 per Toohey J, 216 per Gaudron J, 229-230, 245, 251 per McHugh J, 293 per Gummow J.

197 Three members of the majority (Brennan CJ, Dawson and McHugh JJ) expressly discountenanced[214] the proposition that "representative democracy" or "representative government" is a valid premise for argument about the permissible content of the federal electoral system. The fourth member of the majority in *McGinty*, Gummow J, said[215] that "[t]o adopt as a norm of constitutional law the conclusion that a constitution embodies a principle or a doctrine of representative democracy or representative government (a more precise and accurate term) is to adopt a category of indeterminate reference". It was accepted that the "principle" or "doctrine" identified can at best provide a premise for argument about the form of electoral system that entails[216] "a wide range of variable judgment in interpretation and application". While it was said[217] that, of itself, this may not be open to objection, difficulties were foreseen as arising when "the wide range for variable judgment depends upon, or at least includes as a significant element, matters primarily or significantly of political weight".

198 One important source of the difficulty that attends using "representative government" (or "representative democracy") as a premise for reasoning in the present matter is that the Constitution says so little about the way in which representative government is to be implemented. As was observed in *McGinty*[218], the Constitution prescribes only four elements of representative government. First, there is the requirement of s 24 that members of the House of Representatives be directly chosen by the people of the Commonwealth (and of s 7 that senators be directly chosen by the people of the relevant State). Second, s 24 ties the number of members of the House of Representatives to the number of senators. Third, s 24 relates the number of members chosen in the several States "to the respective numbers of their people". And fourth, s 24 provides that "five members at least shall be chosen in each Original State". But beyond these last three provisions, the whole notion of representative government, as it is expressed in the Constitution, is found in the use of the phrase "directly chosen by the people" in both ss 7 and 24.

---

214 (1996) 186 CLR 140 at 169 per Brennan CJ, 182-183 per Dawson J, 244 per McHugh J.

215 (1996) 186 CLR 140 at 269 (footnote omitted).

216 (1996) 186 CLR 140 at 269-270.

217 (1996) 186 CLR 140 at 270.

218 (1996) 186 CLR 140 at 275-276 per Gummow J.

199 It follows, as Gummow J rightly pointed out in *McGinty*[219], that "[t]he phrase in s 24 'directly chosen by the people of the Commonwealth' is a broad expression to identify the requirement of a popular vote". It also follows, as Gummow J again rightly pointed out in *McGinty*[220], that the phrase used in s 24 (and I would add the like phrase used in s 7) is not to be dissected in a way that would give the words "chosen by the people" an operation distinct from s 24 (or s 7) as a whole[221].

200 Because the constitutional prescription of a form of representative government is as spare as it is, and so much is left for the Parliament to provide, it is inevitable that there are changes in the way in which the notion of representative government is given effect at the federal level. More particularly, the Parliament being given power to prescribe the method of choosing senators (s 9), and power to provide for electoral divisions (s 29), the qualification of electors for the House (s 30), and the law relating to elections for the Senate (s 10) and for the House (s 31), there can be change in each of those aspects of the features that go to make up a system of representative democracy. The limit on those powers lies in the overarching requirements of ss 7 and 24 that the Houses be "directly chosen by the people". But, as was said in *Mulholland v Australian Electoral Commission*[222], "care is called for in elevating a 'direct choice' principle to a broad restraint upon legislative development of the federal system of representative government".

201 In hindsight, the changes that have been made to the federal electoral system since federation may be described as evolutionary. It may be that hindsight would permit the observer to describe the changes as moving generally in a direction that represents a "development" of the particular form of representative government that is practised or established in Australia. It may also be observed that the trend of development has been to include more and more in the classes of persons who may, and now should, turn out to vote at federal elections. The introduction of a uniform federal franchise, the introduction of compulsory enrolment and then compulsory voting, the inclusion of Aboriginal Australians, first among those eligible and then among those bound to enrol and vote, and the lowering of the minimum age for enrolment from 21 years to 18 years, can all take their place in such an analysis.

---

219 (1996) 186 CLR 140 at 279.

220 (1996) 186 CLR 140 at 279.

221 cf the dissenting opinion of Murphy J in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 68-69.

222 (2004) 220 CLR 181 at 237 [156]; [2004] HCA 41.

202 All of these developments demonstrate the correctness of the observation[223] "that representative government is a dynamic rather than a static institution and one that has developed in the course of [the twentieth] century". And it is through the Parliament's power to legislate with respect to these matters that "the Constitution continues to speak to the present and allows for development of the institution of government by changes which may not have been foreseen a century ago or, if foreseen by some, were not then acceptable generally"[224].

203 Neither of these observations, however, permits, let alone requires, the further conclusion that it is the Constitution which has "developed" or that the concept of "representative government" has developed or evolved into a constitutional norm. A conclusion of that kind could be founded only in the text or structure of the Constitution. And because the very premise for the observed processes of development is that the Constitution is silent about those matters, leaving it to the Parliament to undertake the processes of development, that further step cannot be taken. There is no textual or structural foundation for it. Rather, as Gummow J rightly said[225] in *McGinty*:

> "It does not follow from the prescription by the Constitution of a system of representative government that a voting system with a particular characteristic or operation is required by the Constitution. *What is necessary is the broadly identified requirement of ultimate control by the people, exercised by representatives who are elected periodically.* Elements of the system of government which were consistent with, albeit not essential for, representative government might have been constitutionally entrenched or left by the Constitution itself to the legislature to provide and modify from time to time. This is what was done." (emphasis added)

204 "Representative government" was regarded by many nineteenth century writers as "the Ideally Best Form of Government"[226]. Their works were familiar to the framers of the Constitution and to those in the Parliament who debated the Bill for what became the *Commonwealth Electoral Act* 1902 (Cth) ("the 1902 Act"). The enduring controversies about electoral systems (reflected, for example, in the application of the Hare-Clark system in Tasmania) as well as the

---

223 *McGinty v Western Australia* (1996) 186 CLR 140 at 280 per Gummow J.

224 *McGinty* (1996) 186 CLR 140 at 281 per Gummow J (footnote omitted).

225 (1996) 186 CLR 140 at 285.

226 Mill, *Considerations on Representative Government*, (1861), Ch III, "That the Ideally Best Form of Government is Representative Government".

course of debates in the Parliament in connection with the Bill for the 1902 Act show, however, that no one writer's views about representative democracy were seen as commanding the field. It is not right in those circumstances to see the provisions of Ch I of the Constitution, with their important but spare specification of the system of government, as embracing the views of any one of those writers, be it John Stuart Mill or anyone else. To read Ch I in that way denies the evident constitutional intention to permit the Parliament to decide many important questions about the structure and content of the electoral system *without* constitutional restriction beyond the requirement that each House be directly chosen by the people. To assume otherwise is, as Gibbs J said[227] in *McKinlay*, to beg the question and ignore history, or it is, as his Honour also said[228], to add to the Constitution's provisions "new doctrines which may happen to conform to our own prepossessions".

205 Consideration of whether each House, if elected according to mechanisms that include the impugned provisions, will meet the constitutional requirement necessitates examination of what is meant by "directly chosen by the people". It also requires consideration of the place that the relevant cut-off dates have in the whole scheme of arrangements made by the Act for enrolment and voting. It will be necessary to say something further about both of those matters. Before doing that, however, I should identify some features of the plaintiffs' arguments.

The plaintiffs' arguments

206 As already noted, the plaintiffs' argument was directed to establishing first, that the cut-off dates "disqualified" them from exercising their franchise as adult Australian citizens, and second, that the "disqualification" was for no "substantial" reason. The plaintiffs went so far as to submit that their "disqualification" was properly described as "capricious", but the weight of their argument was placed on the proposition that the "disqualification" was not reasonably appropriate and adapted to the end of yielding Houses of the Parliament that would meet the constitutional description of "directly chosen by the people".

207 The plaintiffs accepted that the Act could prescribe a cut-off date for consideration of claims for new enrolment and for transfer of enrolment. That is, the plaintiffs accepted that prescription of a cut-off date could be a measure reasonably appropriate and adapted to the end identified, and further accepted that the particular prescriptions made after the 1983 election were of that kind.

---

227 (1975) 135 CLR 1 at 45.

228 (1975) 135 CLR 1 at 44.

The plaintiffs' acceptance of those propositions reveals features of their arguments which should be identified.

208 First, their claim that the cut-off provisions made by the 2006 Act are invalid does not depend upon how many are affected. The facts agreed by the parties did not establish that allowing a longer period for last minute compliance necessarily results in fewer missing the cut off, and more being correctly enrolled. At the last election before the 2006 Act introduced the impugned provisions, 168,394 people lodged claims for enrolment and transfer after the close of rolls; in 2007, the equivalent number was about one-third smaller: 100,370.

209 Secondly, prescription of any cut-off date before polling day will inevitably mean that some will miss the cut off. The Court was enjoined, more than once, to recognise that it is human nature for some (it was said especially the young) to leave compliance with obligations to the last minute. And if that is right, some, like the plaintiffs, will leave compliance until after the time appointed, whatever that time may be.

210 It follows that, when the plaintiffs submitted that the impugned provisions are not reasonably appropriate and adapted to serve an end consistent or compatible with the maintenance of the constitutionally prescribed system of government, the "end" that the plaintiffs identified must be expressed in such a way that it connotes maximum participation in the poll by those who are eligible to be enrolled. As will be seen, however, there is no foundation for identifying maximum participation as an element of the constitutionally prescribed system of government.

"Directly chosen by the people"

211 The phrase "directly chosen by the people", when used in ss 7 and 24 of the Constitution, conveys a number of ideas. It is neither necessary nor appropriate to attempt to explore all aspects of the meaning that is to be attributed to the phrase.

212 It is not to be doubted, however, that consideration of whether members and senators are "directly chosen by the people" requires examination of the laws that govern not just the franchise, but also enrolment to vote, and the exercise of the right of an enrolled elector to cast his or her vote. *Roach* was a case about the first kind of issue: laws that govern the franchise, or what s 30 of the Constitution calls "the qualification of electors". This case is not. This case concerns enrolment to vote.

213 The members of each House of the Parliament are elected on a franchise which, subject to exceptions that are not engaged in respect of the plaintiffs, is a universal adult franchise embracing all "the people of the Commonwealth"

spoken of in s 24, and all "the people of the State" referred to in s 7. That some who are enrolled to vote, and therefore entitled and bound to vote, do not cast a ballot at an election does not deny that the elected members of each House of the Parliament are "directly chosen by the people". That some who are bound to enrol do not enrol, and therefore do not vote, does not deny that the members of each House are "directly chosen by the people". The plaintiffs' argument was that the absence from the appropriate roll of some, who (belatedly) claimed their entitlement to be on that roll, does mean that the members of each House are not directly chosen by the people. Such a conclusion would be sharply at odds with the recognition that neither the failure to vote by some entitled to vote, nor the failure to claim enrolment by some entitled to enrol, leads to that conclusion.

214 History teaches that, in some countries, registration and voting systems have been devised and administered in ways that have systematically disadvantaged particular groups in the society. But the plaintiffs' complaint in the present case was not of that kind. Rather, the plaintiffs' complaint was directed to the consequences that follow from the impartial administration of the Act in accordance with its terms. And it was a complaint that hinged about the observation that they, and others in like case, cannot cast a vote in this election, in the Division in which they live, because they have not complied with their statutory obligations. They observed that these consequences of non-compliance with the Act fall chiefly upon the young. They did not say, however, that that fact leads to any relevant constitutional consequence or engages any relevant constitutional principle.

215 The plaintiffs' complaint directed attention to what would happen in connection with this election, as opposed to what was lawfully permitted and required to happen in connection with the election. That is, it was said to be constitutionally significant that tens of thousands of persons, who were eligible and required to enrol and vote, had not taken the steps necessary to enable them to vote, in the Division in which they reside, at the election.

216 A necessary step in the plaintiffs' argument that the impugned provisions are invalid was to observe that they, and others in like case, had only a very short time to respond to the stimulus of an election announcement by claiming enrolment, or a transfer of enrolment. They submitted that they should have had a longer time to respond to that particular stimulus. That there were other stimuli to enrolment was dismissed as not to the point. Making it an offence not to enrol forthwith was treated as not a sufficiently effective stimulus. Recognition that few federal elections have been called without a great deal of prior media discussion and speculation about what date will be fixed was treated as irrelevant. The plaintiffs' submissions hinged about the proposition that nothing but a Prime Ministerial announcement fixing the date for an election could sufficiently stimulate those who had not enrolled or transferred enrolment to do what they were legally bound to do.

217 What will in fact happen at this election (as distinct from what not only could but *should* have happened, had the Act been obeyed) bears upon whether each House is "directly chosen by the people" only if that phrase directs attention to the number of persons who actually vote at an election and requires that that number be as large as possible. Or, restating the same proposition in words used in the course of argument, what will happen at this election bears upon satisfaction of the constitutional requirements only if ss 7 and 24 at least connote, if not require, that there be "maximum participation" by the people. There are several reasons why that view of "directly chosen by the people" should not be adopted.

218 First, it is necessary to recognise the distinction between factual participation of "the people" in an election, and the legal opportunity for "the people" to participate in an election. The former idea requires consideration *only* of what has occurred, or will likely occur, at one or more particular elections. It attaches no significance to the observation that the failure to enrol is an offence. By contrast, the latter requires examination of the legal framework within which those events occur. In particular, it requires examination of the legal and practical operation of the relevant statutory provisions. The former is the field of political science and behavioural analysis. The latter is the field of constitutional law.

219 Second, it is necessary to recognise that compulsory voting was not, and was not seen as, a necessary corollary of ss 7 and 24 generally, or of the particular constitutional description of the Houses as "directly chosen by the people", when the Constitution first took effect. Compulsory voting was not introduced until 1924[229]. When introduced, the validity of compulsory voting was challenged but upheld by this Court in *Judd v McKeon*[230]. The introduction of compulsory voting was seen by all members of the Court in that case[231] as a matter for the Parliament to decide, not as a matter of constitutional necessity. And of course none of the transitional electoral provisions picked up from the States and applied by ss 10 and 31, "[u]ntil the Parliament otherwise provide[d]", required compulsory voting or compulsory enrolment.

220 Third, recasting the plaintiffs' argument as a complaint that the impugned provisions unreasonably deny them the opportunity to enrol and vote puts all the weight of their argument on the content that is given to the word "unreasonably".

---

229 *Commonwealth Electoral Act* 1924 (Cth), s 2, inserting s 128A in the Act.

230 (1926) 38 CLR 380; [1926] HCA 33.

231 (1926) 38 CLR 380 at 383 per Knox CJ, Gavan Duffy and Starke JJ, 385 per Isaacs J, 387 per Higgins J, 390 per Rich J.

But whatever content is given to that word, the proposition assumes, without demonstration, that the electoral legislation must permit (that is, it must not deny or inhibit) enrolment at any time before the last *reasonably* available time. And as explained earlier in these reasons, that premise is flawed because it assumes the answer to the question at issue. Moreover, the notion that there was an "unreasonable" denial of the *opportunity* to enrol when the plaintiffs (and others in like case) have had not just the opportunity, but the obligation, to do so forthwith upon becoming entitled to claim enrolment or transfer of enrolment is, on its face, logically and legally unsound. It could have a legal basis only if the Constitution requires maximum participation, and there is no textual or other sufficient foundation for that conclusion.

221 Only if the system of representative government for which the Constitution provides has now changed or developed into either a system where compulsory enrolment and voting are constitutionally essential elements of the system, or a system where the Parliament must maximise the opportunity to enrol and vote, would the necessary premise of the plaintiffs' argument (that the Constitution requires that the electoral law must facilitate and promote *maximum* participation by the people) be made good. The only textual way in which that could be done would be by reading "directly chosen by the people" in ss 7 and 24 as now requiring maximum participation, or by drawing some wider implication from the observation that those provisions require a system of representative government. For the reasons given earlier in discussing what is meant by "representative government", that step cannot and should not be taken. What has changed and developed since federation is the way in which successive Parliaments have exercised the power given by the Constitution to give practical operation to a system of representative government of which only the broadest outlines are fixed by the Constitution. The constitutional requirements have not altered. The provisions of ss 7 and 24, whether generally or in their use of the phrase "directly chosen by the people", have not taken on any different, or more prescriptive, meaning as a result of the various steps taken by successive Parliaments to adjust the electoral system.

222 That is not to say, of course, that maximum participation in the electoral process cannot readily be seen as a desirable civic value and as a worthy legislative objective. But whether and to what extent it is pursued is a choice which the Constitution confides to the Parliament. It is through legislation of the Parliament that the democratic system of government has developed, not by attributing a new and different meaning to the exiguous constitutional text.

223 There is no constitutional foundation for the plaintiffs' arguments. Neither s 7 nor s 24, with their use of the expression "directly chosen by the people", requires the Parliament to establish or maintain an electoral system which will *maximise* the participation of eligible electors. Neither s 7 nor s 24, alone or in combination with the provisions of Ch I, or the Constitution more generally, provides for a system of representative government in which there can be no

fixing of the rolls of eligible electors at, or very soon after, the issue of the writs to begin the electoral process. An election conducted in accordance with the impugned provisions would yield Houses of the Parliament "directly chosen by the people".

224 Although these are reasons enough to conclude that the plaintiffs' proceeding failed, it is as well to go on to consider some more particular aspects of their arguments. As noted earlier in these reasons, the plaintiffs put their case by reference to the two inquiries described in *Roach*: is there a disqualification from what otherwise is adult suffrage; is the disqualification not for a substantial reason?

225 As already explained, there is no disqualification from what otherwise is adult suffrage. The plaintiffs were not barred or inhibited from exercising their entitlement to enrol and vote. Through their own inaction and failure to perform their obligations they claimed enrolment or transfer of enrolment after the due date. They left their claim until *after* the "last minute". There being no disqualification, the second question posed in *Roach*, about no substantial reason, does not arise. It is, nonetheless, desirable to consider it. To do that, it is necessary to make a more detailed examination of the historical and legislative context in which the issues in the present litigation are tendered for decision.

The historical and legislative context

226 Since the enactment of s 8 of the *Commonwealth Electoral Act* 1911 (Cth) inserting s 61C in the 1902 Act, enrolment to vote at federal elections has been compulsory. As enacted, s 31 of the 1902 Act provided that all persons qualified to vote at a federal election were qualified to have their name on the appropriate roll. The *Commonwealth Franchise Act* 1902 (Cth) provided (with some exceptions that need not be considered) that all British subjects resident in Australia for six months continuously, who had attained the age of 21 years, and whose names were on an Electoral Roll, were entitled to vote. Although enrolment was not compulsory in 1902, the first federal Electoral Rolls saw more than 95 per cent of eligible voters enrol. And in some States the numbers on those first federal Electoral Rolls exceeded the numbers on the State Rolls.

227 Compulsion to enrol necessarily has two consequences. First, a time for compliance with the obligation must be fixed. Second, consequences (usually penal) must be identified as following from failure to perform the obligation.

228 Section 61C of the 1902 Act, as inserted by the 1911 Act, obliged every person entitled to be enrolled as an elector, and who was not so enrolled, to fill in and sign a form of claim and "forthwith" send or deliver it to the proper officer. Regulation 6B(2) of the Electoral and Referendum Regulations 1912 (Cth) provided that failure to send or deliver a claim within 21 days of becoming entitled to enrol was an offence punishable by a penalty not exceeding £2 or, in

the case of a first offence, not exceeding 10 shillings. As will later be explained, the Act, as it now stands, makes generally similar provisions fixing the time by which the obligation to enrol is to be performed, and fixing a penalty for failure to comply with the obligation. The plaintiffs' case is that, despite the legislature validly obliging enrolment forthwith, and providing for penal consequences if that obligation is not performed, the legislature not only *must* provide a further opportunity for performance of the obligation to enrol, but also *must* provide for that opportunity to be taken up after an election has been announced and the writs that commence the electoral process have been issued.

229 Since 1973[232], subject to some exceptions that are not immediately relevant, all Australian citizens who have attained 18 years of age have been qualified for enrolment. If qualified for enrolment, a person who lives at (and for the preceding period of one month has lived at) an address in a Division is entitled[233], in respect of residence at that address, to have his or her name placed on the roll for that Division. Special provision is made in the Act for eligible overseas electors[234], the spouses and children of eligible overseas electors[235], Norfolk Island electors[236] and itinerant electors[237], but none of those provisions need be examined here. The Act allows for provisional claims for enrolment by applicants for citizenship[238] and for claims for age 16 enrolment[239], but again, nothing turns directly on the detail of those provisions.

230 A person who is entitled to enrolment for a Division is bound[240] "forthwith" to fill in and sign a claim and send or deliver that claim to the Electoral Commissioner. That obligation extends to those eligible for enrolment for the first time and to those who, because of a change of residence, are bound to

---

232 *Commonwealth Electoral Act* 1973 (Cth), s 3 amending s 39(1) of the Act. See now s 93 of the Act.

233 s 99.

234 ss 94, 94A.

235 s 95.

236 ss 95AA, 95AB, 95AC.

237 s 96.

238 s 99A.

239 s 100.

240 s 101(1).

claim transfer of enrolment. Apart from those whom the Act describes as qualified Norfolk Islanders, every person entitled to have his or her name placed on the roll for any Division, whether by way of enrolment or transfer of enrolment, and whose name is not on the roll upon the expiration of 21 days from the date upon which that person became so entitled, is guilty of an offence[241] unless he or she proves that non-enrolment is not a consequence of failure to make a claim. A person enrolled for a Division who has changed his or her place of living to another address in the same Division, and has lived at the new address for one month, but does not give written notice of the new address within 21 days of the end of the one month period, is guilty[242] of an offence.

231 Submission of a claim for enrolment or transfer precludes[243] prosecution for an offence of not making a claim, if the offence was committed before the claim was made.

232 Enrolment governs more than the entitlement of individuals to vote. Distributions of each State and Territory into Electoral Divisions are made by reference to the numbers of electors enrolled in each Division, and the average divisional enrolment in relation to the relevant State or Territory. Each month, the Electoral Commissioner must[244] ascertain the number of electors enrolled in each Division, determine the average divisional enrolment in respect of each State and Territory, determine the extent to which the number of electors enrolled in each Division differs from the average divisional enrolment, and cause a statement of the matters so ascertained and determined to be published in the *Gazette*. Whenever it appears to the Electoral Commission, from those statements in the *Gazette*, that more than one-third of the Divisions in a State are, and for more than two months have been, malapportioned, a redistribution must commence[245].

233 So far as the enrolment of individual electors is concerned, several observations are to be made about the Act. First, Pt IX of the Act provides for objections to enrolment of a person, and Pt X for review of decisions to reject a claim for enrolment or to remove a person's name from a roll. A decision to

---

241 s 101(4).

242 s 101(5) and (6).

243 s 101(7).

244 ss 55A, 58.

245 s 59.

remove or omit a person's name from a roll is also amenable to judicial review under s 75(v) of the Constitution[246].

234 A decision to accept a claim for enrolment, or transfer of enrolment, cannot be challenged except by the process of objection under Pt IX of the Act. But, since the 2006 Act, the Electoral Commissioner has been forbidden[247] to remove an elector's name from a roll, as a result of the objection process, during the period between 8 pm on the date of the writ for an election and the close of the polling at the election. That is the same period as is now fixed by the Act as the period during which claims for new enrolment cannot be considered. Before the 2006 Act, the prohibition on removing an elector's name was also tied to the period during which claims for new enrolment could not be considered: the period beginning seven days after the date of the writs. Further, s 361(1) of the Act provides that, on an Electoral Petition to the Court of Disputed Returns, "the Court shall not inquire into the correctness of any Roll". It follows, so the Commonwealth submitted, that alleged deficiencies in the Electoral Rolls cannot be agitated, after the election, in a challenge to the result. It also follows, however, that questions about significance of enrolment have a wider focus than the position of any particular individual. It is necessary to consider not only the effect of the Act on individuals, but also the place that the Electoral Rolls play in the conduct of an election as a definitive statement of entitlement to vote.

Closing the Electoral Rolls – history

235 Between 1902 and 1983, a person's name could not be added to an Electoral Roll (whether pursuant to a claim to new enrolment or a claim to transfer enrolment) after the writs had issued[248]. Until 1983, there was a practice, perhaps even a convention[249], that writs for an election would not issue until at least seven days after the public announcement of an intention to call an election. Yet such a practice or convention appears not to have been always followed. The parties in the present matter agreed that, in 1931, only two days elapsed between the announcement of an election and issue of the writs and that, in 1949, only five days elapsed. And the practice, or convention, was one which depended

---

246 *Snowdon v Dondas* (1996) 188 CLR 48 at 72; [1996] HCA 27.

247 s 118(5).

248 *Commonwealth Electoral Act* 1902 (Cth), s 64; *Commonwealth Electoral Act* 1918 (Cth), s 45 (as it then stood). From 1910 the writs were taken to have issued at 6 pm on the day of issue: *Commonwealth Electoral Act* 1909 (Cth), s 12, inserting s 64(2) in the 1902 Act.

249 See *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 266 per Murphy J; [1983] HCA 6.

upon there being an announcement of intention to dissolve the Parliament (and call an election) before the tendering of advice which would lead to the Governor-General in Council causing writs to be issued for a general election of members of the House of Representatives. Section 5 of the Constitution permits the Governor-General "by Proclamation or otherwise, [to] prorogue the Parliament, and ... in like manner dissolve the House of Representatives". Section 32 of the Constitution requires that the writs issue "within ten days ... from the proclamation of a dissolution" of the House. But s 32 does not preclude issuing the writs sooner than that outer limit of 10 days. Section 12 permits the Governor of any State to cause writs to be issued for elections of senators for the State. And this was done in every State, for this election, on 19 July 2010, the same day as writs were issued for the election of members of the House of Representatives.

236 In 1983, writs for the election were issued on the day after the election was announced. As a result, those who, at 6 pm on that day, were in default of their obligation to enrol, or seek transfer of their enrolment, could not have their claims to enrolment on the relevant federal Electoral Roll considered. Their claims to enrolment on the relevant State Roll, however, were allowed. Proceedings were brought in this Court[250] claiming that because the persons concerned had the right to vote at elections for the more numerous House of the Parliament of a State, s 41 of the Constitution required that they not be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth. The Court held (Murphy J dissenting) that the right to vote in s 41 was that possessed under a State law when the federal franchise was established, and that s 41 does not confer a right to vote in a federal election on any person who, from time to time, has the right to vote at a State election. Accordingly, the applications were dismissed.

237 Arguments of the kind advanced in this matter, though available in *R v Pearson; Ex parte Sipka*, were not put to or considered by the Court in that case. Rather, *Sipka* was decided without any direct challenge to the Commonwealth's submissions that the then provisions of the Act providing for closure of the rolls on the day of issue of the writs were "authorised by ss 9, 10, 29, 31 and 51(xxxvi) of the Constitution [and] render[ed] effective those provisions of the Act providing for an electoral roll and for enrolment"[251]. Nor was there any direct challenge to the further argument on behalf of the Commonwealth[252] that "[a] provision which closes off the roll by reference to the date of issue of the writs for an election facilitates the exercise of the franchise".

---

250 *Sipka* (1983) 152 CLR 254.

251 (1983) 152 CLR 254 at 256.

252 (1983) 152 CLR 254 at 256.

238 Just as the decision in *Sipka* does not foreclose the plaintiffs' arguments in this case, the longevity of the provisions which gave rise to the litigation in *Sipka* does not preclude the plaintiffs from success in this litigation. Nor is it necessary for the plaintiffs to assert that the arrangements about closing of the Electoral Rolls which existed between 1902 and 1983 were constitutionally invalid.

239 While the better view is that those arrangements were constitutionally valid, they were administered in a context where, at least for the most part, controversies of the kind that now arise could not have been tendered for consideration by this Court as a "matter". That is not to say that the constitutional validity of the arrangements that persisted during those years up to the early 1980s depended upon the existence of some imperfectly observed political practice or convention about when the proposal to hold an election would be announced. It is to observe only that the factual circumstances which underpin the claims brought by these plaintiffs did not arise, and did not arise because of the way in which electoral announcements were made. It is further to be observed, however, that, if the present election had been announced one week before it was, but writs had been issued on the day they were, the plaintiffs would presumably accept that the impugned provisions governing consideration of claims for new enrolment or transfer of enrolment would be valid in their operation.

240 Following the 1983 election, the Act was amended[253] to provide that the period in which a person's name could not be added to the roll began at 6 pm on the day the rolls close, and that the rolls closed seven days after the issue of the writs. In 1995, the cut-off time of 6 pm was changed[254] to 8 pm.

241 Between the 1983 election and the enactment of the 2006 Act there was debate, from time to time, about what provision should be made for cutting off consideration of claims for new enrolment, or claims for transfer of enrolment, once an election had been called. Participants in the debate appealed to a variety of considerations in aid of particular proposals. Those considerations included, but were not limited to, questions of the "integrity" of the rolls, the "accuracy" of the rolls and what would be the "more democratic" solution. And the proposals were politically controversial. The 2006 Act was enacted over the opposition of the then opposition party and some third party and independent senators.

---

253 *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth), ss 29 and 45, inserting, among other provisions, ss 43(4) and 61A in the Act. (The *Commonwealth Electoral Legislation Amendment Act* 1984 (Cth) provided for the renumbering of the provisions of the Act.)

254 *Electoral and Referendum Amendment Act* 1995 (Cth), Sched 1, Item 17.

The 2006 amendments

242 It is not necessary, however, to trace the detail of the controversy, the arguments that were deployed in the course of the debates in the Parliament, or the extended debates that took place in Committees of the Parliament, especially the Joint Standing Committee on Electoral Matters ("JSCEM"). Nor is it useful to pause to examine the way in which words like "integrity" or "accuracy" can or should be used in describing the state of the Electoral Rolls. Two points are presently important.

243 First, there have been essentially three different forms of statutory regulation of federal electoral enrolment since federation. From federation to 1983, and thus both before and after enrolment was made compulsory in 1911, no claim for new enrolment or transfer of enrolment could be considered if made after the writs for an election were taken to have issued. Between 1983 and 2006, claims for new enrolment and transfer of enrolment could be considered if made within seven days after the writs for an election were issued. Since 2006, claims for new enrolment could not be considered if made after the day on which the writs were issued, and claims for transfer of enrolment could not be considered if made later than the third working day after the date of the writs.

244 Secondly, to the extent to which it is necessary or appropriate to examine why the 2006 Act, in the respects relevant to this matter, was framed in the way it was, several points are to be noticed.

245 Because the changes made by the 2006 Act were politically controversial, debate about them tended to focus upon what was seen as politically persuasive. Issues about the "integrity" or "accuracy" of the rolls had been examined by the JSCEM in its reports on the federal elections held in 1996 and 2004 and in other more particular reports of the JSCEM published in May 2001 and October 2002. The issues were also examined in submissions and reports by the Australian National Audit Office and the Australian Electoral Commission.

246 The central focus of much of what was said in those documents was on enrolment fraud. But reference was also often made to the costs and difficulties associated with the facts that many new and existing electors were not making enrolment claims when they should, but were delaying them to the time when an election had been announced. In the JSCEM report on the conduct of the 2004 federal election ("JSCEM 2004 Report"), published in September 2005, the Committee noted[255] that 60.5 per cent of enrolment transactions that had occurred

---

255 Australia, The Parliament, Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal*

(Footnote continues on next page)

during the close of rolls period would not have been required if electors had made the necessary claims when required to do so. The Committee expressed[256] the belief that "the seven day close of roll period for Federal elections actually encourages electors and potential electors to neglect their obligations in respect of enrolment, believing that they can play 'catch up' during the close of rolls period". The Committee noted[257], with what it described as "a high degree of concern", that "a significant number of electors" had not updated their enrolment details despite contact by the Australian Electoral Commission ("the AEC") reminding them of their obligations. The Committee continued[258]:

> "2.119 Statistics provided by the AEC indicate, that despite AEC efforts and the significant amount of taxpayer funds expended by them in contacting electors prior to elections being announced, that same pattern is repeated election after election.
>
> 2.120 Not only do electors act unlawfully in not enrolling when entitled, they cause the wastage of a significant amount of taxpayer funds that the AEC is obliged to expend on postage and other measures, making repeated attempts to persuade those same electors to update their details on the electoral roll." (footnote omitted)

On the subject of fraud, the Committee said[259]:

> "2.121 The Committee also agrees that the current close of roll arrangements present an opportunity for those who seek to manipulate the roll to do so at a time where little opportunity exists for the AEC to undertake the thorough checking required [for] ensuring roll integrity.
>
> 2.122 The Committee believes that those who argue for the retention of the seven day close of rolls and who promote the argument that there is no proof that enrolment fraud is

---

Election and Matters Related Thereto, (September 2005) ("JSCEM 2004 Report") at 34 [2.114].

256 JSCEM 2004 Report at 35 [2.116].

257 JSCEM 2004 Report at 35 [2.118].

258 JSCEM 2004 Report at 35.

259 JSCEM 2004 Report at 35-36.

> sufficiently widespread to warrant any action, have missed the point.
>
> 2.123 The fundamental issue facing this Committee is to prevent any such fraud before it is able to occur. Failure to do so would amount to neglect.
>
> 2.124 While the risk exists that fraud sufficient to change the result of an election might occur, we are failing in our duty to protect and preserve the integrity of our electoral system and our democratic processes and principles."

The Committee recommended that the rolls be closed at 8 pm on the day that the writ for an election is issued. It said[260] of that change:

> "2.126 This change, along with the introduction of proof of identity and address measures for enrolment and provisional voting, will *ensure* the electoral roll retains *a high degree of accuracy and integrity*, while *reminding electors that the responsibility for ensuring that the electoral roll is updated in a timely manner rests with them*." (emphasis addded)

247 This being the history of the matter, it is not surprising that neither the Explanatory Memorandum, nor the Second Reading Speech, for the Bill that became the 2006 Act canvassed in any detail the arguments for the alterations that were to be made by the proposed law. Those arguments had already been extensively examined. Rather, the Explanatory Memorandum proceeded by reference to a Government Response to the JSCEM 2004 Report, and the Second Reading Speech said little more than that the Bill "contains reform measures arising from some of the government supported recommendations" of that report.

248 Neither the Explanatory Memorandum nor the Second Reading Speech contains any, or at least any elaborated, discussion of the mischief to which the Bill was directed. Nonetheless, read in the context of the JSCEM 2004 Report, and the Government Response to that report, it is evident that, in respects relevant to the present matter, the Bill was intended to provide what the Commonwealth described in its submissions as "prophylactic" measures against fraud, while reminding electors, as the JSCEM 2004 Report said[261], "that the responsibility for ensuring that the electoral roll is updated in a timely manner rests with them".

---

260 JSCEM 2004 Report at 36.

261 at 36 [2.126].

249 The plaintiffs submitted that there was no "substantial reason for abrogating the seven day period" provided by the 1983 legislation and that there was "no evidentiary basis for what in fact occurred" (scil. the changes made by the 2006 Act). The plaintiffs necessarily stopped short of submitting that the views stated in the JSCEM report that are set out above were not held by the majority of the members of the Committee. The plaintiffs necessarily stopped short of submitting that what was said in the report masked other, ulterior, and impermissible purposes. The plaintiffs necessarily stopped short of such submissions because there was no foundation in the material for either submission. But what then was the legal proposition on which the plaintiffs relied when they spoke of no "evidentiary basis" and no "substantial reason"?

250 Shorn of forensic flourishes, the plaintiffs' argument must be understood as being that the impugned laws were not reasonably appropriate and adapted to serving an end consistent or compatible with the maintenance of the constitutionally prescribed system of government. So understood, the plaintiffs' argument proceeded by asserting that the impugned provisions were not reasonably appropriate and adapted to preventing electoral fraud, because there was no demonstration that there had been any significant incidence of fraud before the 2006 Act, and (perhaps) because there were other means of preventing fraud that were consistent with maintaining the seven day period fixed by the 1983 Act. And the plaintiffs then coupled those assertions with the further proposition (already noticed in these reasons) that the "practical operation" of the impugned provision was to "disenfranchise" the plaintiffs and others in like case. It is convenient to consider the plaintiffs' argument in steps: first, the "practical operation" of the impugned laws; second, the question of mischief and, in particular, electoral fraud; and third, the significance of the availability of other measures.

Practical operation

251 Identifying the practical operation of the impugned laws as disenfranchising the plaintiffs and others lay at the very centre of the plaintiffs' case. I have already pointed to the difficulties that follow from speaking of the plaintiffs as having been disenfranchised. Those same difficulties inhere in the assertion that the practical operation of the provisions cutting off consideration of claims for new enrolment and transfer of enrolment "disenfranchises" the plaintiffs. And the difficulties encountered are not just verbal, they are substantial.

252 The complaint which the plaintiffs make about the so-called "practical operation" of the impugned provisions depends upon other, related provisions of the Act having been disobeyed by the plaintiffs. If the plaintiffs had performed their obligations under the Act when they were bound to do so, the impugned provisions would not be engaged. Thus the "practical operation" of the law to which the plaintiffs point is an operation that depends upon the extent to which

other provisions of the law of which the impugned provisions form a part have been disobeyed. This asserted understanding of the "practical operation" of a law is entirely novel and should not be adopted. The constitutional validity of the impugned provisions cannot turn upon the extent to which related statutory obligations have been disobeyed.

253 No less importantly, as has already been explained, the assertion that the practical operation of the impugned provisions disenfranchises the plaintiffs necessarily depends on first adopting one, if not more than one, of the three forms of question begging premises identified earlier in these reasons. The assertion about practical operation depends (at least in part) upon masking the relevant temporal dimension of entitlement to enrol. The assertion assumes that there is a constitutional requirement that last minute enrolment be permitted. The assertion then seeks to justify that assumption by an appeal to what are assumed, rather than demonstrated, to be constitutional norms of "representative government". The assumptions dictate the answer to the particular question that arises in the proceedings.

Mischief

254 The relevant provisions of the 2006 Act were proposed in the JSCEM 2004 Report, not just to prevent fraud, but also to encourage timely observance of the obligations to enrol. It follows that to focus only on questions of fraud prevention ignores another intended purpose of the legislation. That other intended purpose cannot be discarded from consideration as irrelevant. It cannot be dismissed as an untenable view.

255 Even if attention were to be confined to questions of fraud prevention or inhibition, the plaintiffs' argument (that because there was no demonstration of any significant incidence of fraud before the 2006 Act, the impugned provisions are not reasonably appropriate and adapted to an end of fraud prevention) is logically and legally flawed. The logical flaw is evident. The absence of proven instances of fraud does not demonstrate that no new or different step can or should be taken to prevent it. Whether any further step should be taken is a matter of judgment. Nor does pointing to the existence of other means of preventing fraud entail that no new or different step can or should be taken. Again, the question is one for judgment.

256 The legal flaw in the reasoning is of the same kind as has already been observed in connection with the question of practical operation. The plaintiffs' arguments about what is reasonably appropriate and adapted depended upon one or more of the question begging premises that have been identified.

257 It will be recalled that the plaintiffs' argument denied that the impugned provisions are reasonably appropriate and adapted to serving an end consistent or compatible with the maintenance of the constitutionally prescribed system of

government. This was then particularised by saying that the impugned provisions were not reasonably appropriate and adapted to an end of fraud prevention and by saying that no other relevant end was demonstrated. But the plaintiffs accepted that provisions for an Electoral Roll, the details of which were to be fixed at a date before polling day, are reasonably appropriate and adapted to an end consistent with the maintenance of the constitutionally prescribed form of government. That acceptance necessarily depends on accepting the argument put by the Commonwealth in *Sipka*, noted earlier, that a provision which closes off the rolls by reference to the date of issue of the writs for an election facilitates (and, I would add, does not impede or detract from) the exercise of the franchise. To say, as the plaintiffs did, that a provision closing the rolls seven days after issue of the writs is valid, but a provision closing the rolls on the day of the writs (or in the case of transfers, three days after the writs) is not, necessarily proceeds from a premise that provision *must* be made for last minute enrolments: "last minute" not just in the sense of after the time fixed by the Act for performance of the obligation to enrol, and proximate to an election, but "last minute" in the sense of *after* the announcement of the election. The premise begs the question. The premise was not, and cannot be, established.

Availability of other measures

258 The plaintiffs' references to available alternative measures took two distinct forms. First, as already noted, much of the plaintiffs' argument proceeded by comparison with the system of allowing seven days for lodging claims for enrolment or transfer of enrolment that had been introduced in 1983. But, as already explained, those comparisons are significant only if the unstated premise for the argument is that there *must* be legislative provision enabling last minute enrolments.

259 The second form of reference to alternative measures was made in connection with the argument that fixing cut-off times earlier than those fixed in 1983 was not necessary for elimination of fraudulent practices. In this connection, reference was made to what the Australian Electoral Commission has done in two programs: a Continuous Roll Update or "CRU" program and the development of a computerised roll management system known as "RMANS". In each year since 1999-2000, many millions of dollars have been spent by the Australian Electoral Commission on Electoral Roll Review and Continuous Roll Update activities. The latter form of activity required data matching, using RMANS, between entries on the Electoral Rolls and other data held by other government departments or agencies.

260 No doubt processes of data matching can help to avoid registration of fraudulent enrolments. It is an altogether different question (not addressed in the evidence or in argument) whether those techniques can be usefully engaged in dealing with a large number of last minute claims for enrolment. It is this latter question which is important when considering the impugned provisions. (In that

regard it must be remembered that the Commission dealt with more than 500,000 claims lodged between the announcement of the 2010 election and the cut-off dates fixed according to the impugned provisions.) To make good the plaintiffs' proposition, it would be necessary to demonstrate that allowing the Australian Electoral Commission a little more time for checking last minute enrolments than was available under the 1983 provisions would not make, and could not be supposed to make, any contribution to avoidance of fraud. The general references that the plaintiffs made to processes of continuous roll updating and the availability of data matching techniques and facilities fell well short of demonstrating that proposition.

261 Be this as it may, it must also be recalled that the JSCEM 2004 Report made two points: one about preventing fraud and one about trying to encourage better compliance with existing requirements by shortening the time for last minute enrolments. In that latter regard it may be noted that, despite Electoral Roll Review and Continuous Roll Update activities by the Australian Electoral Commission, the estimated number of eligible persons not enrolled generally increased during the period between June 1999 and December 2009[262]. The parties agreed that, at the close of rolls for the 2004 federal election, about 91.5 per cent of eligible voters were enrolled. At the close of rolls for the 2007 election (after the amendments made by the 2006 Act had come into force) the proportion enrolled had risen to about 92.3 per cent of eligible voters. By 31 December 2009, that proportion had dropped to about 90.9 per cent. It was estimated that, at 31 December 2009, nearly 1.4 million eligible persons were not enrolled. For the 2001, 2004 and 2007 elections, the numbers "missing" from the rolls were about 0.9 million, 1.2 million and 1.1 million (respectively). Thus, while the particular number missing varied from election to election (and actually dropped after the amendments made by the 2006 Act) the general trend over the 10 years between 1999 and 2009 was for the number missing to increase, and for the percentage of eligible electors who were enrolled to diminish.

262 The plaintiffs did not demonstrate that shortening the time for last minute enrolment could have no effect on the general level of compliance with the obligation to enrol, or transfer enrolment, forthwith upon becoming entitled to enrol, or required to transfer enrolment. Yet that proposition was a necessary step to making good the plaintiffs' contention that the 2006 Act, so far as now relevant, was not reasonably appropriate or adapted to serving an end consistent or compatible with the maintenance of the constitutionally prescribed system of government.

---

262 Australia, Australian Electoral Commission, "AEC Submission to the Joint Standing Committee on Electoral Matters Inquiry into the NSW Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Bill 2009", (January 2010) at 7, Fig 2.2.

263 The plaintiffs' appeal to the availability of other measures depended upon other, more deep-seated errors than any failure of factual demonstration. In terms, the argument was presented as being at least akin to an argument of proportionality. And it will be recalled that, in the plurality reasons in *Roach*, it was said[263] that "as remarked in *Lange*[264], in this context there is little difference between what is conveyed by that phrase ['reasonably appropriate and adapted'] and the notion of 'proportionality'". Whether expressed as a test of "proportionality" or as a test of "reasonably appropriate and adapted", the inquiry seeks to measure the impugned provisions against other available means of achieving an identified end. Proper identification of the relevant end is, therefore, not simply important; incorrect identification of the end will determine the result of the proportionality analysis. Identifying the intended "end" as facilitating, encouraging or not preventing any who are eligible to vote from participating in the election begs the question by defining the constitutionally mandated system of government in a manner divorced from constitutional text or structure. It dictates the result of any proportionality analysis.

Conclusion

264 The plaintiffs' case was not made good. Application of the impugned provisions does not yield Houses of the Parliament that do not satisfy ss 7 and 24 and are not "directly chosen by the people". The impugned provisions, closing off the rolls by reference to the date of issue of the writs for an election, facilitate the exercise of the franchise. Neither plaintiff (nor others in like case with either) is disenfranchised by application of the impugned provisions. The plaintiffs did not show that the alterations made to the cut-off dates by the 2006 Act were not reasonably appropriate and adapted to the ends of having Electoral Rolls that are fixed for use at a particular election and are suitable for use in distributing States into Electoral Divisions.

265 It was for these reasons that I concluded that the application should be dismissed, with costs.

266 Having regard to what has since been written, one further point should be made. The content of the constitutional expression "directly chosen by the people" neither depends upon, nor is informed by, what are seen from time to time to be the politically accepted or politically acceptable limits to the qualifications that may be made to what is otherwise universal adult suffrage. As

---

263 (2007) 233 CLR 162 at 199 [85].

264 (1997) 189 CLR 520 at 567 fn 272.

I explained in *Roach*[265], reference to "common understanding" or "generally accepted Australian standards" does not provide a valid premise for consideration of the issues in this matter. The understanding or standards mentioned have varied, and will likely continue to vary, over time. Their content cannot be reliably determined in a way that permits their use as a criterion of constitutional validity. The ambit of the relevant constitutional powers is not set by the political mood of the time, or by what legislation may have been enacted in exercise of the powers. Political acceptance and political acceptability have no footing in established doctrines of constitutional interpretation.

---

265 (2007) 233 CLR 162 at 218-220 [157]-[162].

267 HEYDON J. The reasons for judgment of Hayne J have set out the constitutional and legislative provisions, the background circumstances, and the abbreviations relevant to what follows.

The victims of the impugned legislation

268 The plaintiffs said that the impugned provisions created an "exclusion from the constitutional franchise" and "loss of the franchise". They were said to "disenfranchise" the plaintiffs, or "disentitle or exclude [them] from casting a vote". They were said "significantly [to] burden or limit the entitlement of a substantial number of adult citizens to enrol and vote". They were said to be "arbitrary" and "disproportionate".

269 The plaintiffs also referred to a submission of the Human Rights and Equal Opportunity Commission to the Senate Finance and Public Administration Committee in 2006 which made the following claims. One was that the prohibition on accepting new enrolments after the day the writs were issued "has the potential to disadvantage young, first-time voters and new Australian citizens". Another was that a three day period for changing enrolments "disadvantages itinerant populations and people living in remote and rural areas" and "disproportionately" disadvantages "Australia's Indigenous population". Another claim was that these short periods of time "may also disadvantage people with disability who need assistance to access and complete the relevant materials." In addition, the plaintiffs referred to the difficulties young adults face in remaining correctly enrolled due to their residential and workplace mobility. The plaintiffs referred to the disproportionate impact on the homeless. The plaintiffs submitted that "the voting patterns of different age groups can differ substantially", and "a decision as to the time in which rolls will close will have recognised political consequences in relation to enrolments and transfers of the differing age groups, thereby enabling it to be a politically motivated decision." The plaintiffs did not, however, submit that the decisions of the Prime Minister in relation to the calling of the 2010 election fell into this category.

270 The plaintiffs also submitted that "many hundreds of thousands of … young electors … rely on" the existence of a seven day period after the writs are issued for an election "as a way of updating their enrolment". There is no evidence of this reliance. The plaintiffs themselves did not give any evidence to that effect in their affidavits. It is true that many people do not enrol, or transfer their enrolment, until an election is called, but that is a different proposition.

271 The plaintiffs' contentions thus concentrated on the supposed impact of the impugned provisions on Australia's young adults as well as its wretched of the earth – its descamisados and other victims. The plaintiffs never demonstrated that that impact had constitutional relevance, or had any point other than an appeal to pathos. Whether or not the plaintiffs' contentions are correct as a

matter of fact, it may be desirable to begin by noting, first, some notorious background facts, and, secondly, the personal position of the plaintiffs.

Notorious facts about Australian federal elections

272 There are key background matters of fact which very few Australian citizens, at least those resident in Australia, can be ignorant of. Federal elections take place every two or three years. There is speculation from time to time during the period between elections, and constant speculation towards the end of it, about what date the next election will be held on, what advantages a date will bring to the party to which the Prime Minister of the day belongs, and what problems and disadvantages exist in relation to particular dates. That was certainly the case in relation to the years leading up to the 2010 election. The Prime Minister's announcement on 17 July 2010 of the election date did not come as a surprise. There had been continuous media speculation about the date when her predecessor would call an election. That speculation only intensified once she had succeeded to his office. The submissions advanced by the plaintiffs at times suggested that the realistic possibility of an election being called in the middle to late winter of 2010 did not materialise until the Prime Minister's announcement on 17 July 2010. That is not so.

The personal position of each plaintiff

273 What was the effect of the impugned legislation on the plaintiffs personally in relation to the events of this year's election? On Saturday 17 July 2010 the Prime Minister announced that there would be a federal election on Saturday 21 August 2010. Pursuant to ss 12 and 32 of the Constitution, the writs for that election were issued on Monday 19 July 2010. The consequence of the impugned provisions was that claims for new enrolments made after 8pm on Monday 19 July 2010 would not be considered until after the election, and claims for transfers of enrolment made after 8pm on Thursday 22 July 2010 would not be considered until after the election. Had the provisions which preceded the 2006 Act been in force, the electoral roll would have closed for both new enrolments and transfers at 8pm on Monday 26 July 2010. Hence, the first plaintiff, by reason of s 102(4) of the Act, had only one working day to enrol from the time when the Prime Minister announced the election date: she would have had six working days had the provisions in force before the 2006 Act remained in force. And the second plaintiff, by reason of ss 102(4AA) and 155, had only four working days to transfer his enrolment: he too would have had six working days had the provisions in force before the 2006 Act remained in force.

274 But by reason of s 101(1) and (4), the first plaintiff had been under a statutory duty to enrol ever since she turned 18 on 16 June 2010 – more than a month before the rolls closed. It is true that the criminal sanction was small (a fine not exceeding one penalty unit): s 101(6). And it is true that s 101(7) prevented criminal proceedings from being instituted for an offence once the

claim to enrolment was made. But the first plaintiff was in breach of statutory duty until then. What is more, she had had more than the five weeks since her eighteenth birthday in which to enrol. She also had had available to her a facility afforded by s 100 of the Act to make a claim to have her name placed on the roll from the time she turned 16. The first plaintiff did not avail herself of that facility. Had she done so, she would have been placed on the roll, and would have been able to vote as soon as she turned 18.

275 The second plaintiff's position was similar. He had not been jammed between a sudden change of address and an unexpected announcement by the Prime Minister. By reason of s 101(1) and (4), the second plaintiff had been under a statutory duty, backed by the s 101(6) criminal sanction as qualified by s 101(7), to transfer his enrolment from the time when he moved to his new address in March 2010 – some four months before the Prime Minister's not unexpected announcement.

276 Before examining the substantive arguments of the plaintiffs, it is convenient to note some difficult aspects of them.

Some difficulties in the plaintiffs' arguments

277 *An unconvincing distinction between the allegedly invalid and the admittedly valid.* The first plaintiff's argument was that the provisions in force before the 2006 Act that gave her five more working days to enrol than the impugned provisions introduced in 2006 were constitutionally valid, but the impugned provisions introduced in 2006 were not. And the second plaintiff's argument was that the provisions in force before the 2006 Act giving him two more working days to transfer his enrolment than the impugned provisions introduced in 2006 were constitutionally valid, but the impugned provisions introduced in 2006 were not. It is not possible to infer from the requirement in ss 7 and 24 of the Constitution that the Houses of Parliament be "chosen by the people" that these temporal differences are of such crucial decisiveness as to mark the difference between validity and invalidity. Differences of this type are in a sense arbitrary, but they are characteristic of the choices which legislatures make, and have to make. It is unlikely that the fundamental norms underlying the Constitution and reflected in its language would require the conclusion that one regime was constitutionally valid while the other was invalid.

278 In part the unsatisfactory distinctions on which the plaintiffs relied stemmed from a reluctance to face up to the logic of their own arguments. That logic pointed at least to the conclusion there should be the widest possible participation in elections – that no person qualified to vote under s 93 should be prevented from voting under s 101 by reason of a failure to make a claim for enrolment or for transfer of enrolment. The arguments assume that all of those entitled to be on the rolls should be entitled to vote. That goal could only be achieved if the time to make claims for enrolment or for transfer of enrolment

extended for the maximum amount of time before an election – perhaps right up to the moment when the polling booths closed on the day fixed for the election. An argument that ss 7 and 24 of the Constitution require electors to have the maximum amount of time to enrol before an election is more ambitious, but also more powerful, than an argument that they require a period of only one week after the day when the writs are issued. In the present case the plaintiffs selected the limited arguments they did, perhaps, so as to avoid causing alarm by deploying arguments more consistent with the underlying logic of their position. Those arguments would have had a seemingly audacious character, and perhaps a seemingly flawed nature, which would have reflected badly on the limited arguments they actually chose to advance. And the more consistent but more audacious arguments might have had a potentially annihilating effect on the course of the 2010 election: it is far from clear that the first defendant could have coped with the consequences flowing from their success so as to permit the smooth running of the election. The anomalies which result from the much more limited arguments that were offered raise grave questions about the validity of both the limited and the audacious arguments.

279 Incidentally, so far as the logic of the plaintiffs' arguments calls for the widest possible participation in elections, that logic, arguably, points to even wider conclusions. If the words "chosen by the people" require all of those entitled to be on the rolls to be entitled to vote, why should many members of the population lack entitlement to be on the rolls? Given that an important constitutional provision like s 75(v) can be availed of not merely by Australian citizens but by anyone within the Queen's peace, and given that other sections of the Constitution (for example, ss 80 and 117) do not speak only to citizens, is it valid to exclude from the franchise permanent residents? Or people with long term visas? Or any lawful resident? Or even unlawful residents? Is it valid to exclude persons below the age of 18? Are not all these persons in a sense part of "the Australian people", "the Australian nation", "the Australian community"? If the provisions excluding them from the franchise are valid, the underlying assumptions of the plaintiffs' arguments are questionable.

280 *The plaintiffs' arguments do not remedy the problems said to make the impugned provisions invalid.* So far as the plaintiffs' arguments about constitutional validity appealed to the particular circumstances of mobile young people, new citizens, itinerant persons, residents of rural and remote areas, Aboriginal persons, persons with disabilities and homeless persons, they did not demonstrate that the difficulties of all or any of these classes would be overcome to any significant degree by extending for five working days the period of enrolment and for two working days the period for transferring enrolment.

281 *The plaintiffs' arguments do not remedy wider problems.* The plaintiffs contended that the pre-2006 position, giving a seven day period in which to enrol or transfer enrolment, was valid because "it has been shown not to have resulted in such substantial disenfranchisement" that the Parliament had ceased to be a

legislature "yielded by the vote of the people". In so far as the plaintiffs' arguments depended on there being "substantial" numbers of voters "excluded" by the impugned provisions, they overlooked the probability that whatever legislative regime were adopted, numbers of voters which are in some sense "substantial" would be "excluded".

282 In 2004, persons who had not enrolled or transferred their enrolment had seven days after the writs were issued to do so: 168,394 people lodged claims for enrolment or transfer after the electoral rolls closed. In 2007, persons who had not enrolled had to do so on the day the writs were issued and persons who had not transferred their enrolment had three more days: 100,370 lodged claims for enrolment or transfer after the electoral rolls closed. It was estimated that 100,000 claims for enrolment were received after the time stipulated under the 2006 amendments but before the time that applied before the 2006 amendments. There was no evidence, however, about the number of claims received outside the time that applied before the 2006 amendments. It would be naïve to suppose that there were no claims of that kind, or that there were not many people qualified to vote who did not enrol. Indeed the plaintiffs frankly conceded that about 1.4 million persons eligible to enrol and to vote are not enrolled – a figure much higher than the numbers supposedly "excluded" by the impugned legislation.

Disqualification?

283 The Solicitor-General of the Commonwealth assumed the correctness of the test advocated by the plaintiffs. It had two elements. The first turned on whether the impugned provisions amounted to legislative disqualification from adult suffrage. If so, then according to the second element, the disqualification could only be constitutionally valid if, in the words of three Justices in *Roach v Electoral Commissioner*, it were for a "substantial" reason, namely one which was "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government."[266] Even if the Solicitor-General was correct in assuming that the second element of this test is applicable to cases of the present kind, this is not a case of disqualification.

284 As the Solicitor-General rightly submitted, the plaintiffs were not in the position of the plaintiff in *Roach v Electoral Commissioner*. Vicki Lee Roach was completely debarred from voting while she served the term of her

---

266 (2007) 233 CLR 162 at 199 [85] per Gummow, Kirby and Crennan JJ; [2007] HCA 43. The plaintiffs called this "the standard adopted by the majority", but the fourth member of the Court who upheld Ms Roach's claim, Gleeson CJ, did not adopt that standard, and the other two members of the Court dissented.

imprisonment. It was not the case that the law qualified the manner in which she might vote, or the facilities through which she might vote. She was simply not eligible to vote. In contrast, the plaintiffs in this case were fully qualified and entitled respectively to enrol and to transfer enrolment. The impugned provisions stopped them from taking steps to exercise that entitlement over a short period of time – a relatively small fraction of the period in which it was open to the plaintiffs to protect their positions. The plaintiffs were prevented from exercising their entitlement because they failed to comply with simple obligations and procedures in relation to getting enrolled (in the case of the first plaintiff) and transferring enrolment (in the case of the second plaintiff).

285 If the analysis is shifted from the position of the plaintiffs to the position of other persons qualified to enrol or vote, its outcome is as follows. Whether particular voters fall within the classes prevented by the impugned provisions from voting is within their control: they can enrol up to 8pm on the day when the writs are issued, and they can change their enrolment within a further three days. The impugned provisions prevent only three very limited classes of voters who are able, ready and willing to enrol or transfer enrolment from doing so. The first of these very limited classes is voters who have not enrolled because they turn 18 between the issue of the writs and polling day. Their difficulty is curable if they employ the facility available pursuant to s 100 by which persons aged 16 can make a claim to be enrolled. Further, pursuant to ss 100 and 102(4AB) if they turn 18 after the writs are issued and before the election, they can make a claim within the period of three days after the issue of the writs. The second very limited class comprises voters who are to become Australian citizens between the date of the writs and polling day. Their difficulty is curable by the facility available to them to apply for enrolment within a period up to three days after the issue of the writs: ss 99B and 102(4AA). And the third very limited class comprises those who have moved from one Division to another just before the writs are issued and will become entitled, pursuant to s 99(2), to transfer their enrolment after living at a particular address for one month. The plaintiffs did not submit that the existence of this third class rendered the legislation constitutionally invalid, and there is no material before this Court from which it can be concluded that the class is "substantial".

286 Indeed there is nothing to suggest that the memberships of these three classes, whether taken separately or together, and even if the facilities for curing the difficulties of the first two classes are not availed of, are "substantial" in any sense which would satisfy the plaintiffs' test of "substantial disenfranchisement". These three exceptional classes would exist in slightly different forms even under the regime accepted as valid by the plaintiffs, namely the enrolment or transfer of enrolment within seven days after the issue of the writs. The fact that these three exceptional classes exist therefore cannot point to the constitutional invalidity of the impugned provisions while leaving the provisions existing before the 2006 Act valid.

287 All other voters outside the three exceptional classes who fail to enrol or transfer enrolment are the authors of their own misfortunes. They have not taken the steps to enable them to vote which were not only available to them, but required of them by s 101. They are simple steps. It would have been very easy to take them. There was ample time to take them. Despite the prodigious efforts of the first defendant, and the criminal sanctions directed at securing a complete exercise of the franchise, large numbers of people entitled to vote may end up not voting.

288 It was earlier noted that as many as 1.4 million people do not enrol at all, for a variety of reasons. It may be because of their inefficiency. It may be because of their apathy. It may be because they have a positive desire not to participate in the electoral process. One example is the appellant in *Judd v McKeon*[267], which upheld the validity of the provisions making voting compulsory: all the candidates supported capitalism and he belonged to a party which opposed it and prohibited him from voting for supporters of capitalism. Another example is Evelyn Waugh, who said: "I do not aspire to advise my sovereign in her choice of servants."[268] It is difficult to treat any of these circumstances as factors relevant to the invalidation on constitutional grounds of an electoral system which works satisfactorily in relation to those who are not inefficient, apathetic, or conscientiously indisposed to participate. If not, why are the much lower numbers excluded by reason of the impugned legislation relevant? Of those who are validly enrolled, some forget that the election is on and do not vote, some turn up too late to vote, some are prevented from voting by a sudden crisis, some are indifferent about voting, some cast informal votes by mistake, and some cast informal votes deliberately. It is notorious that these classes of enrolled non-voters are much more numerous than those excluded by reason of the impugned legislation. None of their members could be described as "disqualified". Nor could those who fail to take steps under s 101 which would enable them to vote. It is they who disqualify, disenfranchise, exclude or disentitle themselves, not the legislature. The conduct of all these categories of people who fail to enrol, or, being enrolled, fail to vote, does not prevent the legislature being described as "chosen by the people".

289 The plaintiffs submitted that the impugned amendments created a "burden" on those who desired to make a claim for enrolment or for transfer of enrolment outside the times stipulated – a burden which "does fall disproportionately and is known to fall disproportionately so it is a particular burden on a particular part of the people." The legislation placed no "burden",

---

267 (1926) 38 CLR 380; [1926] HCA 33.

268 Gallagher (ed), *The Essays, Articles and Reviews of Evelyn Waugh*, (1983) at 537.

and no "disproportionate" burden. If there were any burden on anyone, it was a burden which those who bore it placed on their own shoulders.

290 Since there has been no "disqualification", it is unnecessary to consider either the formulation or the application of the test which would apply if there had been disqualification.

291 The plaintiffs met the possibility that there was no disqualification by submitting that the *Roach* test extends beyond disqualification to enactments which do not involve disqualification, but which could be said to "disenfranchise any group of adult citizens or otherwise disentitle or exclude them from casting a vote". The test has verbal similarities with that employed in *Lange v Australian Broadcasting Corporation*[269]. That is a test applicable to burdens on freedom of communication about governmental and political matters. It was applied in that case in relation to qualified privilege as a defence to the tort of defamation. Even on the assumption that it operates satisfactorily in that field and in the field of disqualification from voting, it does not follow that it is the correct test in other fields, and the plaintiffs did not demonstrate that it was; indeed they did not even endeavour to do so.

"Chosen by the people": the "originalist" argument

292 The nature of "representative government" has changed in Australia in the last century. The franchise has widened in point of gender, race and age. Enrolment was made compulsory in 1911. Proportional voting was introduced for the House of Representatives in 1918. Voting was made compulsory in 1924. Proportional voting was introduced for the Senate in 1948. But it does not follow from the fact that "representative government" has changed that the meaning of the constitutional expression "chosen by the people" has similarly changed.

293 The plaintiffs, and not only the plaintiffs, advanced submissions turning on the relationship between the forms of electoral law from time to time over the last 110 years and the meaning of the Constitution. It was submitted on behalf of the Attorney-General for Western Australia that the "common contemporary understanding of a concept invoked by the Constitution" – that is, that understanding from time to time in the last century – influences "the meaning of a constitutional term", namely, "chosen by the people". These submissions generated a congenial atmosphere. But that atmosphere was disturbed by the Solicitor-General of the Commonwealth. Stimulating as much approbation as the man who asked for a double whisky in the Grand Pump Room at Bath, he asked an "originalist" question and propounded an "originalist" answer. The question was whether, in the light of the meaning of the words "chosen by the people" in

---

269 (1997) 189 CLR 520 at 567; [1997] HCA 25.

1900, precluding persons not on the electoral roll after the issue of the writs from voting in the election produced a legislature not "chosen by the people". The answer was in the negative, because a system of that kind fell within the meaning of those words in 1900.

294 That answer is correct because the first federal election, in the absence of contrary provision by the Parliament, was conducted pursuant to the State laws relating to the more numerous House of Parliament of each State: see ss 8, 10, 30 and 31 of the Constitution. The researches of the Solicitor-General of the Commonwealth and counsel appearing for the Attorney-General for Western Australia have revealed that all those State laws made the right to vote in an election conditional on being enrolled on the relevant electoral roll[270]. In each State there were provisions that closed off the electoral roll to new enrolments or transferred enrolments at some point before polling day, although the precise date on which the rolls became closed varied significantly from State to State.

295 In New South Wales the general electoral roll was revised annually. The Revision Court sat in October and the roll was to be finalised in December. The Revision Court also sat in March to produce a supplementary roll in May of each year. Each roll remained in force until the coming into force of the next general roll[271]. Transfer of an elector's right to vote from one district to another was accomplished by placing the elector's name on an additional roll without recourse to the Revision Court[272], but no entry could be made in the interval between the issue of the writ and the declaration of the poll[273].

296 In Queensland an annual electoral roll was completed each December and it was supplemented by quarterly electoral rolls[274]. Each roll while in force was (subject to specific exclusions) conclusive evidence of the entitlement of persons named in it to vote[275].

---

270 *Parliamentary Electorates and Elections Act* 1893 (NSW), s 80; *Elections Act* 1885 (Q), s 40; *Electoral Code* 1896 (SA), ss 36, 116 and 126; *Electoral Act* 1896 (Tas), s 57; *Constitution Act Amendment Act* 1890 (Vic), s 241; *Electoral Act* 1899 (WA), ss 21, 87 and 104.

271 *Parliamentary Electorates and Elections Act* 1893 (NSW), ss 47-51.

272 *Parliamentary Electorates and Elections Act Amendment Act* 1896 (NSW), ss 2, 3 and 4.

273 *Parliamentary Electorates and Elections Act Amendment Act* 1896 (NSW), s 4(II).

274 *Elections Act* 1885 (Q), ss 9-37.

275 *Elections Act* 1885 (Q), s 40.

297 In South Australia new rolls were to be prepared every tenth year[276] with supplemental rolls printed annually[277] as well as "immediately previous to a general election"[278]. Claims for enrolment were receivable at any time and were to be acted upon immediately[279], but the rolls were not to be altered on polling day or during the four days preceding an election[280]. Applications for transfer were receivable at any time except on polling day or in the 10 days leading up to the election[281]. However, a person was not entitled to vote unless that person had been registered for six months as an elector[282].

298 In Tasmania claims for enrolment were to be made in November of each year[283], with an annual revision of the rolls to be completed in April[284]. The roll for each Division as revised was to be used in any election taking place until the following April[285].

299 In Victoria separate processes existed for the two Houses of Parliament. For the Legislative Council, a general electoral roll was prepared annually by a process ending in February, with a supplementary roll completed each August[286]. For the Legislative Assembly, a general roll was prepared annually by a process ending in April, with a supplementary roll in September[287]. For both Houses, each roll continued in force until the completion of the next annual roll[288].

---

276 *Electoral Code* 1896 (SA), s 41.

277 *Electoral Code* 1896 (SA), ss 43 and 60.

278 *Electoral Code* 1896 (SA), s 43.

279 *Electoral Code* 1896 (SA), ss 47-49.

280 *Electoral Code* 1896 (SA), s 57.

281 *Electoral Code* 1896 (SA), ss 51-52.

282 *Electoral Code* 1896 (SA), ss 14-15.

283 *Electoral Act* 1896 (Tas), ss 22-25.

284 *Electoral Act* 1896 (Tas), s 56.

285 *Electoral Act* 1896 (Tas), s 57.

286 *Constitution Act Amendment Act* 1890 (Vic), ss 77-96.

287 *Constitution Act Amendment Act* 1890 (Vic), ss 168-185.

288 *Constitution Act Amendment Act* 1890 (Vic), ss 97 and 186.

300 In Western Australia new rolls were to be prepared in connection with each census[289] with supplemental rolls printed annually[290] as well as "immediately previous to a general election"[291]. Claims for enrolment were receivable at any time and were to be acted upon immediately[292], but the rolls were not to be altered on polling day or during the four days preceding an election[293]. Applications for transfer could not be made between the issue of a writ for an election and polling day[294]. A person was not entitled to vote in an election unless that person had been registered for six months as an elector[295].

301 Some of the States having provisions preventing persons from voting unless enrolled, and not permitting enrolment after the issue of the writs, had property qualifications which were either necessary or sufficient conditions for voting. The States in question were Queensland[296], Tasmania[297] and Western Australia[298]. Some of these property qualifications were complex, and checking them in the period between the issue of the writs and polling day might have been difficult. But, as the Solicitor-General of the Commonwealth correctly submitted, this cannot explain why in those States it was not possible to alter the rolls after the issue of the writs.

302 It follows that the contemporary understanding of the words "chosen by the people" in 1900 was consistent with the exclusion of those not on the roll when the writs were issued from voting.

---

289 *Electoral Act* 1899 (WA), s 26.

290 *Electoral Act* 1899 (WA), s 28.

291 *Electoral Act* 1899 (WA), s 28.

292 *Electoral Act* 1899 (WA), ss 33-34.

293 *Electoral Act* 1899 (WA), s 44.

294 *Electoral Act* 1899 (WA), s 37.

295 *Constitution Acts Amendment Act* 1899 (WA), s 15.

296 *Elections Act* 1885 (Q), s 6.

297 *Constitution Amendment Act (No 2)* 1896 (Tas), ss 3-5.

298 *Constitution Acts Amendment Act* 1899 (WA), s 15.

303 Those who object to the type of reasoning employed by the Solicitor-General of the Commonwealth commonly contend that the understanding in 1900 of appropriate electoral laws is irrelevant in that those laws were different from, and less enlightened than, our own. In those days in elections to some legislatures there were property qualifications, restrictions on Aboriginal suffrage and restrictions on female suffrage. The question, however, is not what the most enlightened possible meaning, judged by modern standards, might be borne by the words "chosen by the people". The question is what meaning skilled lawyers and other informed observers considered those words to bear in the 1890s[299], and, being words used to describe processes which were evolving and subject to "dynamism"[300], what meanings those observers would reasonably have considered they might bear in future[301]. Even though the federation age knew of property qualifications, restrictions on Aboriginal suffrage and restrictions on female suffrage, it also knew of universal manhood suffrage, Aboriginal suffrage and female suffrage, and knew of those things in the practical sense that in some parts of Australia they existed without relevant restriction. The failure of the federation age to offer universally applicable systems of suffrage conforming entirely to the most advanced modern models is not a reason to ignore what the meanings and applications of the words "chosen by the people" in the federation age were.

304 As counsel for the Attorney-General for Western Australia correctly submitted, a person in the position of the first plaintiff, who wished to become enrolled after the issue of the writs for an election, could not have done so in the first federal election in any State. And a person in the position of the second plaintiff, who wished to transfer his enrolment after the issue of the writs, could only have done so in South Australia, and even then only in certain circumstances. Assuming that the Constitution now means what it meant then, on the plaintiffs' case, had there been a challenge to the validity of the electoral laws under which the first election was conducted, the challenge would, paradoxically, have succeeded, but for their explicit adoption by ss 10 and 31 of the Constitution. That points against the words "chosen by the people" bearing the construction for which the plaintiffs contend.

---

299 *Cole v Whitfield* (1988) 165 CLR 360 at 385; [1988] HCA 18.

300 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 496 [23] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [2000] HCA 14.

301 *XYZ v The Commonwealth* (2006) 227 CLR 532 at 583-584 [153]; [2006] HCA 25.

The validity of the electoral laws under which elections between 1902 and 1983 were conducted

305 Further, and still assuming that the Constitution now means what it meant then, had there been challenges at the appropriate times, on the plaintiffs' case, every other election up to and including the 1983 election would have been conducted under invalid electoral laws.

306 *1902-1918*. Between 1902 and 1918 there were six elections. They were regulated by the *Commonwealth Electoral Act* 1902 (Cth). Section 31 relevantly provided:

> "All persons qualified to vote at any Election for the Senate or House of Representatives, or who would be qualified so to vote if their names were upon a Roll, shall be qualified and entitled to have their names placed upon the Electoral Roll for the Division in which they live, but no person shall be qualified or entitled to have his name placed upon more than one Roll, or upon any Roll other than the Roll for the Division in which he lives."

Section 64 provided:

> "Claims and applications to transfer received by the Returning Officer or Registrar before the issue of the writ may be registered after the issue of the writ but otherwise no addition to or alteration of the Roll for any Division shall be made during the period between the issue of the writ for an election in the Division and the close of the polling at the election."

Hence persons in the position of the plaintiffs could not have been enrolled, because they had not lodged the relevant claim or application before the issue of the writ. That state of affairs continued even after s 64(2) was added by s 12 of the *Commonwealth Electoral Act* 1909 (Cth): it deemed the writs to be issued at 6pm on the day on which they were issued.

307 *1918-1983*. Between 1918 and 1983 there were 26 elections. The position was governed by s 45 of the Act in its then form. Relevantly it provided:

> "(a) claims for enrolment or transfer of enrolment which are received by the Registrar after six o'clock in the afternoon of the day of the issue of the writ for an election shall not be registered until after the close of the polling at the election; and
>
> (b) except by direction of the Divisional Returning Officer no name shall be removed from a Roll pursuant to a notification of transfer of enrolment received by the Registrar after six o'clock in the

> afternoon of the day of the issue of the writ for an election and before the close of the polling at the election."

Again, in this period the plaintiffs would have been in the same position as under the 2006 amendments, save that the 2006 amendments were a little more liberal in four respects. First, s 102(4) allowed an additional two hours in which claims for enrolment could be lodged (8pm on the day of the writs, not 6pm). Secondly, s 102(4AA) read with s 155 allowed an additional three working days for claims for transfer of enrolment. Thirdly, late claims could be made by persons who turned 18 after the writs were issued under s 100. Fourthly, late claims could be made by persons becoming Australian citizens after the writs were issued by making a provisional claim for enrolment under s 99B.

308 Between 1902 and 1983 the legislation required the electoral rolls to close on the day the writs were issued. The burden of which the plaintiffs complain would not exist in relation to elections in which the executive exercised a discretion to permit more than seven days to elapse between the calling of the election and the issue of the writs. But that cannot render electoral laws valid which would otherwise have been invalid. Legislation which is invalid if administered in one way cannot be treated as valid if it could be administered in another.

309 The Solicitor-General of the Commonwealth was correct to submit that if the submissions of the plaintiffs were sound, all federal elections conducted up to and including 1983 have been conducted under invalid electoral laws, and that this conclusion is so highly improbable as to cast considerable doubt on the submissions of the plaintiffs which led to it. Far from being beside the point, the Solicitor-General's submission is, particularly in relation to elections conducted in the federation age, forceful.

310 The plaintiffs parried the Solicitor-General's submission by contending that there are some developments in electoral law which the Constitution now prevents the legislature from reversing. They said that the Constitution renders it impossible now to return to an earlier stage of development, even though that stage of development would have been constitutionally valid at an earlier time. The only specific examples the plaintiffs gave were universal adult suffrage and the capacity to vote at 18. Even if those examples are correct, it does not follow that the much more general proposition of which they were said to be illustrations is correct[302]. And even if that much more general proposition is correct, it does not follow that the return made in the 2006 amendments to the position obtaining from 1902 to 1983 is constitutionally invalid. The plaintiffs relied on the emergence of "different circumstances (including changing

---

302 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 224 [179].

technology enabling continuous roll updating … and the processing and checking of large numbers of claims for enrolment very rapidly)". The proposition which the plaintiffs advocate does not follow from these circumstances.

311 The proposition which the plaintiffs advocate also leads to the result that even where an election is conducted under legislative provisions which result in members of Parliament being "directly chosen by the people" – the constitutional criterion – those provisions may nonetheless be constitutionally invalid because they retreated from the position achieved by earlier legislation (or executive practice). A conclusion which rests on an asseveration that legislation meeting a constitutional criterion is constitutionally invalid is a contradiction in terms. It is a contradiction which casts in doubt the whole of the reasoning which led to it. The constitutional validity of legislation depends on compliance with the Constitution, not on compliance with "higher" standards established by the course of legislation and by the operation of executive discretion. The question is not whether an impugned legislative provision "regresses" from some "higher" standard established by the status quo. It is only whether it fails to meet a constitutional criterion. Legislative development, durable or otherwise, does not create constitutional validity or invalidity which would not otherwise exist. Otherwise the legislature could enact itself into validity.

Illegality and constitutional validity

312 Under the legislative scheme, an effective franchise system depends on an accurate electoral roll. Entitlement to vote depends on being on the roll. The legislation also seeks to ensure an approximate equality of voters in each Electoral Division. The Electoral Commissioner is obliged each month to ascertain the number of electors enrolled in each Division, determine the average divisional enrolment, determine the extent to which the number of electors enrolled in each Division differs from the average divisional enrolment, and publish a statement of the results in the *Gazette*: s 58(1). Sections 59-78 make provision for redistribution, where, inter alia, more than one third of the Divisions in a State are "malapportioned Divisions". These provisions depend for their effectiveness on those entitled to be enrolled becoming enrolled. They also depend for their effectiveness on persons enrolled making timely statements about a change of residence. The obligations to enrol and transfer enrolment imposed by s 101 are directed at achieving that state of affairs. The right of enrolled electors to vote could not operate optimally without citizens complying with the duties to enrol and to transfer enrolment. To ensure the accuracy of the rolls, the Electoral Commissioner has the power to reject claims to enrol or transfer enrolments which are not in order: s 102(1)(c). There are also provisions pursuant to which electors may object to the enrolment of others: Pt IX. The scheme contains an elaborate procedure for the conduct of an election after the writs have been issued which assumes that the electoral rolls are in very large measure correct. The scheme also gives the electoral rolls immunity from challenge in the Court of Disputed Returns after the election is over: s 361(1).

313 A key element in the legislative scheme to secure largely correct electoral rolls is the use of compulsion. There is a statutory command to claim or transfer enrolment. That command is backed by a criminal sanction. The plaintiffs did not dispute the constitutional validity of either the command or the sanction. What they demand is an entitlement to continue disobeying the command and ignoring the sanction for longer periods than the impugned provisions allow.

314 The plaintiffs say that the impugned provisions are void because they fix periods which cause a "substantial" number of persons to be disenfranchised. On the plaintiffs' arguments, the disenfranchisement only arises because a "substantial" number of people choose to disobey laws compelling them to claim or transfer enrolment, laws which the plaintiffs concede are valid. The plaintiffs' arguments could not work if it were only they who had disobeyed the laws, because two is not a sufficiently substantial number. The laws alleged to be invalid and the laws conceded to be valid are, however, part of a single integrated scheme. The constitutional validity of some laws in that scheme cannot turn on the number of people who choose to disobey other concededly valid laws enacted as part of that scheme. The validity of the impugned provisions cannot wane or wax as the number of persons who fail to comply with their statutory duties rises or falls. Substantial disobedience to laws validly enacted under a power to do so in the Constitution (in this instance s 51(xxxvi)) cannot render invalid other laws enacted under that power. So to hold would subvert not only the validly enacted laws, but also the Constitution under which they were validly enacted.

Conclusion

315 For the above reasons I opposed the orders made by the Court on 6 August 2010, and would have dismissed the proceedings with costs.

316 CRENNAN J. In this proceeding the plaintiffs put in issue the constitutionality of amendments made to the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act") by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth) ("the 2006 Act"). The legislative history, and a description both of the current electoral structure and of the calling of the general election for 21 August 2010, are all set out in the joint judgment of Gummow and Bell JJ.

317 As adult Australian citizens[303], able to satisfy a one month residency requirement[304], each plaintiff is entitled to be on an Electoral Roll under the Electoral Act[305]. Ms Rowe, having turned 18 on 16 June 2010, is obliged to enrol, and Mr Thompson, having changed his address in March 2010, is obliged to transfer his enrolment[306]. If enrolled, each plaintiff is entitled to vote at elections of senators for the State in which each resides[307] and at elections of members of the House of Representatives for the Subdivision in which each resides[308].

318 Each of the plaintiffs wished to vote at the election held on 21 August 2010 and for that purpose each sought to be enrolled on the relevant Electoral Roll within seven days after the issue of the writs. This would have been possible under the Electoral Act as it stood before the 2006 Act. However, the plaintiffs' claims were not considered because of the provisions of ss 102(4), 102(4AA) and 155 of the Electoral Act, being amendments made by the 2006 Act, expressed to repeal ss 102(4) and 155 as they previously stood.

319 Under s 102(4), the time during which a claim for enrolment must not be considered begins at 8:00 pm on the date of the writ or writs for an election for the relevant Division and ends at the close of the polling at the election. Under s 102(4AA) the time during which a claim for transfer of enrolment must not be considered begins at 8:00 pm on the date of the close of the Rolls (fixed by s 155(1) as the third working day after the date of the relevant writ) and ends at the close of the polling at the election.

---

303 Electoral Act, s 93(1)(a) and (b)(i).

304 Electoral Act, s 99(1).

305 Part VI (ss 81-92).

306 Section 101(1).

307 Respectively South Australia and New South Wales.

308 See ss 82 and 93(2).

320 The plaintiffs impugned ss 102(4), 102(4AA) and 155 of the Electoral Act, asserting in their written submissions that they are: (a) contrary to ss 7 and 24 of the Constitution; (b) beyond the legislative powers of the Commonwealth conferred by ss 51(xxxvi) and 30 of the Constitution; and/or (c) beyond what is reasonably appropriate and adapted, or proportionate, to the maintenance of the constitutionally prescribed system of representative government. During the course of oral argument the plaintiffs concentrated on ss 7 and 24 and the prescription therein for Houses of Parliament composed of members "directly chosen by the people". Their submissions did not turn on the word "directly".

321 The impugned provisions were characterised as "disenfranchising" the plaintiffs because, although the plaintiffs were legally eligible to vote in the election in the State and Subdivision in which they reside, the provisions prevented them from doing so. Accordingly, it was contended that the impugned provisions are not reasonably adapted and appropriate to support choice by the people in elections for the Senate and the House of Representatives and that the provisions interfere, unreasonably and unnecessarily, with the opportunity to enrol and vote. The plaintiffs accepted that Parliament was entitled to prescribe a cut-off date for enrolment and transfer, and they did not attack the validity of ss 102(4) and 155 as they stood previously.

322 Evidence from the Deputy Electoral Commissioner indicated that there were approximately 100,000 claims for enrolment received after the cut-off dates described above which would have been made within time under ss 102(4) and 155 as they stood prior to the 2006 Act[309]. Evidence that those claims could be processed onto an Electoral Roll within the statutory timetable set for the election was not controverted.

323 A declaration of invalidity was made by the Court, by majority, on 6 August 2010, the effect of which is to repeal the impugned provisions and thereby restore the operation of the Electoral Act as it previously stood[310]. For the following reasons I joined in the making of those orders.

324 When referring to the influence of the introduction of responsible government and its development, in *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley*[311], Isaacs J asserted the relevance "in interpreting the Australian

---

309 Section 155 as it stood before repeal under the 2006 Act provided that the date fixed for the close of the Rolls shall be seven days after the issue of the relevant writ.

310 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 [25] per Gleeson CJ, 202-203 [96]-[97] per Gummow, Kirby and Crennan JJ; [2007] HCA 43.

311 (1926) 37 CLR 393 at 411-412; [1926] HCA 8.

Constitution, of every fundamental constitutional doctrine existing and fully recognized at the time the Constitution was passed". In *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[312] the text of the Constitution was construed having regard to the historical setting in which the Constitution was created, which included considering the colonial suffrages in Australia in 1900[313].

325 In establishing the Commonwealth, the Constitution directs, and gives effect to, a system of representative government[314] (sometimes called representative democracy[315]) which involves direct popular election[316]. The Constitution left it to Parliament, within the limits fixed by the Constitution, to prescribe the form of representative government[317]. The matters of qualification for the franchise and the method of election for both the Senate and the House of Representatives are left by the Constitution to the political choice of Parliament, so long as any electoral system adopted remains within the broad range of alternatives by which provision may be made for Houses of Parliament composed of members "directly chosen by the people"[318].

---

312 (1975) 135 CLR 1; [1975] HCA 53.

313 (1975) 135 CLR 1 at 17, 19 per Barwick CJ, 58 per Stephen J.

314 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 137-138 per Mason CJ, 150 per Brennan J, 168 per Deane and Toohey JJ, 184, 188 per Dawson J, 210-211 per Gaudron J, 230 per McHugh J; [1992] HCA 45.

315 Following Stephen J in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 56-58.

316 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 56 per Stephen J; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 236 [153] per Gummow and Hayne JJ; [2004] HCA 41.

317 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 173 [5] per Gleeson CJ, 186-187 [45] per Gummow, Kirby and Crennan JJ.

318 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 36 per McTiernan and Jacobs J, 46 per Gibbs J, 56-57 per Stephen J; *McGinty v Western Australia* (1996) 186 CLR 140 at 182-184 per Dawson J, 269-270, 283-284 per Gummow J; [1996] HCA 48; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188-189 [6]-[7], [9] per Gleeson CJ, 206-207 [61]-[65] per McHugh J, 237 [154]-[155] per Gummow and Hayne JJ, 257 [223] per Kirby J, 296 [332] per Callinan J.

326 In *Roach v Electoral Commissioner*[319] Gleeson CJ said:

> "In *McKinlay*[320], McTiernan and Jacobs JJ said that 'the long established universal adult suffrage may now be recognised as a fact'. I take 'fact' to refer to an historical development of constitutional significance of the same kind as the developments considered in *Sue v Hill*[321]. Just as the concept of a foreign power is one that is to be applied to different circumstances at different times, McTiernan and Jacobs JJ said that the words 'chosen by the people of the Commonwealth' were to be applied to different circumstances at different times. Questions of degree may be involved. They concluded that universal adult suffrage was a long established fact, and that anything less could not now be described as a choice by the people. I respectfully agree. As Gummow J said in *McGinty v Western Australia*[322], we have reached a stage in the evolution of representative government which produces that consequence. I see no reason to deny that, in this respect, and to this extent, the words of ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote."

327 The other members of the majority in *Roach*[323] said of representative government:

> "In *McGinty*[324] the Court held that what is involved here is a category of indeterminate reference, where the scope for judgment may include matters of legislative and political choice. But that does not deny the existence of a constitutional bedrock when what is at stake is legislative disqualification of some citizens from exercise of the franchise."

328 The historical circumstances, and the stage reached in the evolution of representative government, as at the date of federation assist in exposing the bedrock and show that the relevant words of ss 7 and 24 have always constrained

---

319 (2007) 233 CLR 162 at 174 [7].

320 (1975) 135 CLR 1 at 36.

321 (1999) 199 CLR 462; [1999] HCA 30.

322 (1996) 186 CLR 140 at 286-287.

323 (2007) 233 CLR 162 at 198 [82] per Gummow, Kirby and Crennan JJ.

324 (1996) 186 CLR 140 at 269-270.

Parliament, in a manner congruent with Gleeson CJ's conclusion that the words of ss 7 and 24 have come to be a constitutional protection of the right to vote.

329 Representative government is a government in which members of Parliament represent those who have voted for them in an election[325]. A franchise which is exclusive and undemocratic yields an oligarchic representative government[326]. Edmund Burke described this form of government as amounting to "virtual representation" of the people, even though the representatives "are not actually chosen by [the people]"[327].

330 The expression "chosen … by the People" occurs in Art I, §2 of the American Constitution, but it has its own distinctive history in Australia[328] grounded in British constitutional history and colonial politics in the second half of the nineteenth century. In constitutional discourse over a long period, choice by the people of parliamentary representatives has signified democracy, democratic elections and a democratic franchise.

331 The defining constitutional debate in Britain in the nineteenth century was over whether (and, if so, how) there should be a change from an oligarchic representative government to a democratic representative government. In that debate, manhood suffrage (that is, a right to vote which was not dependent on considerations of rank or class) was considered crucial to effect the change from oligarchy, "[g]overnment by the few"[329], to democracy, "[g]overnment by the people"[330]. As a result, franchises based on residential qualifications, rather than property qualifications, came to be seen as quintessentially democratic, an important point when considering the stage in the development of representative government which had been reached in the colonies prior to federation.

---

325 *Ashby v White* (1703) 2 Ld Raym 938 [92 ER 126].

326 John Stuart Mill, *Considerations on Representative Government*, 2nd ed (1861), Ch IV at 81, 83.

327 Letter to Sir Hector Langrishe, 1797, quoted in Birch, *Representative and Responsible Government*, (1964) at 24.

328 Cf *Wesberry v Sanders* 376 US 1 (1964); see also *Baker v Carr* 369 US 186 (1962).

329 *A New English Dictionary* (which became the *Oxford English Dictionary*), (1905), vol VII, Pt I at 103.

330 *A New English Dictionary* (which became the *Oxford English Dictionary*), (1897), vol III, Pt I at 183.

332 The Constitution emerged after debate in Britain over extending parliamentary representation by widening the franchise, in the direction of democratic representative government. Whilst framers of the Constitution "admired and respected British institutions"[331], an aspect of those institutions already contested successfully in some of the Australian colonies in the middle of the nineteenth century was the franchise based on property qualifications[332].

Britain – "chosen by the people"

333 The centrality of the franchise to sharing political power had caused arguments over extending parliamentary representation stretching right back to the Putney Army debates held in the period 1647 to 1649. Sustained debates over a version of manhood suffrage[333] were then generated by the "Heads of the Proposals"[334] and two "Agreements of the People" drawn up chiefly by the Levellers, who supported a republican democracy. Whilst the proposals for manhood suffrage were defeated, the identification of manhood suffrage as a democratic franchise by which "the people do … choose themselves a Parliament"[335] distinguished it from the extant exclusive franchise based on property qualifications.

---

331 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 172 [1] per Gleeson CJ.

332 As to which see Cannon (ed), *The Oxford Companion to British History*, rev ed (2002) at 896:

> "an Act of Henry VI's reign in 1429 declared that 'great, outrageous and excessive numbers of people … of small substance and of no value' were voting at elections, and went on to limit the franchise to freeholders with land worth 40 shillings a year, free of all charges. This remained the franchise until 1832."

333 See Woodhouse (ed), *Puritanism and Liberty: Being the Army Debates (1647-9) from the Clarke Manuscripts*, (1938) ("*Puritanism and Liberty*") at 52-75, 77-83, 343, 356-363, 406-407, 433-434, 438, 445-446, 450, 454 and 462-463. See also Tuck, *Philosophy and Government 1572–1651*, (1993) at 245-252.

334 The "Heads of the Proposals", to be found in *Puritanism and Liberty* at 422, referred to "some other rule of equality or proportion, to render the House of Commons (as near as may be) an equal representative of the whole".

335 Article III of the first "Agreement of the People" (28 October 1647) proposed "[t]hat the people do, of course, choose themselves a Parliament": Gardiner, *The Constitutional Documents of the Puritan Revolution 1625–1660*, 3rd ed (1906) at 333-335. Article III of the second "Agreement of the People" (15 January 1649) proposed, among other matters, manhood suffrage with the exception of persons receiving alms, servants and Royalists: Gardiner at 359-371.

334 Whilst debates over sharing political power by extending the franchise never disappeared completely in Britain, they were back on the political agenda during a significant part of the nineteenth century. The Reform Acts of 1832[336], 1867[337] and 1884[338] provided for ever greater inclusion of electors in the franchise. The third Reform Act, which extended household suffrage, has been referred to as going "almost all the way to universal male suffrage"[339].

335 The Chartist movement emerged in 1838, after the first Reform Act[340]. The "People's Charter", directed to the House of Commons, had six points concerning the sharing of political power. The first, mentioned by Barwick CJ in *King v Jones*[341], was "[a] vote for every man twenty one years of age, of sound mind, and not undergoing punishment for crime" (often referred to as universal manhood suffrage[342]). The second was the ballot "[t]o protect the elector in the exercise of his vote", that is, a secret ballot, which was first instituted in Victoria in 1856[343]. Regular and short parliaments were also advocated[344].

---

336 *Representation of the People Act* 1832 (2 & 3 Will IV c 45).

337 *Representation of the People Act* 1867 (30 & 31 Vict c 102).

338 *Representation of the People Act* 1884 (48 & 49 Vict c 3).

339 Butler, *The Electoral System in Britain Since 1918*, 2nd ed (1963) at 5.

340 The Act widened the British electorate but it did not change its social, occupational or property-based character. However, the principle was conceded that it was the individual citizen who should be represented in Parliament.

341 (1972) 128 CLR 221 at 234; [1972] HCA 44.

342 Jeremy Bentham proposed a form of universal manhood suffrage to effect, together with other proposals, what he regarded as the right and proper end of government, namely "the greatest happiness of the greatest number, the only legitimate end of government": Bentham, "Supreme Operative", (1822), §16, in Schofield (ed), *The Collected Works of Jeremy Bentham: First Principles Preparatory to Constitutional Code*, (1989) 149 at 197-198.

343 *Electoral Act* 1856 (Vic) (19 Vict No 12), s 36.

344 The other points of the Charter were that electorates should contain the same number of votes to ensure votes were of equal value, there should be no property qualification for members of parliament and members should be paid: the six points of the People's Charter are set out in Hanham, *The Nineteenth Century Constitution 1815–1914: Documents and Commentary*, (1969) at 270.

The Australian colonies – "chosen by the people"

336 In that historical setting, colonial franchises were developed in Australia, in the 1850s, for newly instituted bicameral legislatures, as New South Wales, Victoria and South Australia framed their own Constitutions after the passage of the *Australian Constitutions Act* 1850 (Imp), which granted self-government[345].

337 The first of the colonies to provide residential qualifications for voters (that is, manhood suffrage) in respect of elections for the Legislative Assembly was South Australia, with the *Constitution Act* (SA)[346] passed in 1856.

338 In Victoria, the second colony to introduce manhood suffrage, the discovery of major deposits of gold at Ballarat occurred shortly after the separation from New South Wales[347].

339 The Bill for the new Constitution for Victoria was laid on the table for debate by the colonial legislature in January 1854. It was noted by Colonial Secretary Foster in the prefatory report of the Select Committee on the New Constitution that "nothing could be more impolitic than to legislate against the spirit of the age" and that "the social condition of this colony renders a close assimilation to certain British institutions impossible and that an attempt to imitate them is likely, not only to fail, but to introduce the evils without the advantages experienced from them in England"[348]. A campaign had already begun for the enfranchisement of the diggers on the goldfields whose "property" was a tent or hut.

340 A diggers' association called the Ballarat Reform League had a programme which was "substantially that of English Chartism adapted to local circumstances"[349].

---

345 13 & 14 Vict c 59. See generally Lumb, *The Constitutions of the Australian States*, 5th ed (1991).

346 Act No 2 of 1855-6.

347 The separation of Victoria from New South Wales took effect, pursuant to the *Australian Constitutions Act* 1850, on 1 July 1851: *Victorian Government Gazette*, 9 July 1851 at 77-78. The first findings at Ballarat occurred "during the first days of September [1851]": Davison, *The Discovery and Geognosy of Gold Deposits in Australia*, (1860) at 120.

348 *Argus*, 4 January 1854.

349 Scott, *A Short History of Australia*, 4th ed reissue (1925) at 213. The programme included "parliamentary representation on the basis of manhood suffrage, the

(Footnote continues on next page)

341 Diggers urged that "it is the inalienable right of every citizen to have a voice in making the laws he is called upon to obey. That taxation without representation is tyranny."[350] In a list of grievances they referred to "the strong conviction in the minds of the diggers that they never will have justice until they are fully and fairly represented in the Legislative Council" and urged the "giving [of] full and fair representation to the people"[351]. This was the language of British radicalism supporting a democratic franchise, and it echoed John Locke's insistence on the rights of the individual and the idea that good and just government should command the consent of the people[352]. Public discourse reflected the same themes.

342 The campaign for digger franchise eventually succeeded in 1855, the year following the Eureka Stockade[353], with the franchise following a £1 miner's

---

payment of members of Parliament [and] the abolition of the property qualification for members of Parliament".

350 Enclosure No 2 from Sir Charles Hotham, Lieutenant-Governor of Victoria to Sir George Grey, the Colonial Secretary, in Clark (ed), *Select Documents in Australian History 1851–1900*, (1955) at 58. "Unfair taxation without representation" was given as one of the American colonists' reasons for the Revolutionary War, which commenced in April 1775. Thomas Paine emphasised the imbalance between taxation and the right to vote in *The Rights of Man*, (1791), Pt I; (1792), Pt II. The theme of "no taxation without representation" was picked up again in the early part of the nineteenth century in William Cobbett's *Political Register*. It was repeated by the Chartists as a way of characterising their demands as "constitutional". The expression found its way into public colonial debates on the franchise in both New South Wales and Victoria.

351 See the letter from the Ballarat Reform League to the Board of Enquiry, set out in Victoria, *Riot at Ballaarat: Report of the Board Appointed to Enquire into Circumstances Connected with the Late Disturbance at Ballaarat together with the Evidence Taken by the Board*, (1854), Appendix B at 20.

352 Locke said: "whenever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience": Locke, *The Second Treatise of Government*, Gough ed (rev) (1956), Ch XIX, "Of the Dissolution of Government", §222 at 110.

353 At which both diggers and troops were killed: see Molony, *Eureka*, (2001) at 160-161.

right[354]. The *Victoria Constitution Act* 1855 (Imp)[355] received the Royal Assent on 16 July 1855 and came into operation a short time thereafter, and manhood suffrage for the Legislative Assembly inevitably followed digger suffrage in 1857[356]. Throughout the campaign for a wide suffrage based on residential qualifications, "choice by the people" of parliamentary representatives signified democracy, which required democratic election of parliamentary representatives, which in turn required a democratic franchise.

343 In New South Wales, the third colony to introduce manhood suffrage, there had been a public campaign, centred in Sydney, by a distinct group of self-styled democrats for some years before the passage of the *New South Wales Constitution Act* 1855 (Imp)[357]; a group, known as the Constitutional Association, in which Mr (later Sir) Henry Parkes was active, had its own newspaper, *The People's Advocate and New South Wales Vindicator*[358]. Whilst events differed markedly from those in Victoria, the same imbrication of radical ideas was advanced in support of manhood suffrage for the lower House of Parliament. Manhood suffrage and the secret ballot were introduced for the Legislative Assembly in New South Wales with the passage of the *Electoral Act* 1858 (NSW)[359] on 24 November 1858.

344 The conception of democracy appealed to during campaigns in the 1850s for the right to vote transcended questions of qualifications for the franchise. Democracy was seen as an active and continuing process in which all legally eligible citizens had an equal share in the political life of the community, so as to secure legislatures which were both just and representative, and which enured to the peace and good order of the polity[360]. To that consideration might be added

---

354 *Victoria Constitution Act* 1855 (Imp) (18 & 19 Vict c 55), Sched 1, s 5 and *Gold Fields Act* 1855 (Vic) (18 Vict No 37), ss 2 and 3.

355 18 & 19 Vict c 55.

356 See *Abolition of Property Qualification Act* 1857 (Vic) (21 Vict No 12).

357 18 & 19 Vict c 54.

358 See Cochrane, *Colonial Ambition: Foundations of Australian Democracy*, (2006) at 197-198; and Hirst, *The Strange Birth of Colonial Democracy: New South Wales 1848–1884*, (1988) at 3.

359 22 Vict No 20.

360 This conception of democracy was subsequently explicated by John Stuart Mill in his essay *Considerations on Representative Government,* 2nd ed (1861), Ch III. For a contemporary account of a similar conception of democracy see Sen, *The Idea of Justice*, (2009), Chs 15, 16.

that, in its relations with other nations, a democratic nation is characterised as one in which political equality and liberty are secured, however variously, by different electoral systems. The centrality of the franchise, to a citizen's participation in the life of the community and membership of the Australian body politic, was recognised in *Roach*[361].

345 Whilst manhood suffrage for lower Houses of Parliament was achieved in the 1850s with relative ease in the colonies mentioned[362], an immediate reaction, to halt the tide of democracy, was to institute plural voting on property qualifications in lower Houses and to ensure that upper Houses were not democratic[363]. At federation the most populous States were New South Wales, Victoria, Queensland (which was part of New South Wales until 1859[364]) and South Australia[365].

346 At the time of their preparations for the Bill for the second Reform Act, British politicians, including Benjamin Disraeli, were keen to be informed of the experience of democracy in Australia[366], not least because they were interested in knowing whether plural voting successfully retarded the effects of the abovementioned colonial franchises.

347 Whilst the Constitution does not subscribe to any political philosophy, or theory of government, "choice by the people" of parliamentary representatives is

---

361 (2007) 233 CLR 162 at 174 [7] per Gleeson CJ, 199 [83] per Gummow, Kirby and Crennan JJ.

362 It can be noted that the *Constitutional Act* 1854 (Tas) (18 Vict No 17), which was somewhat incomplete, contained property qualifications for electors of the Legislative Assembly. By 1901, residence alone was sufficient qualification.

363 For example, there was a nominee upper House in New South Wales, in which members were nominated for life: 18 & 19 Vict c 54. In Victoria there was an elected upper House, with high property qualifications for both members (at £5000) and electors (at £1000): 18 & 19 Vict c 55. For an account of the institution of the latter, see Parkinson, *Sir William Stawell and the Victorian Constitution*, (2004) at 23-32.

364 The separation of Queensland from New South Wales was effected by Letters Patent issued 6 June 1859.

365 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 469-470.

366 Smith, *The Making of the Second Reform Bill*, (1966) at 76-78, 81, 230-231.

a constitutional notion signifying individual citizens having a share in political power through a democratic franchise.

Sections 8, 30 and 41 of the Constitution

348 Before turning to ss 7 and 24 of the Constitution, it is convenient to consider the qualifications in the colonial franchises picked up by ss 8, 30 and 41 for the light they throw on the constitutional imperative of choice by the people. Sections 51(xxxvi), 8 and 30 provide for the making of laws by the Parliament for the qualification of electors. Section 30 states:

> "Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once."

349 Section 8 provides:

> "The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once."

350 Section 41 preserves the rights of women and Aboriginal Australians to vote, to the extent that such rights existed in the colonies at the time of federation[367]. Section 41 provides:

> "No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth."

351 Unlike s 51(xxxvi), none of these sections is expressed to be "subject to this Constitution".

352 The colonial franchises picked up by these sections are colonial franchises for the lower Houses. Franchises for colonial upper Houses are not, with respect, relevant to s 30 of the Constitution[368]. Further, given both the reference to "the

---

367 *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254; [1983] HCA 6.

368 Cf *McGinty v Western Australia* (1996) 186 CLR 140 at 242. See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 469-470.

people" in ss 7 and 24, and the prohibition on plural voting in s 30, the Victorian franchise based on a "very small property qualification as the basis of plural enrolment"[369], and property qualifications for plural voting which existed elsewhere[370], do not seem to be of any abiding constitutional significance.

353 What were well known in the majority of the colonies of Australia at federation were franchises for colonial lower Houses, based on residential qualifications. Men (generally described as natural-born or naturalised British subjects[371]) of 21 years of age, who were not subject to a disqualification[372], and who satisfied residential qualifications, could vote for the lower Houses of Parliament in New South Wales[373], Victoria[374], Queensland[375], South Australia[376] and Western Australia[377]. In Tasmania, the same applied from 28 January 1901[378]. Aboriginal Australians were included in those franchises in New South

---

369 *King v Jones* (1972) 128 CLR 221 at 234 per Barwick CJ. The *Constitution Act Amendment Act* 1899 (Vic), s 4 abolished plural voting in Victoria.

370 Provisions permitting plural voting based on property qualifications existed in Queensland, Tasmania and Western Australia.

371 There were some franchises which included "denizens".

372 There were some exclusions from the franchise, such as for persons of unsound mind, in receipt of charity, or who were prisoners.

373 *Parliamentary Electorates and Elections Act* 1893 (NSW), s 23.

374 *Constitution Act Amendment Act* 1890 (Vic), s 128. Existing alongside this suffrage there was a non-resident's suffrage based on property qualifications: s 130.

375 *Elections Act* 1885 (Q), s 6(1) and *Elections Act* 1897 (Q), s 4. Existing alongside this suffrage were suffrages based on both household and property qualifications: ss 6(2) and 6(3) of the 1885 Act. Cf *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 19.

376 *Electoral Code* 1896 (SA), s 15.

377 *Constitution Acts Amendment Act* 1899 (WA), s 26.

378 The *Constitution Amendment Act* 1900 (Tas), s 5, which provided for manhood suffrage, was proclaimed on 28 January 1901. Prior to that date Tasmania coupled a residential qualification with a small property qualification: *Constitution Amendment Act (No 2)* 1896 (Tas), s 4.

Wales, Victoria, South Australia and Tasmania[379]. It must be noted that in Queensland and Western Australia, Aboriginal persons had to satisfy a property qualification[380]. In the Northern Territory section of South Australia, Aboriginal Australians were excluded from the franchise[381], and this is recognised in s 25 of the Constitution. Women of 21 years of age, who satisfied residential qualifications, could vote for the lower Houses in South Australia and Western Australia[382]. Neither enrolment nor voting was compulsory at this time. Given the ban on plural voting in ss 8 and 30 these franchises, based on residential qualifications, were the significant franchises for the referenda for the Constitution and the first Parliament[383].

354 Reflecting such matters, ss 8, 30 and 41 were described by Professor Harrison Moore in his text on the Constitution as "designed to secure the 'democratic' principle that the suffrage shall be of the widest, and that no person shall have more than one vote."[384]

355 In *McKinlay*[385], McTiernan and Jacobs JJ said of s 24:

> "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)."

356 What has occurred since federation is that a franchise which only avoids arbitrary exclusion based on class cannot possibly be described as democratic. The Constitution, and specifically ss 7 and 24, would constrain any reversion to arbitrary exclusions from the franchise, based on gender and race, of the kind

---

379 *Parliamentary Electorates and Elections Act* 1893 (NSW), s 23; *Constitution Act Amendment Act* 1890 (Vic), s 128; *Electoral Code* 1896 (SA), s 15; *Constitution Amendment Act* 1900 (Tas), s 5.

380 *Elections Act* 1885 (Q), s 6; *Constitution Acts Amendment Act* 1899 (WA), s 26.

381 *Electoral Code* 1896 (SA), s 16.

382 *Electoral Code* 1896 (SA), s 15; *Constitution Acts Amendment Act* 1899 (WA), s 26.

383 *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254; also, see generally Twomey, "The Federal Constitutional Right to Vote in Australia", (2000) 28 *Federal Law Review* 125.

384 *The Constitution of the Commonwealth of Australia*, (1902) at 106.

385 (1975) 135 CLR 1 at 36.

which occurred in one or more colonies at the time of federation[386]. However, the colonial franchises, based on residential qualifications, were the antithesis of an exclusive suffrage designed to yield an oligarchic representative government. They were expressly designed to yield democratic lower Houses. For both informed people in Australia at the time of federation[387], and the framers of the Constitution who had experience as colonial politicians[388], the state of the development of representative government which had been reached as at federation was that five of the six States had democratic (that is, not oligarchic) franchises for the lower Houses of Parliament. Tasmania followed from 28 January 1901.

357 Thus one significance of the colonial franchises, for present purposes, is that they assist an understanding of the genesis of the constitutional protection given to the right to vote, to which I will return.

Sections 7 and 24 – a drafting consideration

358 Section 24 of the Constitution relevantly provides:

> "The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators."

359 The implications of the words "chosen by the people" for the federal franchise were readily understood by the "politically experienced members of the constitutional conventions"[389]. Workable colonial democracies, based on the colonial franchises, for lower Houses of Parliament, discussed above, must have been familiar to them. It was known, even beyond Australian shores, that plural voting in the colonial lower Houses was intended to dilute the effect of democratic colonial franchises.

---

386 *McGinty v Western Australia* (1996) 186 CLR 140 at 221 per Gaudron J, 287 per Gummow J.

387 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 230 per McHugh J.

388 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 188-189 [53] per Gummow, Kirby and Crennan JJ; see also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 [150] per Gummow and Hayne JJ.

389 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 19 per Barwick CJ.

360 At the Convention in Sydney in 1891, the delegates were considering a forerunner of s 7 (cl 9), which relevantly provided:

> "The senate shall be composed of eight members for each state, directly chosen by the houses of the parliament of the several states during a session thereof, and each senator shall have one vote."

361 It was recognised by Mr Alfred Deakin that, unless the section in the Constitution governing the composition of the Senate was on the same terms as s 24, there would be different constituencies for the House of Representatives and the Senate[390]. As already mentioned, a number of colonial upper Houses were either nominee houses or elected on restrictive property qualifications. By the 1897 Convention there was support for popular election of the Senate[391].

362 Section 7 of the Constitution relevantly provides:

> "The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate."

363 In a passage more fully set out in the joint judgment of Gummow and Bell JJ[392], Quick and Garran described the principle of popular election for the Senate as being "in harmony with the progressive instincts and tendencies of the times"[393].

364 In *McGinty*[394], in relation to the same period, Gummow J said:

> "Learned commentators observing the situation from a vantage point outside Australia wrote of the extremely 'democratic' nature of the new Constitution, representing 'the high-water mark of popular government'." (footnote omitted)

---

390 *Official Report of the National Australasian Convention Debates*, (Sydney), 2 April 1891 at 591-592.

391 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 9 September 1897 at 257.

392 At [119].

393 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 418.

394 (1996) 186 CLR 140 at 271.

365 In the light of the colonial franchises for lower Houses of Parliament at the time of federation (and notwithstanding their lack of uniformity and deficits in relation to gender and race), ss 7 and 24 would have constrained Parliament from instituting an exclusive federal franchise based on property qualifications, or a franchise which permitted plural voting, for the reason that at the time such franchises would have been considered conspicuously undemocratic.

366 The correct characterisation of the legislative changes to the franchise since the *Commonwealth Electoral Act* 1902 (Cth) is that a democratic franchise has been widened on the journey to "representative democracy in its purest form"[395], that is, universal adult suffrage, in respect of which there are no arbitrary exclusions based on class, gender or race. In *McKinlay*, as a prelude to treating universal adult suffrage as "an historical development of constitutional significance"[396], McTiernan and Jacobs JJ referred to "the common understanding of the time" of the words "chosen by the people of the Commonwealth"[397] in order to acknowledge that common understanding varied over time, in accordance with legislative changes to the franchise.

367 Recalling the remarks of Isaacs J in *Kreglinger*[398], the constitutional principles which distinguish between oligarchic and democratic government were fully understood at the time of the commencement of the Constitution and were always in consideration in respect of the drafting of ss 7 and 24. Sections 7 and 24 of the Constitution do not prescribe any particular franchise. However, they constrain the Parliament from instituting a franchise which will result in an oligarchic representative government and mandate a franchise which will result in a democratic representative government, the preferable term used by Mason J in *McKinlay*[399] to describe the system of government, prescribed and maintained by the Constitution. What is sufficient to constitute democratic representative government has changed over time, as conceptions of democracy have changed, to require a fully inclusive franchise – that is, a franchise free of arbitrary exclusions based on class, gender or race.

368 To recognise that ss 7 and 24 mandate a democratic franchise, for the purposes of the popular elections which they prescribe, is to recognise the

---

395 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 57 per Stephen J.

396 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7] per Gleeson CJ.

397 (1975) 135 CLR 1 at 36.

398 (1926) 37 CLR 393.

399 (1975) 135 CLR 1 at 62.

embedding of the right to vote in the constitutional imperative of choice by the people of parliamentary representatives.

Validity

369 The provisions for compulsory enrolment and for the imposition of a penalty for a failure to enrol, or transfer enrolment, within prescribed time limits have been set out in the reasons of others and are not repeated here.

370 Section 101(7) of the Electoral Act provides that a penalty for late enrolment will not be imposed, once enrolment or transfer of enrolment has been attended to. Whilst it is not suggested to be relevant to the plaintiffs, illness is a simple example of a reason for late enrolment, or late transfer, which would not ordinarily be thought to be inexcusable. Examples could be multiplied. Insofar as enrolment is both a legal duty and a civic right, in its operation, s 101(7) privileges the civic right over the legal duty, which is consonant with an electoral process designed to protect the franchise by encouraging enrolment and transfer of enrolment.

371 Provisions governing compulsory voting, upheld as constitutional in *Judd v McKeon*[400], and their legislative history, have also been set out in the reasons of others.

372 The plaintiffs framed their argument, that the impugned provisions were invalid, by reference to the centrality of the existence and exercise of the franchise, which is critical to democratic representative government, and which reflects a citizen's membership of, and participation in, the political life of the community[401]. It was emphasised in argument that the franchise in respect of parliamentary representatives for the State and Subdivision in which each of the plaintiffs resides is constitutionally protected.

373 The plaintiffs first contended that, in their practical operation, the impugned provisions "disenfranchised" them in the sense used in *Roach*. The provisions operate in practice to exclude persons such as the first plaintiff from the right to vote, and persons such as the second plaintiff from the right to participate in choosing their correct parliamentary representatives[402].

---

400 (1926) 38 CLR 380; [1926] HCA 33.

401 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7] per Gleeson CJ, 198-199 [83] per Gummow, Kirby and Crennan JJ.

402 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174-175 [8] per Gleeson CJ, 198-200 [81]-[86] per Gummow, Kirby and Crennan JJ.

374 Secondly, the plaintiffs submitted that the disenfranchisement or exclusion, best described as a disentitlement, was not for a "substantial reason" as explained in *Roach*[403], and that the provisions were arbitrary and disproportionate in relation to maintaining the constitutionally prescribed system of representative government. The term "disproportionate" was employed to describe provisions which were not necessary, appropriate or justifiable in terms of preserving the integrity of the Rolls. In that context, the term "necessary" is not confined to what is "essential" or "unavoidable" but encompasses what is "reasonably appropriate and adapted" to serve a legitimate end. Debate on this aspect of the case was conducted largely by reference to that familiar expression, and this avoided the danger recognised by Gleeson CJ in *Mulholland* and *Roach* of referring to proportionality, in the context of the Constitution, so as to evoke considerations relevant only to different constitutional settings[404].

375 The Commonwealth (and the Attorney-General for Western Australia, intervening in support of the Commonwealth) accepted that the power to make laws with respect to the qualification of electors, and the conduct of elections, is subject to the constraint that, by ss 7 and 24, each of the Houses of Parliament is to be "chosen by the people".

376 The Commonwealth also accepted that if the impugned provisions, in their practical operation, created a disqualification from what otherwise is adult suffrage, the question to be asked, in terms of *Roach*, was whether the disqualification is for a "substantial reason".

377 As to the plaintiffs' first argument, the Commonwealth argued that the impugned provisions did not effect a disqualification from the franchise, even though the provisions operated to prevent people from enrolling after a particular date, because s 101 of the Electoral Act imposes a duty on persons who are entitled to be enrolled to become enrolled, and to keep their addresses up to date. In respect of the plaintiffs' cases, it was asserted that they had not taken steps to enrol, or transfer, when required to do so under the Electoral Act.

378 On the plaintiffs' second argument, the Commonwealth submitted that the impugned provisions are not directed to any purpose incompatible with ss 7 and 24. It was contended that the orderly conduct of elections, based on Electoral

---

403 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174-175 [7]-[8] per Gleeson CJ, 199 [85] per Gummow, Kirby and Crennan JJ.

404 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200 [39]; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 178-179 [17].

Rolls of integrity, is consistent with the constitutionally prescribed system of government, a point which was not in contention between the parties.

379 It was submitted that it is not a prerequisite to the existence of the power to provide a relatively early cut-off date following the announcement of an election, that there be any actual electoral fraud; it is not incompatible with ss 7 and 24 if a purpose of an early cut-off date is to obviate prophylactically a risk of electoral fraud.

380 It was also contended by the Commonwealth that the early cut-off date was directed to enhancement of the integrity of the Electoral Rolls, particularised in two distinct ways: first, it was said the impugned provisions increased the time available to the Australian Electoral Commission for processing enrolment applications before polling day, and secondly, it was said that the impugned provisions would reduce a known phenomenon of a late surge in enrolments by encouraging people not to wait until an election is called before enrolling. The conclusion said to follow was that the disentitlement or exclusion effected by the impugned provisions is appropriate and adapted to the smooth conduct of elections.

381 It can be accepted that the impugned provisions differ from those under consideration in *Roach*. Nevertheless, they operate to disentitle or exclude persons (otherwise legally eligible) from the right to vote and the right to participate in choosing parliamentary representatives for the State and Subdivision in which they reside. It can also be accepted that achieving and maintaining Electoral Rolls of integrity is a purpose which is compatible with ss 7 and 24.

382 The federal electoral process, characterised by compulsory enrolment and compulsory voting, requires comprehensive and accurate Electoral Rolls. Such Rolls will "guard" and "protect"[405] the franchise by ensuring that persons eligible to vote in an election, for their parliamentary representatives, will be able to do so. The Australian Electoral Commission, the independent body charged with maintaining the Electoral Rolls[406], was able to process in the usual way any late enrolments under the previous seven day cut-off period[407]. There was no evidence that fraudulent activity was reduced by the shortening of the seven day cut-off period, nor was there any evidence that systematic electoral fraud

---

405 *Kean v Kerby* (1920) 27 CLR 449 at 459 per Isaacs J; [1920] HCA 35.

406 See ss 6 and 7 of the Electoral Act.

407 Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto*, (2009) at 44 [3.35].

exists[408]. The Commonwealth was careful to emphasise that, in the context of a majority of a Joint Standing Committee on Electoral Matters recommending a shortening of the cut-off period[409], a concern about electoral fraud had never been put any higher than a concern about the potential for electoral fraud.

383 The statement of agreed facts recorded that, for the general elections of 1993, 1996, 1998 and 2001, some 3.32 per cent, 3.23 per cent, 2.94 per cent and 2.96 per cent respectively of total enrolments were processed, as late enrolment transactions, during the period between the issue of the writs for each of those elections and the closure of the Rolls. In 2004, before the cut-off periods instituted by the 2006 amendments, 423,993 enrolment transactions took place in the period permitted between the issue of the writs and the closure of the Rolls. In 2007, there were 279,469 enrolment transactions between the issue of the writs and the closure of the Rolls. It has already been mentioned that there were at least 100,000 late claims for enrolment in respect of the 21 August 2010 election.

384 In all those circumstances, the impugned provisions have not been shown to be necessary or appropriate for the protection of the integrity of the Rolls, as that object was advanced by the Commonwealth. First, this is because the Australian Electoral Commission had no difficulty in processing the volume of late enrolments which occurred with the previous seven day cut-off period. Secondly, to seek to discourage a surge of late claims for enrolment by disentitling or excluding those making them constitutes a failure to recognise the centrality of the franchise to a citizen's participation in the political life of the community[410]. Thirdly, the main reason put forward by the Commonwealth as the justification for the impugned provisions – namely, that they will operate to protect the Rolls from the risk of, or potential for, systematic electoral fraud – is to protect the Rolls from a risk or potential which has not been substantiated to date. Accordingly, the justification put forward to support the impugned provisions does not constitute a substantial reason, that is, a reason of real significance, for disentitling a significant number of electors from exercising their right to vote for parliamentary representatives in the State and Subdivision in which they reside. The impugned provisions cannot be reconciled with the constitutional imperative of choice by the people of those representatives.

---

408 Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto*, (2009) at 50 [3.59].

409 Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, (2005) at 34-36 [2.114]-[2.125].

410 See fn 401 above.

Conclusions

385 For these reasons I joined in the orders made on 6 August 2010. I agree with the order proposed by Gummow and Bell JJ otherwise dismissing the application.

386 KIEFEL J. It has been observed that the Constitution does not mandate any particular electoral system, but leaves the choice as to the features of that system to Parliament[411]. Reid and Forrest[412] observed that the Constitution made provision only for the "bare foundations of the electoral law for the representative Parliament of a new nation." The "whole range of matters" which it left unspecified, or subject to change, included methods of voting to elect the members of the two Houses of Parliament, persons authorised to vote, the question of voluntary or compulsory registration of voters, voting itself and the control of Electoral Rolls[413].

387 The plaintiffs here contend that ss 7 and 24 of the Constitution effect limitations upon the exercise of legislative power with respect to the Electoral Rolls and claims by persons to be enrolled. They contend that amendments made to the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act") in 2006, which reduced the time within which persons could make a claim for enrolment to vote or for transfer of enrolment, after elections had been called, are invalid. Their argument has two strands. It is submitted that the protection extended to the franchise by ss 7 and 24 requires that Parliament ensures the maximum exercise of the franchise. And it is submitted that the provisions in question go further than is necessary and thereby impermissibly limit the exercise of the franchise. The latter contention invokes notions of proportionality.

The provisions of the Electoral Act

388 Parliament has exercised legislative power concerning elections in a number of important respects. It has extended the franchise to all Australian citizens who have attained the age of 18 years[414], subject to provisions for

---

411 *McGinty v Western Australia* (1996) 186 CLR 140 at 184 per Dawson J, 284 per Gummow J; [1996] HCA 48; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 [6] per Gleeson CJ, 207 [64] per McHugh J, 237 [154] per Gummow and Hayne JJ; [2004] HCA 41.

412 *Australia's Commonwealth Parliament: 1901-1988*, (1989) at 86.

413 Reid and Forrest, *Australia's Commonwealth Parliament: 1901-1988*, (1989) at 86-87.

414 *Commonwealth Electoral Act* 1918 (Cth), s 93(1)(b)(i), together with certain non-citizens whose names were on a Roll before 26 January 1984 and who would be British subjects if the relevant citizenship law had remained in force: s 93(1)(b)(ii).

disqualification[415]. It has made voting at elections compulsory[416]. It has obliged persons entitled to vote to enrol[417].

389 The Electoral Act provides for a Roll of Electors for each State and Territory[418]. Each State and the Australian Capital Territory are distributed into Electoral Divisions[419]. Provision is made for a Roll for each Division and a separate Roll for each Subdivision of a Division[420]. The Rolls are maintained as accurate, but not only for the purpose of ascertaining the entitlement of persons to vote at elections. They are sources of information[421] and are used to determine redistributions of Divisions in a State or Territory[422]. One of the key factors in the assessment, regularly undertaken, of the need for a redistribution, is the number of electors in fact enrolled in a Division at the relevant time[423]. The accuracy of the Rolls is therefore essential.

390 As presently expressed[424], a person who is entitled to be enrolled for any Division[425], whether by way of enrolment or transfer of enrolment, is required "forthwith [to] fill in and sign a claim [to enrolment] and send or deliver the claim to the Electoral Commissioner." A person so enrolled is called an Elector[426]. Any person who is entitled to have his or her name placed on the Roll and whose name is not on the Roll upon the expiration of 21 days from becoming

---

415 For example, *Commonwealth Electoral Act* 1918, s 93(8).

416 As introduced by the *Commonwealth Electoral Act* 1924 (Cth), s 2.

417 *Commonwealth Electoral Act* 1918, s 101(1).

418 *Commonwealth Electoral Act* 1918, s 81(1).

419 *Commonwealth Electoral Act* 1918, s 56.

420 *Commonwealth Electoral Act* 1918, s 82.

421 *Commonwealth Electoral Act* 1918, ss 90A, 90B.

422 See *Commonwealth Electoral Act* 1918, ss 59-78.

423 See *Commonwealth Electoral Act* 1918, ss 66(3)(a), 73(4)(a).

424 *Commonwealth Electoral Act* 1918, s 101(1).

425 Section 101 refers to a Subdivision. The Act provides for both Divisions and Subdivisions, but there are no Subdivisions in use. For consistency, I refer to Divisions.

426 *Commonwealth Electoral Act* 1918, s 4(1), definition of "Elector".

so entitled is guilty of an offence, unless he or she proves that the non-enrolment is not a consequence of his or her failure to send or deliver a claim[427]. This offence provision is ameliorated by a further provision: that, where a person sends or delivers a claim for enrolment, proceedings shall not be instituted against that person for an offence committed before he or she sent or delivered the claim[428].

391 Regrettably, and despite the not inconsiderable efforts of the Australian Electoral Commission ("the AEC") and the possibility of prosecution for the abovementioned offence, some persons qualified to vote do not enrol or transfer their enrolment when becoming obliged to do so. Some make their claim at the last possible moment and only when an election has been announced.

392 This is not a new phenomenon. Records of the 2004 federal election disclose that there were 423,993 enrolment transactions (claims for enrolment and updating of existing enrolments) in the nine day period between the announcement of the election and the close of the Rolls. After the close of the Rolls, 168,394 claims were lodged. In 2007, following the amendments in question, when the post-announcement enrolment period was three days for new enrolments and nine days for updating enrolments, there were 279,469 enrolment transactions in that period and a further 100,370 after the close of the Rolls.

393 Following the announcement of the election for the two Houses made in July 2010, some 508,000 claims for enrolment or transfer of enrolment were received and processed onto the Rolls. At the time this matter was heard, the AEC estimated that there might be another 100,000 claims which would not be considered because of the provisions in question, ss 102(4) and 102(4AA) of the Electoral Act. The first and second plaintiffs' claims, to enrolment and transfer of enrolment respectively, were amongst them.

Background to the 2006 amendments

394 The 2006 amendments followed a "Report of the Inquiry into the Conduct of the 2004 Federal Election" by the Joint Standing Committee on Electoral Matters ("the JSCEM")[429]. This was not the first time that the question of the closure of the Rolls had been addressed. The issue had been dealt with on a

---

427 *Commonwealth Electoral Act* 1918, s 101(4).

428 *Commonwealth Electoral Act* 1918, s 101(7).

429 Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, (2005).

number of occasions prior to the 2004 Election Report. This may explain why the recommendations contained in that Report were not specifically mentioned in either the Explanatory Memorandum or the second reading speech to the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005, the Bill which introduced the provisions here in question. In the Report on the 2001 election, retention of the seven day period was recommended[430]. In another, earlier, report on the integrity of the Rolls[431], the JSCEM recommended that the period be shortened so that for new enrolments, the Rolls would close on the day of issue of the writs, and for transfers of enrolment, three days later.

395 In the 2004 Election Report, the JSCEM observed that the AEC processed approximately 17.5 per cent of the enrolment transactions for the whole year in the seven days before Roll closure[432]. It was considered that this limited the AEC's ability to conduct the thorough checks necessary to ensure the integrity of the Rolls[433] and that the "period of grace", of seven days, actually encouraged electors or potential electors to neglect their obligations and attempt to "catch up" in that period[434].

396 The JSCEM had referred, in the latter regard, to the fact that 60.5 per cent of the enrolment transactions which occurred in that period would not have been necessary if electors, or potential electors, had fulfilled their statutory obligation to enrol or update their enrolment details within 21 days of becoming so

---

430 Joint Standing Committee on Electoral Matters, *The 2001 Federal Election: Report of the Inquiry into the conduct of the 2001 Federal Election, and matters related thereto*, (2003) at 63 [2.175].

431 Joint Standing Committee on Electoral Matters, *User friendly, not abuser friendly: Report of the Inquiry into the Integrity of the Electoral Roll*, (2001) at 50 [2.133].

432 Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, (2005) at 34 [2.112].

433 Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, (2005) at 34 [2.113].

434 Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, (2005) at 35 [2.116]-[2.117].

entitled[435]. Because the "period of grace" encouraged reliance upon the extra time allowed, it was considered by the JSCEM to serve "to decrease the accuracy of the roll during non-election periods"[436]. Further, unsuccessful attempts by the AEC to maintain the Rolls as current caused a significant wastage of taxpayer funds, the JSCEM said[437].

397 The JSCEM went on to say that it "also agrees that the current close of roll arrangements present an opportunity for those who seek to manipulate the roll to do so at a time where little opportunity exists for the AEC to undertake the thorough checking required [for] ensuring roll integrity."[438] Dealing with the argument that there was no proof of electoral fraud sufficiently widespread to warrant any action, the JSCEM said that that approach "missed the point"[439], which was that steps should be taken to prevent fraud.

398 Following upon the recommendations of the JSCEM, and after the further recommendation of the Senate Finance and Public Administration Committee that the Bill be passed[440], amendments were effected to the Electoral Act[441]. Section 102(4) provides that a claim for enrolment made after 8.00 pm on the date of the writ for an election is not to be considered until after the close of

---

435 Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, (2005) at 34 [2.114].

436 Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, (2005) at 35 [2.117].

437 Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, (2005) at 35 [2.120].

438 Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, (2005) at 35 [2.121].

439 Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, (2005) at 35 [2.122].

440 The Senate, Standing Committee on Finance and Public Administration, *Electoral and Referendum Legislation Amendment Bill 2006*, (2007) at 6 [2.27].

441 *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth).

polling at the election. Section 102(4AA) provides that a claim to have an enrolment transferred made after 8.00 pm on the date of the close of the Roll for the relevant Division is not to be considered until after the close of polling at the election. According to s 155(1), for a claim to transfer enrolment, this is the third working day after the date of the writ.

The plaintiffs' circumstances

399 On Saturday, 17 July 2010 the Prime Minister announced that an election of both Houses was to be called. The writs for those elections were obtained very shortly afterwards, on Monday, 19 July 2010. The first plaintiff therefore had until 8.00 pm on 19 July 2010 to enrol for the election and the second plaintiff until 8.00 pm on Thursday, 22 July 2010 to transfer his enrolment.

400 The first plaintiff attained the age of 18 years on 16 June 2010. When the election was announced she had not enrolled. She attempted, unsuccessfully, to do so on the day of issue of the writs, Monday, 19 July 2010. She did not lodge a claim until Friday, 23 July 2010.

401 The second plaintiff was 23 years of age at the relevant times. He changed his address to one in another Division in March 2010. He did not advise the AEC of this, as he was required to do. He attempted to do so on the day before the election was called, but was also unsuccessful in submitting the claim. He also lodged his claim on 23 July 2010.

402 Neither of the plaintiffs fulfilled their obligations as required by s 101 of the Electoral Act. Their failure to do so cannot be disregarded when considering the operation and effect of the provisions in question, and whether they were unreasonable or disproportionate, as the plaintiffs contend. Neither plaintiff suggested that it was not possible for them to have enrolled when required and thereby have achieved the status of Elector for their Division. It was not suggested that it was not possible for them to have done so in the time allowed after the election was called. Their case is that they should have been allowed more time.

The plaintiffs' claims

403 The plaintiffs' argument centres upon two questions, which are said to arise from the joint judgment (Gummow, Kirby and Crennan JJ) in *Roach v Electoral Commissioner*[442], namely:

---

442 (2007) 233 CLR 162; [2007] HCA 43.

(1) whether the impugned provisions disenfranchise any group of adult citizens or otherwise disentitle or exclude them from casting a vote for their representatives; and

(2) whether the disenfranchisement, disentitlement or exclusion is for a "substantial reason" or is "disproportionate".

404 *Roach* concerned the disqualification, from voting at federal elections, of all persons serving a sentence of imprisonment. The majority held that the provisions in question were invalid. It was held that ss 7 and 24 of the Constitution limit the scope of laws affecting the franchise[443] and that a disqualification from the exercise of the franchise could only be made for a "substantial" reason, so as to be consistent with "choice by the people"[444]. The latter question, concerning the legislative disqualification, was said, in the joint reasons, to require consideration of questions of proportionality[445]. Gleeson CJ considered that a rational connection was necessary to explain the disenfranchisement, given the constitutional imperative of "chosen by the people" appearing in ss 7 and 24[446]. The majority concluded that the provisions were arbitrary in their effect and therefore did not provide a sufficient reason for disenfranchisement[447].

Disenfranchisement?

405 Sections 7 and 24 commence with a statement concerning the composition of the Senate and the House of Representatives, each of which is "directly chosen by the people" of the State (s 7) and the Commonwealth (s 24). Those sections are emphatic of two factors: direct elections and a popular vote[448].

---

443 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 187 [49].

444 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7] per Gleeson CJ, 199 [85] per Gummow, Kirby and Crennan JJ.

445 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85].

446 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 [24].

447 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 [23] per Gleeson CJ, 200-201 [90] per Gummow, Kirby and Crennan JJ.

448 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 21 per Barwick CJ; [1975] HCA 53. See also *McGinty v Western Australia* (1996) 186 CLR 140 at 279 per Gummow J; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 236 [153] per Gummow and Hayne JJ.

406 The plaintiffs did not contend that the joint reasons in *Roach* spoke of an individual having a right to vote protected by ss 7 and 24. The concern expressed in the joint reasons was with respect to the importance of *the franchise* to the maintenance of the system of government upon which the Constitution is based. The existence and exercise of the franchise were said to reflect "notions of citizenship and membership of the Australian federal body politic."[449] And it was said that such notions were "not extinguished by the mere fact of imprisonment"[450], as a prelude to posing the question in that case: whether the disqualification was for a substantial reason[451]. But nowhere was it said that what was at issue was an individual right to vote.

407 It was expressly stated in the joint reasons in *Roach* that the case concerned the "denial of entitlement to cast any vote at all", not "the existence of an individual right, but rather the extent of the limitation upon legislative power derived from the text and structure of the Constitution and identified in *Lange*."[452] In *Lange v Australian Broadcasting Corporation*[453] it was said that ss 7 and 24 "do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power."[454] The implied freedom there in question was that of communication on political matters.

408 In *Roach* Gleeson CJ did make reference to "the right to vote". His Honour said that, having regard to what had been said in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[455] by McTiernan and Jacobs JJ, he saw "no reason to deny that … the words of ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote."[456] McTiernan and Jacobs JJ had said that "the long established universal adult suffrage may now be recognized as

---

449 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [83].

450 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [84].

451 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85].

452 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199-200 [86].

453 (1997) 189 CLR 520; [1997] HCA 25.

454 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

455 (1975) 135 CLR 1 at 36.

456 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7].

a fact"[457]. In context, Gleeson CJ may have been referring to what is generally described as an incident of universal adult suffrage, rather than an individualised view of "the franchise" which is protected by ss 7 and 24. His Honour had earlier referred to the dictionary definition of "universal suffrage", which, it may be expected, was given as the right of all adults to vote[458].

409 Earlier authority is expressive of those enfranchised in a collective sense. In *McKinlay*[459] McTiernan and Jacobs JJ pointed out that it was incorrect to equate "the people" referred to in s 24 with electors, or as taking account of those enfranchised individually. Rather, the term referred to a collective body. Gibbs J compared the use of the word "electors" in other sections (s 41 being one) with the use of "the people" in s 24[460].

410 References to "the franchise" should therefore be understood to refer, collectively, to those people who are qualified to vote. Individuals cannot be selected by legislation for disqualification. Therefore disenfranchisement or exclusion from voting refers to a disqualification of a class of people. "Chosen by the people" refers to the election of a representative by all those qualified to vote, who do vote.

411 The importance of the existence and maintenance of voting to the system of representative government upon which the Constitution is based must not be underestimated. But the provisions here in question are not directed to voting and do not disqualify any group of persons from voting. They limit the time for enrolment. They cannot be said to be so certain, and of such magnitude, in their effect as to affect the franchise, in the sense referred to above. What the plaintiffs complain of is that the provisions have the potential to render a person unable to vote, if he or she fails to comply with their obligations respecting enrolment. The provisions may therefore raise questions about proportionality, but they do not establish disentitlement, without more.

412 The argument developed by the plaintiffs, in response to these limitations, was that the legislation must ensure the maximum participation of voters. This

---

457 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 36.

458 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 173 [6].

459 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 35-36.

460 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 44. See also *Langer v The Commonwealth* (1996) 186 CLR 302 at 332 per Toohey and Gaudron JJ; [1996] HCA 43.

was not a matter in issue, and therefore was not considered, in *Roach*. It is said to be required as an expression of "chosen by the people" and because a system of representative government requires such participation. The plaintiffs' argument therefore assumes a constitutional imperative.

413 The description given by Isaacs J in *Judd v McKeon*[461] of elections as "expressive of the will of the community", properly understood, does not support the plaintiffs' argument for a constitutional requirement regarding maximum participation. The statement was taken from the following passage of his Honour's reasons:

> "The community organized, being seised of the subject matter of parliamentary elections and finding no express restrictions in the Constitution, may properly do all it thinks necessary to make elections as expressive of the will of the community as they possibly can be."

414 In *Judd v McKeon* the Court was concerned with the validity of provisions rendering it an offence under the Electoral Act for electors to fail to vote, consequent upon voting having been made compulsory. The Court confirmed that Parliament may prescribe compulsory voting. In context, therefore, Isaacs J was affirming parliamentary power with respect to elections in the passage quoted and the lack of restrictions evident in the Constitution upon that power. His Honour, in referring to elections being "as expressive of the will of the community as they possibly can be", was not expressing a constitutional restriction, but an ideal.

415 Considerations of representative government do not point to a constitutionally derived requirement in the terms for which the plaintiffs contended. To the contrary, the power given to Parliament to legislate with respect to elections should not be seen as fixed by reference to a requirement that the greatest number of people as possible vote.

416 In *McGinty v Western Australia*[462] Gummow J cautioned that:

> "To adopt as a norm of constitutional law the conclusion that a constitution embodies a principle or a doctrine of representative democracy or representative government (a more precise and accurate term) is to adopt a category of indeterminate reference." (footnote omitted)

---

461 (1926) 38 CLR 380 at 385; [1926] HCA 33.

462 (1996) 186 CLR 140 at 269.

His Honour observed that this would allow a wide range of variable judgments in the interpretation and application of these principles or doctrines[463]. Brennan CJ[464] said that:

> "It is logically impermissible to treat 'representative democracy' as though it were contained in the Constitution, to attribute to the term a meaning or content derived from sources extrinsic to the Constitution and then to invalidate a law for inconsistency with the meaning or content so attributed."

417 It is difficult to identify what is essential to representative government, not the least because ideas about it may change over time. In *McKinlay* Stephen J suggested that it may be possible to identify a quality which is essential to representative democracy as absent, but not possible to identify a requirement so essential as to be determinative of the existence of representative democracy[465].

418 In *Mulholland v Australian Electoral Commission*[466] Gleeson CJ observed that a notable feature of our system of government is how little of the detail of it is to be found in the Constitution and how much is left to be filled in by Parliament[467]. Gummow J has explained that the Constitution allowed for further legislative evolution in the system of representative government and thereby avoided constitutional rigidity[468]. It was necessary to rely upon later provision by Parliament, because agreement could not be reached on many matters[469].

419 It is necessary to bear in mind that, at the time of federation, democracy was not a perfectly developed concept[470]. No one view prevailed. If the framers of the Constitution did have a view about what was the most appropriate electoral

---

463 *McGinty v Western Australia* (1996) 186 CLR 140 at 269-270.

464 *McGinty v Western Australia* (1996) 186 CLR 140 at 169.

465 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 57.

466 (2004) 220 CLR 181.

467 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 [6].

468 *McGinty v Western Australia* (1996) 186 CLR 140 at 269.

469 *McGinty v Western Australia* (1996) 186 CLR 140 at 280 per Gummow J.

470 *McGinty v Western Australia* (1996) 186 CLR 140 at 221 per Gaudron J.

system, they did not express it in the Constitution[471]. Any views they may have had remain at best "unexpressed assumptions" on which the framers proceeded[472].

420 Sections 10 and 31 of the Constitution, which, together with s 51(xxxvi), provide for laws respecting elections to the Houses, commence with the words "[u]ntil the Parliament otherwise provides". The words accommodate the notion that representative government is a dynamic institution, as Gummow J observed in *McGinty*[473]. In *Mulholland* Gummow and Hayne JJ[474] said that, because "[u]ntil the Parliament otherwise provides" allows for change, care must be taken in elevating a "direct choice" principle to a broad restraint upon legislative development. This assumes particular importance in this case.

421 In *McKinlay* Stephen J[475] said that the principle of representative democracy predicates the enfranchisement of electors, the existence of an electoral system capable of giving effect to the selection of representatives and the bestowal of legislative functions on the representatives selected. But, his Honour added, the quality and character of each of the three ingredients is not fixed or precise. In each there is scope for variety. In relation to the electoral system, it includes matters which may affect the significance of the vote given.

422 The unstated, but essential, premise for the plaintiffs' argument of maximum participation in the franchise is that all those entitled to vote must vote. Compulsory voting has been required since 1924. It was recognised in *Judd v McKeon* as a legislative choice. It is not reflective of any constitutional requirement. To the contrary, the constitutional intendment is that such matters remain subject to the exercise of parliamentary choice, as conceptions of representative government and democracy change and adapt.

---

471 *McGinty v Western Australia* (1996) 186 CLR 140 at 184 per Dawson J.

472 *Australian National Airways Pty Ltd v The Commonwealth* ("the *Airlines Nationalisation Case*") (1945) 71 CLR 29 at 81 per Dixon J; [1945] HCA 41.

473 *McGinty v Western Australia* (1996) 186 CLR 140 at 280; see also at 200 per Toohey J. And see Kirk, "Constitutional Implications from Representative Democracy", (1995) 23 *Federal Law Review* 37 at 50; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 237 [155] per Gummow and Hayne JJ.

474 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 237 [156].

475 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 56.

423 Parliament may consider that compulsory voting remains appropriate to Australia, to a sense of social obligation of participation in the franchise, and therefore continues that system of voting. It is not the preferred system in many other countries which have forms of representative government. It would be unwise to assume that such a system will continue to be maintained in Australia. Compulsory voting cannot be regarded as essential to our representative government here. It would be wrong to take steps towards effectively entrenching it by requiring that legislation concerning elections ensure the maximum exercise of the franchise. It would be inconsistent with the intention expressed in the Constitution: that Parliament be free to legislate in this area from time to time.

Proportionality

424 The plaintiffs' submissions also described the effect of the provisions in question as a "burden" upon their entitlement to enrol and vote, as distinct from an outright disentitlement. Consideration of the extent of the effects of legislative measures raises questions of proportionality.

425 The term "proportionality" implies a relationship between things. A definition of "proportion", in the sense of being in or having a due or proper proportion, is given as the "[d]ue relation … between things or parts of a thing as renders the whole harmonious; balance, symmetry, agreement, harmony."[476] It has been suggested that proportionality is a part of, but not a synonym for, the requirement that a law be "reasonably appropriate and adapted"[477]. If this is the case, notions of proportionality may be somewhat obscured by that expression.

426 In the Australian constitutional context, proportionality may generally be said to involve considerations of the relationship between legislative means and constitutionally legitimate ends, or the effect of legislative means, or measures, upon matters the subject of constitutional protection or guarantee.

427 The expression "reasonably appropriate and adapted" was imported into Australian constitutional law some time ago from the United States constitutional context. The term "proportionality" has its origins in Germany. It has been influential in many legal systems, in Europe and elsewhere, as a principle applied

---

476 *The Oxford English Dictionary*, 2nd ed (1989), vol 12 at 647, sense 4.

477 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 321 per Brennan J; [1994] HCA 44. See also *Richardson v Forestry Commission* (1988) 164 CLR 261 at 311-312 per Deane J, 346 per Gaudron J; [1988] HCA 10; Zines, "Constitutionally Protected Individual Rights", in Finn (ed), *Essays on Law and Government: Volume 2 – The Citizen and the State in the Courts*, (1996) 136 at 156.

to test the validity of legislation[478], particularly where legislation effects a restriction of a protected interest.

428 Both expressions, "proportionality" and "reasonably appropriate and adapted", are used in the joint judgment in *Roach*. The plaintiffs' reliance on what was said in *Lange* and in *Roach* concerning proportionality raises questions about its meaning, its use and how it might apply in the circumstances of this case.

429 In the joint judgment in *Roach* it was said that a valid disqualification of prisoners required a "substantial reason". Their Honours said[479]:

> "A reason will answer that description if it be reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government. When used here the phrase 'reasonably appropriate and adapted' does not mean 'essential' or 'unavoidable'. Rather, as remarked in *Lange*, in this context there is little difference between what is conveyed by that phrase and the notion of 'proportionality'. What upon close scrutiny is disproportionate or arbitrary may not answer to the description reasonably appropriate and adapted for an end consistent or compatible with observance of the relevant constitutional restraint upon legislative power." (footnotes omitted)

430 In *Lange*[480] the Court said that the freedom of communication which the Constitution protects is not absolute. It operates as a restriction upon legislative power, but will not invalidate a law having a legitimate object or end if the law satisfies two conditions[481]:

> "The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government … The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end."

---

478 And also administrative action, but that may be put to one side.

479 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85] per Gummow, Kirby and Crennan JJ.

480 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561.

481 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562.

The Court went on[482]:

> "Different formulae have been used by members of this Court in other cases to express the test whether the freedom provided by the Constitution has been infringed. Some judges have expressed the test as whether the law is reasonably appropriate and adapted to the fulfilment of a legitimate purpose. Others have favoured different expressions, including proportionality. In the context of the questions raised by the case stated, there is no need to distinguish these concepts."

"Reasonably appropriate and adapted"

431 The phrase "reasonably appropriate and adapted" (to a legitimate end) has a long history in Australian constitutional law. It derived from Marshall CJ's judgment in *McCulloch v Maryland*[483] and was applied in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*[484] and following cases[485].

432 In *McCulloch* a question with which Marshall CJ was concerned was whether Congress had the power to incorporate a bank. It was held that it was authorised by the Constitution to pass all laws "necessary and proper" to carry into execution the express powers conferred upon it[486]. It could therefore incorporate a bank if that was a suitable mode of executing the powers of government. The width of legislative discretion was therefore the context for the often-cited passage from his Honour's reasons[487]:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

---

482 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562.

483 17 US 316 at 421 (1819).

484 (1908) 6 CLR 309; [1908] HCA 95.

485 Including *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

486 *McCulloch v Maryland* 17 US 316 at 412 (1819).

487 *McCulloch v Maryland* 17 US 316 at 421 (1819).

433 In *Federated Saw Mill &c Employes of Australasia v James Moore & Son Pty Ltd*[488] O'Connor J described the principle enunciated in *McCulloch*, and followed in *Jumbunna*, as being:

> "when the object aimed at is within the limits of the power, the legislature cannot be interfered with or controlled as to the mode in which it may deem fit to exercise the power, provided that it chooses means which are appropriate and fairly adapted to the object."

434 The enquiry whether a law is "with respect to" a constitutional head of power is, clearly enough, concerned with the law's connection to that power. In *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*)[489], Deane J introduced the term "proportionality" to the question whether a law could be characterised by reference to a constitutional head of power. His Honour said[490]:

> "Implicit in the requirement that a law be capable of being reasonably considered to be appropriate and adapted to achieving what is said to provide it with the character of a law with respect to external affairs is a need for there to be a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it. … The absence of any reasonable proportionality between the law and the purpose of discharging the obligation under the convention would preclude characterization as a law with respect to external affairs".

One enquiry as to proportionality therefore concerns the means or measures employed by the legislation to achieve or procure the designated purpose. There may be other approaches to it.

435 Marshall CJ's reference to appropriateness suggests an enquiry as to the suitability of the means for the designated purpose. Any test for proportionality must then reside in the words "plainly adapted to that end". Later in his reasons, Marshall CJ referred to the "means" as being "adequate to its ends"[491]. This description may suggest that the operation and effect of a law must be necessary to achieve the designated purpose. A requirement of necessity suggests that the law must not stray too far from the bounds of that purpose. In *Mulholland*

---

488 (1909) 8 CLR 465 at 510; [1909] HCA 43.

489 (1983) 158 CLR 1; [1983] HCA 21.

490 *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 260.

491 *McCulloch v Maryland* 17 US 316 at 424 (1819).

Gleeson CJ observed that there is a long history of the use, legislatively and judicially, of the term "necessary" and equated its meaning with "reasonably appropriate and adapted"[492].

Reasonable necessity – a test of proportionality

436 "Reasonable necessity" has long been used as a test, or legal criterion, of the validity of legislation[493]. Nowhere is this clearer than in cases involving s 92 of the Constitution and the freedom of trade, commerce and intercourse among the States which is the subject of its protection.

437 In *Permewan Wright Consolidated Pty Ltd v Trewhitt*[494] Stephen J said that if regulations affecting interstate trade are to be valid, the restrictions which they impose must be no greater than are reasonably necessary in all the circumstances. Where the restrictions were severe in their effect, it would be important for the court to look to whether there were other means of attaining the legitimate end which were less injurious to interstate trade[495].

438 An essential qualification to the test as stated is that the identified alternative measure be "as practicable as the law in question."[496] This is an important qualification. It helps to maintain legislative choice and avoids unwarranted substitution. The question whether other measures are as effective may be a question of fact[497]. In cases involving s 92 it may require expert economic opinion[498].

---

492 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200 [39].

493 *Thomas v Mowbray* (2007) 233 CLR 307 at 332 [24] per Gleeson CJ; [2007] HCA 33.

494 (1979) 145 CLR 1 at 31; [1979] HCA 58.

495 *Permewan Wright Consolidated Pty Ltd v Trewhitt* (1979) 145 CLR 1 at 31. See also *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 306 per Stephen and Mason JJ; [1980] HCA 40.

496 *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 306 per Stephen and Mason JJ.

497 *Uebergang v Australian Wheat Board* (1980) 145 CLR 266.

498 Such evidence is not usually provided – see Sir Anthony Mason, "Law and Economics", (1991) 17 *Monash University Law Review* 167 at 176.

439 The approach discussed, which enquires as to the availability of alternative, practicable and less restrictive measures, finds clear expression in the judgment of Mason J in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW*[499], where his Honour held that the method chosen to regulate trade in milk had not been shown to be the "only practical and reasonable mode" which would achieve the objective of ensuring the high quality of the milk and protecting public health.

440 More recently, in *Betfair Pty Ltd v Western Australia*[500], the test of reasonable necessity propounded in *North Eastern Dairy Co* was accepted as a doctrine of the Court[501]. It was regarded as consistent with what had been said in *Cole v Whitfield*[502], where the Court held that the provision in question was a "necessary means of enforcing the prohibition against the catching of undersized crayfish in Tasmanian waters."

441 In *Betfair* the prohibitions against the use of betting exchanges in Western Australia were argued to be necessary for the protection of the racing industry in that State. However, in the joint judgment it was said[503]:

> "But, allowing for the presence to some degree of a threat of this nature, a method of countering it, which is an alternative to that offered by prohibition of betting exchanges, must be effective but non-discriminatory regulation. That was the legislative choice taken by Tasmania and it cannot be said that that taken by Western Australia is necessary for the protection of the integrity of the racing industry of that State. In other words, the prohibitory State law is not proportionate; it is not appropriate and adapted to the propounded legislative object."

---

499 (1975) 134 CLR 559 at 616; [1975] HCA 45.

500 (2008) 234 CLR 418; [2008] HCA 11.

501 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 477 [103] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

502 (1988) 165 CLR 360 at 409; [1988] HCA 18.

503 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 479 [110].

And it was concluded that[504]:

> "it cannot be found in this case that prohibition was necessary in the stated sense for the protection or preservation of the integrity of the racing industry."

442 It follows that, although the expressions "appropriate and adapted" and "proportionate" were used, the test applied was that of the availability of alternative, practicable and less restrictive measures.

443 The test has been applied in cases involving the implied freedom of communication on political matters. In *Lange*, reference was made to the decision of the majority in *Australian Capital Television Pty Ltd v The Commonwealth* ("*ACTV*")[505], by way of explication of the second condition for validity referred to in *Lange*; namely, that the law be "reasonably appropriate and adapted to serve a legitimate end"[506]. *Lange* explained the majority decision in *ACTV*, which held invalid legislation which seriously impeded discussion during the course of a federal election, as grounded upon the fact that "there were other less drastic means by which the objectives of the law could be achieved."[507] There may be other views about the ratio in *ACTV*, but the point to be made, for present purposes, is that *Lange* recognises the test of proportionality just discussed: reasonable necessity assessed by the availability of alternative measures.

444 Cases involving s 92 proceed upon an acceptance that the freedoms guaranteed by that section are not absolute. The same may be said of other, implied, freedoms[508]. It has been pointed out that, once it is accepted that a guarantee is not absolute, some test of what constitutes a legitimate type or level of restriction must be developed[509]. This serves as a reminder of the wider concern of the test discussed, indeed of all tests of proportionality. Its concern is not just about how the objectives of the legislation in question may otherwise be

---

504 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 480 [112].

505 (1992) 177 CLR 106; [1992] HCA 45.

506 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

507 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568.

508 See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 142 per Mason CJ.

509 Kirk, "Constitutional Implications from Representative Democracy", (1995) 23 *Federal Law Review* 37 at 41.

fulfilled. It is used to determine the limits of legislation which restricts a freedom guaranteed by the Constitution. When alternative, practicable measures, less restrictive of a freedom, are available, it may be concluded that the measures in question are not reasonably necessary. They go too far and are disproportionate. The limits of legislative power are thereby determined. But there may be other methods of answering the question.

Other tests of proportionality?

445 A test of reasonable necessity, by reference to alternative measures, may not always be available or appropriate having regard to the nature and effect of the legislative measures in question. In *Davis v The Commonwealth*[510], *Nationwide News Pty Ltd v Wills*[511] and *ACTV*, lack of proportionality was assessed by reference to a range of factors.

446 The legislation in *Davis* was seen as disproportionate, by reference to the severity of its effects upon freedom of expression and the need identified by its objects. The provisions of the *Australian Bicentennial Authority Act* 1980 (Cth) made it an offence for a person, without the consent of the Australian Bicentennial Authority, to use its name or any prescribed expression, such as "Bicentenary", "Expo", "Melbourne" and "Sydney", in connection with a business, trade, or the sale or supply of goods. Articles or goods used as a means by which such an offence was committed were liable to forfeiture. After some illustrations of the operation of the provisions in question it was said that[512]:

> "the effect of the provisions is to give the Authority an extraordinary power to regulate the use of expressions in everyday use in this country, though the circumstances of that use in countless situations could not conceivably prejudice the commemoration of the Bicentenary or the attainment by the Authority of its objects. In arming the Authority with this extraordinary power the Act provides for a regime of protection which is grossly disproportionate to the need to protect the commemoration and the Authority."

Although the statutory regime may have been related to a legitimate end, it was said that "the provisions in question reach too far" and that "[t]his extraordinary

---

510 (1988) 166 CLR 79; [1988] HCA 63.

511 (1992) 177 CLR 1 at 31; [1992] HCA 46.

512 *Davis v The Commonwealth* (1988) 166 CLR 79 at 99-100 per Mason CJ, Deane and Gaudron JJ, Wilson and Dawson JJ agreeing at 101.

intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power."[513]

447 The legislation in *Nationwide News*[514] created offences for the use of words, in the nature of criticism, about the Industrial Relations Commission and its members, but it did not provide for defences usual to contempt and defamation, such as justification and fair comment. The provisions were held invalid. Mason CJ and McHugh J held that the extent of the protection provided was unnecessary and therefore disproportionate. Gaudron J agreed with this conclusion[515]. Mason CJ reached his conclusion by reference to the extent of the adverse impact of the provisions upon freedom of expression[516]. McHugh J used the same terms as had been employed in *Davis* – an "extraordinary intrusion" that was "grossly disproportionate to its need" – and concluded that the legislation went "well beyond" the protection required[517].

448 Deane and Toohey JJ discussed the nature of the interest sought to be protected by the legislation and held that the measures went "far beyond" what could be considered necessary in the public interest[518]. Mason CJ compared the measures with the level of protection under which courts function. This did not suggest that the Commission required more extrinsic powers[519]. Brennan J identified a lesser restriction which could have been effected[520].

449 Of the implied freedom of communication on political matters, Mason CJ said, in *ACTV*, that the guarantee does not postulate that it will always prevail over competing public interests[521]. The admission that the freedom cannot be regarded as absolute once again highlights the need for a test such as proportionality.

---

513 *Davis v The Commonwealth* (1988) 166 CLR 79 at 100.

514 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 35.

515 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 95.

516 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 34.

517 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 101, 102.

518 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 78.

519 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 33-34.

520 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 53.

521 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 142.

450 Having identified the interests that the legislation sought to advance, his Honour turned his attention to the nature of the interests in question in that case, which were to be seen as protected by the implied freedom. His Honour did so through the viewpoint of the restrictive effect that laws might have upon different kinds of communication. His Honour distinguished laws effecting restrictions upon information or ideas from those which restricted an activity or mode of communication.

451 In the case of the former, his Honour suggested that, speaking generally, it would be extremely difficult to justify such restrictions, implying that the nature of a protected interest may weigh heavily against any form of restriction. His Honour said a "compelling justification" would be required to warrant a restriction[522]. Even then, the measures must be no more than is reasonably necessary to achieve the public interest said to justify the restriction. His Honour added that it may be necessary to weigh the competing public interest against the restriction of freedom of communication, although, ordinarily, paramount weight would be given to the freedom[523].

452 On the other hand, his Honour considered that restrictions imposed on the mode of communication of ideas or information may be more susceptible of justification. In such a case, his Honour suggested, a balancing of interests may be necessary, as well as a determination whether the restriction is reasonably necessary to achieve the competing public interest. If the restriction is disproportionate in that regard, then its purpose may be taken to impair the freedom[524].

453 Mason CJ was alone in this approach to proportionality in *ACTV*. Deane and Toohey JJ approached the question of proportionality by reference to the character of the law, holding that a law with respect to the prohibition or restriction of communications would be more difficult to justify[525] than others. Their Honours regarded the effect of the legislation as going beyond what was reasonably necessary in a democratic society, because it distorted the freedom of

---

522 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143.

523 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143.

524 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143-144.

525 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169.

political communication which underlies representative government. Brennan J considered the proportionality between the restriction effected by the law on the freedom and the legitimate interest the law was intended to serve[526].

454 Mason CJ's approach, of the identification of the particular interests in question which are the subject of the constitutional guarantees, has not been taken up in cases subsequent to *ACTV*. In *Lange* and *Roach* in particular, the interest said to be protected was stated in wide terms – as the system of government prescribed by the Constitution. Such differences of approach are important to an assessment of proportionality, for they define the relationship which is its subject.

455 It may be said, by reference to these cases, that assessments of proportionality in Australian law involve a range of discernible tests and the identification of various factors which are relevant to the relationship of the legislation in question to its purposes or to interests the subject of constitutional protection. This invites comparison with the position in countries where tests are more clearly defined and openly stated.

Proportionality – European law

456 In *Roach* Gleeson CJ expressed concern about the importation of the concept of proportionality into the Australian constitutional context[527]. This was not the first occasion upon which concerns of this kind had been expressed[528]. In *Mulholland* Gleeson CJ had observed that the use of the term "proportionality" has the advantage that it is commonly used in other jurisdictions, in similar fields of discourse, and the disadvantage that it has there taken on different elaborations which may be imported into a different legal context without explanation[529]. However, despite his misgivings, his Honour said in *Roach* that he found aspects of the reasoning of the courts of other jurisdictions "instructive"[530]. Gleeson CJ's qualification in *Mulholland* is important. It requires that any derivation from the principle be critically analysed.

---

526 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 157.

527 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 178 [17].

528 See for example *Leask v The Commonwealth* (1996) 187 CLR 579 at 600-601 per Dawson J; [1996] HCA 29.

529 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 197-198 [34].

530 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 179 [17].

457 There is no doubt that the principle has a different status in other legal systems. In Germany and the European Community, to which I shall shortly refer, it has, respectively, the status of a constitutional principle[531] and a general principle of wide application. The context in which it is applied, the extent to which account is taken of legislative discretion, and the extent to which legislation is required to conform to higher principles, may differ. Nevertheless, the question to which it is directed is common to these systems and our own. It is how to determine the limit of legislative power, where its exercise has the effect of restricting protected interests or freedoms. The methods used to test the principle of proportionality are rational and adaptable. Some bear resemblance to tests which have already been utilised in this Court. Further, proportionality is a principle having its roots in the rule of law[532]. That rule is reflected in the judgments of the majority in *Roach*, which rejected the legislative disqualification as arbitrary and therefore disproportionate.

458 It should not be assumed that the application of identifiable tests of proportionality will lead to widening, impermissibly, the scope of review of legislation. The statement and explication of the tests employed in the assessment of proportionality should result in a more rigorous and disciplined analysis and render the process undertaken more clear. Once it is acknowledged that constitutional protections are not absolute, some test must be utilised in an assessment of proportionality, as has earlier been observed. It is preferable to identify how that assessment is undertaken in order to avoid the invocation of proportionality as a mere statement of conclusion.

459 The principle of proportionality has its clearest expression in Germany. In its earlier form, as a principle of necessity, it appeared at the end of the 19th century, as a response to excessive police powers in Prussia, although its origins are said to be more ancient[533]. Its main purpose is the protection of fundamental freedoms. Professor Jürgen Schwarze explains that[534]:

> "where intervention by the public authorities is justified by reference to social objectives, such intervention must be limited by its effectiveness and consequently also by its proportionality in relation to the interest it seeks to defend."

---

531 Schwarze, *European Administrative Law*, rev ed (2006) at 688.

532 Schwarze, *European Administrative Law*, rev ed (2006) at 712.

533 Schwarze, *European Administrative Law*, rev ed (2006) at 685-686; Currie, *The Constitution of the Federal Republic of Germany*, (1994) at 307.

534 Schwarze, *European Administrative Law*, rev ed (2006) at 679.

460 There is general agreement that proportionality is tested by reference to three factors, or sub-principles, in Germany[535]:

> "(1) First, the state measures concerned must be *suitable* for the purpose of facilitating or achieving the pursued objective.
>
> (2) Second, the suitable measure must also be *necessary*, in the sense that the authority concerned has no other mechanism at its disposal which is less restrictive of freedom[536]. …
>
> (3) [Third], the measure concerned may not be *disproportionate* to the restrictions which it involves". (emphasis in original)

The Federal Constitutional Court[537] of Germany has defined the principle in similar terms[538]. The three sub-principles, or tests, of the principle of proportionality are: (1) suitability, (2) necessity and (3) proportionality in the strict sense.

461 The principle applied by the European Court of Justice ("the ECJ") is substantially drawn from German law[539], although it may not be applied in the same way and the sub-principles may not be differentiated to the same degree[540]. Its principal application by the ECJ is in the sphere of freedom of economic activity[541], where the second sub-principle assumes particular importance.

---

535 Schwarze, *European Administrative Law*, rev ed (2006) at 687.

536 This is further clarified in Schwarze, *European Administrative Law*, rev ed (2006) at 687, where it says that it is not the method used which has to be necessary, but "the excessive restriction of freedom involved in the choice of method".

537 Bundesverfassungsgericht.

538 In the decision published in vol 48 at 402, it was said that "[t]he intervention must be suitable and necessary for the achievement of its objective. It may not impose excessive burdens on the individual concerned, and must consequently be reasonable in its effect on him": see Schwarze, *European Administrative Law*, rev ed (2006) at 687.

539 As to its sources see Schwarze, *European Administrative Law*, rev ed (2006) at 710-717.

540 Schwarze, *European Administrative Law*, rev ed (2006) at 855.

541 Schwarze, *European Administrative Law*, rev ed (2006) at 773.

462 The first of the three sub-principles, suitability, looks to the probable effectiveness of the legislative measure and unsuitability is rarely established[542]. Another word for suitability might be "adapted"[543], as earlier mentioned in connection with the phrase "reasonably appropriate and adapted"[544].

463 The test of reasonable necessity is the test more often applied by the ECJ in relation to cases involving measures which restrict the freedom of movement of goods. In a leading case, it was held that the objective of protecting consumers could have been achieved by a measure which meant a less drastic restriction of the free movement of goods[545]. An analogy with the test confirmed in *Betfair*, and in *Lange*, can be drawn. And it is pointed out that necessity does not involve only the fact that there may be a choice of alternative means, as that would deny legislative choice. The other measure has to be equally effective[546].

464 It is said that the sub-principle of proportionality in the strict sense is applied in a negative manner and that this serves to restrict its operation. A legislative measure will be held invalid only where it is unnecessarily harmful to the interest protected by the Constitution and is "manifestly disproportionate"[547]. How this is applied in particular cases may serve to further illuminate what is meant by that term. For present purposes, it may be observed that it is not dissimilar to statements made in *Davis* and *Nationwide News*, where the effects of the legislative measures on the relevant freedoms were said themselves to be too severe to qualify as proportionate.

465 As may be expected of an enquiry of this kind, factors such as the extent or severity of the restrictions effected by the legislative measures on the freedoms, or protected interests, and the objective pursued by the legislation, have been considered relevant in decisions of the ECJ and of the Federal

---

542 Emiliou, *The Principle of Proportionality in European Law*, (1996) at 26, 29.

543 Currie, *The Constitution of the Federal Republic of Germany*, (1994) at 20.

544 See [435] above.

545 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (Case 120/78) ("the *Cassis de Dijon Case*") [1979] 1 ECR 649. References to "less drastic means" are also found in United States constitutional jurisprudence: see "Less Drastic Means and the First Amendment", (1969) 78 *Yale Law Journal* 464.

546 Emiliou, *The Principle of Proportionality in European Law*, (1996) at 30.

547 Emiliou, *The Principle of Proportionality in European Law*, (1996) at 36, 268.

Constitutional Court[548]. The latter Court requires that the seriousness of the effect of the legislative restriction, and the importance of the reasons said to justify it, be in adequate proportion to each other[549]. Much is said to depend upon the nature of the legislative provision and the sphere of protection of the freedom or interest involved[550].

466 It has also been the concern of the High Court to assess the effect of the legislative measures in question, in relation to either or both of the legislative objective and the freedom protected. Less attention has been directed to the identification of the aspect of the freedom which is the subject of the protection. A freedom protected by the Constitution is generally assumed to have a status such that a significant reason is required to be given for any serious restriction of it. *Roach* did not concern a protected freedom, but rather a basal concept which informs the Constitution. It was that concept which was said to be relevant to an assessment of proportionality.

Lange and *Roach*

467 At issue in *Lange* was the effect of the defamation law of New South Wales on the freedom of political communication. It will be recalled that two conditions were said to be necessary if a freedom was not to invalidate a law affecting it. The first was that the object of the law had to be compatible with the maintenance of the system of representative government. The second was that the law had to be reasonably appropriate and adapted to achieve its legitimate object or end[551].

468 Later in its reasons, the Court posed two questions as the test for whether a law impermissibly infringes upon freedom of communication. The first was whether the law had the effect of burdening the freedom. The second was expressed in the language of proportionality[552]:

---

548 Tridimas, "Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny", in Ellis (ed), *The Principle of Proportionality in the Laws of Europe*, (1999) 65 at 76-77; Schwarze, *European Administrative Law*, rev ed (2006) at 688.

549 Schwarze, *European Administrative Law*, rev ed (2006) at 688.

550 Emiliou, *The Principle of Proportionality in European Law*, (1996) at 32.

551 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562.

552 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

> "Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the [system of government prescribed by the Constitution]".

469 It may be observed that the question appears to combine the two conditions earlier stated. The law's purpose (the "legitimate end") is that which is compatible with the maintenance of the prescribed system of government. The question is whether the law is reasonably appropriate and adapted to serve that end. So understood, the test may involve whether the operation and effect of the law's measures are reasonably necessary to that legitimate purpose. Indeed this is the approach which was taken.

470 In *Lange* the Court examined the common law rules of defamation in New South Wales by reference to whether there were other, less drastic measures by which the objectives of the law could be achieved, following the approach thought to have been taken by the majority in *ACTV*[553]. The Court was able to conclude that the law went no further than was necessary, for the protection of reputation, given the extended application of the law of qualified privilege[554]. It did so by adapting that law to accommodate the recognition of the constitutionally guaranteed freedom.

471 A distinctive feature of *Lange*, so far as concerns tests of proportionality, is that the Court was able to achieve proportionality through its approach to the common law. By this means, it was able to conclude that proportionality existed based upon the test of reasonable necessity and was not required to undertake the task of assessing the extent of the effect of the defamation laws upon the freedom, as had been undertaken in some of the earlier cases involved with restrictions upon freedom of political communication.

472 McHugh J in *Coleman v Power*[555] considered that the fact that the Court in *Lange* adopted the example of *ACTV* was important to understanding what was intended by the second limb of the test in *Lange*. This must be accepted. His Honour's interpretation of what was said about *ACTV* led his Honour to conclude further that the test in *Lange* was intended to include, not only the compatibility of the law's objective, but also the compatibility of the measures undertaken to achieve the law's objective, with the prescribed system of government[556]. A

---

553 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568.

554 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 575.

555 (2004) 220 CLR 1 at 50-51 [93]-[94]; [2004] HCA 39.

556 *Coleman v Power* (2004) 220 CLR 1 at 50-51 [94]; and see at 78 [196] per Gummow and Hayne JJ, 82 [213] per Kirby J.

relationship between legislative measures and the maintenance of the prescribed system of government is somewhat different from the relationship involved in tests of proportionality employed in previous cases. It is not obvious that the decision in *Lange* was reached by an assessment involving that relationship. Nevertheless, the relationship appears to have assumed importance in *Roach*.

473 The essential difficulty with the legislative disqualification in *Roach*, identified in the majority judgments, was that there was no evident reason or purpose beyond the obvious intention to remove a prisoner's ability to vote. It was arbitrary and did not differentiate between serious and other offences[557]. It may not be thought that much more was required for a finding that the law was disproportionate. Indeed, in the joint judgment it was said that what can be seen to be "disproportionate or arbitrary" may not meet the requirement that it be "reasonably appropriate and adapted for an end consistent or compatible with observance of the relevant constitutional restraint upon legislative power."[558] That constitutional restraint is identified in connection with the test of proportionality, as being what is necessary to the maintenance of the prescribed system of representative government.

474 The disqualification in question in *Roach* was compared, in the joint judgment, with another provided by the Electoral Act which, however, was considered to be valid. That provision disentitled persons who were incapable of understanding the nature and significance of voting, because they were of unsound mind. Although it limited the exercise of the franchise, it was held to do so[559]:

> "for an end apt to protect the integrity of the electoral process. That end, plainly enough, is consistent and compatible with the maintenance of the system of representative government."

475 The effect of the disqualification in *Roach*, on the other hand, was "further to stigmatise" prisoners by denying them the exercise of the franchise[560]. In the discussion which followed, it was pointed out that the disqualification operated

---

557 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 [23]-[24] per Gleeson CJ, 200 [90], 201 [93] per Gummow, Kirby and Crennan JJ.

558 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85] per Gummow, Kirby and Crennan JJ.

559 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 200 [88] per Gummow, Kirby and Crennan JJ.

560 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 200 [89] per Gummow, Kirby and Crennan JJ.

without regard to the nature of the offence committed, the length of the term of the imprisonment, sentencing policy and the offender's personal circumstances[561]. It was concluded that[562]:

> "The legislative pursuit of an end which stigmatises offenders by imposing a civil disability during any term of imprisonment takes s 93(8AA) beyond what is reasonably appropriate and adapted (or 'proportionate') to the maintenance of representative government. The net of disqualification is cast too wide".

476 The last sentence in this passage reflects a view of the excessive effect of the legislative provision. It is difficult to see how it could be otherwise, absent a reason for complete disqualification. This might suffice for a conclusion that it was disproportionate. However, it was obviously considered necessary to further test proportionality. In doing so, the relationship which was identified as relevant was as between the effects of the legislative measure; namely, the further stigma of disqualification, and the "maintenance of the system of representative government".

477 The identification of a system as the interest which is the subject of constitutional protection might raise questions about how legislative effects upon it are to be assessed, not the least because it is a concept, the essential features of which are difficult to isolate. However, the joint judgment in *Roach* further particularised voting as the feature with which it was concerned. It was said that voting in elections lies at the very heart of the system of government for which the Constitution provides[563]. The effect of disqualification from it was therefore serious and no reason was given to explain this legislative choice.

478 It is of interest to observe that in *Roach* the disqualification which had been effected under the previous legislation was held to be valid. It disenfranchised prisoners who were serving sentences of three years or more. This was considered to be explicable. It reflected one electoral cycle, which had customarily formed a basis for a disqualification[564], and it could be seen to

---

561 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 200-201 [90]-[93] per Gummow, Kirby and Crennan JJ.

562 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 202 [95] per Gummow, Kirby and Crennan JJ.

563 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 198 [81] per Gummow, Kirby and Crennan JJ.

564 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 203 [98] per Gummow, Kirby and Crennan JJ.

distinguish between serious lawlessness and less serious, yet reprehensible, conduct[565]. The earlier legislation could have permitted proportionality to be tested by reference to alternative, but less restrictive, measures, but it does not appear to have been approached in this way. Nevertheless, that test is one upon which the plaintiffs here rely.

Proportionality applied: the plaintiffs' case

479 The plaintiffs' challenge, at its first level, was said to draw upon *Roach*. It was that the provisions did not serve any legitimate end. There was no need for the provisions, because no problem had been identified by the AEC with respect to the integrity of the Electoral Rolls. This may raise a threshold question, rather than one involving any proportionality as between the legislation and its purpose.

480 The submission overlooks the terms of the AEC's advice to the JSCEM for the purpose of its report, in 2002, on the integrity of the Electoral Roll[566], namely:

> "With the system we have – a compulsory enrolment system – it is as open as possible, but we have never said it is not possible to defraud the system. We have always said that it has not occurred in a systematic way."

The JSCEM on that occasion recommended that the AEC should further address "this potential risk to the electoral system."[567]

481 Further, the submission does not take account of the other reason given by the JSCEM for a shortening of the "period of grace". It was said that it was necessary to obtain greater compliance with enrolment obligations, not just at the time when elections were called but also in the period between elections. The JSCEM considered that the "period of grace" worked against such an objective and encouraged people to leave enrolment to the last moment.

---

565 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 204 [102] per Gummow, Kirby and Crennan JJ.

566 Joint Standing Committee on Electoral Matters, *The Integrity of the Electoral Roll: Review of ANAO Report No 42 2001-02, Integrity of the Electoral Roll*, (2002) at 15 [2.43].

567 Joint Standing Committee on Electoral Matters, *The Integrity of the Electoral Roll: Review of ANAO Report No 42 2001-02, Integrity of the Electoral Roll*, (2002) at 15 [2.44].

482 It cannot be suggested that the measures in question are without justification, in contrast to the disqualification in *Roach*. Both objects are not only compatible with the maintenance of an orderly and effective system of voting, as an aspect of the system of representative government, they are important to it. The principal object seeks to ensure greater compliance with electoral obligations.

483 The point made by the plaintiffs in reply is relevant to proportionality. It was put that, accepting that there may be some concerns of the kind mentioned, less restrictive means could have been adopted to address them. Thus, the test of reasonable necessity, as assessed by alternative practicable means, is raised, as it was in *Lange*. Such a test assumes that the measures are sufficiently restrictive to warrant a search for alternative means. This is a matter which will require separate consideration.

484 It was not suggested by the plaintiffs that the Electoral Act should make provision for persons to enrol or transfer enrolment at all times up to polling. Nor was it suggested that the legislation should provide that the AEC should undertake enrolments itself, which has been mooted elsewhere. The plaintiffs' case was that they should have been allowed to have their claims considered at any time during the seven days prior to closure of the Rolls, as the Act had permitted prior to the 2006 amendments.

485 It is not sufficient, for this test of proportionality, that an alternative legislative measure be identified. The Court must be able to conclude that that alternative measure is just as effective for the legislative purpose as the measures employed. Such a conclusion is not possible here. There is nothing to suggest that allowing the longer period before the close of Rolls would be just as effective for the purpose of encouraging compliance with enrolment obligations and, therefore, nothing upon which to conclude that the opinion of the JSCEM was wrong.

486 Attention is then directed to a consideration of the effects of the legislative measures – in the first place, in connection with the pursuit of the objectives of the legislation and, in the second, by reference to the interest identified in *Roach* as subject to constitutional protection. It is necessary, in this regard, to bear in mind that it is the *effects* of the legislation which are relevant, not a view of their importance to the electoral system, about which different views have been held.

487 It must first be observed that what is restricted by the legislative measure is an entitlement to enrol, not an entitlement to vote. Nevertheless, voting is only possible upon enrolment and it must therefore be accepted that a possible effect of the measure is that a person's ability to vote at a particular election may be lost. But the effect is only possible and the loss is temporary.

488 No issue is taken by the plaintiffs with the aspect of the scheme of the Electoral Act which obliges enrolment and renders it an offence to fail to do so. The provisions in question do not themselves operate to render a person unable to vote. What is necessary to bring about that result is the failure of a person to fulfil his or her obligations within a specified period, when fulfilment is not attended by any obvious difficulty. It would be a curious application of a test of proportionality if a law, otherwise valid, was invalid because Parliament should recognise that people will not fulfil their statutory obligations. It is of interest to observe that the ECJ is said to be loath to apply the principle of proportionality when it is invoked in an attempt to justify a failure to comply with Community law[568].

489 The denial of enrolment and voting for an election, for a legitimate reason, does not intrude too far upon the system of voting. It is, and has always been, a part of that system. It reinforces the requirement that persons qualified to vote enrol in a timely way, which is conducive to the effective working of the system. No denial of the franchise is involved. It is not possible, logically, for the plaintiffs to suggest that these provisions are incompatible, but those allowing for a few more days for enrolment are not.

Conclusion

490 For these reasons I did not join in the orders made on 6 August 2010. I would have dismissed the proceedings with costs.

---

568 Tridimas, "Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny", in Ellis (ed), *The Principle of Proportionality in the Laws of Europe*, (1999) 65 at 66.