ROACH..... PLAINTIFF;

AND

ELECTORAL COMMISSIONER AND ANOTHER.. ..... DEFENDANTS.

[2007] HCA 43

HC of A 2007

June 12, 13; *Aug* 30; *Sept* 26 2007

Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ

Constitutional Law (Cth) — Parliament — Elections — Disqualification — Prisoners — Whether disqualification of persons serving sentence of imprisonment consistent with constitutional requirement for Parliament to be chosen by the people — Commonwealth Constitution, ss 7, 24, 30, 44(ii), 51(xxxvi), 122 — Commonwealth Electoral Act 1918 (Cth), ss 93(8), 93(8AA), 208(2)(c) — Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004 (Cth), s 3, Sch 1, Items 1-5 — Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth), Sch 1, Items 14, 15, 61.

The *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006* (Cth) repealed and replaced ss 93(8AA) and 208(2)(c) of the *Commonwealth Electoral Act 1918* (Cth) by enacting provisions disqualifying as voters at federal elections persons who were serving sentences of imprisonment, regardless of duration, for an offence against the law of the Commonwealth or of a State or Territory. The disentitlement to vote had previously applied only to prisoners serving sentences of three years or longer under amendments made by the *Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004* (Cth). A prisoner who had been convicted of five offences under Victorian law and sentenced to an effective term of six years' imprisonment, thereby disentitling her from voting in federal elections, commenced proceedings in the High Court for declarations of invalidity in respect of the 2006 amendments and, if found invalid, further declarations as to the validity of the 2004 amendments which had been replaced by the 2006 amendments.

Held, (1) by Gleeson CJ, Gummow, Kirby and Crennan JJ, Hayne and Heydon dissenting, that the 2006 amendments, in so far as they inserted ss 93(8AA) and 208(2)(c) of the Act, were invalid.

Voting in elections for Parliament was at the heart of the system of representative government provided for in the *Constitution*. Legislative disqualification from what otherwise was adult suffrage had to be for a substantial reason. A reason would answer that description if it was reasonably appropriate and adapted for an end consistent or compatible with the maintenance of the constitutionally prescribed system of representative government. The changes made to s 93(8AA) by the 2006 amendments cast a net of disqualification too wide by operating without regard to the culpability of the offender.

(2) By the whole Court, that the former provisions of s 93(8AA), reflecting the 2004 amendments, which disenfranchised prisoners serving sentences of three years or more, were valid. They had proper regard to the seriousness of offence by using length of sentence as a criterion of culpability founding disqualification and temporary unfitness to participate in the electoral process and as such were consistent with established law and custom so as to fall within a permissible area of legislative choice between various criteria for disqualification.

McGinty v Western Australia (1996) 186 CLR 140; *Langer v The Commonwealth* (1996) 186 CLR 302; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1; and *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, considered.

Observations by Gleeson CJ and other members of the Court about the need for caution in using comparative jurisprudence founded on human rights instruments in interpreting the *Constitution* because of the fundamental difference of other legal regimes.

CASE STATED and questions reserved pursuant to the *Judiciary Act 1903* (Cth), s 18.

Vicki Lee Roach was born in 1958 and was an Australian citizen. She was enrolled for the Federal Division of Kooyong in Victoria for the purposes of federal elections. In 2004 she was convicted in the County Court of Victoria on five counts of offences under the *Crimes Act 1958* (Vic). She was sentenced to an effective term of imprisonment of six years. On 5 March 2007, she sued the Australian Electoral Commission and the Commonwealth of Australia in the High Court, claiming a declaration that ss 93(8AA) and 208(2)(c) of the *Commonwealth Electoral Act 1918* (Cth) were invalid. Those provisions reflected amendments made by the *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006* (Cth). Their effect was to disqualify as voters at federal elections persons who were serving sentences of imprisonment, regardless or duration, for an offence against the law of the Commonwealth or of a State or Territory. Previously, the only prisoners serving custodial sentences of three years or longer had been disqualified, under amendments made by the *Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004* (Cth). On 2 May 2007, Hayne J ordered that a case be stated and that questions of law be reserved for the consideration of the Full Court pursuant to s 18 of the *Judiciary Act 1903* (Cth). By an amended special case filed on 9 July 2007, with the leave of the Full Court, the validity of both the 2006 amendments and 2004 amendments was reserved for consideration by the Full Court. The Attorney-Generals of the States of New South Wales and Western Australia intervened in support of the validity of the 2006 and 2004 amendments.

R Merkel QC (with him *F K Forsyth* and *K L Walker*), for the plaintiff. An exercise of the power of Parliament to provide for the qualification of electors under ss 30 and 51(xxxvi) is subject to the

Constitution and hence to ss 7 and 24 and the system of representative democracy which those, and other, sections of the *Constitution* provide. A law that disqualifies qualified members of the "the people" from voting will be contrary to ss 7 and 24 if the disqualification is not either in furtherance of, or rationally connected and not consistent with, representative democracy. Blanket disenfranchisement is arbitrary. The sole criterion for disentitlement under the impugned provisions is that the person is serving a sentence of imprisonment on the date of an election. Such an arbitrary disentitlement to vote is not in furtherance of, rationally connected with, or consistent with, representative democracy. The disqualification of prisoners operates without regard to the nature or seriousness of the offence or to the term of imprisonment of an individual prisoner. The arbitrariness of the impugned provisions is exemplified by their disregard of important facts, such as that a large proportion of prisoners serve a sentence of two years or less, that sentences for the same or comparable offences vary significantly between the States and Territories and that principles of sentencing discretion inevitably result in persons who have committed crimes of comparable moral culpability being given different sentences based on matters unrelated to the seriousness or nature of the offence. Indigenous Australians and men are also disproportionately disqualified from voting under the impugned provisions.

Several Justices have observed that attention must be directed to contemporary standards in interpreting ss 7 and 24, particularly in considering whether what was constitutionally permissible in 1901 in giving effect to ss 7, 24 and 128 is constitutionally permissible today (1). There is an analogy between that approach and the Court's general approach to constitutional interpretation (2) and the approach adopted in relation to s 80 of the *Constitution* (3). The meaning of "chosen by the people" depends on the stage in the evolution of representative government at a particular time. Universal adult suffrage could not now be abandoned in favour of the system that operated in one or more colonies at Federation (4). The federal franchise has gradually been expanded since 1901 so that many categories of persons who could not vote in 1901 are entitled and obliged to vote now.

(1) *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 36; *McGinty v Western Australia* (1996) 186 CLR 140 at 201, 218-219, 221, 286-287; *Langer v The Commonwealth* (1995) 186 CLR 302 at 342-343; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 261.

(2) *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 97, 119; *Singh v The Commonwealth* (2004) 222 CLR 322 at 332-333, 347-351, 385-386, 412-415; *Grain Pool (WA) v The Commonwealth* (2000) 202 CLR 479 at 496.

(3) *Cheatle v The Queen* (1993) 177 CLR 541 at 560.

(4) *McGinty v Western Australia* (1996) 186 CLR 140 at 286-287. See also *Langer v The Commonwealth* (1996) 186 CLR 302 at 332-333, 342-343; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 237-238, 261.

Justices have identified changes in the franchise and electoral system and said that the franchise could not now be wound back. It has been suggested that Parliament may not disenfranchise women or indigenous people (5), raise the minimum voting age from eighteen (6); reintroduce a property requirement (7); reintroduce an educational requirement (8); remove the secret ballot (9); confine the qualification for candidates for election to members of one political party (10); or create a marked numerical inequality between electorates (11). While the *Constitution* does not provide for universal suffrage and allows Parliament considerable latitude in relation to elections and the franchise, ss 7 and 24 limit its ability to impose quantitative and qualitative restrictions. A limit must be rationally connected, and not inconsistent, with representative democracy. There is an "irreducible minimum" (12) core of persons comprising "the people" who, under contemporary standards, must be permitted to vote. Beyond that core Parliament may expand and contract the franchise from time to time. The current irreducible core of persons who must be permitted to vote if the Houses of Parliament are to be "directly chosen by the people" are those citizens who are qualified members of "the people". The lack of a rational basis for the impugned provisions is demonstrated by the arbitrary nature of the disqualification. Even if the historical exclusion based on serious crime were to be accepted, the impugned provisions would not ensure that persons who had committed a serious criminal offence did not vote; nor that persons who had "broken the social compact" did not vote. They operate in a discriminatory fashion, simply ensuring that persons who are serving a term of imprisonment on the day of an election do not vote. That is an irrational basis for exclusion and thus is contrary to ss 7 and 24 of the *Constitution*. [GLEESON CJ. Is your argument that you cannot now disqualify people because they are Aboriginals or women?] Yes, our argument is premised on the acceptance by a number of Justices that one cannot wind the clock back in terms of the disqualification power on the same basis as one may have been able wind the clock forward

(5) *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 68-69; *McGinty v Western Australia* (1996) 186 CLR 140 at 222; *Langer v The Commonwealth* (1996) 186 CLR 302 at 342; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 256.

(6) *McGinty v Western Australia* (1996) 186 CLR 140 at 286.

(7) *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 68-69; *McGinty v Western Australia* (1996) 186 CLR 140 at 222; *Langer v The Commonwealth* (1996) 186 CLR 302 at 342.

(8) *McGinty v Western Australia* (1996) 186 CLR 140 at 222.

(9) *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 261.

(10) *McGinty v Western Australia* (1996) 186 CLR 140 at 220; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 237. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 227-228.

(11) *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 35; *McGinty v Western Australia* (1996) 186 CLR 140 at 279, 286.

(12) *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 185.

on the qualification power. If it were otherwise any groups could be disqualified, subject only to the criterion that if the group is so large it is no longer a popular election or a choice by the people. That would be inconsistent with the reasoning adopted in the political communication cases.

The power conferred by ss 30 and 51(xxxvi) is purposive, to prescribe the qualification of electors for the purpose of implementing representative democracy, particularly as provided for in ss 7 and 24. The impugned provisions are not reasonably appropriate and adapted, or proportionate, to that purpose. They are also contrary to the freedoms of political communication (13) and political participation (14). They are directed at controlling political communication and participation. Hence they must be "necessary for the attainment of some overriding public purpose" (15) and they require "compelling justification" (16). Alternatively, they impose a burden on the freedoms of political communication and must be reasonably appropriate and adapted to furthering a legitimate objective in a manner that is compatible with a system of representative democracy (17). The impugned provisions do not meet either test. [KIRBY J. Your principle has to be founded on notions of citizenship and entitlements because you are a member of the polity and you do not cease to be that just because you are imprisoned.] The fabric that gave rise to the implication logically must ultimately protect the right to vote because that is what the electoral process comes down to.

Our submissions are supported by recent decisions in Canada, the European Union and South Africa, holding prisoner disenfranchisement provisions invalid (18). The general approach in Canada is to not look at the legitimate end divorced from the proportionality because proportionality is intimately bound up with the end. [GLEESON CJ. In terms of the relationship between Parliament and the courts, the proportionality identified in *Lange* and its progeny is a very different kind of proportionality from the kind identified in s 1 of the Canadian Charter.]

(13) *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
(14) *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 227.
(15) *Levy v Victoria* (1996) 189 CLR 579 at 619. See also *Coleman v Power* (2004) 220 CLR 1 at 30-32; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 76-77.
(16) *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143. See also *Coleman v Power* (2004) 220 CLR 1 at 123.
(17) *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567. See also *Coleman v Power* (2004) 220 CLR 1 at 51, 77-78.
(18) eg, *Belczowski v The Queen* [1992] 2 FC 440; *Sauvé v Canada (Attorney-General)* [1993] 2 SCR 438; *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519; *Hirst v United Kingdom [No 2]* (2005) 42 EHRR 41; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders* [2004] BCLR 445.

P J Hanks QC and *P R D Gray*, for the first defendant, adopted the conclusions of written submissions of the second defendant.

D M J Bennett QC, Solicitor-General for the Commonwealth, (with him *L G De Ferrari*), for the second defendant. The Court has not held that requirements arising from ss 7 and 24 of the *Constitution* apply to the making of laws concerning the qualification of voters. Those requirements do control the making of such laws because it is settled that the voting system as a whole must not be "so distorted as not to answer the broad identification … of ultimate control by periodic popular election" (19). Whether the voting system is so distorted is a matter of degree (20). There is no fixed test. [He referred to *Mulholland v Australian Electoral Commission* (21).] The plaintiff's submission of what is constitutionally mandated by ss 7 and 24 in accordance with contemporary standards is circular in setting up a category of "qualified" persons based on a threshold assessment of their entitlement to vote. However, s 93(8AA) is one of the elements of that assessment. The simpler approach is to set aside the circular expression "qualified members of 'the people'", and to assess whether the disqualification is such as to so distort the electoral system so that it no longer answers to the identification "directly chosen by the people of the Commonwealth" in the constitutional text. The reliance on "contemporary standards" is fraught with difficulty. It is unclear whose standards are to be chosen as the benchmark. The disentitlement to vote is not arbitrary. Although there may be a debate about the nature of the connection between offending against law and disentitlement from participating in the choice of those who make law, there is at least a rational connection between them. In any event, the disqualification in question does not so distort the electoral system so that it no longer answers the identification "chosen by the people". The ultimate question is if the *Constitution* is read in 2007, would this result in the legislature not being chosen by the people of Australia? The impugned law can reasonably be described as a measure to ensure that people who have committed an offence serious enough to warrant punishment do not vote and to balance that measure with the restoration of the entitlement to vote on release. The coincidence of a person's imprisonment and the timing of an election is a necessary concomitant of disqualifying persons currently serving a sentence of imprisonment. The qualitative effect of the disqualification effected by s 93(8AA) does not provide grounds for concluding that the direct popular choice

(19) *McGinty v Western Australia* (1996) 186 CLR 140 at 285. See also *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 35-36; *McGinty v Western Australia* (1996) 186 CLR 140 at 166-167, 184, 220-222, 279, 286-287.

(20) *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 36-37, 57; *McGinty v Western Australia* (1996) 186 CLR 140 at 201, 218-219, 274, 287.

(21) (2004) 220 CLR 181 at 237.

requirement of ss 7 and 24 is not met. The fact that sentencing practice may vary from State to State does not affect the matter. Inconsistency of that kind is not prohibited by the *Constitution* (22). [GLEESON CJ. Is the discrimen that is applied in this legislation the fact that the disqualified people have been taken out of the community by court order?] Yes. That is done by s 4(1A) which applies only "in detention on a full-time basis" and it is attributable to the sentence. The Act says that if the criminal justice system has determined that a person should be imprisoned for a specific period that is the period for which he is disqualified from voting.

A franchise excluding persons imprisoned on conviction of a crime was consistent with the required identification in 1901. Changes since then have not so altered the constitutional understanding of the requirements of the electoral system that the exclusion of prisoners is no longer to be regarded as consistent with the *Constitution*. The first consideration is how elected Parliaments (of the Commonwealth and the States) have viewed the issue. The federal franchise at all times has been subject to some form of disqualification for convicted prisoners. Further, from 1901 to the present, the franchises in the several States (with two exceptions) have maintained some form of disqualification of persons serving sentences following conviction of offences against the laws of the Commonwealth or a State or Territory. The history of referenda on proposed amendments relating to the franchises and to an entrenched constitutional right to vote, shows that on each occasion the proposed amendment would have allowed for disqualification on the basis of imprisonment for an offence. The plaintiff's submission amounts to a contention that there is a type of ratchet in that every time the franchise is expanded that expansion becomes fixed and immutable. Within the powers of Parliament where one extends the franchise, one can reduce it. That is *Kartinyeri v The Commonwealth* (23) and the basic principles that what Parliament does it can undo and that Parliament cannot make a law which it cannot repeal. [GLEESON CJ. You could not by legislation reverse the emancipation of Catholics.] It is the same problem as with women. It is a group which both qualitatively and quantitatively, if disenfranchised, would mean that the election was not by the people of Australia.

International developments do not support the plaintiff's case. Judgments of ultimate appellate courts in comparable jurisdictions include decisions upholding laws that disqualify prisoners from voting. Recent decisions of the Supreme Court of Canada and the European Court of Human Rights are based on paramount instruments enshrined in municipal law which have been construed as conferring individual rights. The reasoning in those cases cannot be transferred to the

(22) *Leeth v The Commonwealth* (1992) 174 CLR 455; *Putland v The Queen* (2004) 218 CLR 174.
(23) (1998) 195 CLR 337.

construction of ss 7 and 24 of the *Constitution* (24). In the United States, there is no recognition of a constitutional right which would invalidate laws disqualifying prisoners from voting (25). In New Zealand and India, electoral laws that disenfranchise prisoners have been upheld as constitutionally valid (26). There is far from clear acceptance among ultimate appellate courts that, in contemporary democracies comparable with Australia, it is impermissible, or "irrational" or "arbitrary", for the Parliament to exclude prisoners from the franchise.

The power conferred by ss 30 and 51(xxxvi) is not purposive. The characterisation of a law made under s 51 is not determined by reference to concepts such as "irrationality", "arbitrariness", or "discrimination". [He referred to *Grain Pool (WA) v The Commonwealth* (27).] The impugned provisions have a substantial connection with the subject matter of s 51(xxxvi), read with s 30: they prescribe one aspect of the qualification of electors of members of the House of Representatives (and of the Senate).

If the validity of the impugned provisions depends on establishing a rational connection between the exclusion of persons serving a sentence of imprisonment and representative democracy, there is such a connection in the denial of a right to vote to those persons while serving imprisonment. The impugned provisions support civic responsibility by preventing persons who have broken the social compact by committing a serious breach of Australian law, encourage recognition that the rights and obligations of community participation are correlative, and support the integrity of the electoral system by excluding from voting in a federal election or referendum persons who, because of full-time detention, are less able to participate in political communications and political matters.

Voting is not a communication protected by the implied freedom of political communication. Freedom of political communication is required to enable the act of voting and is limited to the communication that is necessary to place the elector in a position to make an informed choice. The act of choice by the people is not "communication" within the scope of the implied freedom identified in *Lange's Case*. It is not a communication authorised by the general law and amenable to protection by the implied freedom but is expressly provided for by ss 7 and 24 of the *Constitution*. There is no free standing implied freedom of political participation.

(24) *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 242, 295, 301.
(25) *Richardson v Ramirez* (1974) 418 US 24.
(26) *Re Bennett* (1993) 2 HRNZ 358; *Anukul Chandra Pradhan, Advocate, Supreme Court v Union of India*, AIR 1997 Supreme Court 2814.
(27) (2000) 202 CLR 479.

R J Meadows QC, Solicitor-General for the State of Western Australia, (with him *R M Mitchell*), for the Attorney-General for that State, intervening. The only relevant constitutional question is whether the impugned provisions result in the House of Representatives not being composed of members directly chosen by the people. The provision for those members to be "directly chosen by the people" does not carry a requirement that all "members of the people" (a phrase in the plaintiff's submissions) participate in direct elections as electors. So long as Parliament remains composed of members directly chosen by the people, that is in a popular election, it is for the Parliament to determine which persons are qualified to be electors. Having regard to the textual and historical context in which ss 7 and 24 of the *Constitution* appear, and the common contemporary understanding of the requirements of popular election, the exclusion of prisoners from voting is not inconsistent with members of the Senate and the House of Representatives being directly chosen by the people. Parliament's expression of the common contemporary understanding of the requirements or characteristics of a popular election, through the enactment of electoral laws and proposals for referenda, is the most reliable guide to the identification of that understanding. The express provisions of the *Constitution* do not leave room for an implied limitation on the power of the Parliament based on an implied freedom of political participation. The implied limitation on power is confined to what is necessary for the effective operation of that system of representative and responsible government for which the *Constitution* provides. Questions of implied limitations, or whether a law is reasonably appropriate and adapted, or proportional, to achieving a legitimate object or end, do not arise. If the impugned provisions result in Parliament not being composed of members "directly chosen by the people", they are invalid regardless of the reasons for their enactment. If they do not have that result, ss 30 and 51(xxxvi) make the adequacy of the reasons for the provisions matters of legislative policy for determination by the Parliament, not a matter for judgment by the courts.

M G Sexton SC, Solicitor-General for the State of New South Wales, (with him *K M Richardson* and *J S Caldwell*), for the Attorney-General for that State, intervening. The plaintiff's submissions about the requirements imposed by ss 7 and 24 of the *Constitution* are inconsistent with a number of statements of principle. First, the words "the people" in those sections are not intended to be read literally (28). The phrase is "not to be dissected" to provide a distinct component of "chosen by the people" with its own operation above that of ss 7 and 24 and independently of other provisions of the *Constitution* (29). Secondly, "directly chosen by the people" must be considered against

(28) *Langer v The Commonwealth* (1996) 186 CLR 302 at 333, 342.
(29) *McGinty v Western Australia* (1996) 186 CLR 140 at 279.

the historical context that the system of federal representative government was implemented when there were large variations in voting qualifications in the colonies (30). Thirdly, ss 7 and 24 and, in particular, the phrase "directly chosen by the people", are not concerned with the particular form to be taken by the franchise in a system of direct election of members of the House of Representatives and the Senate (31). The phrase is a basic condition of the democratic process which leaves substantial room for parliamentary choice and for change from time to time (32). The power to determine which members of the population are to elect its representatives was to be determined by Parliament, subject to the denial of plural voting and subject to the limitation that characteristics or elements of the electoral system adopted must answer the constitutionally-mandated system of representative government (33). The plaintiff's submissions proceed on the unstated assumption that, by reference to "contemporary standards", prisoners are now accepted as within the "core" or the "irreducible minimum" of persons comprising "the people" who must be permitted to vote. This meets the obstacle that the participation of prisoners in popular elections has never been a characteristic of representative government in Australia as that notion has evolved (34). The franchise for prisoners, far from expanding since Federation, has grown more restrictive. Thus, while the content of the abstraction "the people" will change from time to time, that content has not changed to a general acceptance that "the people" now includes persons serving prison sentences, such that disqualification from voting of those persons so distorts the electoral system as to not answer the broadly-identified requirement of ultimate control by the people by periodic popular election (35). There is no substance in the submission that, even if s 93(8AA) is otherwise within power, it is invalid for infringement of the restraint on power identified as implied freedom of political communication.

R Merkel QC, in reply.

30 August 2007

THE COURT pronounced the orders that are published at 226-228.

Cur adv vult

26 September 2007

(30) *McGinty v Western Australia* (1996) 186 CLR 140 at 242-243, 270-271.
(31) *McGinty v Western Australia* (1996) 186 CLR 140 at 381-382.
(32) *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 190-191.
(33) *McGinty v Western Australia* (1996) 186 CLR 140 at 255; *Langer v The Commonwealth* (1996) 186 CLR 302 at 393; *Coleman v Power* (2004) 220 CLR 1 at 30-31; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 206, 211, 214.
(34) *McGinty v Western Australia* (1996) 186 CLR 140 at 287.
(35) *McGinty v Western Australia* (1996) 186 CLR 140 at 166-167, 273, 285, 287.

The following written reasons for judgment were published: —

1 GLEESON CJ. The *Australian Constitution* was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon legislative power for the purpose of protecting the rights of individuals. It was not the outcome of a revolution, or a struggle against oppression. It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies. Although it was drafted mainly in Australia, and in large measure (with a notable exception concerning the Judicature – s 74) approved by a referendum process in the Australian colonies, and by the colonial Parliaments, it took legal effect as an Act of the Imperial Parliament. Most of the framers regarded themselves as British. They admired and respected British institutions, including parliamentary sovereignty. The new Federation was part of the British Empire; a matter important to its security. Although the framers were concerned primarily with the distribution of legislative, executive and judicial power between the central authority and the States, there remained, in their view of governmental authority affecting the lives of Australians, another important centre of power in London.

2 In *Mulholland v Australian Electoral Commission* (36), for the purpose of noting a partial explanation of what the *Constitution* says and what it does not say, I referred to Barwick CJ's observations in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (37):

> "Because [the] *Constitution* was federal in nature, there was necessarily a distribution of governmental powers as between the Commonwealth and the constituent States with consequential limitation on the sovereignty of the Parliament and of that of the legislatures of the States. All were subject to the *Constitution*. But otherwise there was no antipathy amongst the colonists to the notion of the sovereignty of Parliament in the scheme of government."

3 Speaking extra-judicially in 1942, to an audience in the United States, Sir Owen Dixon said (38):

> "The framers of the *Australian Constitution* were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to the control of the legislature itself."

4 Sir Owen Dixon found a need to explain to American lawyers the scarcity in the *Australian Constitution* of formal guarantees of rights and freedoms which they associated with the idea of "constitutional

(36) (2004) 220 CLR 181 at 189.
(37) (1975) 135 CLR 1 at 24.
(38) Dixon, "Two Constitutions Compared", in Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (1965) 100, at p 102.

rights". That is not to say that the *Constitution* contains no guarantees or protections of individual rights, express or implied. Yet it reflects a high level of acceptance of what Barwick CJ called "the notion of the sovereignty of Parliament in the scheme of government". Nowhere is this more plainly illustrated than in the extent to which the *Constitution* left it to Parliament to prescribe the form of our system of representative democracy (39).

5 Important features of our system of representative democracy, such as compulsory voting, election of members of the House of Representatives by preferential voting, and proportional representation in the Senate, are the consequence of legislation, not constitutional provision. One striking example concerns a matter which the framers deliberately left to be dealt with by Parliament: female suffrage. The *Constitution*, in s 128, refers to States "in which adult suffrage prevails." In 1901, adult suffrage meant the franchise for women as well as men. Quick and Garran, referring to the Convention Debates, noted "the difficulty as to women's suffrage" which was taken into account in the wording of s 128 (40). Another example is voting by Aboriginal people, which remained an issue not fully resolved until the second half of the twentieth century.

6 The combined effect of ss 51(xxxvi), 8 and 30 is that Parliament may make laws providing for the qualification of electors. That Australia came to have universal adult suffrage was the result of legislative action. Universal suffrage does not exclude the possibility of some exceptions. The *Oxford English Dictionary* says that the term means "the right of all adults (with minor exceptions) to vote in political elections" (41). Among countries which now have universal suffrage there are observable differences in the exceptions that are accepted, but there is also a broad agreement as to the kinds of exception that would not be tolerated. Could Parliament now legislate to remove universal adult suffrage? If the answer to that question is in the negative (as I believe it to be) then the reason must be in the terms of ss 7 and 24 of the *Constitution*, which require that the senators and members of the House of Representatives be "directly chosen by the people" of the State or the Commonwealth respectively. In 1901, those words did not mandate universal adult suffrage. In 1901, the words "foreign power" in s 44(i) did not include the United Kingdom, yet in *Sue v Hill* (42) this Court held that, by reason of changes in Australia's relations with the United Kingdom and in national and international circumstances over the intervening period, they had come to include the United Kingdom. The meaning of the words "foreign power" did

(39) *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 [6].
(40) Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, reprinted ed (1976), p 987.
(41) *Concise Oxford English Dictionary*, 11th ed (2004), p 1579.
(42) (1999) 199 CLR 462.

not change, but the facts relevant to the identification of the United Kingdom as being included in or excluded from that meaning had changed.

7 In *McKinlay* (43), 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* (44), 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. 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 (45). 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.

8 It is difficult to accept that Parliament could now disenfranchise people on the ground of adherence to a particular religion. It could not, as it were, reverse Catholic emancipation. Ordinarily there would be no rational connection between religious faith and exclusion from that aspect of community membership involved in participation, by voting, in the electoral process. It is easy to multiply examples of possible forms of disenfranchisement that would be identified readily as inconsistent with choice by the people, but other possible examples might be more doubtful. An arbitrary exception would be inconsistent with choice by the people. There would need to be some rationale for the exception; the definition of the excluded class or group would need to have a rational connection with the identification of community membership or with the capacity to exercise free choice. Citizenship,

(43) (1975) 135 CLR 1 at 36.
(44) (1996) 186 CLR 140 at 286-287.
(45) cf *McGinty v Western Australia* (1996) 186 CLR 140 at 170 per Brennan CJ.

itself, could be a basis for discriminating between those who will and those who will not be permitted to vote (46). Citizens, being people who have been recognised as formal members of the community, would, if deprived temporarily of the right to vote, be excluded from the right to participate in the political life of the community in a most basic way. The rational connection between such exclusion and the identification of community membership for the purpose of the franchise might be found in conduct which manifests such a rejection of civic responsibility as to warrant temporary withdrawal of a civic right.

9 This brings me to the issue in the present case. The facts, the legislation, and the historical background appear from the reasons of Gummow, Kirby and Crennan JJ (the joint reasons). Since 1902, when the Commonwealth Parliament first legislated with respect to the franchise, the legislation always provided that, along with persons of unsound mind and persons attainted of treason, prisoners *of certain kinds* were not entitled to vote. The rationale for excluding persons of unsound mind is obvious, although the application of the criterion of exclusion may be imprecise, and could be contentious in some cases. The rationale is related to the capacity to exercise choice. People who engage in acts of treason may be regarded as having no just claim to participate in the community's self-governance. It will be necessary to return to the rationale for excluding prisoners. First, however, the changes in the exclusion over the years should be noted. Not all people in prison are serving sentences of imprisonment. Some are awaiting trial. They are not covered by any of the exclusions. There was some discussion in argument concerning fine defaulters. It was suggested that, perhaps depending on the precise terms of the orders made against them, they also would not be excluded. It is unnecessary to pursue that question. From 1902 until 1983, the exclusion was of convicted persons under sentence or subject to be sentenced for an offence punishable by imprisonment for one year or longer. From 1983 until 1995, the reference to one year was replaced by five years. From 1995 to 2004, the reference to imprisonment for an offence punishable by imprisonment for five years or longer was altered to serving a sentence of five years or longer. From 2004 to 2006, the period of five years was altered to three years. In 2006, Parliament enacted s 93(8AA) of the *Commonwealth Electoral Act 1918* (Cth) which provides that a person who is serving a sentence of imprisonment for an offence against the law of the Commonwealth or of a State or Territory is not entitled to vote at any Senate election or House of Representatives election. The plaintiff's challenge to the validity of s 93(8AA) gives rise to the primary issue in the present case. If it succeeds, there is a question whether the previous (three-year) regime still validly applies.

(46) *Bennett v The Commonwealth* (2007) 231 CLR 91.

10 What is the rationale for the exclusion of prisoners? Two possibilities may be dismissed. First, the mere fact of imprisonment is not of itself the basis of exclusion. According to the Australian Bureau of Statistics, at 30 June 2006 there were 25,790 prisoners (sentenced and unsentenced) in Australian prisons. Unsentenced prisoners (typically persons on remand awaiting trial) comprised 22 per cent (5,581) of the total prisoner population (47). They have the right to vote. We were informed that they do so either by postal voting or by the visit to prisons of mobile voting booths. Accordingly, there is nothing inherently inconsistent between being in custody and voting; even under the current exclusion, more than one-fifth of prisoners vote. Secondly, exclusion by federal law from voting cannot be justified as an additional punishment. The great majority of prisoners in Australia are people who have been sentenced by State courts for offences against State law. The States bear the principal responsibility for the administration of criminal justice. There would be serious constitutional difficulties involved in seeking to justify a federal law such as s 93(8AA) as an additional punishment upon State offenders; especially upon State offenders who had previously been convicted and sentenced under State law. I do not intend to suggest that there would be no difficulties about treating it as additional punishment for offences against federal or territorial law, but the position of State offenders is sufficient to demonstrate the problem with treating it as punishment at all.

11 The rationale for the exclusion from the franchise of some prisoners, that is, those who have been convicted and are serving sentences, either of a certain duration or of no particular minimum duration, must lie in the significance of the combined facts of offending and imprisonment, as related to the right to participate in political membership of the community. The combination is important. Just as not all prisoners are excluded, even under s 93(8AA), from voting, not all persons convicted of criminal offences are excluded. Non-custodial sentences do not attract the exclusion. A pecuniary penalty, no matter how heavy, does not lead to loss of the vote. Since it is only offences that attract a custodial sentence that are involved, this must be because of a view that the seriousness of an offence is relevant, and a custodial sentence is at least a method, albeit imperfect, of discriminating between offences for the purpose of marking off those whose offending is so serious as to warrant this form of exclusion from the political rights of citizenship.

12 Since what is involved is not an additional form of punishment, and since deprivation of the franchise takes away a right associated with citizenship, that is, with full membership of the community, the rationale for the exclusion must be that serious offending represents such a form of civic irresponsibility that it is appropriate for Parliament

(47) Australian Bureau of Statistics, *Prisoners in Australia, 2006*, Report No 4517.0.

to mark such behaviour as anti-social and to direct that physical separation from the community will be accompanied by symbolic separation in the form of loss of a fundamental political right. The concept of citizenship has itself evolved in Australian law (48). The preamble to the *Australian Citizenship Act 2007* (Cth) declares that Parliament recognises that Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations. The reference to the reciprocity of rights and obligations is important in the context of membership of the community. Serious offending may warrant temporary suspension of one of the rights of membership, that is, the right to vote. Emphasis upon civic responsibilities as the corollary of political rights and freedoms, and upon society's legitimate interest in promoting recognition of responsibilities as well as acknowledgment of rights, has been influential in contemporary legal explanation of exclusions from the franchise as consistent with the idea of universal adult suffrage.

13 In *Sauvé v Canada (Chief Electoral Officer)* (49), Gonthier J cited a passage in a work of the American constitutional law scholar, Professor Tribe (50), who wrote:

> "Every state, as well as the federal government, imposes some restrictions on the franchise. Although free and open participation in the electoral process lies at the core of democratic institutions, the need to confer the franchise on all who aspire to it is tempered by the recognition that completely unlimited voting could subvert the ideal of popular rule which democracy so ardently embraces. Moreover, in deciding who may and who may not vote in its elections, a community takes a crucial step in defining its identity."

14 Gonthier J made the point (51) that it is legitimate for society to curtail the vote temporarily of people who have demonstrated a great disrespect for the community by committing serious crimes, on the basis that civic responsibility and respect for the rule of law are prerequisites to democratic participation. This, he said, reinforces the significance of the relationship between individuals and their community when it comes to voting.

15 The litigation in *Sauvé* concerned an issue similar to the present, but the issue arose under a different legal regime. The *Canadian Charter of Rights and Freedoms*, in s 3, guarantees every citizen the right to vote. Section 1, however, permits "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This

(48) See *Singh v The Commonwealth* (2004) 222 CLR 322; *Hwang v The Commonwealth* (2005) 80 ALJR 125; 222 ALR 83; Brazil, "Australian Nationality and Immigration" in Ryan, *International Law in Australia*, 2nd ed (1984), p 210; Rubenstein, *Australian Citizenship Law in Context* (2002).

(49) [2002] 3 SCR 519 at 585 [119].

(50) Tribe, *American Constitutional Law*, 2nd ed (1988), p 1084.

(51) [2002] 3 SCR 519 at 583-584 [116], [117].

qualification requires both a rational connection between a constitutionally valid objective and the limitation in question, and also minimum impairment to the guaranteed right (52). It is this minimum impairment aspect of proportionality that necessitates close attention to the constitutional context in which that term is used. No doubt it is for that reason that the parties in the present case accepted that *Sauvé* (like the case of *Hirst* discussed below) turned upon the application of a legal standard that was different from the standard relevant to Australia. The Supreme Court of Canada had previously held that a blanket ban on voting by prisoners, regardless of the length of their sentences, violated the Charter (53). The legislature changed the law to deny the right to vote to all inmates serving sentences of two years or more. Dividing five-four, the Supreme Court of Canada again held that the legislation violated the Charter. The central issue was whether the s 1 justification (involving the minimum impairment standard) had been made out.

16 The United Kingdom has for many years had legislation which disenfranchises all convicted prisoners. The European Court of Human Rights, in *Hirst v United Kingdom [No 2]* (54), by majority, held that the automatic blanket ban imposed on all convicted prisoners violated Art 3 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. The majority accepted that the United Kingdom law pursued the legitimate aim of enhancing civic responsibility and respect for the rule of law by depriving those who had breached the basic rules of society of the right to have a say in the way such rules were made for the duration of their sentence. However, they concluded that the measure was arbitrary in applying to all prisoners, and lacked proportionality (which in this context also required not only a rational connection between means and ends but also the use of means that were no more than necessary to accomplish the objective), even allowing for the margin of appreciation to be extended to the legislature (55). We were informed by counsel that the United Kingdom's response to the decision has not yet been decided.

17 There is a danger that uncritical translation of the concept of proportionality from the legal context of cases such as *Sauvé* or *Hirst* to the Australian context could lead to the application in this country of a constitutionally inappropriate standard of judicial review of legislative action. Human rights instruments which declare in general terms a right, such as a right to vote, and then permit legislation in derogation of that right, but only in the case of a legitimate objective

(52) See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 197-199 [33]-[38]; *Sauve v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 at 534-535 [7].

(53) *Sauve v Canada (Attorney-General)* [1993] 2 SCR 438.

(54) (2005) 42 EHRR 41.

(55) See *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80.

pursued by means that are no more than necessary to accomplish that objective, and give a court the power to decide whether a certain derogation is permissible, confer a wider power of judicial review than that ordinarily applied under our *Constitution*. They create a relationship between legislative and judicial power significantly different from that reflected in the *Australian Constitution*, and explained at the commencement of these reasons. The difference between the majority and minority opinions in both *Sauvé* and *Hirst* turned largely upon the margin of appreciation which the courts thought proper to allow the legislature in deciding the question of proportionality. Neither side in the present litigation suggested that this jurisprudence could be applied directly to the *Australian Constitution*. Even so, aspects of the reasoning are instructive.

18 To return to *Sauvé*, Gonthier J, with whom L'Heureux-Dubé, Major and Bastarache JJ agreed, and who favoured upholding the legislation disenfranchising prisoners serving sentences of two years or more, related the disqualification to the idea of citizenship. He said (56):

> "The disenfranchisement of *serious criminal offenders* serves to deliver a message to both the community and the offenders themselves that *serious criminal activity* will not be tolerated by the community. In making such a choice, Parliament is projecting a view of Canadian society which Canadian society has of itself. The commission of *serious crimes* gives rise to a temporary suspension of this nexus: on the physical level, this is reflected in incarceration and the deprivation of a range of liberties normally exercised by citizens and, at the symbolic level, this is reflected in temporary disenfranchisement. The symbolic dimension is thus a further manifestation of community disapproval of the *serious criminal conduct*."

(Emphasis added.)

19 Those observations apply also to Australia. It is consistent with our constitutional concept of choice by the people for Parliament to treat those who have been imprisoned for serious criminal offences as having suffered a temporary suspension of their connection with the community, reflected at the physical level in incarceration, and reflected also in temporary deprivation of the right to participate by voting in the political life of the community. It is also for Parliament, consistently with the rationale for exclusion, to decide the basis upon which to identify incarcerated offenders whose serious criminal wrongdoing warrants temporary suspension of a right of citizenship. I have no doubt that the disenfranchisement of prisoners serving three-year sentences was valid, and I do not suggest that disenfranchisement of prisoners serving sentences of some specified lesser term would necessarily be invalid. The specification of a term reflects a judgment by Parliament which marks off serious criminal

(56) [2002] 3 SCR 519 at 585 [119].

offending, and reflects the melancholy fact that not all sentences of imprisonment necessarily result from conduct that falls into that category.

20 That fact is also reflected in one provision of the *Constitution* itself. Section 44 deals with the disqualification of senators and members of the House of Representatives. The section disqualifies a person who "has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer". I do not suggest that, by implication, this imposes a lower limit on Parliament's capacity to disqualify voters. There is, of course, an incongruity in the fact that the current legislation, in the relevant respect, imposes stricter standards upon eligibility to be a voter than the *Constitution* imposes upon eligibility to be a senator or a member of the House of Representatives. The point, however, is that s 44 recognises that the mere fact of imprisonment, regardless of the nature of the offence or the length of the term, does not necessarily indicate serious criminal conduct. That was so in 1901, and it remains so today.

21 One of the major problems currently affecting the administration of criminal justice, in Australia and elsewhere, is that of the short-term prison sentence, an expression which is normally used to refer to sentences of six months or less. In a 2001 report, the New South Wales Legislative Council's Select Committee on the Increase in Prisoner Population recommended that the government consider and initiate public consultation in relation to the abolition of sentences of six months or less (57). The Bureau of Crime Statistics and Research was asked to estimate the impact on the prison system of such abolition. In 2000-2001, offenders sentenced to less than six months accounted for 65 per cent of all persons sentenced to prison by New South Wales adult criminal courts for that year. They are a much lower percentage of the total prison population but, for obvious reasons, the turnover is greater. According to the Bureau, it was estimated that, if all those who currently received sentences of six months or less were instead given non-custodial penalties, the number of new prisoners received in New South Wales prisons would drop from about 150 per week to about ninety per week (58). In 2004, the New South Wales Sentencing Council reported on the same topic (59). Short-term sentences were not abolished. In 2007, the Judicial Commission of New South Wales recorded that "sentences of six months or less, usually imposed by lower courts, have a significant impact on the prison population" (60).

(57) New South Wales, Legislative Council, Select Committee on the Increase in Prisoner Population, *Final Report* (2001), p xvii.

(58) Lind and Eyland, "The impact of abolishing short prison sentences", *Crime and Justice Bulletin*, vol 73 (2002) 1, at p 5.

(59) New South Wales Sentencing Council, *Abolishing Prison Sentences of 6 Months or Less* (2004).

(60) Judicial Commission of New South Wales, *Full-time imprisonment in New South*

Section 5(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) reflects a legislative concern to attempt to limit the number of short sentences. Western Australian legislation has gone further (61). In England, short-term sentences were significantly affected by ss 181-195 of the *Criminal Justice Act 2003* (UK) (62).

22 As a matter of sentencing practicality, in the case of short-term sentences the availability of realistic alternatives to custody is of particular importance. If an offence is serious enough to warrant a sentence of imprisonment for a year or more, the likelihood is that the sentencing judicial officer will have formed the view that there was no serious alternative to a custodial sentence. In most Australian jurisdictions, there is a legislative requirement to treat imprisonment as a last resort when imposing a penalty (63). More than 95 per cent of short-term sentences are imposed by magistrates (64). The availability, in all the circumstances of a particular case, of other sentencing options such as fines, community service, home detention, or periodic detention may be critical. Relevant circumstances may include the personal situation of the offender, or the locality. In the case of offenders who are indigent, or homeless, or mentally unstable, the range of practical options may be limited. In rural and regional areas, the facilities and resources available to support other options also may be limited. In its June 2004 Report, made pursuant to s 100J(1)(a) and (d) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the New South Wales Sentencing Council recorded that the Chief Magistrate "acknowledged the unavailability of uniform sentencing options throughout NSW" and "clearly demonstrated that alternatives to sentences of full-time imprisonment are not equally distributed across the State" (65). Practical considerations of this kind give particular meaning to "disadvantaged" (66). I do not suggest these problems are peculiar to New South Wales. I refer to it because it is the largest jurisdiction. A study published in 2002 examined the types of offence for which people were serving short terms of imprisonment in New

(cont)

Wales and other jurisdictions: A national and international comparison (2007), p 8.

(61) *Sentencing Legislation Amendment and Repeal Act 2003* (WA), s 33.

(62) Ashworth, *Sentencing and Criminal Justice*, 4th ed (2005), p 271.

(63) eg, *Crimes Act 1914* (Cth), s 17A; *Crimes (Sentencing Procedure) Act 1999* (NSW), s 5(1); *Sentencing Act 1991* (Vic), s 5(4); *Criminal Law (Sentencing) Act 1988* (SA), s 11(1)(a)(iv); *Sentencing Act 1995* (WA), s 6(4)(a); *Penalties and Sentences Act 1992* (Qld), s 9(2)(a).

(64) Keane, Poletti and Donnelly, "Common Offences and the Use of Imprisonment in the District and Supreme Courts in 2002", *Sentencing Trends and Issues*, vol 30 (2004) 1, at p 3.

(65) New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court* (2004), p 59.

(66) See New South Wales, Legislative Council, Standing Committee on Law and Justice, *Community based sentencing options for rural and remote areas and disadvantaged populations* (2006).

South Wales (67). Theft (excluding robbery) was the most common offence. Then followed breaches of court orders, assault, and driving or traffic offences.

23 The adoption of the criterion of serving a sentence of imprisonment as the method of identifying serious criminal conduct for the purpose of satisfying the rationale for treating serious offenders as having severed their link with the community, a severance reflected in temporary disenfranchisement, breaks down at the level of short-term prisoners. They include a not insubstantial number of people who, by reason of their personal characteristics (such as poverty, homelessness, or mental problems), or geographical circumstances, do not qualify for, or, do not qualify for a full range of, non-custodial sentencing options. At this level, the method of discriminating between offences, for the purpose of deciding which are so serious as to warrant disenfranchisement and which are not, becomes arbitrary.

24 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.

25 I would uphold the challenge to the validity of s 93(8AA). I have already indicated that in my view the previous legislation was valid. For the reasons given in the joint reasons it continues to apply.

26 For these reasons, I joined in the order made on 30 August 2007.

27 GUMMOW, KIRBY AND CRENNAN JJ. Section 28 of the *Constitution* stipulates that unless sooner dissolved by the Governor-General every House of Representatives shall continue for three years from the first meeting of the House. Part III (with respect to the House) and Pt II (with respect to the Senate) make further provision with respect to elections and s 57 deals with double dissolutions.

28 Part VI (ss 81-92) of the *Commonwealth Electoral Act 1918* (Cth) (the Electoral Act) provides for the establishment and maintenance of a roll of electors for each State and Territory and for Division and Subdivision rolls.

29 Part VII (ss 93-97) deals with qualifications and disqualifications for enrolment and for voting. In particular, s 93 specifies those entitled to enrolment (persons who have attained eighteen years and are citizens or a member of a closed class of British subjects) and, with certain exceptions, provides that an elector whose name is so enrolled is entitled to vote at Senate and House of Representatives elections. The provisions with respect to entitlement represent the culmination of the movement for universal suffrage. Over time the cry "one man one vote" came to include women, Australians of indigenous descent, and

(67) Lind and Eyland, "The Impact of Abolishing Short Term Prison Sentences", *Crime and Justice Bulletin*, vol 73 (2002) 1.

those aged at least eighteen years. The provision in s 93 for exceptions reflects the notion of disqualification, to protect the integrity of the electoral result from the exercise of the franchise by groups of voters sharing some characteristic considered to affect capacity to vote responsibly and independently.

30 Two of these groups singled out for exclusion in this way by s 93 are those incapable of understanding the nature and significance of enrolment and voting, by reason of unsoundness of mind, and those convicted of treason and treachery and not pardoned. This litigation concerns a third category, those convicted and serving their sentence, a class which includes the plaintiff.

31 The issues which arise on the Amended Special Case involve constraints which are said by the plaintiff to be derived from the text and structure of the *Constitution* and to render invalid certain of the amendments to the Electoral Act made by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) (the 2006 Act). The relevant provisions of the 2006 Act commenced on 22 June 2006. If the plaintiff makes good her principal submission respecting the 2006 Act, consequential issues will arise as to the identification and effect of surviving provisions of the Electoral Act in their unamended form.

32 What follows are our reasons for supporting the order with respect to the Amended Special Case which was made on 30 August 2007.

The facts

33 The plaintiff was born in 1958 and is an Australian citizen of indigenous descent. She is enrolled for the Federal Division of Kooyong in Victoria, is of sound mind and capable of understanding the nature and significance of voting, and has never been convicted of treason or treachery. However, in 2004 the plaintiff was convicted in the County Court of Victoria on five counts of offences under the *Crimes Act 1958* (Vic) and is currently serving a total effective sentence of six years imprisonment imposed by that court (68). She will not be eligible for parole until 22 August 2008. The plaintiff asserts the invalidity of provisions now found in the Electoral Act the effect of which is to deny what otherwise would be her entitlement to vote at any Senate election or House of Representatives election held before 22 August 2008. Subject to one issue considered later in these joint reasons (69) there is no doubt respecting the standing of the plaintiff.

(68) The plaintiff was convicted of the offences of burglary (count 1), theft (count 2), conduct endangering persons (count 3), and causing serious injury negligently (counts 4 and 5). The plaintiff was sentenced to three years imprisonment on count 4, two years on each of counts 1 and 3 and to twelve months on each of counts 2 and 5. Allowances for concurrency and cumulation resulted in the total effective sentence of six years.

(69) At [99].

34 The first defendant, the Electoral Commissioner, is the chief executive officer of the Australian Electoral Commission established by s 6 of the Electoral Act. The first defendant appeared by senior counsel and made submissions respecting the administration of the Electoral Act. The active opposition to the plaintiff's case was provided by the second defendant, the Commonwealth, with the support of the Attorneys-General of New South Wales and of Western Australia as interveners.

The 2006 Act

35 The nature of the relevant changes made to the Electoral Act by the 2006 Act appear from the following passage in the Explanatory Memorandum to the Bill for the 2006 Act:

> "Currently prisoners serving a sentence of three years or longer are not entitled to enrol and vote. These persons are removed from the roll by objection following receipt of information from the prison authorities. Prisoners serving a sentence of less than three years are entitled to remain enrolled or if unenrolled, apply for enrolment.
>
> The proposed amendments will apply such that all prisoners serving a sentence of full-time detention will not be entitled to vote, but may remain on the roll, or if unenrolled apply for enrolment. However, they will not appear on a certified list or be identifiable as prisoners on the public roll. Those serving alternative sentences such as periodic or home detention, as well as those serving a non-custodial sentence or who have been released on parole, will still be eligible to enrol and vote."

36 On 30 June 2006 there were 20,209 prisoners in Australian prisons who were serving a sentence; 24 per cent of the prison population was indigenous and the percentage varied across Australia, from 82 per cent in the Northern Territory to 6 per cent in Victoria. Some 35 per cent of prisoners were serving a term of two years or less.

37 Before the changes made by the 2006 Act, s 93(8) and (8AA) of the Electoral Act stated:

> "(8) A person who:
>
> (a) by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting; or
>
> (b) is serving a sentence of 3 years or longer for an offence against the law of the Commonwealth or of a State or Territory; or
>
> (c) has been convicted of treason or treachery and has not been pardoned;
>
> is not entitled to have his or her name placed on or retained on any Roll or to vote at any Senate election or House of Representatives election.
>
> (8AA) Paragraph (8)(b) applies whether the person started serving the sentence before, on or after the commencement of

Schedule 1 to the *Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004*."

38 Item 14 of Sch 1 to the 2006 Act stated of para (b) of s 93(8), "Repeal the paragraph". Item 15 dealt with sub-s (8AA) of s 93 and stated:

"Repeal the subsection, substitute:

(8AA) A person who is serving a sentence of imprisonment for an offence against the law of the Commonwealth or of a State or Territory is not entitled to vote at any Senate election or House of Representatives election."

The phrase "sentence of imprisonment" is defined in s 4(1A) of the Electoral Act (70) as follows:

"(1A) For the purposes of this Act, a person is serving a *sentence of imprisonment* only if:

(a) the person is in detention on a full-time basis for an offence against a law of the Commonwealth or a State or Territory; and

(b) that detention is attributable to the sentence of imprisonment concerned."

(Emphasis in original.)

39 Section 109 of the Electoral Act now requires the principal officer having control of the prisons and gaols of a State or Territory to provide to the Australian Electoral Officer information respecting persons serving a sentence of imprisonment. Paragraph (c) of s 208(2) excludes from the certified lists of voters prepared by the Electoral Commissioner those voters to whom s 93(8AA) applies. Those voters are also excluded from the operation of s 221(3) which makes the state of the electoral rolls in force at the time of an election conclusive evidence of the right to vote as an elector.

The plaintiff's case

40 The plaintiff challenges the validity of those provisions of the 2006 Act which made the changes to the Electoral Act described above, in particular the inclusion of s 93(8AA). The grounds upon which she asserts invalidity involve the following four alternative propositions: first, whilst ss 8 and 30 of the *Constitution* speak of the "qualification" of electors they do not speak of provisions for "disqualification" and the consequence of this omission is said to be that any legislation for disqualification must "satisfy the representative government criteria"; secondly, s 93(8AA) punishes persons such as the plaintiff who have been convicted under State laws and the Parliament has no power to legislate in that way; thirdly, it follows from the reasoning in *Lange v Australian Broadcasting Corporation* (71) that there is an implied freedom of political communication (or of political participation) which protects voting in federal elections, and that this is

(70) Inserted by Item 4 of Sch 1 to the 2006 Act.
(71) (1997) 189 CLR 520.

impermissibly burdened by the 2006 Act; finally, the 2006 Act impermissibly limits the operation of the system of representative (and responsible) government which is mandated by the *Constitution*.

41 The first three of these submissions may be considered immediately. As to the first, the distinction between qualification and disqualification, the following is to be said. Section 93 of the Electoral Act deals sequentially with those entitled to enrolment and those entitled to vote, and renders that entitlement to vote subject, among other provisions, to s 93(8AA); the phrase "qualification" when used in ss 8 and 30 of the *Constitution* is sufficiently broad to allow for reservations or exceptions to a qualification which otherwise is conferred by the law in question.

42 As to the second submission, respecting federal punishment for State offences, two points are to be made. First, the circumstance that the plaintiff is serving a sentence of imprisonment for offences against the law of Victoria supplies the factum upon which the federal law operates. Secondly, if the federal law otherwise be within power, as a law with respect to the qualification of electors, the nature of that factum does not deny to the law that character.

43 As to the third, for the reasons to be developed below, what is at stake on the plaintiff's case is not so much a freedom to communicate about political matters but participation as an elector in the central processes of representative government. It is this consideration which marks out as the appropriate ground for the decision in this case the plaintiff's fourth submission. To consideration of that submission we now turn, beginning with the relevant provisions of the *Constitution*.

The Constitution

44 Section 1 of the *Constitution* vests the legislative power of the Commonwealth in the Federal Parliament, which consists of the Queen, the Senate and the House of Representatives. Of s 1, together with ss 7, 8, 13, 24, 25, 28 and 30, the Court said in its joint judgment in *Lange* (72), and with reference to the description by Isaacs J in *Federal Commissioner of Taxation v Munro* (73) of the *Constitution* as concerned to advance representative government, that these provisions give effect to this purpose by "providing for the fundamental features of representative government".

45 The plaintiff's case proceeds on the footing that questions respecting the extent of the franchise and the manner of its exercise affect the fundamentals of a system of representative government (74). However, it has been remarked in this Court that in providing for those fundamentals the *Constitution* makes allowance for the evolutionary nature of representative government as a dynamic rather than purely

(72) (1997) 189 CLR 520 at 557.
(73) (1926) 38 CLR 153 at 178.
(74) See further, *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 190-191 [14], 205-207 [61]-[65], 237-238 [155]-[157], 257-258 [222]-[223].

static institution (75). Ultimately, the issues in the present case concern the relationship between the constitutionally mandated fundamentals and the scope for legislative evolution.

46 On their face, the laws impugned by the plaintiff are supported by s 51(xxxvi) and by ss 8 and 30 of the *Constitution*; that is to say, as matters in respect of which the "Constitution makes provision until the Parliament otherwise provides". But the power granted the Parliament by s 51(xxxvi) itself is conferred, in accordance with the opening words of s 51, "subject to this Constitution".

47 Section 8 of the *Constitution* reads:

> "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."

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."

These provisions contain specific limitations upon the power of the Parliament to prescribe the franchise. There can be no plural voting (for example, by reference to the location of several parcels of real property owned by the elector) and the qualifications of electors cannot differ between the two legislative chambers.

48 Further, it appeared to be common ground (and correctly so) that these provisions were to be read not in isolation but with an appreciation both of the structure and the text of the *Constitution*. Reference may first be made to s 128. This requires submission of proposed laws for the alteration of the *Constitution* to be submitted to the electors qualified to vote for the election of members of the House of Representatives. Section 7 requires the Senate to be composed of Senators "directly chosen by the people of the State" and is to be read with the territories power in s 122 (76). Section 24, which also is to be read with s 122, requires that members of the House of Representatives "be composed of members directly chosen by the people of the Commonwealth".

49 The Commonwealth correctly accepts that ss 7 and 24 place some limits upon the scope of laws prescribing the exercise of the franchise, and that in addition to the specific insistence upon direct choice by those eligible to vote, laws controlling that eligibility must observe a

(75) *McGinty v Western Australia* (1996) 186 CLR 140 at 279-280; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 213-214 [78].
(76) *Queensland v The Commonwealth* (1977) 139 CLR 585.

requirement that the electoral system as a whole provide for ultimate control by periodic popular election. However, the Commonwealth emphasised that whether the voting system has been so distorted as not to meet that requirement is a matter of permissible degree. The Commonwealth submitted that that degree was not exceeded by the 2006 Act, but it did not offer any particular criterion for the determination of such questions. However, in oral submissions, the Solicitor-General of the Commonwealth readily accepted that a law excluding members of a major political party or residents of a particular area of a State would be invalid; so also, despite prevalent attitudes in 1900, would be a law which now purported to exclude from the franchise persons of indigenous descent or bankrupts.

50 For her part, the plaintiff emphasised that a law which stipulates a criterion for disenfranchisement fixing upon service at the election date of any sentence of imprisonment operates in an arbitrary or capricious fashion, with no rational ground for the automatic exclusion from exercise of the popular franchise mandated by the *Constitution*, and would be invalid. She submitted that the 2006 Act was such a law.

51 Reference also should be made to s 44 of the *Constitution*. Among those incapable of being chosen or sitting as a senator or member is, as specified in s 44(ii), any person who:

> "[i]s attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer."

The force here of the word "and" is to render conjunctive the reference to conviction and sentence (77). The phrase "under sentence" is apt to include those who although sentenced to penal servitude may be at large under, for example, a licence or on parole (78).

52 The Commonwealth submits that whatever implication or principle may be evident in the grounds in s 44(ii) for disqualification of senators and members, and of candidates for election, s 44(ii) is disconnected from consideration of the validity of the denial by s 93(8AA) of the exercise of the franchise. That submission should be rejected as being too wide.

53 Not only must the *Constitution* be read as a whole, but an understanding of its text and structure may be assisted by reference to the systems of representative government with which the framers were most familiar as colonial politicians. These do not necessarily limit or

(77) *Nile v Wood* (1987) 167 CLR 133 at 139.

(78) See *Bullock v Dodds* (1819) 2 B & Ald 257 [106 ER 361]; *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 588-589, 603-605; *Baker v The Queen* (2004) 223 CLR 513 at 527-528 [27]-[29]; *Rogers on Elections*, 16th ed (1897), vol 1, p 201. In *In the Matter of Jones* (1835) 2 Ad & El 436 [111 ER 169] the Court of King's Bench held that habeas corpus would not issue to enable a freeholder, in custody upon conviction for a misdemeanor, to vote at an election for a member of the House of Commons to represent his county.

control the evolution of the constitutional requirements to which reference has been made. However, they help to explain the common assumptions about the subject to which the chosen words might refer over time. Why was express provision made in s 44(ii) for disqualification of those who might be elected to membership of the Senate or the House, but, as regards the exercise of the franchise such matters left by ss 8 and 30 to later legislation? Had the two subjects been linked in the Australasian colonial constitutions? What was the rationale in those constitutions for the disqualification by provisions of the kind later found in s 44(ii)?

54 The answers to these questions throw light upon the issues in the present case, particularly upon the broader submissions respecting impermissible distortions of the system of representative government established under the *Constitution*. Accordingly, it is to these questions that we now turn.

Disqualification under colonial constitutions of electors, candidates and members

55 With the development within the British Empire of representative systems of government it became necessary to deal with the matter of disqualification. An illustrative starting point is s 23 of what is known in Canada as the *Constitutional Act 1791* (Imp) (79). This separated Upper and Lower Canada and provided an elected assembly for each province. Section 23 dealt compendiously with disqualification as follows:

> "That no Person shall be capable of voting at any Election of a Member to serve in such Assembly, in either of the said Provinces, or of being elected at any such Election, who shall have been attainted for Treason or Felony in any Court of Law within any of His Majesty's Dominions …"

56 This criterion of disqualification reflected what was understood at the time to be the rules of the common law respecting both electors and candidates for the House of Commons (80). With respect to candidates, the rule was put on the footing that persons attainted of treason and felony could not answer the description in the writs of election of knights, citizens and burgesses as being persons of discretion, in the sense of prudence and sound judgment (81). As Blackstone put it, these persons were "unfit to fit anywhere [in the House of Commons]" (82). With respect to electors, Blackstone referred to several old statutes which provided that persons convicted of perjury or subornation of perjury were incapable of voting at any election (83).

(79) 31 Geo III c 31. See *Belczowski v The Queen* [1992] 2 FC 440 at 458.
(80) *Rogers on Elections*, 16th ed (1897), vol 1, p 200; 17th ed (1895), vol 2, pp 30-31.
(81) Coke, *Institutes of the Laws of England* (1798), Pt 4, Ch 1, p 48; Comyns, *A Digest of the Laws of England*, 4th ed (1800), vol 5, pp 185-187.
(82) Blackstone, *Commentaries on the Laws of England* (1769), bk 1, c 2, p 169.
(83) Blackstone, *Commentaries on the Laws of England* (1769), bk 1, c 2, p 167.

57 For reasons which do not immediately appear, but which may reflect both the law and customs of the British Parliament and some apprehension at Westminster respecting the character of the developing colonial societies, a further head of disqualification was created, first, it seems, in Canada with the *Union Act 1840* (Imp) (84). That union was imposed after the rebellion of 1837 and the subsequent report by Lord Durham and lasted until Confederation in 1867. Section 7 of the 1840 statute provided for the vacation of the seats of Legislative Councillors who were attainted of treason or convicted of felony "or of any infamous crime". Section 31(4) of the *British North America Act 1867* (Imp) (85) carried over this provision to the vacation of the places of members of the Canadian Senate and it remains in the *Canadian Constitution*.

58 Section 6 of the *Australian Constitutions Act 1842* (Imp) (86) established for New South Wales a partly representative legislature and stipulated that:

> "no person shall be entitled to vote at any such Election who shall have been attainted or convicted of any Treason, Felony, or infamous Offence within any Part of Her Majesty's Dominions, unless he shall have received a free Pardon, or one conditional on not leaving the Colony, for such Offence, or shall have undergone the sentence or Punishment to which he shall have been adjudged for such Offence."

The expression "infamous crime" was used in the provision dealing with the vacation of seats of Legislative Councillors.

59 In his book *The Electoral Law of New South Wales and Victoria*, published in Sydney in 1851, Arthur Wrixon correctly identified (87) the provenance of the term "infamous offence" by reference to Starkie's treatise on the law of evidence. The common law took the view, as Wigmore later put it (88), that a person wholly capable of correct observation and of accurate recollection "may still be so lacking in the sense of moral responsibility as … to lack the fundamental capacity of a witness". Starkie wrote (89):

> "Where a man is convicted of an offence which is inconsistent with the common principles of honesty and humanity, the law considers his oath to be of no weight, and excludes his testimony as of too doubtful and suspicious a nature to be admitted in a court of

(84) 3 & 4 Vict c 35.

(85) 30 & 31 Vict c 3.

(86) 5 & 6 Vict c 76. Subsequent developments in New South Wales respecting the franchise and disqualifications are detailed in Twomey, *The Constitution of New South Wales* (2004), pp 324-328.

(87) At 23. In 1853 Arthur Wrixon was appointed a Judge of the County Court and his son, Sir Henry Wrixon, was a member from Victoria at the 1891 Sydney Convention: *Australian Dictionary of Biography* (1976), vol 6, pp 445-446.

(88) *Wigmore on Evidence*, Chadbourn Revision (1979), vol 2, para §515.

(89) *A Practical Treatise of the Law of Evidence*, 7th American ed from 3rd London ed (1842), vol 1, pp 94-95 (footnotes omitted).

> justice to affect the property or liberty of others. Formerly, the infamy of the punishment, as being characteristic of the crime, and not the nature of the crime itself, was the test of incompetency; but in modern times, immediate reference has been made to the offence itself, since it is the crime, and not the punishment, which renders the offender unworthy of belief. By the common law, the punishment of the pillory indicated the crimen falsi, and, consequently, no one who had stood in the pillory could afterwards be a witness; but now a person is competent, although he has undergone that punishment for a libel, trespass, or riot; and on the other hand, when convicted of an infamous crime, he is incompetent, although his punishment may have been a mere fine.
>
> The crimes which render a person incompetent are treason, felony, all offences founded in fraud, and which come within the general notion of the crimen falsi of the Roman law, as perjury, subornation of perjury, and forgery, piracy, swindling, cheating."

60 The *Evidence Act 1843* (Imp) (90) changed the common law and stated (s 1) that "no person offered as a witness shall hereafter be excluded by reason of incapacity from crime …". However, as a ground of disqualification of electors, candidates and sitting members, the notion of "infamous crime" was included in the constitutional provisions made by or under Imperial legislation for the establishment in the 1850s of representative government in the Australasian colonies.

61 Upon the framing of the legislation respecting New Zealand (91), Tasmania (92), New South Wales (93), Victoria (94) and South Australia (95) two points may be made. The legislation linked qualification of electors with membership of the lower house of the legislature. Secondly, it expressed as a proviso to that qualification the exclusion of those attainted or convicted of treason, felony or other infamous offence or crime in any part of the Queen's dominions, with

(90) 6 & 7 Vict c 85.

(91) The *New Zealand Constitution Act 1852* (Imp) 15 & 16 Vict c 72, ss 8, 42, 50. Subsequent legislation in New Zealand is traced in Robins, "The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand", *New Zealand Journal of Public and International Law*, vol 4 (2006) 165, at pp 167-171.

(92) The Tasmanian statute No 17 of 1854 was made in exercise of the power conferred by s 32 of the *Australian Constitutions Act 1850* (Imp) 13 & 14 Vict c 59. Sections 13, 24 and 25 of the 1854 statute dealt with disqualification.

(93) The *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict c 54, Sch 1, ss 11, 16, 26. It was under power conferred by the 1855 Imperial Act that the 1859 Order in Council established a Legislative Council and Legislative Assembly for Queensland. Section 8 of that Order in Council applied in Queensland, and until further provided, the New South Wales provision for the disqualification of electors and members of the Legislative Assembly.

(94) The *Victoria Constitution Act 1855* (Imp) 18 & 19 Vict c 55, Sch 1, ss 11, 12, 24.

(95) The South Australian statute No 2 of 1855-56 also relied upon the 1850 Imperial statute. Sections 14, 16 and 26 of the South Australian statute dealt with disqualification.

a saving for those who had received a free pardon or undergone the sentence passed upon them for the offence. Disqualification of sitting members was triggered by attaint of treason, and by conviction of felony or any infamous offence or crime.

62 Several observations may now be made upon the development in the Australian colonies of the principles respecting disqualification of electors, candidates and legislators which accompanied the growth of representative government. First, those casting the ballot in elections for the Legislative Assemblies and Houses of Assembly (restrictive franchises and nominated systems were continued over some time for Legislative Councils) and those whom they elected to the lower houses now were to be drawn from far broader elements of colonial society than was then the case in the United Kingdom. Secondly, the same notions of attaint for treason and conviction for felony or other infamous crime founded grounds for disqualification of electors, candidates and legislators. Thirdly, these grounds for disqualification manifested an understanding of what was required for participation in the public affairs of the body politic, particularly in polities such as the Australian colonies where the immigrant societies were not underpinned by a class system. Fourthly, that understanding fixed upon considerations of fitness and probity of character which were seen to be lacking in those convicted of crimes which answered the common law description of being "infamous".

Disqualification and the framing of the Constitution

63 Against this background of experience in the government of the Australasian colonies, it was not surprising that the Bill which was adopted at the Sydney Convention in 1891 provided in Ch I cl 46(3) that among those incapable of being chosen or of sitting in either legislative chamber was any person "attainted of treason, or convicted of felony or of any infamous crime", and that the disability might be removed by "the expiration or remission of the sentence, or a pardon, or release, or otherwise".

64 Mr Henry Wrixon QC sought to have the disqualification rendered permanent but his motion to that effect failed (96). The upshot was that Australia has not followed the path of the United States. There, consistently with the interpretation given its *Constitution* in *Richardson v Ramirez* (97), in 2002 some four million citizens were barred for life from voting by reason of a criminal conviction, and of these the majority were no longer undergoing punishment (98).

65 Section 44(ii) assumed the form taken in the *Constitution* after an intervention by Sir Samuel Griffith, then the Chief Justice of

(96) *Official Record of the Debates of the Australasian Federal Convention* (Sydney) 3 April 1891, pp 655-659.

(97) (1974) 418 US 24; see also *Hunter v Underwood* (1985) 471 US 222 at 233.

(98) Ewald, "'Civil Death': The Ideological Paradox of Criminal Disenfranchisement Law in the United States" [2002] *Wisconsin Law Review* 1045, at p 1046.

Queensland. Following the Adelaide Convention in 1897, he presented to both Houses of the Parliament of Queensland a paper (99) upon the draft Constitution and said of what was then s 45 (100):

> "This section (which is not altered from the Draft of 1891) needs verbal amendment. The words 'until,' &c, at the end are not applicable to the whole of the cases mentioned. The word 'felony' also is, it is suggested, an inappropriate one. Apart from the fact that the word no longer bears any definite descriptive meaning, the use of it has the effect of making the disqualification in question dependent upon State law. In New Zealand the term is no longer used in criminal law, and it may be disused in other Colonies. Moreover, the same offences are felonies in some Colonies and misdemeanours in others. In all, I believe, manslaughter by negligence is felony.
>
> On this point I submit three alternative suggestions —
>
> 1. To leave the imposition of disqualifications to the Federal Parliament;
>
> 2. To establish disqualifications until that Parliament otherwise provides;
>
> 3. To substitute for 'felony' words to the effect following: 'An offence of such a nature that by the law of the State of which he is a representative a person convicted of it is liable to undergo penal servitude or imprisonment with hard labour for a term of three years.'"

From the Sydney Convention which followed in September 1897, what was then numbered s 45(iii) emerged in the following amended form (101):

> "Who is attainted of treason, or has been convicted of ~~felony or of any infamous crime~~ any offence punishable under the law of the Commonwealth or of a State, by imprisonment for three years or longer."

66 The stipulation of three years had the consequence that the disqualification from candidacy would operate at least once during the electoral cycle. The reduction from three years to one year was made by the Drafting Committee in the final stages of the Melbourne Convention in March 1898 and was adopted without debate (102). What may have weighed with the Drafting Committee were changes made in the United Kingdom by the *Forfeiture Act 1870* (UK) (103). Section 2 thereof rendered incapable of being elected or sitting as a member of Parliament any person convicted of treason or felony and

(99) Reproduced in Williams, *The Australian Constitution: A Documentary History* (2005), pp 616-635.
(100) Williams, *The Australian Constitution: A Documentary History* (2005), p 633.
(101) Williams, *The Australian Constitution: A Documentary History* (2005), p 774.
(102) *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 16 March 1898, pp 2439-2448.
(103) 33 & 34 Vict c 23.

sentenced to death, or penal servitude, or imprisonment either with hard labour or exceeding twelve months; the incapacity was to continue until the punishment had been suffered or a free pardon had been received.

67 What is presently significant is the reference made by Sir Samuel Griffith in 1897 to the inappropriate use of "felony", given that manslaughter by negligence was a felony (104). The redrafting that Griffith urged on the Sydney Convention to answer the need for "verbal amendment" thus was not designed to depart from the concern which had animated the text in its previous form. This, as has been remarked earlier in these reasons, involved the probity of those to whom the disqualification was to be applied.

Disjunction between ss 8, 30 and 44(ii) of the Constitution

68 The colonial precedents to which reference has been made directly linked disqualification of electors and candidates, whereas whilst s 44(ii) linked candidates and members, no relevant specific provision was made for electors. The criteria for qualification and disqualification of electors were left by the *Constitution* to State law, until the Parliament provided otherwise. This state of affairs reflected stresses and strains which in the 1890s affected the whole subject of the franchise.

69 In the Australasian colonies a rapid growth had occurred in the development of universal male suffrage. This growth happened in different forms and at a different pace in the individual colonies. This is conveniently explained in the following passage from Professor McMinn's work, *A Constitutional History of Australia* (105):

> "In the adoption of the constitutional devices of radical democracy the Australian colonies moved much faster than did the United Kingdom. Indeed, their Constitution Acts, based as they were on Bills framed in the colonies themselves, were much more radical than a generation of English politicians who remembered Chartism, and the threat which it seemed to level at society, would themselves have liked. In South Australia, for example, universal manhood suffrage on the basis of 'one man, one vote' existed from the institution of responsible government, when the franchise in England was held by perhaps one-fifth of the adult males of the kingdom. Two other colonies soon took advantage of the power of amending their constitutions to follow the South Australian example. In Victoria there was something very close to manhood suffrage from the start, for the right to vote was enjoyed not only by

(104) Compare the provision in s 80 for jury trial "on indictment" of the specified offences, which has given rise to differences in the Court. See, eg, *Cheatle v The Queen* (1993) 177 CLR 541; *Katsuno v The Queen* (1999) 199 CLR 40; *Re Colina; Ex parte Torney* (1999) 200 CLR 386; *Cheung v The Queen* (2001) 209 CLR 1.

(105) (1979), p 62. See also Hirst, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (1988), pp 98-103.

> those who satisfied the almost nominal property and occupation tests, but also by holders of a miner's right. In 1857 the vote was given to all adult males, partly to eliminate the possibility that the miner's-right holders (who were allowed to vote in any electoral district they chose) might swamp the votes of local residents. New South Wales legislated for manhood suffrage the following year."

With respect to what he calls "the smaller colonies" the learned author adds (106):

> "The first 'extension' of the franchise in Tasmania in 1870 did little more than lower the qualification levels sufficiently to preserve the rights of those who already had the franchise and were in danger of losing it because of a decline in property values and incomes. After this time perhaps sixty per cent of adult males were electors. A real extension came in 1885, after a mining boom brought both prosperity and democratic pressures; the vote was given to all men in 1896. Three years earlier manhood suffrage had been established in Western Australia, and in 1905 Queensland became the last colony to abolish its franchise requirements. By this time the value of money had diminished to such an extent that they were disfranchising few apart from itinerant workers, perhaps one-sixth of the colony's male adults."

70 However, universal manhood suffrage alone would not provide a sufficient foundation for representative government as that institution has been understood after 1900, and, indeed, as it was coming to be understood in Australia in the 1890s. Plural voting still subsisted in the larger colonies. This and the absence of the female franchise and the need to include in the franchise only members of "white Australia" were topics of debate at the Conventions. Plural voting was denied at the federal level by explicit provision in ss 8 and 30 of the *Constitution*. But, subject to the somewhat delphic provision made by s 41, (107) the thorny issues of the female franchise and racial disqualification (of indigenous Australians and even of immigrant British subjects) were left by ss 8 and 30 of the *Constitution* to State law until the Parliament otherwise provided.

The 1902 Act

71 The first Parliament of the Commonwealth responded in ss 3 and 4 of the *Commonwealth Franchise Act 1902* (Cth) (the 1902 Act). Sections 3 and 4 (with side notes) read:

"Persons entitled to vote.	3. Subject to the disqualifications hereafter set out, all persons not under twenty-one years of age whether male or female married or unmarried —

(106) McMinn, *A Constitutional History of Australia* (1979), p 62.

(107) Section 41 is now spent: *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 235 [151].

	(a) Who have lived in Australia for six months continuously, and (b) Who are natural born or naturalized subjects of the King, and (c) Whose names are on the Electoral Roll for any Electoral Division, shall be entitled to vote at the election of Members of the Senate and the House of Representatives.
Disqualifications. See sec 44 sub-sec ii of the Constitution.	4. No person who is of unsound mind and no person attainted of treason, or who has been convicted and is under sentence or subject to be sentenced for any offence punishable *under the law of any part of the King's dominions* by imprisonment for one year or longer, shall be entitled to vote at any election of Members of the Senate or the House of Representatives.
Disqualification of coloured races.	No aboriginal native of Australia Asia Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on an Electoral Roll unless so entitled under section forty-one of the Constitution."

(Emphasis added.)

72 The words emphasised differed from the confinement of s 44(ii) of the *Constitution* to federal and State offences, but were consistent with colonial precedents to which reference is made elsewhere in these reasons. It may be added that a proposal that disqualification extend to those in receipt of charitable relief as an inmate of a public charitable institution was withdrawn. Why, Senator Stewart asked, although in some eyes "to be poor is the greatest crime it is possible for a man to commit", should not an inmate of a charitable institution "be allowed to take an interest in the affairs of his country?" (108).

73 The 1902 Act was repealed in 1918 by s 3 of the Electoral Act, and provision both for entitlement to vote and disqualification has been made by the latter statute as amended from time to time.

74 A provision to the effect of the second paragraph of s 4 of the 1902 Act was included in s 39 of the Electoral Act and remained there until wholly removed in 1962 (109). With respect to the first paragraph of that section, in 1983 the period of "imprisonment for one year or

(108) Australia, Senate, *Parliamentary Debates* (Hansard), 10 April 1902, pp 11575-11576.

(109) *Commonwealth Electoral Act 1962* (Cth), s 2. Some limited provision in favour of

longer" then appearing in s 93 was replaced by "5 years or longer" (110). This was recast by the *Electoral and Referendum Amendment Act 1995* (Cth) (the 1995 Act) so as to disqualify persons "serving a sentence of 5 years or longer for an offence against the law of the Commonwealth or of a State or Territory" (Sch 1, Item 5). The period of three years was substituted in 2004 by the *Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004* (Cth) (the 2004 Act) (Sch 1, Item 1). Section 93(8)(b) then took the form set out earlier in these reasons until the commencement of the 2006 Act. The relevant provisions came into force on 10 August 2004 immediately after the commencement on the same day of provisions of the *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2004* (Cth) (the First 2004 Act) which the 2004 Act amended or repealed to produce the state of the statute law respecting the three year regime, as just mentioned.

75 It may be added that s 80(1)(d) of the *Electoral Act 1993* (NZ) disqualifies from registration and thus from voting those detained in prisons under a sentence of preventative detention, of imprisonment for life or for a term of three years or more.

76 We return to the validity of the 2006 Act.

The validity of the 2006 Act

77 In *Mulholland v Australian Electoral Commission* (111), Gummow and Hayne JJ observed:

> "The recurrent phrase in the *Constitution* 'until the Parliament otherwise provides' accommodates the notion that representative government is not a static institution and allows for its development by changes such as those with respect to the involvement of political parties, electoral funding and 'voting above the line'. Some of these changes would not have been foreseen at the time of federation or, if foreseen by some, would not have been generally accepted for constitutional entrenchment.
>
> Thus, care is called for in elevating a 'direct choice' principle to a broad restraint upon legislative development of the federal system of representative government."

78 As the Commonwealth submissions respecting the impermissible exclusion of sections of society such as bankrupts and those of indigenous descent demonstrate, there are constitutional restraints necessarily implicit in the otherwise broad legislative mandate conferred by the words "until the Parliament otherwise provides". The difficulty, as Gaudron J observed in *McGinty* (112), lies in the process

(cont)
"aboriginal natives of Australia" had been made by s 3 of the *Commonwealth Electoral Act 1949* (Cth).

(110) *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), s 23(e).

(111) (2004) 220 CLR 181 at 237 [155]-[156].

(112) (1996) 186 CLR 140 at 220-221.

by which it may be determined that a law impermissibly limits the electoral process and system.

79 So in *Mulholland* itself, the Court held that provisions in the Electoral Act respecting the registration of political parties and the requirements of "the 500 rule" did not infringe the constitutional imperatives respecting representative government. Earlier, in *Langer v The Commonwealth* (113) the Court upheld the prescription by the Electoral Act of a method of full preferential voting for elections for the House of Representatives. *McGinty* (114) affirmed that the *Constitution* contained no implication affecting disparities of voting power upon holders of the franchise for the election of members of a State legislature.

80 On the other side of the line lies the freedom of communication on matters of government and politics which was identified in *Lange* (115) as "an indispensable incident" of the system of representative government established and maintained by the *Constitution*. As remarked earlier in these reasons, disqualification from exercise of the franchise is, if anything, a subject even closer to the central conceptions of representative government. Given the particular Australian experience with the expansion of the franchise in the nineteenth century, well in advance of that in the United Kingdom, this hardly could be otherwise.

81 Voting in elections for the Parliament lies at the very heart of the system of government for which the *Constitution* provides. This central concept is reflected in the detailed provisions for the election of the Parliament of the Commonwealth in what is otherwise a comparatively brief constitutional text.

82 In *McGinty* (116) 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.

83 In *McGinty* Brennan CJ considered the phrase "chosen by the people" as admitting of a requirement "of a franchise that is held generally by all adults or all adult citizens unless there be substantial reasons for excluding them" (117). This proposition reflects the understanding that representative government as that notion is understood in the Australian constitutional context comprehends not only the bringing of concerns and grievances to the attention of legislators but also the presence of a voice in the selection of those

(113) (1996) 186 CLR 302.
(114) (1996) 186 CLR 140.
(115) (1997) 189 CLR 520 at 559.
(116) (1996) 186 CLR 140 at 270-271.
(117) (1996) 186 CLR 140 at 170.

legislators (118). Further, in the federal system established and maintained by the *Constitution*, the exercise of the franchise is the means by which those living under that system of government participate in the selection of both legislative chambers, as one of the people of the relevant State and as one of the people of the Commonwealth. In this way, the existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic.

84 Such notions are not extinguished by the mere fact of imprisonment. Prisoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration. Indeed, upon one view, the *Constitution* envisages their ongoing obligations to the body politic to which, in due course, the overwhelming majority of them will be returned following completion of their sentence.

85 The question with respect to legislative disqualification from what otherwise is adult suffrage (where eighteen is now the age of legal majority throughout Australia) thus becomes a not unfamiliar one. 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" (119). Rather, as remarked in *Lange* (120), 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.

86 The affinity to what is called the second question in *Lange* (121) will be apparent. It has been said (122) that the ability to cast a fully informed vote in an election of members of the Parliament depends upon the ability to acquire relevant information and thus upon that freedom of communication seen in *Lange* as an indispensable incident of the representative government mandated by the *Constitution*. The present case concerns not the ability to cast a fully informed vote but upon denial of entitlement to cast any vote at all. This case concerns not the existence of an individual right, but rather the extent of the

(118) See the remarks of McLachlin J in *Re Provincial Electoral Boundaries, Reference* [1991] 2 SCR 158 at 183.

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

(120) (1997) 189 CLR 520 at 567 fn 272.

(121) See *Coleman v Power* (2004) 220 CLR 1 at 51 [95], 77-78 [196], 90-91 [236].

(122) See, in particular, the reasons of McHugh J in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 211 [73].

limitation upon legislative power derived from the text and structure of the *Constitution* and identified in *Lange* (123).

87 Some guidance for resolution of the present case is provided by *Coleman v Power* (124). There Gummow and Hayne JJ and Kirby J were of the view that in the statutory provision under consideration (125) the proscription of "abusive" and "insulting" words was to be construed as applying to words which, in the circumstances where they are used, are so hurtful as either intended to or be reasonably likely to provoke unlawful physical retaliation (126). Were that not so, and were a broader meaning given to the area of proscribed communication then the end served by the statute would necessarily be the maintenance of civility of discourse; given the established use of insult and invective in political discourse, that end could not satisfy the second question or test in *Lange* (127). McHugh J construed the statute as imposing an unqualified prohibition upon the use of insulting words in a broad sense which thus went beyond what could be regarded as reasonably appropriate and adapted to maintaining the constitutionally prescribed system of representative government (128).

88 Paragraph (a) of s 93(8) of the Electoral Act disentitles those who are incapable of understanding the nature and significance of enrolment and voting because they are of unsound mind. That provision plainly is valid. It limits the exercise of the franchise, but does so 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.

89 The end served by the denial in s 93(8AA) of the exercise of the franchise by electors then serving a sentence of imprisonment for an offence against federal State or Territory law is further to stigmatise this particular class of prisoner by denying them during the period of imprisonment the exercise of the civic right and responsibility entailed in the franchise. The measurement of that end against the maintenance of the system of representative government first requires a closer examination of the particular class of prisoner which has been singled out in this way.

90 Section 93(8AA) operates without regard to the nature of the offence committed, the length of the term of imprisonment imposed, or the personal circumstances of the offender. As indicated earlier in these reasons, there is long established law and custom, stemming from the terms of the institution in the Australasian colonies of representative government, whereby disqualification of electors (and candidates) was based upon a view that conviction for certain descriptions of offence

(123) (1997) 189 CLR 520 at 561, 566, 567-568.
(124) (2004) 220 CLR 1.
(125) *Vagrants, Gaming and Other Offences Act 1931* (Qld), s 7(1)(d).
(126) (2004) 220 CLR 1 at 77 [193], 87 [226].
(127) (2004) 220 CLR 1 at 78-79 [197]-[199], 98-99 [255]-[256].
(128) (2004) 220 CLR 1 at 54 [104]-[105].

evinced an incompatible culpability which rendered those electors unfit (at least until the sentence had been served or a pardon granted) to participate in the electoral process. That tradition is broken by a law in the terms of s 93(8AA) as such a law has no regard to culpability. Moreover, the disqualification imposed by that provision may operate more stringently than that imposed by s 44(ii) of the *Constitution* upon candidates and members of the Senate and the House, even though the latter seek, or are subject to, unique responsibilities as legislators which are different in kind to those of electors. The disharmony between s 93(8AA) of the Act and s 44(ii) of the *Constitution* is plain.

91 Contemporary penal policy sometimes asserts that the imposition of a custodial sentence is to be a last rather than first resort. Things may have stood differently at the time of federation. But with respect to the present state of affairs, several matters to which the Chief Justice refers in his reasons are of particular significance. First, a very substantial proportion of prisoners serve sentences of six months or less. Secondly, when decisions to impose short-term custodial sentences are made, the range of practical sentencing options (including fines, home or periodic detention and community service orders) may be limited by the facilities and resources available to support them and by the personal situation of those offenders who are indigent, homeless or mentally unstable.

92 Moreover, s 93(8AA) is not yoked to sentencing laws or practices of any particular description. Rather it picks up the consequences of the administration of those laws as they apply from time to time across the range of Australian jurisdictions. Sentencing policy and, in particular, that regarding mandatory sentencing is notoriously a matter of continuing public debate and variable legislative responses in different Australian jurisdictions. In such matters, statutory provisions and administrative policies and emphases constantly change. However, the *Constitution* with its central notion of electoral representation and participation endures.

93 The 2006 Act treats indifferently imprisonment for a token period of days, mandatory sentences, and sentences for offences of strict liability. It does not reflect any assessment of any degree of culpability other than that which can be attributed to prisoners in general as a section of society. In that regard, the plaintiff referred, as examples, to current legislation in several States and Territories whereby, as a last resort, failure to pay fines may result in a term of imprisonment, and to legislation in Victoria (129) and Queensland (130) whereby begging is an offence punishable by a term of imprisonment. (The Commonwealth disputed whether all the current legislation with respect to fine defaulters would produce consequences which answered the definition of "sentence of imprisonment" in s 4(1A) of the Electoral Act but that

(129) *Summary Offences Act 1966* (Vic), s 49A.
(130) *Summary Offences Act 2005* (Qld), s 8.

cannot fully meet the point the plaintiff seeks to make.) Further, in 2006 of the prison population 6.3 per cent was serving a sentence for a public order offence or a road traffic or motor vehicle regulatory offence and 17.6 per cent was serving a sentence of less than one year.

94 The Solicitor-General of the Commonwealth accepted that, for example, manslaughter is a striking example of an offence which involves an extensive range of moral culpability down to little more than negligence; this may be reflected in the term of the sentence imposed. He responded that the 2006 Act operated with a valid degree of precision by limiting the period of disqualification to that for which the law provided incarceration. The difficulty with that proposition is the scope thereby provided for the particularly capricious denial of the exercise of the franchise.

95 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 by s 93(8AA). The result is that ss 93(8AA) and 208(2)(c) are invalid and question (1) in the Amended Special Case should be answered accordingly.

The consequences of invalidity of the 2006 Act

96 The invalidity of the relevant provisions of the 2006 Act does not fully dispose of the case. The position of the Commonwealth is that if the 2006 Act be invalid the twofold consequence is that the Electoral Act as it stood after the 2004 Act, with a disenfranchisement based on the period of sentence being served three years or longer, is both operative and valid. The plaintiff counters that in this form the relevant provisions of the 2004 Act are inoperative or, if otherwise operative, are invalid.

97 The plaintiff first directs attention to the text of Sch 1, Items 14 and 15 of the 2006 Act. That text is set out earlier in these reasons (131). The effect of the plaintiff's submission is that these Items remain effective to repeal the relevant three year provision of the 2004 Act and this is so even without its replacement by the regime of the 2006 Act. That submission should be rejected. There is disclosed no Parliamentary "intention" to remove the 2004 Act provisions independently of the adoption of the new provisions, and to leave a gap in the Electoral Act (132). This is not a case, if one may be found, where the invalidity of new provisions leaves intact the repeal of the earlier provisions; here

(131) At [38].

(132) cf *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 69, 73-74, 95-96.

the efficacy of the former was a condition of the repeal of the latter (133). This is apparent both as a matter of form and of substance (134).

Validity of the 2004 Act

98 The three year provisions (to put the subject matter in short form) of the 2004 Act differ in their nature from the 2006 Act. They operate to deny the exercise of the franchise during one normal electoral cycle but do not operate without regard to the seriousness of the offence committed as an indicium of culpability and temporary unfitness to participate in the electoral process. In that way the three year provisions are reflective of long established law and custom, preceding the adoption of the *Constitution*, whereby legislative disqualification of electors has been made on the basis of such culpability beyond the bare fact of imprisonment.

99 The plaintiff seemed to eschew her standing to challenge a disqualification system such as that of five years or longer established by the 1995 Act. But to succeed even with respect to the three year provisions the plaintiff has to make good her original submission. This was that disqualification of persons serving a term of imprisonment could only be a basis of exclusion "rationally connected with representative democracy" if the offence involved an attack on the existence of the federal polity or electoral fraud such as to undermine the integrity of the electoral system.

100 At a general level of debate there is support for and against reasoning of this kind in the majority and minority reasons given by the Supreme Court of Canada in *Sauvé v Canada (Chief Electoral Officer)* (135). However, the Supreme Court there was considering (and held invalid) a two year or more sentence disqualification provision and did so by reference to an express conferral upon citizens by s 3 of the *Canadian Charter of Rights and Freedoms* of "the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein". The reasoning of the majority in *Sauvé* was that the legislation was an unreasonable infringement of the right to vote guaranteed to citizens by s 3 of the Charter. This reasoning was influential in the decision of the European Court of Human Rights in *Hirst v United Kingdom [No 2]* (136). There the question was whether the exclusion imposed by the United Kingdom (137) upon convicted prisoners in detention was disproportionate according to the jurisprudence of that Court. The Grand

(133) cf *Attorney-General (NSW); Ex rel McKellar v The Commonwealth* (1977) 139 CLR 527 at 535-536, 550, 560; Rose, "Constitutional Invalidity and Amendments to Acts", *Federal Law Review*, vol 10 (1979) 93.

(134) See *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 564-565 [46]-[47].

(135) [2002] 3 SCR 519.

(136) (2005) 42 EHRR 41.

(137) *Representation of the People Act 1983* (UK), s 3. This rendered legally incapable of voting those detained in a penal institution in pursuance of a sentence; there

Chamber by a decision of twelve of the Judges to five held against the United Kingdom. Article 3 of Protocol 1 to the European Convention on Human Rights guarantees "free elections … under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature" and this has been classified by the European Court as conferring individual rights (138).

101 The question respecting the three year provision that is presented by the constitutional jurisprudence of this Court differs from that which would arise at Ottawa or Strasbourg. It is whether the 2004 Act is appropriate and adapted to serve an end consistent or compatible with the maintenance of the prescribed system of representative government. The end is the placing of a civil disability upon those serving a sentence of three years or longer for an offence, the disability to continue whilst that sentence is being served.

102 Given the nineteenth century colonial history, the development in the 1890s of the drafts of the *Constitution*, the common assumptions at that time, and the use of the length of sentence as a criterion of culpability founding disqualification, it cannot be said that at federation such a system was necessarily inconsistent, incompatible or disproportionate in the relevant sense. Further, in the light of the legislative development of representative government since federation such an inconsistency or incompatibility has not arisen by reason of subsequent events. Despite the arguments by the plaintiff respecting alleged imperfections of the three year voting disqualification criterion, such a criterion does distinguish between serious lawlessness and less serious but still reprehensible conduct. It reflects the primacy of the electoral cycle for which the *Constitution* itself provides in s 28. There is, as remarked earlier in these reasons, a permissible area in such matters for legislative choice between various criteria for disqualification. The 2004 Act fell within that area and the attack on its validity fails.

Orders

103 Both the plaintiff and the second defendant have had some measure of success. The plaintiff brought the proceeding as a test case, raising important questions of constitutional principle. Her case faced substantial opposition. It has succeeded in part. In our view it would be just for the plaintiff to have half of her costs of the Amended Special Case.

104 The questions in the Amended Special Case should be answered as follows:

(1) Section 93(8AA) and s 208(2)(c) of the Electoral Act are invalid.

(2), (3) Unnecessary to answer.

(3A) The provisions listed in the question are in force and valid.

(cont)

were exceptions in favour, for example, of those imprisoned for contempt of court or the non-payment of fines.

(138) *Mathieu-Mohin and Clerfayt v Belgium* [1987] EHCR 1.

(3B), (3C) Questions 3B and 3C postulate a relevant distinction between the text of the 2004 Act and the First 2004 Act, but given the answer to question (3A) it is unnecessary to answer them.

(4) The plaintiff have one half of her costs of the Amended Special Case.

(5) Unnecessary to answer, given the answer to Question (1).

105 HAYNE J. The central question, in these proceedings, is whether s 93(8AA) of the *Commonwealth Electoral Act 1918* (Cth) (the Act) is a valid law. Section 93(8AA) provides that:

> "A person who is serving a sentence of imprisonment for an offence against the law of the Commonwealth or of a State or Territory is not entitled to vote at any Senate election or House of Representatives election."

Certain associated provisions of the Act (ss 208(2)(c) (139) and 221(3) (140)) are also subject to challenge.

106 An order was made in this matter on 30 August 2007. For the reasons that follow I would have made an order giving answers to the questions stated upholding the validity of the impugned provisions.

107 The impugned provisions were enacted pursuant to the legislative power given to the Parliament by the *Constitution*: by s 30 in conjunction with s 51(xxxvi). Section 30 provides that:

> "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."

By s 8 of the *Constitution*, the qualification of electors of senators is "that which is prescribed by this *Constitution*, or by the Parliament, as the qualification for electors of members of the House of Representatives". The reference in s 30 to "[u]ntil the Parliament

(139) Section 208 provides that the Electoral Commissioner must arrange for the preparation of a certified list of voters for each Division. Sub-section (2) requires the inclusion in that certified list of each person who is enrolled, will be at least eighteen years old on polling day and is not covered by s 93(8AA).

(140) Section 221 provides: "(1) In the case of a Senate election, an elector shall only be admitted to vote for the election of Senators for the State or Territory for which he or she is enrolled. (2) In the case of a House of Representatives election, an elector shall only be admitted to vote for the election of a member for the Division for which he or she is enrolled. (3) For the purposes of this section, the electoral Rolls in force at the time of the election shall be conclusive evidence of the right of each person enrolled thereon (other than a person whose name has been placed on a Roll in pursuance of a claim made under section 100 and who will not have attained 18 years of age on the date fixed for the polling in the election, or a person who is covered by subsection 93(8AA) (sentences of imprisonment)) to vote as an elector, unless a person shows by his or her answers to the questions prescribed by section 229 that he or she is not entitled to vote."

otherwise provides" engages s 51(xxxvi) and its conferring of legislative power on the Parliament, "subject to this *Constitution*", with respect to "matters in respect of which this *Constitution* makes provision until the Parliament otherwise provides".

108 Section 7 of the *Constitution* provides (so far as now relevant) that "[t]he Senate shall be composed of senators for each State, directly chosen by the people of the State". Section 24 (again so far as now relevant) provides that "[t]he House of Representatives shall be composed of members directly chosen by the people of the Commonwealth".

109 The plaintiff alleged that the impugned provisions, in their application to her, are invalid because their application would deny the *Constitution's* requirement that each House of the Parliament is "directly chosen by the people".

110 The text of the relevant provisions shows that the power given to the Parliament by s 30 (to provide for the qualification of electors) is to be read as limited by the requirements of ss 7 and 24 that the two Houses are "directly chosen by the people". But what limitation on that power is conveyed by those words?

111 History provides the only certain guide. The drafting history of what became s 30 shows that the Parliament's power under that section was given so that the Parliament itself could determine the franchise upon which it was elected. That is, the purpose of the conferral of legislative power under s 30 was to provide the Parliament with the power to determine which groups should be given the franchise.

112 Once that is recognised, it follows that the words "directly chosen by the people" are to be understood as an expression of generality, not as an expression of universality. Because the power to delineate the franchise was given to the Parliament, the ambit of exceptions to or disqualifications from the franchise was a matter for the Parliament itself, so long always as the generality of "directly chosen by the people" was preserved.

113 The scope, or content, of that "generality" cannot be charted by precise metes and bounds. The nature of its content, however, is indicated by the range of provisions made by the several State laws that were "picked up", at federation, by s 30. All of those laws disqualified some prisoners from voting. Excepting prisoners from the franchise did not and does not deny the generality required by "directly chosen by the people".

114 Competing approaches to the question necessarily begin from a premise that assumes the answer. It will be necessary, later in these reasons, to identify the competing approaches proffered by the plaintiff and the premises from which those approaches were advanced.

The facts and the proceedings

115 The plaintiff is an Australian citizen of indigenous descent. She is aged over eighteen years. She is entitled (141) and required (s 101) to be enrolled to vote and is enrolled to vote in the Division of Kooyong. The plaintiff is serving a sentence of imprisonment for offences against the laws of the State of Victoria. She is not eligible to be released from prison before the latest date by which the next federal election must be held. If the impugned provisions are valid, she will not be entitled to vote at that election.

116 The plaintiff has commenced proceedings in the original jurisdiction of the Court seeking, among other relief, declarations that the impugned provisions are invalid. The parties joined in stating (142) what were said to be the questions of law arising in the proceeding in the form of a special case for the opinion of the Full Court. Those questions, as ultimately amended, included questions asking whether ss 93(8AA), 208(2)(c), and 221(3) of the Act are invalid.

117 By amendments to the Special Case, made in the course of argument, the parties sought to raise some further questions predicated upon the Court finding that the impugned provisions of the Act, in its present form, are invalid. Those further questions addressed the validity of two earlier forms of provisions of the Act dealing with the eligibility of prisoners to vote in federal elections: the provisions as they stood before the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) (the 2006 Act), and the provisions as they stood before the *Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004* (Cth) (the 2004 Act).

118 The Act, as it stood before the 2004 Act, disqualified prisoners serving a sentence of five years or longer for an offence against a law of the Commonwealth or of a State or Territory (143). The 2004 Act provided for the disqualification of prisoners serving a sentence of three years or longer for an offence against a law of the Commonwealth or of a State or Territory.

119 The plaintiff alleges that if the Act validly provides that persons serving a sentence of five years or longer are disqualified from voting, she would not be subject to that disqualification. She was convicted on five counts for offences of burglary (144), theft (145), conduct

(141) *Commonwealth Electoral Act 1918* (Cth), s 93(1)(a), (b)(i).

(142) *High Court Rules 2004*, r 27.08.1.

(143) Section 23(e) of the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) had provided for the disqualification of persons convicted and under sentence for an offence *punishable* under the law of the Commonwealth or of a State or Territory by imprisonment for five years or longer. The amendments made by Sch 1, item 5, of the *Electoral and Referendum Amendment Act 1995* (Cth) provided for the disqualification of any person *serving* a sentence of five years or longer for an offence against a law of the Commonwealth or of a State or Territory.

(144) Contrary to s 76 of the *Crimes Act 1958* (Vic).

(145) Contrary to s 72 of the *Crimes Act 1958*.

endangering persons (146), and negligently causing serious injury (147). She was not sentenced, in respect of any of those offences, to a term of imprisonment of five years or longer. The orders for cumulation and concurrency that were made resulted in a total effective sentence of six years and it was ordered that she was not to be eligible for parole before the expiration of four years. Whether the plaintiff's contention is correct was not explored in argument, and it is neither necessary nor desirable to consider the point. It is a point that does not arise under the questions that the parties, by their Amended Special Case, have joined in presenting for consideration by the Full Court.

120 No question is asked by the parties which directly invites attention to whether the provisions enacted in 1902 by the *Commonwealth Franchise Act 1902* (Cth) (the 1902 Act) concerning the disqualification of prisoners were valid. Those provisions remained in force until 1983 (148). They were evidently based upon the model provided by s 44(ii) of the *Constitution* and its prescription of which persons are incapable of being chosen or of sitting as a senator or as a member of the House of Representatives. The 1902 Act, like the provisions of s 44(ii), fastened upon those who were attainted of treason, or had been convicted and were under sentence, or subject to be sentenced, for an offence punishable by imprisonment for one year or longer. Whereas s 44(ii) of the *Constitution* identified the relevant offences as offences under the law of the Commonwealth or of a State, the 1902 Act cast its net wider by embracing offences under the law of any part of the King's dominions.

The central issue and relevant history

121 The validity of the impugned provisions turns ultimately upon the content that is to be given to the expression "directly chosen by the people" when used in ss 7 and 24 of the *Constitution*. It is that expression which is relied on as limiting the evidently general provision of s 30 that the Parliament may provide for the qualification of electors of members of the House of Representatives. If the Parliament does that, the provision applies by force of s 8 as the qualification of electors of senators.

122 The drafting history of the provision that became s 30 provides the most important indication of both the place that the provision has in the constitutional arrangements governing the federal Parliament and the breadth of the relevant legislative power given to the Parliament. The draft of the *Constitution* that was considered at the 1891 Convention in Sydney provided that the qualification of electors of members of the House of Representatives should be "in each state that which is prescribed by the law of the state as the qualification for electors of the more numerous house of the parliament of the state". In

(146) Contrary to s 23 of the *Crimes Act 1958*.
(147) Contrary to s 24 of the *Crimes Act 1958*.
(148) *Commonwealth Electoral Legislation Amendment Act 1983*, s 23.

the course of debate (149) about the clause, Mr Barton proposed (150) the insertion of words giving power to the federal Parliament to prescribe a uniform qualification of electors of the House of Representatives. The proposal was resisted as antithetical to "States' rights". In support of the proposal, Mr Barton said (151):

> "From the beginning I have held the opinion that if we constitute a free parliament in a free country, we must give the house most directly responsible to the people the right of fixing the franchise. *You must allow not only that house, for that is a mere form of words, but the people, to fix their franchise.* We must therefore look to the people of the commonwealth to constitute a franchise upon which they shall be represented in the house of representatives."

(Emphasis added.)

Mr Barton's proposal was rejected in 1891.

123 Before the Adelaide session, in 1897, the Constitutional Committee, under the chairmanship of Mr Barton, revised the 1891 draft. It was in that committee (152) that what was to become s 30 reached substantially its final form. In particular, the draft submitted (153) to the 1897 Adelaide Convention began with the words "[u]ntil the Parliament otherwise provides". The draft (cl 29) provided that:

> "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 for electors of the more numerous House of the Parliament of the State. But in the choosing of such members each elector shall have only one vote."

The reference to State laws is critical.

124 Unlike Sydney, the proposal put to the Convention in Adelaide, to allow the federal Parliament to enact a uniform franchise, attracted no serious debate (154) about whether the power over the franchise should rest with the federal Parliament rather than the several State parliaments. Instead, the debate centred upon women's suffrage, and whether the *Constitution* should conclude that issue by providing for adult suffrage. The outcome of the Adelaide Convention was to adopt a clause which, in relevant respects, was in the form submitted to the Convention. The issue of women's suffrage was left for the new federal Parliament to decide.

(149) *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 2 April 1891, pp 613-637.
(150) *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 2 April 1891, p 628.
(151) *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 2 April 1891, p 630.
(152) La Nauze, *The Making of the Australian Constitution* (1972), p 125.
(153) *Official Record of the Debates of the Australasian Federal Convention* (Adelaide), 15 April 1897, p 715.
(154) *Official Record of the Debates of the Australasian Federal Convention* (Adelaide), 15 April 1897, pp 715-732, 22 April 1897, pp 1191-1197.

125 This assumption underpinned the whole of the Parliamentary debates about the first Parliamentary specification of the federal franchise in the 1902 Act. Like the debates at the 1897 Adelaide Convention, the debates (155) in the Parliament about what was to become the 1902 Act focused chiefly upon the controversy about whether women should have the vote. The issue was resolved by the 1902 Act. That is, as Mr Barton had foreshadowed, when speaking (156) in support of his (failed) proposal to the 1891 Sydney Convention, the resolution of what, at the time, was seen as a difficult political question was effected by the Parliament in exercise of the power given by s 30: the power of "fixing the franchise". As Mr Barton had said (157): "we must give the house most directly responsible to the people the right of fixing the franchise. *You must not only allow that house, for that is a mere form of words, but the people, to fix their franchise*" (emphasis added).

126 That was what the Parliament did in 1902 by its provision (158) that "[s]ubject to the disqualifications hereafter set out, *all persons* not under twenty-one years of age *whether male or female married or unmarried*" who met criteria of residence, being a subject of the King, and being enrolled, were entitled to vote (emphasis added). But the franchise thus granted, although general, was not universal. Section 4 of the 1902 Act provided that:

> "No person who is of unsound mind and no person attainted of treason, or who has been convicted and is under sentence or subject to be sentenced for any offence punishable under the law of any part of the King's dominions by imprisonment for one year or longer, shall be entitled to vote at any election of Members of the Senate or the House of Representatives.
>
> No aboriginal native of Australia Asia Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on an Electoral Roll unless so entitled under section forty-one of the Constitution (159)."

127 These matters of history point unambiguously to the conclusions expressed at the outset of these reasons. That is, the words "directly chosen by the people" must be understood as words of generality, not as words of universality. The words were not intended to convey a requirement for universal adult suffrage.

(155) Australia, Senate, *Parliamentary Debates* (Hansard), 9 April 1902, pp 11450-11502, 10 April 1902, pp 11552-11599; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 23 April 1902, pp 11929-11953.

(156) *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 2 April 1891, p 630.

(157) *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 2 April 1891, p 630.

(158) *Commonwealth Franchise Act 1902* (Cth), s 3.

(159) The disqualification of those whom the 1902 Act called "aboriginal native[s] of Australia" stated in the second paragraph was amended by the *Commonwealth Electoral Act 1949* (Cth) and removed by the *Commonwealth Electoral Act 1962* (Cth).

128 There are some additional textual indications that point in the same direction. It is convenient to deal with those here.

129 It should go without saying that the provisions of ss 7, 8, 24 and 30 must all be read in the context provided by the whole of the *Constitution*. Particular attention must be paid to the context provided by Pt 2 of Ch I (ss 7-23, concerning The Senate), Pt 3 of the same chapter (ss 24-40, concerning The House of Representatives) and Pt 4 of that chapter (ss 41-50, concerning Both Houses of the Parliament). But it is also necessary to pay due regard to s 128 concerning Alteration of the *Constitution*.

130 What is to be observed from the other provisions of Ch I of the *Constitution* is the frequency of reference (both by the formula "[u]ntil the Parliament otherwise provides" and otherwise) to the powers of the Parliament to enact laws regulating both elections for and membership of both of the Houses of the Parliament. Section 7 (with its provisions about the division of Queensland into divisions, and its provision for the numbers of senators to be elected in each State), s 9 (concerning the method of election of senators), s 10 (applying certain State laws to the election of senators), s 14 (concerning further provision for the rotation of vacancies in the Senate), and s 22 (concerning the quorum at a meeting of the Senate) are examples of such provisions. The examples can readily be multiplied by reference to Pt 3 (see ss 24, 27, 29, 30, 31, 34, 39) and Pt 4 of Ch I (see ss 46, 47, 48, 49). By these provisions, the *Constitution* provides power for the Parliament to regulate a number of aspects of how it is to be constituted and how it is to be elected. The conferring of these powers is consistent with the franchise being a matter for the Parliament to determine, subject only to the requirement that each House be "directly chosen by the people".

131 Two different points emerge from consideration of s 128. First, there is the point that the *Constitution* provides that it is the "electors qualified to vote for the election of members of the House of Representatives" who are ultimately to decide upon constitutional alteration. This is an important element of the form of representative democracy for which the *Constitution* provides. The second and more directly relevant point comes from the fourth paragraph of s 128. That provides that:

> "When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails."

The expression "adult suffrage" was, of course, a reference to a suffrage in which both men and women had the vote. But the present significance of the reference to "adult suffrage" is that it was evidently understood as consistent with the exclusion of some prisoners from the

vote. All of the States (including those (160) that, at the time of federation, provided for adult suffrage) made some provision excluding some prisoners from voting.

132 Election of both Houses of the federal Parliament by those who, under the relevant State laws were qualified as electors for the more numerous House of the State Parliaments, yielded, in each case, a House that satisfied the constitutional description of "directly chosen by the people". It may well be that the framers of the *Constitution*, and others at the time, expected that the first federal Parliament would soon enact a uniform federal franchise. But that was not required by the *Constitution*. If, contrary to any such expectation (and contrary to the fact) the Parliament had not legislated for a uniform federal franchise, it would have been consistent with constitutional requirements for successive federal elections to be conducted on the several different franchises which obtained in the States. And the Houses of the Parliament thus elected would have been "directly chosen by the people".

133 The State legislation which, at federation, prescribed the qualification of electors for the more numerous House of the State Parliaments indicates the content that is to be given to "directly chosen by the people". It is, therefore, necessary to say a little more about the relevant provisions of that State legislation.

State legislation "picked up" by s 30

134 Several States followed a legislative pattern that derived ultimately from the *Australian Constitutions Act 1842* (Imp). That Act had provided (s 5) for a property qualification for electors but provided for the disqualification of those attainted or convicted of "any treason, felony, or infamous offence within any part of Her Majesty's dominions" unless the person had received a free pardon, or one conditional upon not leaving the colony, or had undergone the sentence or punishment. Some colonies that had followed (161) this pattern had, by the time of federation, altered or abandoned the specification of property qualifications for voting. In some colonies (162) there was adult suffrage; in other colonies there was adult male suffrage. But in the colonies other than New South Wales and Victoria, the specification of the disqualification remained substantially in the form enacted in the *Australian Constitutions Act 1842*. That is, it was a disqualification that hinged about the currency of a sentence for "Treason, Felony or infamous Offence".

135 The New South Wales and Victorian disqualification provisions were more extensive. They disqualified several different classes of persons from voting. In New South Wales, s 23(IV) of the *Parliamentary*

(160) South Australia and Western Australia.

(161) *The Electoral Code 1896* (SA); *Elections Act 1885* (Qld); *Constitution Act 1889* (WA); *The Constitution Act 1855* (Tas).

(162) South Australia and Western Australia.

Electorates and Elections Act 1893 (NSW) provided that all who were "in prison under any conviction" were disqualified from voting. As well, the section provided for the disqualification of a number of other classes of person: some on account of their being under sentence following conviction for some kinds of offence identified by the severity of the maximum sentence that could be imposed for the offence, others on account of their having been imprisoned for an aggregate period of at least three months within the recent past. Still others were disqualified on account of their recent conviction for certain public order offences: being an habitual drunkard, an incorrigible rogue, or a rogue and vagabond. And any man against whom there was an unsatisfied order for maintenance of wife or children or who had recently been convicted of an aggravated assault upon his wife was disqualified.

136 The relevant Victorian provision was not identical but it contained provisions that were generally similar to those applying in New South Wales. Unlike New South Wales, there was not the blanket disqualification of anyone "in prison under any conviction". When it is recalled, however, that voting was not compulsory, and could be effected only by the voter attending at a polling place, the absence of a blanket disqualification of those in prison is not surprising. Section 24 of the *Purification of Rolls Act 1891* (Vic) did require the removal from the electoral roll of "every person … who during the last three years has served any term or terms of imprisonment for any period or periods amounting in the aggregate to at least three months such term or terms of imprisonment having been imposed without the option of a fine". It required the removal of persons who during the preceding three years had been found guilty of any of a number of offences concerning the conduct of elections. It required the removal of those who in the previous year had been convicted of being an habitual drunkard, idle and disorderly person, incorrigible rogue, or rogue and vagabond, as well as those who had unsatisfied orders for maintenance of wife or children, or who, in the previous year, had been convicted of committing an aggravated assault on his wife.

137 Several observations may be made about these different laws, all of them "picked up" by s 30 of the *Constitution*. First there is the obvious point to be made about their variety. There was no single form of franchise that was seen as necessary to produce the result that the Houses of the federal Parliament would be "directly chosen by the people". The most obvious, and then most controversial, difference was between South Australia and Western Australia (each with adult suffrage) and other States which did not provide for women to vote. But there were marked differences between the ways in which the several States identified those who were to be disqualified from voting.

138 All States excluded some prisoners from voting. For present purposes, the critical observation is that New South Wales excluded (163) "every person who … is in prison under any conviction".

139 This being the state of the law picked up by s 30, persons in prison under sentence were, and now can be, excluded from voting without denying the Houses that are thus elected the constitutional description of "directly chosen by the people".

140 Moreover, this being the state of the law picked up by s 30, no more refined or precise proposition, whether hinged about length of sentence, quality of offence or otherwise, can now be identified as controlling the content of "directly chosen by the people" in its application to the subject of prisoners voting. The diversity of the relevant State provisions denies that a proposition of that kind can be identified as informing the constitutional adoption and application of those State laws. State laws operated in some cases by reference to the length of the sentence that was imposed, in some by reference to the length or kind of sentence that could be imposed, in others by reference to the quality of the offence (treason, felony or infamous offence). The differences between the provisions are not to be ignored in favour of now devising, a priori, a criterion drawn either by reference to a particular length of sentence (whether actually imposed or available) or by reference to some quality of the offence for which the person has been imprisoned.

141 Penological theories that seek to connect any particular form of deprivation of rights or freedoms with the attainment of desired goals of punishment or reformation, may be very important considerations for legislators or other policy-makers. They may affect the way in which a court approaches the fixing of sentence for crime. But they are not relevant to the issues that arise in the present matter. Notions of "infamous crime", like notions of "civil death" (164), find no textual footing in the *Constitution*. Neither of those notions, nor any other form of penological theory, underpins or informs the content of any of the relevant constitutional provisions.

142 Moreover, the *Constitution* does not establish a form of representative democracy in which the limits to the legislative power of the Parliament with respect to the franchise are to be found in a democratic theory which exists and has its content independent of the constitutional text. The form of representative democracy for which the *Constitution* provides was established with British and American models at the forefront of the framers' consideration. But neither of those models was adopted. The *Constitution* provided its own form of government: a form of government in which there are elements that

(163) *Parliamentary Electorates and Elections Act 1893* (NSW), s 23(IV).

(164) Ewald, "'Civil Death': The Ideological Paradox of Criminal Disenfranchisement Law in the United States", [2002] *Wisconsin Law Review* 1045.

evidently draw on the experience of others but which, taken as a whole, is unique. To impose upon the text and structure that was adopted a priori assumptions about what is now thought to be a desirable form of government or would conform to a pleasingly symmetrical theory of government is to do no more than assert the desirability of a particular answer to the issue that now arises.

The plaintiff's submissions

143 The plaintiff submitted that "disqualification must be reasonably appropriate and adapted to achieve a legitimate end that is consistent with the constitutional system of representative and responsible government in order to be valid". She further submitted that "the validity of the impugned provisions falls to be determined by reference to the representative democracy criteria" and that, however those criteria are formulated, the impugned provisions do not meet them "because they operate in an arbitrary and discriminatory manner and are both over- and under-inclusive".

144 The plaintiff identified four paths which she submitted lead to the ultimate propositions just identified. It will be convenient to deal with each separately, recognising that each was said to lead to the same end. But one point, which goes to the root of the plaintiff's submissions, must be made at once.

145 The plaintiff did not give content to the "representative government criteria" which underpinned all of her submissions. Rather, it was submitted that it mattered not how those criteria were formulated; it sufficed to describe the operation of the impugned law as "arbitrary and discriminatory" and as "over- and under-inclusive". But if, as must be the case, the "representative government criteria" include a criterion about qualification of electors, the specification of that criterion concludes the issue that must now be decided. The plaintiff, at least implicitly, makes an assertion that the representative government criterion governing the qualification of electors must have a particular content. That assertion is not based on constitutional text or history and the argument thus becomes circular. The assertion of content determines the answer. This approach is flawed.

146 The first of the paths identified by the plaintiff began from the proposition that the *Constitution* provides no express legislative power to provide for the "disqualification" of electors as distinct from their "qualification". Power in relation to "disqualification" was said to lie only in an incidental power (either as an incident to the power to provide for qualification or under s 51(xxxix)). It was submitted that it follows (a) that the power to provide for disqualification "is purposive in nature: it can be exercised only for the purpose of effectuating the main power"; and (b) that the power to provide for disqualification is subject to ss 7 and 24 (with their references to "directly chosen by the people") and "the other sections of the *Constitution* providing for representative and responsible government". The result of this analysis

was said to be that "any disqualification of persons from voting must satisfy the representative government criteria".

147 The premise for this aspect of the plaintiff's argument should not be accepted. Section 30 should not be read as drawing a distinction between "qualification" of electors and their "disqualification". When s 30 of the *Constitution* speaks, as it does, of "the qualification of electors of members of the House of Representatives" and "the qualification of electors of the more numerous House of Parliament of [a] State" it is not to be read as confined to the delineation of a class of persons by inclusion. Rather, in the context of s 30, "qualification" must be read as extending to delineation of the class of those who are "electors of members of the House of Representatives" by inclusion, exclusion, or both. And the reference in s 8 to "[t]he qualification of electors of senators" must be read in the same way.

148 If s 30 is not read in the way just described, the validity of a particular legislative prescription of who may be an elector of members of the House of Representatives would turn upon the form of the provision, not its substantive operation. The valid engagement of s 30 is not to be understood as turning upon the Parliament adopting a particular drafting technique. Further, the proposition that the legislative power with respect to "qualification" of electors extends only to the prescription of those who are included within the relevant class would require reading the latter part of s 30, picking up State laws, either as picking up only so much of those State laws as was not cast as a form of disqualification, or as using the word "qualification" in a sense different from its use in the first part of the section. Neither of those readings should be adopted.

149 It may be accepted that the text of the *Constitution* provides some footing for distinguishing between questions of "qualification of electors" and their "disqualification". The sidenotes to both ss 8 and 30 are "[q]ualification of electors". By contrast, the sidenote to s 25 is "[p]rovision as to races disqualified from voting". Section 25 provides that, for the purpose of the calculation to be made under s 24 of the number of members of the House of Representatives to be chosen in each of the several States, "if by the law of any State all persons of any race are *disqualified* from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted" (emphasis added). In addition, it is to be observed that ss 16 and 34 speak of the "qualifications" of a senator and a member of the House of Representatives, respectively, whereas s 44, with its prescription of which persons are to be incapable of being chosen or of sitting as a senator or a member of the House of Representatives, is given the sidenote "[d]isqualification". And both ss 45 and 46 deal with consequences that follow from disqualification under s 44.

150 Moreover, it must also be accepted that the several State laws governing the franchise in elections for the more numerous House of

the State Parliament that were picked up at federation by operation of s 30 were commonly drafted in a form that prescribed who was entitled to vote by first describing generally the class of persons who were to be entitled (those "qualified") and then providing a series of exceptions (by way of "disqualification") to the general reach of the qualification provisions. Even so, as the *Australian Constitutions Act 1842* demonstrates, no clear line was drawn in such legislation between matters of qualification and matters of disqualification. Section 5 of that Act specified those who were qualified by reference to certain property criteria. Section 6, the disqualification provision, then dealt with some matters that might more easily be described as qualifications to vote by providing that:

> "[N]o Person shall be entitled to vote at any such Election as aforesaid unless he be of the full Age of Twenty-one Years, and a natural-born Subject of the Queen …"

Yet it was the same section that went on to deal with persons "who shall have been attainted or convicted of any Treason, Felony, or infamous Offence within any Part of Her Majesty's Dominions".

151 These observations about the different uses of the words "qualification" and "disqualification" in the *Constitution* itself, in the laws to which s 30 required reference at federation, and in the law which was the ultimate pattern for some of that State legislation, do not require the conclusion that the references in s 30 to "the qualification of electors of members of the House of Representatives" and "the qualification of electors of the more numerous House of Parliament of [a] State" are to be read as confined to the delineation of a class of persons by inclusion. Rather, as stated earlier, "qualification" must be read, in ss 30 and 8, as permitting delineation of the class of those who are "electors" by inclusion, exclusion, or both.

152 The premise for the first of the four paths identified by the plaintiff as leading to the conclusions for which she contended should be rejected.

153 It may be that the first path of the plaintiff's argument is to be understood as making a different, and essentially individual and temporal, point. That is, the argument may be understood as contending that, because the relevant legislative power is expressed as a power with respect to the subject of "qualification of electors", there is no express legislative power to make a law that would "disqualify" a person from voting if that person has, at some earlier time, met the criteria of qualification. For the reasons already given, the argument fails. Moreover, its acceptance would lead to absurd results. The absurdity is illustrated by considering the case of a person, qualified and enrolled as an elector, later becoming of unsound mind. There can be no doubt that the legislative power permits the making of a law which would disqualify that person from voting so long as he or she was of unsound mind.

154 The second path described by the plaintiff fixed upon the limitation provided by the references in ss 7 and 24 of the *Constitution* to

"directly chosen by the people". It was said that "[t]hese sections … place a limit on the power to provide for the qualification of electors which precludes the Parliament from winding back the franchise and precludes the Parliament from disqualifying those who are otherwise qualified unless such disqualification is not inconsistent with ss 7 and 24". "Satisfaction of the representative government criteria" was said to be "necessary to ensure the requisite consistency".

155 As noted at the outset of these reasons, it is clear that the power given to the Parliament by s 30 to provide for the qualification of electors is to be read as limited by the requirements of ss 7 and 24 that the two Houses are "directly chosen by the people". The central question is what limitation on the power is conveyed by those words. Thus when the plaintiff submits that "[s]atisfaction of the representative government criteria is necessary to ensure the requisite consistency" the critical step is to identify what is meant by the "representative government criteria". This the plaintiff sought to do by reference first to statements made in decisions of this Court, and then by reference to some decisions of ultimate courts of other countries and some international materials.

156 Some particular emphasis was given, in argument, to what was said by McTiernan and Jacobs JJ in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (165):

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

(Emphasis added.)

Two points are to be noted about this passage. First, there is the reference to "common understanding". Secondly, there is the suggestion that the meaning or application of "directly chosen by the people" may change over time.

157 Is "directly chosen by the people" to be understood by reference to "the common understanding of the time"? That is, do what might be

(165) (1975) 135 CLR 1 at 36.

called "generally accepted Australian standards" provide a valid premise for consideration of the issues presented in this matter?

158 There are at least two reasons to reject reference to "common understanding" or "generally accepted Australian standards" as informing the content that is to be given to "directly chosen by the people". First, there is the obvious difficulty of determining what those standards are, and to what extent they are "generally accepted". Does it suffice that they are standards that are reflected in legislation which, by hypothesis, has been passed by a majority of popularly elected representatives in the two Houses of the federal Parliament? If that is sufficient, the limitation has no content; the Parliament may do as it chooses. If that is not sufficient, what is it that will demonstrate either the content of the asserted understanding or its common or general acceptance?

159 Secondly, and more fundamentally, it is not to be supposed that the ambit of the relevant constitutional power (as distinct from the political capacity to exercise the power) is constrained by what may, from time to time, be identified as politically accepted or acceptable limits to the qualifications that may be made to what now is an otherwise universal adult suffrage. Political acceptance and political acceptability find no footing in accepted doctrines of constitutional construction. The meaning of constitutional standards does not vary with the level of popular acceptance that particular applications of the power might enjoy.

160 The plaintiff's argument that the franchise cannot be "wound back" amounted to the contention that the Parliament has no legislative power to depart from what now is seen as a commonly understood minimum requirement for the franchise. To the extent to which the argument depends upon the invocation of "common understanding", it must be rejected for the reasons that have been given. To the extent to which it makes the temporal point noted in connection with the plaintiff's first path of argument, it must likewise be rejected.

161 Further, although it is not necessary to decide the point, it may greatly be doubted that the content of the expression "directly chosen by the people" changes over time. "[D]irectly chosen by the people" expresses a standard. It is not an expression that has a relevantly different application as facts change. The standard expressed is unvarying. It describes an important characteristic that each of the Houses of the Parliament must have. That the meaning of "directly chosen by the people" cannot be charted by metes and bounds does not entail that the meaning changes over time.

162 The expression "directly chosen by the people" may be seen as standing in sharp contrast with expressions like "foreign power" (166), or "postal, telegraphic, telephonic, and other like services" (167). The

(166) *Constitution*, s 44(i); *Sue v Hill* (1999) 199 CLR 462.
(167) *Constitution*, s 51(v); *R v Brislan; Ex parte Williams* (1935) 54 CLR 262.

latter expressions must be applied to various facts and circumstances that can and do change over time. In particular, the political or technical facts to which they are applied may require different applications of the relevant expression over time. The better view may well be that "directly chosen by the people" is not an expression of that kind. It is, however, not necessary to decide the point. It suffices to say that its content is not to be found by reference to what is "commonly understood", what is politically accepted, or what is politically acceptable.

163 The plaintiff sought to give content to the "representative government criteria" by reference to a deal of overseas material. Emphasis was placed, in argument, on the ways in which other nations, operating under different constitutional instruments and arrangements, have dealt with prisoners voting. Particular reference was made to several Canadian decisions (168) about the application of the *Canadian Charter of Rights and Freedoms* to federal laws disqualifying prisoners from voting, to the decision of the European Court of Human Rights in *Hirst v United Kingdom [No 2]* (169) concerning the compatibility of s 3 of the *Representation of the People Act 1983* (UK) (170) with the First Protocol to the European Convention on Human Rights, and to a decision of the Constitutional Court of South Africa (171) concerning the validity of provisions depriving prisoners, serving a sentence of imprisonment without the option of paying a fine, of the right to participate in elections during the period of their imprisonment. All of these decisions held the legislation in question to be incompatible with an applicable statement of rights and freedoms, or to be constitutionally invalid. It was said that these decisions, or these decisions when read in conjunction with international instruments such as the International Covenant on Civil and Political Rights (172), revealed a generally accepted international standard that could, even should, find application either in the search for the "common understanding" of which McTiernan and Jacobs JJ spoke in *McKinlay* (173), or otherwise in the construction of "directly chosen by the people". American decisions (174) upholding the validity of statutes providing for the

(168) *Belczowski v The Queen* [1991] 3 FC 151; [1992] 2 FC 440; *Sauve v Canada (Attorney-General)*; [1993] 2 SCR 438; *Sauve v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

(169) (2005) 42 EHRR 41.

(170) Providing that a "convicted person during the time that he is detained in a penal institution in pursuance of his sentence … is legally incapable of voting at any parliamentary or local election".

(171) *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2004 (5) BCLR 445.

(172) As amplified by General Comment No 25, "*The right to participate in public affairs, voting rights and the right of equal access to public service (Art 25)*" published by the Office of the High Commissioner for Human Rights, adopted 12 July 1996.

(173) (1975) 135 CLR 1 at 36.

(174) eg, *Richardson v Ramirez* (1974) 418 US 24.

life-long disenfranchisement of felons were said to be irrelevant on the ground that they depended upon the particular text and history of s 2 of the Fourteenth Amendment to the *United States Constitution*.

164 The argument from overseas material, in all of the several forms in which it was advanced by the plaintiff, should be rejected. The reasons given earlier in relation to "common understanding" or "generally accepted Australian standards" require that rejection. But there is a further and fundamental flaw in the plaintiff's argument.

165 Any appeal to the decisions of other courts about the operation of other constitutional instruments or general statements of rights and freedoms is an appeal that calls for the closest consideration of whether there are any relevant similarities between the instruments that were examined and applied in those decisions and the particular provisions that this Court must consider. The plaintiff's argument that no useful guidance is to be had from United States' decisions acknowledges the force of this proposition.

166 There is no similarity between the provisions considered in the cases referred to and relied on by the plaintiff and the provisions of the *Constitution* that are in issue in the present matter. The only connection between the cases and other international materials upon which the plaintiff relied and the present issues is to be found in the statement of the problem as an issue about the validity of legislative provisions excluding prisoners from voting. That the problem may be stated in generally similar terms does not mean that differences between the governing instruments may be ignored. Yet in essence that is what the appeal made by the plaintiff to "generally accepted international standards" seeks to have the Court do.

167 The third of the paths identified by the plaintiff assumed (contrary to the submission made as the first path) that the impugned provisions are within the power conferred by ss 30 and 51(xxxvi). She submitted that that power is conferred "subject to this Constitution" and that the power is thus subject to an implied freedom of political communication, participation and association "which protects voting together with the communications required to render the vote an informed choice".

168 Reference to the implied freedom of political communication does not support the plaintiff's case unless it is first assumed that the freedom that is identified is one that either depends upon or implies a particular kind of franchise. But that is the very question for decision and, in the end, the appeal to the implied freedom is to be seen as no more than a restatement of the premise described as the "representative democracy criteria". For the reasons given earlier, that premise, to have the consequence for which the plaintiff contends, must assume the answer to the question for decision.

169 The fourth of the paths the plaintiff identified commenced with the proposition that the Parliament has no power to impose punishment for breach of a State law. It was said that because the effect of the

impugned laws is punitive, it is to be assumed that their purpose was punitive. This being so, it was said that it was for the Commonwealth to "demonstrate some other, legitimate, purpose the law serves, which purpose has displaced the presumed punitive purpose". The plaintiff submitted that no other legitimate purpose had been or could be identified.

170 To say that the impugned laws are "punitive in their effect" seeks to characterise the way in which a person affected by the laws may describe the consequence of their application. That has been said (175) to be relevant to questions about the exercise of judicial power but it is neither necessary nor appropriate to consider here the utility of such a characterisation to questions arising under Ch III. The point which the plaintiff made was not a point about the exercise of judicial power, it was that the impugned provisions had not only a punitive effect but also a punitive purpose.

171 This branch of the plaintiff's submissions depended upon melding a number of disparate ideas into the single proposition that because the law "is punitive in nature" it is beyond the power of the Parliament. First, much of this aspect of the plaintiff's argument proceeded from the premise that the "representative government criteria" include a criterion about the franchise that supports her contentions. Thus it was said that

> "[t]he effect of the impugned provision is to punish persons who are imprisoned for breach of a State law by depriving them of *one of their fundamental rights and duties as a citizen: the right to vote* (which they had, as qualified electors, prior to commencing their term of imprisonment)."

(Emphasis added.)

For the reasons given earlier, the argument is circular.

172 Secondly, the argument about effects and purposes did not distinguish between the political purposes or effects that may have moved a majority of the members of the two Houses to support a particular proposal and the questions of legal effect (176) that are to be considered when asking whether a law is a law with respect to a head of legislative power. Only the latter kinds of effect ("the rights, powers, liabilities, duties and privileges which [the impugned law] creates", and the "practical as well as the legal operation" of the law (177)) are relevant to the present issues. For the reasons given earlier, the impugned laws have the requisite character of a law made with respect to a matter of the kind described in s 51(xxxvi).

173 Finally, in support of this fourth path, and her arguments more generally, the plaintiff relied upon a deal of statistical and other material as demonstrating that the impugned laws have an application

(175) *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28.

(176) *Grain Pool (WA) v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

(177) *Grain Pool* (2000) 202 CLR 479 at 492 [16].

that is arbitrary or capricious. The statistical material upon which the plaintiff relied may yield a number of conclusions, not all as useful or reliable as others. It may be accepted, however, that not all crime is detected, not all criminals are prosecuted, and sentencing practices vary from jurisdiction to jurisdiction and to some extent may vary within a single jurisdiction. There are those who are in prison who have done far less than some who are at large in the community. There are jurisdictions which provide for mandatory sentences of imprisonment in cases where other jurisdictions do not. The indigenous population of this country is markedly over-represented in the prison population.

174 All of this may be accepted. But the root question remains: what is the limitation on legislative power that is prescribed by the requirement that the Houses of the Parliament are "directly chosen by the people"? The matters relied on by the plaintiff are relevant to the answer that is to be given if, and only if, some assumption is made about the nature of the representative democracy for which the *Constitution* provides. But that is the question for decision.

Conclusion

175 Most of the questions stated in the Amended Special Case asked whether the impugned provisions were invalid for a reason stated in the question. The reasons stated in the questions included, for example, "because they [the impugned provisions] are contrary to ss 7 and 24 of the *Commonwealth Constitution*".

176 Rather than answer a series of questions framed with that level of specificity, I would have answered the fifth question stated, namely:

> "Q. Should the Court grant the Plaintiff the relief claimed in paragraph 1 of the application for an order to show cause, namely a declaration that ss 93(8AA) and 208(2)(c) of the Act are invalid and of no effect?
>
> A. No. None of ss 93(8AA), 208(2)(c) or 221(3) is invalid."

It would then have been unnecessary to answer any of the other questions stated in the Amended Special Case except question 4 (Who should pay the costs of the Special Case?). I would have answered that question: "The plaintiff."

177 HEYDON J. The responses proposed by Hayne J to the questions asked are correct. His reasons for giving these responses are incontrovertible. Only the following additional points are made.

178 In the course of argument the Solicitor-General of the Commonwealth, no doubt understandably, made various concessions which were welcomed by the plaintiff. Some were express (178). Some were implied (179). Doubtless some are correct, and perhaps, for a

(178) See, eg, [49] above. Another is a concession that under present conditions persons over the age of seventy could not be excluded from voting.

(179) Thus he conceded the correctness of *Lange v Australian Broadcasting Corporation*

variety of possible reasons, they are all correct, but, since they are concessions, they have not been the subject of contested argument, it is not necessary to decide whether they are correct, and anything said to flow from them is to that extent unsupported.

179 The plaintiff's submissions contained many assumptions as to whether it would be possible now to narrow the franchise on the basis of race, age, gender, religion, educational standards or political beliefs, questions which no Australian legislator has ever dreamed of or is likely to dream of. Resolution of the present case does not call for any of these assumptions to be either made or tested (180); and certainly none of them were tested. It is enough to say that narrowing the franchise in any of these ways may be highly undesirable; it does not follow that it is unconstitutional.

180 The plaintiff's key assumption was that it is a necessary but not sufficient condition for the validity of electoral laws that they maintain or widen the franchise: "one cannot wind the clock back". Thus, it was assumed, if an electoral law contracts the franchise it is invalid. Many think that one of the advantages of having a liberal democratic legislature, particularly when the legislators belong to political parties having different opinions on some issues, is its capacity to experiment, to test what does or does not work, to make up for unsatisfactory "advances" by carrying out prudent "retreats". That capacity stands in contrast to the tendency of totalitarian regimes to become gerontocratic and ossified, faithful to only one technique of government. It would be surprising if the *Australian Constitution* operated so as to inhibit the capacity of the legislature, having changed the electoral laws in a particular way, to restore them to their earlier form if that change was found wanting in the light of experience.

181 The plaintiff relied on the terms of, and various decisions about and commentaries on, certain foreign and international instruments – the International Covenant on Civil and Political Rights, the First Protocol of the European Convention on Human Rights, the *Canadian Charter of Rights and Freedoms* and the *Constitution of South Africa*. The plaintiff's primary arguments were fixed, as they had to be, on ss 7, 8, 24, 30 and 51(xxxvi) of the *Constitution*, and on implications from these provisions. It is thus surprising that the plaintiff submitted that

(cont)

(1997) 189 CLR 520. Even if it is correct and is given full force – and it must be accepted as correct and given full force until a successful application is made for it to be overruled – it says nothing about the present problem, which, unlike the problem it considered, is not a problem about freedom of political communication. But it may serve as a warning about the difficulties of tests turning on whether legislation is "reasonably appropriate and adapted" to the fulfilment of a particular purpose, or equivalent tests, and a warning against too readily detecting tests of that kind in the *Constitution*.

(180) For some discussion, see Goldsworthy, "Originalism in Constitutional Interpretation", *Federal Law Review*, vol 25 (1997) 1, at pp 2-8, 39-47; Goldsworthy, "Interpreting the Constitution in its Second Century", *Melbourne University Law Review*, vol 24 (2000) 677, at pp 698-699.

those arguments were "strongly supported" by decisions under the last three instruments "which found that prisoner disenfranchisement provisions were invalid". It is surprising because these instruments can have nothing whatever to do with the construction of the *Australian Constitution*. These instruments did not influence the framers of the *Constitution*, for they all postdate it by many years. It is highly improbable that it had any influence on them. The language they employ is radically different. One of the instruments is a treaty to which Australia is not and could not be a party. Another of the instruments relied on by the plaintiff is a treaty to which Australia is a party, but the plaintiff relied for its construction on comments by the United Nations Human Rights Committee. If Australian law permitted reference to materials of that kind as an aid to construing the *Constitution*, it might be thought that the process of assessing the significance of what the Committee did would be assisted by knowing which countries were on the Committee at the relevant times, what the names and standing of the representatives of these countries were, what influence (if any) Australia had on the Committee's deliberations, and indeed whether Australia was given any significant opportunity to be heard. The plaintiff's submissions did not deal with these points. But the fact is that our law does not permit recourse to these materials. The proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900 is denied by most (181), though not all (182), of the relevant authorities – that is, denied by twenty-one of the Justices of this Court who have considered the matter, and affirmed by only one.

182 An aspect of the plaintiff's argument about arbitrariness was that a large proportion of prisoners serve a sentence of two years or less, and whether these prisoners lose the vote depends on the length of time they spend in prison and where that period falls in "the three year federal electoral cycle". In practice the cycle is much less than three years. Many federal elections within living memory have been held less than three years after the previous one, and the plaintiff asserted,

(181) *Polites v The Commonwealth* (1945) 70 CLR 60 at 69 per Latham CJ; at 74 per Rich J; at 75-76 per Starke J; at 78 per Dixon J; at 79 per McTiernan J; at 81 per Williams J; *Fishwick v Cleland* (1960) 106 CLR 186 at 196-197 per Dixon CJ, McTiernan, Fullagar, Kitto, Menzies and Windeyer JJ; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 551 per Brennan J; *Horta v The Commonwealth* (1994) 181 CLR 183 at 195 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 383-386 [95]-[101] per Gummow and Hayne JJ; *AMS v AIF* (1999) 199 CLR 160 at 180 [50] per Gleeson CJ, McHugh and Gummow JJ; *Western Australia v Ward* (2002) 213 CLR 1 at 390-391 [961] per Callinan J; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589-594 [62]-[71] per McHugh J.

(182) *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-658 per Kirby J; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-419 [166]-[167] per Kirby J; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 622-630 [168]-[191] per Kirby J; cf *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 424-426 [169]-[173] per Kirby J.

plausibly, that over the whole history of Federation they have been held on average about every two years and four months. It would be strange if the constitutional validity of a restriction on the franchise rose and fell with executive decisions about the duration of parliaments.

183 Finally, the plaintiff submitted that it was not necessary for her to argue that any of the legislation in force before 2004 was invalid. But, despite the plaintiff's refusal to admit this unconditionally (183), the following conclusions flow if her contention is sound. One is that if legislation in the form of the 1902 Act came up for consideration now, it would be declared void. Another is that if federal legislation was enacted in the form of that which existed in New South Wales and Victoria in 1900 and came up for consideration now, it would be declared void. On the assumption (which it is appreciated not everyone shares) that, leaving aside special circumstances capable of satisfactory explanation (184), legislation which would be declared void in 2007 would also have been declared void in 1902 or at any time between those two dates, it would follow that federal statutes in the two forms just described would also have been declared void in 1902, and in any year since that date in which they were challenged. That in turn would mean that every federal election in our history apart from the first one would have been held under invalid electoral laws. These conclusions are so highly improbable that the contentions of the plaintiff which lead to them must be incorrect.

The questions stated in the Amended Special Case filed on 9 July 2007 be answered as follows:

(1) Q. Are ss 93(8AA) and 208(2)(c) of the Act, and s 221(3) of the Act to the extent that it gives effect to these provisions, invalid because they are contrary to ss 7 and 24 of the Commonwealth Constitution?

A. Sections 93(8AA) and 208(2)(c) of the Act are invalid.

(2) Q. Are ss 93(8AA) and 208(2)(c) of the Act, and s 221(3) of the Act to the extent that it gives effect to these provisions, invalid because they are beyond the legislative power of the Commonwealth conferred by ss 51(xxxvi) and 30 of the Constitution and any head of legislative power?

A. Unnecessary to answer.

(183) The plaintiff submitted that her arguments about arbitrariness had less strength in relation to the "three-year regime" in force before 2006 and the "five-year regime" in force before 2004, but did not abandon her position that any regime would have elements of arbitrariness liable to invalidate it.

(184) eg, *Sue v Hill* (1999) 199 CLR 462.

(3) Q. Are ss 93(8AA) and 208(2)(c) of the Act, and s 221(3) of the Act to the extent that it gives effect to these provisions, invalid because they are contrary to:

(i) The freedom of political communication implied in the Constitution; or

(ii) A freedom of participation, association and communication in relation to federal elections implied in the Constitution?

A. Unnecessary to answer.

(3A) Q. If the answer to question 1, 2 or 3, is "yes", are ss 93, 109, 208 and 221(3) of the Act as in force prior to the amendments (including repeals and substitutions) made to those and related provisions by the Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2006 (Cth), s 3 and Sch 1, items 3, 4, 13, 14, 15, 50, 60 and 62 in force and valid?

A. The provisions listed in the question are in force and valid.

(3B) Q. If the answer to question 3A is "no", are ss 93 and 109 of the Act as in force prior to the amendments (including repeals and substitutions) made to those and related provisions by the Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004 (Cth), s 3 and Sch 1, items 1-5 in force and valid?

A. Question 3B postulates a relevant distinction between the text of the Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004 (Cth) and the Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2004 (Cth), but, given the answer to question 3A, unnecessary to answer.

(3C) Q. If the answer to question 3B is "no", are ss 93 and 109 of the Act as in force prior to the amendments (including repeals and substitutions) made to those and related provisions by the Electoral and Referendum Amendment (Enrolment Integrity

and Other Measures) Act 2004 (Cth), s 3 and Sch 1, items 6, 7, 46, 71 and 95 in force?

A. Question 3C postutates a relevant distinction between the text of the Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004 (Cth) and the Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2004 (Cth), but, given the answer to question 3A, unnecessary to answer.

(4) Q. Who should pay the costs of the special case?

A. The plaintiff should have one half of her costs of the amended special case.

(5) Q. Should the Court grant the plaintiff the relief claimed in para 1 of the application for an order to show cause, namely a declaration that ss 93(8AA) and 208(2)(c) of the Act are invalid and of no effect?

A. Unnecessary to answer, given the answer to question 1.

Solicitors for the plaintiff, *Allens Arthur Robinson*.

Solicitor for the first and second defendants, *Australian Government Solicitor*.

Solicitors for the interveners, *I V Knight*, Crown Solicitor for the State of New South Wales, and *Timothy Sharp*, State Solicitor for Western Australia.

JAR