THE RIGHT TO VOTE AND THE AUSTRALIAN CONSTITUTION

O DIREITO DE VOTO E A CONSTITUIÇÃO AUSTRALIANA

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ABSTRACT

Australia is a democracy. Therefore, the right to vote is an integral component of the Australian system of government. Thus it may come as a surprise that the Commonwealth Constitution does not contain an express right to vote. In the absence of an express constitutional right to vote, the High Court has nevertheless recognized that such a right is essential to ensuring the system of representative government established by the Commonwealth Constitution. Accordingly, along with the implied freedom of political communication, the High Court has found that the right to vote is inherent in sections 7 and 24 of the Commonwealth Constitution which require that the Parliament be "directly chosen by the people". This article begins by providing a contextual overview of the Commonwealth Constitution. It then examines the concept of rights in Australian constitutional law. After noting that there are four express rights in the Commonwealth Constitution, the article turns to a discussion of the concept of implied rights before focusing on the implied right to vote. Discussion of the right to vote concentrates on the two High Court decisions which have established that there is a constitutionally entrenched right to vote in Australia: *Roach v Electoral Commissioner*[1] and *Rowe v Electoral Commissioner*[2].

Keywords: Australia. Constitutional law. Right to vote. Implied rights.

RESUMO

A Austrália é uma democracia. O direito de voto é, portanto, um elemento integral do sistema australiano de governo. Assim, pode parecer sur-

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1 (2007) 233 CLR 162.

2 (2010) 243 CLR 1.

preendente que a Constituição não disponha de forma expressa sobre esse direito. Na ausência de um direito constitucional e expresso ao voto, a Suprema Corte reconheceu que tal direito é essencial para assegurar o sistema representativo de governo estabelecido pela Constituição. Assim, seguindo a questão da liberdade implícita de comunicação política, a Suprema Corte decidiu que o direito de voto é inerente às seções 7 e 24 da Constituição, as quais requerem que o Parlamento seja " diretamente escolhido pelo "povo". Esse artigo se inicia com um panorama contextual da Constituição. Será então examinado o conceito de direitos no direito constitucional australiano. Após notar que há quatro direitos expressos na constituição, o artigo se volta para a discussão do conceito de direitos implícitos antes de focar a análise no direito implícito ao voto. O debate sobre o direito de voto se concentra em duas decisões da Suprema Corte que determinaram que há um direito ao voto constitucionalmente estabelecido na Austrália – casos *Roach v Electoral Commissioner* and *Rowe v Electoral Commissioner.*

Palavras-chave: Austrália. Direito constitucional. Direito de voto. Direitos implícitos.

INTRODUCTION

Australia is a Western, liberal democracy. Like other democracies, our system of government is based on a number of key doctrines such as the rule of law and the separation of powers. Further, like the United States but unlike the United Kingdom, Australia has a written Constitution which enshrines many of the core principles which underpin the functioning of our democracy. A survey of the majority of Australian citizens would undoubtedly reveal a widespread belief that inherent in our democratic system is the inalienable right of every adult citizen to vote. Thus it would surprise most people to learn that it was not until 2007 that the High Court of Australia confirmed that there is in fact a constitutionally entrenched right to universal suffrage.[3] In one respect, this is to state the obvious. After all, Australia is a democracy and, given that the right to vote forms the foundation of any democratic system, it seems absurd that such a right would be contentious. Yet the notion of a constitutionally entrenched right to vote has been extremely controversial. After all, Australia has no Bill of Rights and the Constitution explicitly articulates only four express rights, which do not include a right to vote. Thus the path by which the High Court has determined that a right to vote is nevertheless implied from the text of the Constitution is

[3] The High Court is the highest court in the land. It has both original jurisdiction and appellate jurisdiction. Its original jurisdiction includes jurisdiction to interpret the Commonwealth Constitution. See: *Commonwealth of Australia Constitution Act (1900)* (Cth) Ch III.

mired in controversy, particularly stemming from those who adopt an originalist approach to constitutional interpretation.

Part A of this article provides a contextual overview of the Australian Constitution. Part B examines the concept of rights in Australian constitutional law. It begins by noting that, in the absence of a Bill of Rights, Australia relies mainly on institutional mechanisms for rights protection. Nevertheless, the Constitution does enshrine four express rights, which are briefly discussed. In addition to these express rights, the High Court has developed the notion of implied rights. Thus Part B concludes by discussing the concept of implied rights in Australian constitutional law. Part C then concentrates on the right to vote which is the focus of this article, discussing the two High Court decisions which have established that there is a constitutionally entrenched right to vote in Australia: *Roach v Electoral Commissioner*[4] and *Rowe v Electoral Commissioner.*[5]

A OVERVIEW OF THE AUSTRALIAN CONSTITUTION

Australia is a Federation.[6] This means that, like the United States, each State has its own Parliament and there is also a central, federal Parliament. Further, each State has its own Constitution and there is also a Constitution at the federal level, known as the Commonwealth Constitution.[7] Each State is bound by its own Constitution, and all the States (and territories) are also bound by the Commonwealth Constitution. This article focuses on the Commonwealth Constitution, as opposed to the Constitutions of the States, as it is in relation to the Commonwealth Constitution that the implied right to vote has evolved.

The Commonwealth Constitution divides legislative power between the Commonwealth and the States. According to the Constitution, the Commonwealth can only legislate over areas where it has a "head of power". In other words, the "Commonwealth can pass no law without specific constitutional authority for that law".[8] A few areas are designated by the Commonwealth Constitution as falling within the *exclusive* domain of Commonwealth legislative power. This means that only the Commonwealth, and not the States, is empowered to legis-

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4 (2007) 233 CLR 162.

5 (2010) 243 CLR 1.

6 The Federation consists of six States (New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania) and two territories (Northern Territory and Australian Capital Territory).

7 The Constitutions of each State take the form of an Act of Parliament: *Constitution Act 1902* (NSW) *Constitution Act 1975* (Vic), *Constitution of Queensland 2001* (Qld), *Constitution Act 1934* (SA), *Constitution Act 1889* (WA), *Constitution Act 1934* (Tas). The federal Constitution is known as the *Commonwealth of Australia Constitution Act (1900)* (Cth).

8 Joseph, S and Castan, M, *Federal Constitutional Law: A Contemporary View*, 3rd ed, Sydney: Thomson Reuters, 2010, [1.55].

late in relation to these areas. For example, section 115 of the Commonwealth Constitution states that "[a] State shall not coin money".[9] Therefore, pursuant to this section, the Commonwealth has exclusive power to "coin money". However, most areas of Commonwealth legislative power are shared with the States. These are known as *concurrent* legislative powers because both the Commonwealth and State governments may pass laws addressing these areas at the same time. For example, theoretically both the Commonwealth and the States may pass laws with respect to copyright, marriage or the old-age pension.[10] Further, those legislative powers which are not allocated to the Commonwealth by the Commonwealth Constitution (or withdrawn from the States by the Commonwealth Constitution) remain within the exclusive domain of the States.[11] These are known as *residual* powers; essentially the power to legislate with respect to areas over which the Commonwealth has no legislative authority. For example, the Commonwealth Constitution does not authorise the Commonwealth to legislate with respect to education. Therefore, legislative power over education remains within the domain of the States.

Nevertheless, despite the division of legislative power which exists "on the books", the balance of power inevitably skews towards the Commonwealth. There are a number of reasons for this imbalance of legislative power. First, section 109 of the Commonwealth Constitution states that "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid".[12] This means that, with respect to the concurrent powers, where both the Commonwealth and a State have passed laws dealing with the same topic area, and these laws conflict, the Commonwealth law prevails. This section of the Commonwealth Constitution has the effect of shutting the States out of legislating over many areas. For example, whereas the power to legislate over marriage is theoretically a concurrent power (as set out above), the fact that the Commonwealth has passed the *Marriage Act 1961* means that the States are shut out of legislating effectively with respect to marriage. The second key reason for the imbalance of legislative power towards the Commonwealth relates to the broad interpretation which the High Court has given to the legislative powers of the Commonwealth. This broad interpretation of Commonwealth power has had the corresponding effect of narrowing the scope of the States' legislative power. For example, the broad interpretation of the external affairs power and the power to make laws with respect to corporations has potentially far reaching effects.[13]

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9 *Commonwealth of Australia Constitution Act (1900)* (Cth) s 115.

10 *Commonwealth of Australia Constitution Act (1900)* (Cth) ss 51(xviii), (xxi), (xxiii).

11 *Commonwealth of Australia Constitution Act (1900)* (Cth) s 107.

12 *Commonwealth of Australia Constitution Act (1900)* (Cth) s 109.

13 The Commonwealth's power to legislate with respect to external affairs is contained in s 51(xxix) of the Commonwealth Constitution. For an example of the High Court's broad inter-

In addition to dividing legislative power between the Commonwealth and the States, the Commonwealth Constitution also demarcates the power of the legislature, executive and judiciary respectively.[14] This is the well-known 'separation of powers' doctrine, which "prescribes that the functions of the three arms of government be clearly and institutionally separated".[15] In this way, each arm of government acts as a check on the others to ensure that there is no abuse of power. In Australia, the separation between the legislature and executive has become increasingly blurred but the separation of judicial power remains a fundamental doctrine in Australian Constitutional law. This is because the separation of judicial power is crucial to ensuring the independence of the judiciary and to safeguarding individual liberty.[16] By remaining independent from the legislature and executive, the High Court is empowered to categorise the conduct of the legislature or executive as unconstitutional and therefore to ensure that the arms of government act within the power conferred upon them by the Commonwealth Constitution. This "power to restrain or remedy unconstitutional acts of the other branches of government" is known as *judicial review.*[17] One of the most well-known examples of the High Court striking down a Commonwealth law as unconstitutional occurred in the case of *Australian Communist Party v The Commonwealth*.[18] In this case, the High Court struck down as unconstitutional a law which purported to dissolve the Australian Communist Party and which gave the Governor-General the power to declare any organisation which supported communism to be illegal.[19]

Another key doctrine which underpins the Australian system of Constitutional law is the doctrine of *representative government*. The Australian federal Parliament is made up of two houses of Parliament. The lower house is known as the House of Representatives and the upper house is known as the Senate. As the name suggests, the principle of representative government refers to the composition of the lower house, the House of Representatives, and dictates that the

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pretation of this power see: *Commonwealth v Tasmania* (1983) 158 CLR 1. The Commonwealth's power to legislate with respect to corporations is contained in s 51(xx) of the Commonwealth Constitution. For an example of the High Court's broad interpretation of this power see: *New South Wales v Commonwealth* (2006) 229 CLR 1.

14 Chapter I of the Commonwealth Constitution sets out the role of The Parliament, Chapter II sets out the role of The Executive Government and Chapter III sets out the role of the Judicature.

15 Joseph, S and Castan, M, *Federal Constitutional Law: A Contemporary View,* 3rd ed, Sydney: Thomson Reuters, 2010, [1.50].

16 See for example *R v Davison* (1954) 90 CLR 353.

17 Goldsworthy, J 'Australia: Devotion to Legalism' in Goldsworthy J (ed), *Interpreting Constitutions,* Oxford: Oxford University Press, 2006, p 110.

18 (1951) 83 CLR 1.

19 It should be noted that the High Court struck the law down on the basis that it failed to fall within a head of power rather than on the basis of any rights-based doctrine.

lower house must be democratically elected.[20] This principle is reflected in section 24 of the Commonwealth Constitution which states that the "House of Representatives shall be composed of members directly chosen by the people of the Commonwealth".[21] The concept of representative government is fundamental to any democracy. In the words of John Stuart Mill, "the ideally best form of government is that in which the sovereignty, or supreme controlling power in the last resort, is vested in the entire aggregate of the community".[22] Mill eloquently explains the principle, stating that

> the meaning of representative government is, that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves the ultimate controlling power, which, in every constitution, must reside somewhere. This ultimate power they must possess in all its completeness. They must be masters, whenever they please, of all the operations of government.[23]

Closely linked to the doctrine of representative government, and referred to as the central feature of the Australian constitutional system, is the doctrine of *responsible government*.[24] Pursuant to this doctrine the executive, the administrative arm of government, is responsible to the legislature in two ways. First, the Crown (represented by the Governor-General) exercises the executive power vested in it on the advice of its Ministers.[25] Second, the Ministers are responsible to Parliament for the actions of the Crown. In other words, the Ministers (including the Prime Minister) may only remain in government while they have the confidence of the House of Representatives.[26] Given that, pursuant to the principle of representative government, the House of Representatives is "composed of members directly chosen by the people", the government is therefore responsible to the people.[27]

To summarise the above discussion, it may be said that the fundamental principles of Australian constitutional law are: federalism, separation of powers, representative government and responsible government. This article will now

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20 Joseph, S and Castan, M, *Federal Constitutional Law: A Contemporary View,* 3rd ed, Sydney: Thomson Reuters, 2010, [1.35].

21 *Commonwealth of Australia Constitution Act (1900)* (Cth) s 24.

22 Mill, John Stuart, *Representative Government,* Germany: GRIN Verlag oHG, 2009, p 44.

23 Mill, John Stuart, *Representative Government,* Germany: GRIN Verlag oHG, 2009, p 69.

24 See for example *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

25 Section 61 of the Commonwealth Constitution states that: "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

26 Joseph, S and Castan, M, *Federal Constitutional Law: A Contemporary View,* 3rd ed, Sydney: Thomson Reuters, 2010, [1.40].

27 *Commonwealth of Australia Constitution Act (1900)* (Cth) s 24.

provide a brief overview of the role of rights in the Commonwealth Constitution before providing a more in-depth analysis of the rise of the right to vote.

B RIGHTS IN THE AUSTRALIAN CONSTITUTION

Unlike the United States Constitution, there is no Bill of Rights in the Commonwealth Constitution. In fact, Australia and Israel are the only two Western liberal democracies without a constitutional or statutory Bill of Rights.[28] Further, unlike the constitutions of most other Western liberal democracies, the Commonwealth Constitution includes only a few provisions that expressly confer rights.[29] Thus Australia relies mainly on institutional mechanisms for rights protection. The primary example of such an institutional mechanism for protecting rights may be found in the reliance on the Parliament to pass laws which protect human rights and to refrain from passing laws which infringe rights.[30] There are clearly weaknesses inherent in such a mechanism for protecting rights. For example, such an approach relies on Parliament's will to pass rights respecting legislation and to refrain from passing legislation which infringes rights. Such political will may vary depending on the composition of Parliament and, given that each Parliament has the power to pass laws overriding those of a previous Parliament, rights respecting legislation may exist one day and disappear the next. Further, relying on Parliament's law making power to protect rights fails to recognise that "members of the governing party in a Parliament, who rely on the support of a majority of voters, have less of an incentive to be concerned about the rights of minorities, especially if the minorities are small or politically weak and their cause is unpopular".[31] This concept is known as "tyranny of the majority." Another example of the weakness of such an institutional approach to rights protection is that in the absence of an express requirement to consider a law's impact on rights, Parliament may pass laws which inadvertently infringe rights in the interests of promoting a different social value, such as economic management.[32] In addition, the "Australian approach relies heavily on a political culture that respects rights. Political culture changes over time and Australia does relatively little to reinforce the understanding of the significance of rights and the willing-

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28 Joseph, S and Castan, M, *Federal Constitutional Law: A Contemporary View,* 3rd ed, Sydney: Thomson Reuters, 2010, [12.105].

29 Saunders, C, 'The Australian Constitution and Our Rights' in Sykes, H (ed), *Future Justice,* Ebook, 2010, p 117.

30 Saunders, C, 'The Australian Constitution and Our Rights' in Sykes, H (ed), *Future Justice,* Ebook, 2010, p 125.

31 Saunders, C, 'The Australian Constitution and Our Rights' in Sykes, H (ed), *Future Justice,* Ebook, 2010, p 126.

32 Saunders, C, 'The Australian Constitution and Our Rights' in Sykes, H (ed), *Future Justice,* Ebook, 2010, p 126.

ness to give them priority".[33] Consequently, Australia's record of human rights protection is less than exemplary.[34]

As well as presuming that Parliament protects rights, the Australian system also presumes that rights are protected by the judiciary. For example, the courts protect common law rights, such as the right to a fair trial and may interpret statutes in a way which assumes that Parliament does not intend to infringe fundamental rights.[35] Further, the High Court is empowered to strike down a law for which there is no specific Constitutional authority.[36] An example of the potentially rights respecting reach of this power of the High Court may be found in *Australian Communist Party v The Commonwealth*,[37] mentioned above, which had the effect of protecting the right of Australian citizens to ascribe to a range of political ideologies (including communism). Nonetheless, this institutional mechanism for protecting rights also harbours numerous weaknesses. For instance, the rights recognised by the common law are by no means comprehensive and there is ongoing debate as to whether the courts can take account of international law in interpreting statutes and developing the common law.[38] Thus it is clear that the most effective way to protect rights is by enshrining them in the Constitution, particularly one that is difficult to amend (like the Commonwealth Constitution).[39] It is with this in mind that we now turn to consider the few rights that are expressly enshrined in the Commonwealth Constitution.

Express Rights in the Commonwealth Constitution

In the words of Joseph and Castan, the "short list of express rights hardly resembles any comprehensive attempt by the drafters to protect the human rights of individuals from government encroachment. This accords with the characteristic caution regarding constitutional rights of the Anglo-Australian legal

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33 Saunders, C, 'The Australian Constitution and Our Rights' in Sykes, H (ed), *Future Justice,* Ebook, 2010, p 119.

34 Saunders, C, 'The Australian Constitution and Our Rights' in Sykes, H (ed), *Future Justice,* Ebook, 2010, p 119.

35 The "common law" refers to "[t]he unwritten law derived from the traditional law of England as developed by judicial precedence, interpretation, expansion and modification: *Dietrich v R* (1992) 177 CLR 292". See: *Encyclopaedic Australian Legal Dictionary,* LexisNexis.

36 See above discussion providing an overview of the Australian Constitution.

37 (1951) 83 CLR 1.

38 Saunders, C, 'The Australian Constitution and Our Rights' in Sykes, H (ed), *Future Justice,* Ebook, 2010, p 127.

39 Section 128 of the Commonwealth Constitution set out the procedure for amendment the Constitution: "The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives…".

tradition".[40] Indeed, there are only four express rights enshrined in the Commonwealth Constitution: a right to just compensation if one's property is compulsorily acquired, a limited right to trial by jury, freedom of religion, and freedom from discrimination on the basis of State residence.

Section 51(xxxi) of the Commonwealth Constitution protects property rights. It authorises the Commonwealth Parliament to make laws with respect to the 'acquisition of property on just terms from any State or person in respect of which the Parliament has power to make laws…".[41] Thus section 51(xxxi) acts as a conferral of power in that it authorises the Commonwealth to acquire property belonging to another. However, this conferral of power is subject to the qualification that the acquisition be "on just terms". Consequently, section 51(xxxi) is both a conferral of power, a limit on Commonwealth power and a guarantee of property rights. With respect to the meaning of "just terms", the standard is that of full compensation. Thus Brennan J in *Georgiadis v Australian and Overseas Telecommunications Corporation*[42] stated that "[u]nless it be shown that what is gained is full compensation for what is lost, the terms cannot be found to be just".[43] Further, the importance of this section was emphasised by Callinan J in *Smith v ANL Ltd*[44] when he stated that:

> It is unthinkable that in a democratic society, particularly in normal and peaceful times that those who elect a government would regard with equanimity the expropriation of their or other private property without proper compensation. What the public enjoys should be at the public, and not a private expense. The authors of the Constitution must have been of that opinion when they inserted s 51(xxxi) into the Constitution.[45]

Section 80 of the Commonwealth Constitution provides a right to trial by jury. It states that the "trial on indictment of any offence against any law of the Commonwealth shall be by jury…".[46] Thus section 80 guarantees a right to trial by jury but only in circumstances where the accused is alleged to have breached a Commonwealth (as opposed to State) law and only in cases of "trial on indictment". The phrase "trial by indictment" has been interpreted literally, thus the right to trial by jury has been confined to apply only with respect to indictable federal offences. Given that the Commonwealth Parliament determines whether

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40 Joseph, S and Castan, M, *Federal Constitutional Law: A Contemporary View,* 3rd ed, Sydney: Thomson Reuters, 2010, [12.05].

41 *Commonwealth of Australia Constitution Act (1900)* (Cth) s 51(xxxi).

42 (1994) 179 CLR 297.

43 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 311.

44 (2000) 204 CLR 493.

45 *Smith v ANL Ltd* (2000) 204 CLR 493, 541-542.

46 *Commonwealth of Australia Constitution Act (1900)* (Cth) s 80.

a particular offence is tried on indictment, section 80 only applies if the Commonwealth chooses to require such a trial.[47] As Joseph and Castan point out, the narrow interpretation given to section 80 "potentially allows the Commonwealth to completely undermine the guarantee by simply directing that all Commonwealth offences be tried summarily".[48] Thus in *R v Archdall and Roskruge*[49] the High Court determined that the Commonwealth Parliament could create an offence of hindering the provision of a public service by the Commonwealth which is punishable by imprisonment for 12 months and which is triable summarily, without a jury. Higgins J clearly articulated the view of the court, stating that "if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment…".[50] Another criticism which has been directed at the prevailing interpretation of the right to trial by jury is that it is not a right at all. The fact that a person accused of committing an indictable Commonwealth offence has no choice but to submit to trial by jury may be viewed as contradicting the notion of trial by jury as a "right" possessed by the accused.[51]

Section 116 of the Commonwealth Constitution guarantees freedom of religion. It states that "[t]he Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth".[52] Section 116 contains four separate guarantees; it prevents the Commonwealth from:

1. Establishing any religion;
2. Imposing any religious observance;
3. Prohibiting the free exercise of any religion; and
4. Requiring a religious test as a qualification for any office or public trust under the Commonwealth.

The High Court's jurisprudence has focused exclusively on the prohibition of the Commonwealth establishing a religion and the prohibition of the free exercise of any religion.[53] While the term "religion" has been broadly interpreted, the rights therein have been interpreted narrowly.[54] For example, the prohibition

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47 Hanks, P, Gordon, F and Hill, G, *Constitutional Law in Australia,* 3rd ed, Chatswood: LexisNexis Butterworths, 2012, [10.108].

48 Joseph, S and Castan, M, *Federal Constitutional Law: A Contemporary View,* 3rd ed, Sydney: Thomson Reuters, 2010, [12.65].

49 (1928) 41 CLR 128.

50 *R v Archdall and Roskruge* (1928) 41 CLR 128, 139-140.

51 See *Brown v R* (1986) 160 CLR 226.

52 *Commonwealth of Australia Constitution Act (1900)* (Cth) s 116.

53 Joseph, S and Castan, M, *Federal Constitutional Law: A Contemporary View,* 3rd ed, Sydney: Thomson Reuters, 2010, [12.70].

54 Joseph, S and Castan, M, *Federal Constitutional Law: A Contemporary View,* 3rd ed, Sydney: Thomson Reuters, 2010, [12.75].

of the establishment of any religion has been interpreted as prohibiting the Commonwealth from overtly favouring a particular religion to such an extent that people may form the view that the religion in question has become the official religion of Australia.[55] Further, the assertion that "the Commonwealth shall not make any law… *for* prohibiting the free exercise of any religion" has been interpreted to mean that where the purpose of the law is not to prohibit the free exercise of any religion, the law will be valid even if its effect inhibits religious practice.[56]

The fourth express right enshrined in the Commonwealth Constitution is the right not be discriminated against on the basis of interstate residence. Section 117 of the Commonwealth Constitution states that "[a] subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State".[57] Thus pursuant to s 117, a State is prohibited from discriminating against a person because he or she lives in another State.[58] This right is different from the other express rights for a number of reasons. First, it binds the States whereas the other rights bind the Commonwealth. Secondly, given that the purpose behind s 117 was to help foster national unity rather than to protect individuals, whether it is a "human right" at all is debatable.[59] Nevertheless, assuming that section 117 does confer a right, it has evolved into a relatively strong right. It seems to apply to both direct and indirect discrimination and the limits on the right are relatively narrow.[60] For example, in *Goryl v Greyhound Australia Pty Ltd*[61] McHugh J stated that in order to determine whether a subject-matter is outside s 117, it is necessary to ask "whether, by necessary implication, the matter is so exclusively the concern of the State and its people that an interstate resident is not entitled to equality of treatment in respect of it".[62] Thus the right to be free from discrimination on the basis of inter-state residence will be applicable in all circumstances except where a matter is exclusively the concern of a State and its people.

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55 See *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559 (the Defence of Government Schools or DOGS case).

56 *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116.

57 *Commonwealth of Australia Constitution Act (1900)* (Cth) s 117.

58 Joseph, S and Castan, M, *Federal Constitutional Law: A Contemporary View,* 3rd ed, Sydney: Thomson Reuters, 2010, [12.90].

59 Joseph, S and Castan, M, *Federal Constitutional Law: A Contemporary View,* 3rd ed, Sydney: Thomson Reuters, 2010, [12.90].

60 *Street v Queensland Bar Association* (1989) 168 CLR 461. However, see *Sweedman v Transport Accident Commission* (2006) 226 CLR 632 where the High Court seems to have misapplied the test.

61 (1994) 179 CLR 463.

62 *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463 [12.95].

Implied Rights in the Australian Constitution

The dearth of *express* rights in the Commonwealth Constitution has resulted in the development of the notion that there are certain *implied* rights in the Constitution. Currently, the High Court has developed the doctrine of implied rights with respect to the right to vote and the right to political communication, more accurately described as the implied freedom of political communication. This section will briefly discuss the implied freedom of political communication to provide some context for the discussion of the right to vote which constitutes the remainder of this article.

In the case of *Lange v Australian Broadcasting Corporation*[63] a unanimous High Court held that a guarantee of freedom of political communication is implied from the text of the Constitution which provides for a system of representative and responsible government.[64] The High Court stated that:

> Sections 7 and 24 of the Constitution, read in context, require the members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively. This requirement embraces all that is necessary to effectuate the free election of representatives at periodic elections. What is involved in the people directly choosing their representatives at periodic elections, however, can be understood only by reference to the system of representative and responsible government to which ss7 and 24 and other sections of the Constitution give effect…
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> *Freedom of communication on matters of government and politics is an indispensible incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall 'be directly chosen by the people' of the Commonwealth and the States, respectively.*[65]

Thus the source of the implied freedom of political communication is the text of the Constitution; the freedom is implied from the sections providing for the system of representative government – specifically sections 7 and 24 of the Commonwealth Constitution. It is based on the notion that the system of representative government established by the Constitution cannot exist without a guaranteed freedom of political communication. In other words, the freedom is necessarily inherent in the text of the Constitution.

The freedom operates as a restriction on State and Commonwealth legislative powers; neither the States nor the Commonwealth may pass laws which vio-

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63 (1997) 189 CLR 520.

64 For an explanation of the concepts of representative and responsible government see Part A of this article.

65 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 556-559 (emphasis added).

late the implied freedom of political communication. Further, the common law must conform to the freedom.[66] The High Court in *Lange v Australian Broadcasting Corporation*[67] formulated a test (which was modified slightly in *Coleman v Power*)[68] for determining whether a law violates the implied freedom. Pursuant to that test, a law will only violate the freedom if it burdens communication about government or political matters in its terms, operation or effect. However, a law which burdens political communication in this way will nevertheless be valid if it is reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

Thus, unlike the right to free speech which is enshrined in the United States Constitution, the freedom does not cover all speech but only speech of a political nature. Further, while the term "political communication" has been broadly defined, the High Court has treaded cautiously in its application of the doctrine. Since the foundational cases in 1992[69] only two statutes and one aspect of the common law have been subjected to the requirements of the doctrine.[70] This has prompted Stone to comment that "the freedom of political communication is weak across two axes: it covers only a narrow category of expression and it provides relatively weak protection for that expression".[71]

In addition, the implied freedom of political communication is not conceptualised as a right as such. The High Court in *Lange v Australian Broadcasting Corporation*[72] was of the view that the freedom should be conceptualised as a shield and not a sword. Joseph and Castan explain this approach, pointing out

> the Court's concern to establish that the nature of the freedom was not that of a personal or individual right capable of conferring private rights in, for instance, common law defamation actions. Instead, according to the Court, the nature of the freedom was confined to that of a limitation upon legislative (and executive) power that conferred what might be distinguished as only public rights exercisable in public law constitutional actions.[73]

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66 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

67 (1997) 189 CLR 520.

68 (2004) 220 CLR 1.

69 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 and *Nationwide News v Wills* (1992) 177 CLR 1.

70 Stone, A. '"Insult and Emotion, Calumny and Invective": Twenty Years of Freedom of Political Communication' (2011) 30(1) *University of Queensland Law Journal* 79, 79.

71 Stone, A. '"Insult and Emotion, Calumny and Invective": Twenty Years of Freedom of Political Communication' (2011) 30(1) *University of Queensland Law Journal* 79, 79-80.

72 (1997) 189 CLR 520.

73 Joseph, S and Castan, M, *Federal Constitutional Law: A Contemporary View*, 3rd ed, Sydney: Thomson Reuters, 2010, [13.40].

Thus the implied freedom of political communication acts as a relatively weak safeguard against censorship, particularly when compared with the guarantees of free speech which exist in other democracies, such as the United States. In Stone's words, "[t]he freedom of political communication is a *minimum* requirement protecting *only* communications without which representative and responsible government at the federal level would falter".[74]

Nonetheless, despite the narrow applicability of the doctrine, the implied freedom of political communication (indeed the notion of implied rights generally) has been subjected to much criticism. In particular, criticism has been especially vehement from those who favour an originalist approach to constitutional interpretation. For example, Goldsworthy has stated that:

> The implied freedom of political communication does not satisfy the obviousness test…the framers [of the Constitution] deliberately chose not to include a bill of rights in the Constitution…They entrusted to parliaments, not courts, the responsibility for striking the necessary balances between competing rights, and between rights and other community interests, because they knew that this requires political rather than legal judgment, and political judgment should be accountable to the electorate.[75]

Thus in Goldsworthy's view, the framers of the Commonwealth Constitution deliberately decided not to include a bill of rights and not include an express right to free speech. Therefore, if such a right is to become a part of the Australian legal landscape, it can only be by constitutional amendment[76] or by Parliament passing a law which provides for such a right.[77] Allan makes a similar point when he queries why the framers of the Constitution would have inserted an express right to freedom of religion in section 116 but neglected to insert an express right to freedom of communication; "[w]hy bother to do that explicitly, but merely imply a right to freedom of political communication? Hard question, isn't it?"[78] Likewise, Callinan and Stoker are exceedingly critical of the doctrine, stating that:

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74 Stone, A, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28 *University of New South Wales Law Journal* 842, 843 (emphasis added).

75 Goldsworthy, J, 'Constitutional Implications Revisited' (2011) 30(1) *University of Queensland Law Journal* 9, 21-22.

76 See footnote 37 for the procedure for constitutional amendment.

77 For an alternative perspective which contests Goldworthy's view of this issue see: Patrick Emerton, 'Political Freedoms and Entitlements in the Australian Constitution – an Example of Referential Intentions Yielding Unintended Legal Consequences' (2010) 38 *Federal Law Review* 169.

78 Allan, J, 'Implied Rights and Federalism: Inventing Intentions While Ignoring Them' (2009) 34 *University of Western Australia Law Review* 228, 231.

> The basis for a court in Australia to infer implied constitutional rights, having regard to the determination of the authors of the Constitution not to adopt the United States model of express rights, is a fragile one. That is not to say that true democrats should not be on the lookout for judges who might seek to peer though shadows of the penumbra, and to experience constitutional emanations like divine revelations.[79]

It is with this derision of the concept of implied constitutional rights that we now turn to consider the most recently developed of the implied rights, the right to vote.

C THE RIGHT TO VOTE IN THE AUSTRALIAN CONSTITUTION

There is no express right to vote in the Commonwealth Constitution. Sections 8, 30 and 41 could potentially have been interpreted as the source of such a right but have instead been treated as transitional provisions.[80] Nevertheless, the High Court has declared that there is an implied right to vote, sourced in sections 7 and 24 of the Commonwealth Constitution. These sections, as set out above, require that the senators and members of the House of Representatives be "directly chosen by the people".[81] It is therefore on the basis of the system of representative government established by these sections of the Commonwealth Constitution that an implied right to vote has been recognised and developed. Indeed, it is no surprise that the High Court has found that sections 7 and 24 of the Commonwealth Constitution constitute the source of a Constitutional right to vote given that these sections have been held to constitute the source of an implied freedom of political communication. After all, "the claim that voting in elections is more fundamental to the text and structure of the Constitution than

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79 Callinan, I D F and Stoker, A, 'Politicizing the Judges: Human Rights Legislation' (2011) 30(1) *University of Queensland Law Journal* 53, 57-58.

80 Joseph, S and Castan, M, *Federal Constitutional Law: A Contemporary View,* 3rd ed, Sydney: Thomson Reuters, 2010, [12.100]. Section 8 states: "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."

Section 41 states: "No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth." The following cases have discussed the meaning of s 41: *King v Jones* (1972) 128 CLR 221, *R v Pearson;* Ex Parte Sipka (1983) 152 CLR 254

81 *Commonwealth of Australia Constitution Act (1900)* (Cth) ss 7 and 24.

political communication is well established."[82] Thus it is somewhat surprising that it took until 2007 for a case to come before the High Court which directly concerned this notion of a constitutional right to vote. Granted, a few previous cases had touched on this issue. For example, in *McGinty v Western Australia*[83] the High Court followed the 1975 case of *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[84] and rejected the claim that the Commonwealth Constitution guaranteed equality of voting power. Another example is *Judd v McKeon*[85] in which the High Court rejected a constitutional challenge to the system of compulsory voting. However, it was only in 2007 with the case of *Roach v Electoral Commissioner*[86] that the High Court clearly expressed the view that there is a constitutional right to vote and in 2010, in *Rowe v Electoral Commissioner,*[87] that the High Court began to expand upon the nature of such a right.

Roach *v* Electoral Commissioner[88]

In 2006, the federal Parliament enacted section 93(8AA) of the *Commonwealth Electoral Act 1918* (Cth). This section provided 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." In other words, it prohibited a person serving a sentence of imprisonment from voting in any federal election irrespective of the nature of the offence committed or the duration of the prison sentence. The plaintiff in this case, Vickie Roach, was an Australian citizen of indigenous descent who was serving a sentence of six years imprisonment for committing a crime. She was prohibited from voting in a federal election pursuant to section 93(8AA). She claimed that this section was unconstitutional on the basis that it infringed the right to vote inherent in sections 7 and 24 of the Commonwealth Constitution which provide for the system of representative government (among other grounds).

Gummow, Kirby and Crennan JJ formed the majority together with Gleeson CJ who wrote a separate concurring judgment. They decided that section 93(8AA) of the *Commonwealth Electoral Act (1918)* was invalid on the basis that it infringed the right to vote inherent in sections of the Constitution which provide for the

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82 Nicholas Aroney, 'Towards the "Best Explanation" of the Constitution: Text, Structure, History and Principle in *Roach V Electoral Commissioner* (2011) 30(1) *University of Queensland Law Journal* 145, 155.

83 (1996) 186 CLR 140.

84 (1975)135 CLR 1.

85 (1926) 38 CLR 380.

86 (2007) 233 CLR 162.

87 (2010) 243 CLR 1.

88 (2007) 233 CLR 162.

system of representative government. In other words, the majority accepted that sections 7 and 24 of the Commonwealth Constitution may be regarded as the constitutional source of a right to vote. Further, both stressed that these sections do not merely represent a general right to vote but a right to *universal* suffrage. Nevertheless, their Honours conceded that this right to universal suffrage may be subject to certain exceptions or limitations. Thus for the majority the question became: what are those exceptions and does the section of the Commonwealth legislation at issue fall within one of those exceptions?[89]

In answering this question, Gleeson CJ expressed the view that, given the importance of the franchise to the system of representative government, there must be a "substantial reason" for limiting a person's right to vote.[90] He stated that the rationale for excluding persons serving a sentence of imprisonment from voting in federal elections "must be that serious offending represents such a form of civic irresponsibility that it is appropriate for Parliament 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".[91] Nevertheless, while accepting this rationale for excluding certain prisoners from the general right to vote, Gleeson CJ expressed concern regarding the expansive wording of section 93(8AA). This section not only excluded those prisoners who had committed serious crimes from voting, but it excluded any person serving a sentence of imprisonment, regardless of the duration of the sentence or the nature of the offence.[92] According to Gleeson CJ, denying all persons serving a sentence of imprisonment the right to vote, including those short-term prisoners serving sentences of less than six months (who may be imprisoned not because of the gravity of the offence committed but because of personal circumstances such as poverty, homelessness or mental illness) exceeded the permissible power of Parliament to limit the right to vote. On this basis, Gleeson CJ declared s 93(8AA) invalid.

In their joint judgment, Gummow, Kirby and Crennan JJ adopted a different path to reach the same conclusion. Drawing on the test established in *Lange v Australian Broadcasting Corporation*[93] (discussed above) for determining whether the implied freedom of political communication has been violated, they stated that in order to determine the constitutionality of disqualifying a class of persons from what is otherwise universal adult suffrage it is necessary to ask: is

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89 *Roach v Electoral Commissioner* (2007) 233 CLR 162 [7] (Gleeson CJ), [49] (Gummow, Kirby and Crennan JJ).

90 *Roach v Electoral Commissioner* (2007) 233 CLR 162 [7].

91 *Roach v Electoral Commissioner* (2007) 233 CLR 162.

92 *Roach v Electoral Commissioner* (2007) 233 CLR 162.

93 (1997) 189 CLR 520.

the disqualification for a reason that is reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government?[94] In this instance, they held that "[t]he 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 …to the maintenance of representative government".[95] Like the Chief Justice, their Honours noted that s 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".[96] Similarly, they also noted that a significant proportion of prison sentences are short-term and are imposed because non-custodial sentences are unavailable due to indigence, homelessness, mental illness or other personal circumstances.[97] Consequently, their Honours held that the arbitrary and capricious operation of the section at issue rendered it unconstitutional.

Thus in their joint judgment, Gummow, Kirby and Crennan JJ reached the same conclusion as Gleeson CJ, that being that s 93(8AA) of the *Commonwealth Electoral Act* was invalid. However, whereas in the joint judgment their Honours essentially applied the proportionality test from *Lange v Australian Broadcasting Corporation*[98] to reach this conclusion, Gleeson CJ reached this conclusion without explicitly applying such a proportionality test. Nevertheless, it is possible that such an approach implicitly informed his reasoning given that he conceded that a narrower disqualification may be constitutional but that the expansive nature of the disqualification in s 93(8AA) strayed too far from the constitutionally prescribed ideal of universal suffrage. Consequently, all of the judges in the majority engaged in some kind of balancing act, as demonstrated by the fact that whereas all of the majority judges found s 93(8AA) to be unconstitutional, they also all found the equivalent provision of the previous Commonwealth Act to be valid. Unlike s 93(8AA) of the 2006 Act at issue, the 2004 Act distinguished between serious and less serious offences by only disqualifying those imprisoned

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94 *Roach v Electoral Commissioner* (2007) 233 CLR 162 [85].

95 *Roach v Electoral Commissioner* (2007) 233 CLR 162 [95].

96 *Roach v Electoral Commissioner* (2007) 233 CLR 162 [90].

97 *Roach v Electoral Commissioner* (2007) 233 CLR 162 [91]. In addition, they noted that s 93(8AA) provides more stringent criteria with respect to the question of eligibility to vote than the Commonwealth Constitution provides with respect to eligibility to be a member of Parliament. Section 44(ii) of the Commonwealth Constitution stated that: "Any person who… is 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*… shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives." See: *Commonwealth of Australia Constitution Act (1900)* (Cth) s 44(ii) (emphasis added).

98 (1997) 189 CLR 520.

for three years or more. All judges in the majority found the relevant provision of the 2004 Act to be valid on the basis that the criterion that a person be imprisoned for at least three years to be disqualified from voting demonstrated that the seriousness of the offence committed was being taken into account. As a result, the majority took the view that there is an implied right to vote stemming from the system of representative government established by sections 7 and 24 of the Commonwealth Constitution but that Parliament may impose certain limitations on this right to vote. When determining whether a limitation is constitutional, it is necessary to conduct a kind of balancing act; to administer a proportionality test for the purpose of determining whether the limitation can co-exist with the notion that Parliament must be "directly chosen by the people".

In dissent, Hayne J (with whom Heydon J largely agreed) upheld the validity of s 93(8AA) primarily on the basis that the Commonwealth Constitution as a whole, particularly sections 30 and 8, give Parliament the power to decide the meaning of "directly chosen by the people" in sections 7 and 24.[99] In other words, the Constitution gives Parliament the power to decide who should be included in, and who should be excluded from, the notion of "the people" for the purpose of elections. Thus the dissenting judges refused to locate an implied right to vote in the Constitution. Further, Hayne J noted that the notion that persons serving sentences of imprisonment should be excluded from the franchise may be traced back to legislation enacted in 1902; such limitations were therefore clearly contemplated by the framers of the Constitution and there is no reason to suggest that the constitutionally permissible limitations on the right to vote have changed over time.[100] Thus the tenor of the dissenting judgments echoed the criticisms of those favouring an originalist approach to constitutional interpretation discussed towards the end of Part B above.[101]

Rowe *v* Electoral Commissioner[102]

The most recent case concerning the right to vote under the Commonwealth Constitution revolved around the 2010 federal election. It concerned the duration of time that a person has to enrol to vote, or transfer to a different voting district, following the announcement of a federal election. Prior to 2006, a person eligible

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99 *Roach v Electoral Commissioner* (2007) 233 CLR 162 [111].

100 *Roach v Electoral Commissioner* (2007) 233 CLR 162 [126]. It should nevertheless be noted that the law in 1902 excluded persons serving sentences of imprisonment for one year or longer: *Commonwealth Franchise Act 1902* (Cth) s 4.

101 In addition to the dissenting judgments, a critique of the reasoning of the majority may be found in: Nicholas Aroney, 'Towards the "Best Explanation" of the Constitution: Text, Structure, History and Principle in *Roach V Electoral Commissioner* (2011) 30(1) *University of Queensland Law Journal* 145.

102 (2010) 243 CLR 1.

to vote had seven days to enrol or to transfer their enrolment following the "issuing of the writs", a process which follows announcement of an election. In 2006, the legislation was amended such that the time period during which a person could enrol to vote or transfer their enrolment following the announcement of a pending federal election was significantly shortened. Both plaintiffs were eligible to vote. However, the first plaintiff, Rowe, was not allowed to vote in the 2010 federal election because she enrolled too late and the second plaintiff, Thompson, lodged his transfer too late for it to be considered. The plaintiffs challenged the 2006 amendment to the legislation. They argued, in line with the reasoning in *Roach v Electoral Commissioner,*[103] that the shortened cut-off dates effectively disqualified them from exercising their right to vote and that the disqualification was for no "substantial reason". In other words, they argued that the 2006 amendment breached the requirement in sections 7 and 24 of the Commonwealth Constitution that Parliament be composed of members "directly chosen by the people".

In a 4-3 majority, the High Court agreed with the plaintiffs and held that the 2006 amendments were invalid. Crennan J posed the key question as follows:

> The matters of qualification for the franchise and the method of election for both the Senate and the House of Representatives are left by the Constitution to the political choice of Parliament, so long as any electoral system adopted remains within the broad range of alternatives by which provision may be made for Houses of Parliament composed of members "directly chosen by the people".[104]

Thus the question was whether the constitutional requirement for a Parliament to be "directly chosen by the people" would be violated in circumstances where stringent time limitations were placed on an eligible person's ability to enrol to vote following the announcement of an election. They reasoned that the law at issue could be differentiated from the law in *Roach v Electoral Commissioner*[105] on the basis that it did not explicitly carve out an exception to the right to vote. Nevertheless, the circumstances in this case could be analogised with *Roach* given that the right to vote is conditional upon effective enrolment to vote, therefore, procedural requirements regarding enrolment to vote have a substantive effect upon entitlements to vote.[106]

After concluding that the substantive effect of the 2006 amendment was to disqualify eligible persons from exercising their franchise, the majority then

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[103] (2007) 233 CLR 162.
[104] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 [325] (Crennan J).
[105] (2010) 243 CLR 1.
[106] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 [24] (French CJ), [154] (Gummow and Bell JJ).

proceeded to apply the proportionality test from *Roach*[107] to determine whether the law was nevertheless constitutional and found that it failed this test. In other words, the majority drew on the reasoning in *Roach*,[108] finding that the obligation to enrol is designed to facilitate "maximum participation" in elections by those qualified to vote, and that there must therefore be a "substantial reason" for limiting the franchise by imposing such an early cut-off for enrolment.[109] The majority held that the removal of the seven day period, and the consequential disenfranchisement of 100,000 people, could not be justified by any of the purposes precipitating the amendment. According to Crennan J:

> *the impugned provisions have not been shown to be necessary or appropriate for the protection of the integrity of the Rolls, as that object was advanced by the Commonwealth.* First, this is because the Australian Electoral Commission had no difficulty in processing the volume of late enrolments which occurred with the previous seven day cut-off period. Secondly, to seek to discourage a surge of late claims for enrolment by disentitling or excluding those making them constitutes a failure to recognise the centrality of the franchise to a citizen's participation in the political life of the community. Thirdly, the main reason put forward by the Commonwealth as the justification for the impugned provisions – namely, that they will operate to protect the Rolls from a risk of, or potential for, systematic electoral fraud – is to protect the rolls from a risk or potential which has not been substantiated to date. Accordingly, *the justification put forward to support the impugned provisions does not constitute a substantial reason, that is, a reason of real significance, for disentitling a significant number of electors from exercising their right to vote for parliamentary representatives* in the State and Subdivision in which they reside. The impugned provisions cannot be reconciled with the constitutional imperative of choice by the people of those representatives.[110]

Accordingly, the majority judges held that the means of setting an early cut-off time for enrolment to vote was not appropriate and adapted to the end of ensuring the integrity of the electoral process. Thus while the aim of the legislation (to ensure the integrity of the electoral process) was compatible with the maintenance of the constitutionally prescribed system of representative government, the majority found that the means were not appropriate and adapted to achieving this end.

The minority judges dissented on the basis that the limited time period during which eligible persons could enrol to vote following the announcement

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107 *Roach v Electoral Commissioner* (2007) 233 CLR 162.
108 *Roach v Electoral Commissioner* (2007) 233 CLR 162.
109 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 [157]-[159]
110 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 [384] (Crennan J) (emphasis added).

of an election did not result in the disenfranchisement of eligible voters. There was therefore no need to consider whether the disenfranchisement met the proportionality test established in *Roach v Electoral Commissioner.*[111] Further, the minority differentiated this case from *Roach*[112] on the basis that *Roach*[113] was concerned with the qualification of electors whereas this case was not about qualification but about the permissible procedure for exercising the right to vote.[114] This is to be distinguished from the approach of the majority which viewed the procedure for enrolment as having a substantive effect on the right to vote. Another point which influenced the minority judgments was the reality that the plaintiffs could have enrolled to vote (or registered a transfer) any time prior to the announcement of a federal election. The time restrictions only applied after the election was announced. In fact, an eligible voter is not only able to enrol at any time before an election announcement but is obligated by statute to do so. Therefore, in the view of the minority, the plaintiffs disqualified themselves from voting, they could have enrolled before the announcement of the election but chose not to do so; Parliament is not obliged to enable last minute enrolments.[115] To quote Kiefel J, there is a "requirement that persons qualified to vote enrol in a timely way, which is conducive to the effective working of the system. No denial of the franchise is involved"[116] and to quote Heydon J, the plaintiffs were the "authors of their own misfortunes".[117] Thus the minority disputed the majority's assertion that the constitutionally prescribed system of representative government requires that Parliament ensures the *maximum* participation by eligible voters.[118]

The Future of the Right to Vote

Following the cases of *Roach v Electoral Commissioner*[119] and *Rowe v Electoral Commissioner*[120] it seems that the High Court is adopting a broad approach to the interpretation of sections 7 and 24 of the Commonwealth Constitution in the context of the right to vote. Williams and Lynch make the point that

> It is hard to see where the limits of this lie. As French CJ stated: 'all laws of the Commonwealth framework providing for enrolment and for the

111 (2007) 233 CLR 162.
112 *Roach v Electoral Commissioner* (2007) 233 CLR 162.
113 *Roach v Electoral Commissioner* (2007) 233 CLR 162.
114 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 [186]-[187] (Hayne J).
115 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 [210] (Hayne J), [274]-[275] (Heydon J).
116 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 [210] (Hayne J), [489] (Kiefel J).
117 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 [287] (Heydon J).
118 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 [210] (Hayne J), [413] (Kiefel J).
119 (2007) 233 CLR 162.
120 (2010) 243 CLR 1.

> conduct of elections must operate within the constitutional framework defined by the words "directly chosen by the people"'. It is not such a big step to suggest that aspects of how ballots are cast, and in particular the secret ballot, may be constitutionally entrenched. It may also be that the constitutional expression 'the people' will be a source of further development. For example, does the constitutional protection of the right to vote of 'the people' negate restrictions imposed by the *Commonwealth Electoral Act 1918* (Cth) on the voting rights of Australian citizens living overseas?[121]

Further, it seems from the majority judgment in *Rowe*[122] that there can be no turning back the clock. That once Parliament has legislated to institute an initiative designed to protect or promote a constitutional right, such as the seven day grace period designed to give people more time to enrol to vote, attempts to roll back such initiatives may be deemed unconstitutional.[123] This perspective is supported by the recognition of French CJ in *Rowe*[124] of "the possibility that the constitutional concept would acquire, as it did, a more democratic content than existed at Federation. That content, being constitutional in character, although it may be subject to adjustment from time to time, cannot now be diminished."[125] Thus the evolution of the constitutional right to vote may be viewed as an example of the High Court using judicial review as a mechanism for securing and constitutionally entrenching human rights protection in the absence of a Bill of Rights (as discussed in Part B above).

CONCLUSION

> Everyone agrees that a democracy requires the rule of the people, which is often effectuated through representatives in a legislative body. Therefore, frequent elections are necessary to keep these representatives accountable to their constituents.[126]

Australia is a democracy. Therefore, the right to vote is an integral component of the Australian system of government. In the absence of an express constitutional right to vote, the High Court has nevertheless finally recognized that such a right is essential to ensuring the system of representative government

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121 Williams, G and Lynch, A, 'The High Court on Constitutional Law: The 2010 Term' (2011) 34(3) *University of New South Wales Law Journal* 1006, 1011 (citations omitted).

122 *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

123 Orr, G, 'The Voting Rights Ratchet: *Rowe v Electoral Commissioner*' (2011) 22 *Public Law Review* 83, 88.

124 *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

125 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 [18] (French CJ).

126 Aharon Barak, 'Foreword: A Judge On Judging: The Role Of A Supreme Court In A Democracy', (2002) 116 *Harvard Law Review* 16, 38-39.

established by the Commonwealth Constitution. Thus, along with the implied freedom of political communication, the High Court has found that the right to vote is inherent in sections 7 and 24 of the Commonwealth Constitution which require that the Parliament be "directly chosen by the people". The willingness of the High Court to imply these rights from the text of the Commonwealth Constitution has potentially wide ranging effects. In 2007 the High Court decided that denying all persons serving sentences of imprisonment the right to vote was unconstitutional.[127] In 2010 the High Court decided that shortening the duration of time in which a person may enroll to vote following the announcement of a pending election was unconstitutional.[128]

Moving forward, it is unclear how wide the High Court will cast this net and exactly what the boundaries of the right to vote will be. Further, it is unclear whether the broad reading of sections 7 and 24 in the context of the right to vote may act as a springboard for other rights to be derived from these sections. For example, for years there has been discussion regarding whether the High Court might be willing to recognize freedoms of movement, association and participation as deriving from sections 7 and 24 of the Commonwealth Constitution and in a number of cases individual judges have expressed the view that such rights exist.[129] Thus there is a possibility that the right to vote cases will provide renewed impetus to the development of additional constitutional rights and freedoms.

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127 *Roach v Electoral Commissioner* (2007) 233 CLR 162.
128 *Rowe v Electoral Commissioner* (2010) 243 CLR 1.
129 See for example: *Buck v Bavone* (1976) 135 CLR 110 per Murphy J, *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 per McHugh and Gaudron JJ, *Kruger v Commonwealth* (the *Stolen Generation* case) (1997) 190 CLR 1 per Gaudron, Toohey and McHugh JJ, *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 per McHugh and Kirby JJ.