

Roach v Electoral Commissioner [2007] HCA 43

The 2006 Commonwealth Amendment Act inserted s 93(8AA) into the *Commonwealth Electoral Act 1918* (Cth). This amendment provided that a person could not vote at a House of Representatives or Senate election if they were serving a prison sentence for committing an offence against a law of the Commonwealth, State or Territory.

Section 93(8AA) was held to be constitutionally invalid by a majority of 4:2 of the High Court of Australia as follows:

Valid	Invalid
Heydon J Hayne J	Gleeson CJ Gummow J Kirby J Crennan J

Consequently:

- the previous Commonwealth statutory regime was restored; and
- prisoners could vote in Commonwealth elections for the House of Representatives and the Senate unless (having committed an offence against Commonwealth, State and Territory laws) they were serving a sentence of three years or longer.

The Majority

The majority of the High Court were influenced by the fact that the 2006 disenfranchisement applied to all prisoners, and not just those found guilty of a serious crime. This meant that prisoners' exclusion from the Commonwealth franchise was not proportionate to the Commonwealth constitutional system of representative government required by ss 7 and 24 of the *Constitution*.

Gleeson CJ explained in his judgment (at [7]) that:

the words of ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote. 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. 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.

When might the Commonwealth Parliament be able to disenfranchise a person from voting for the House of Representatives and/or the Senate?

Reason for Disenfranchisement	Would this be constitutionally valid?
Not an Australian citizen	YES
Of unsound mind	YES
Member of a particular religious or racial group	NO
Bankruptcy	NO
Being under the age of 18	YES
For being of a particular gender	NO

The Minority

The minority judges did not think that ss 7 and 24 imposed a requirement of universal suffrage or that the meaning of ‘directly chosen by the people’ had changed since Federation (1 January 1901). For example, Heydon J said (at [179]) that:

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...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.

Why was this High Court case significant?

It was significant because the High Court found that:

- (1) there is no express right to vote in the *Commonwealth Constitution*
- (2) ss 7 and 24 limit the Commonwealth Parliament's legislative powers to regulate the franchise in ways that are not consistent with a ‘direct choice by the people’.

Useful Links on the Case:

Link to the Judgment: <http://www.austlii.edu.au/au/cases/cth/HCA/2007/43.html>

<http://www.hrlrc.org.au/content/topics/prisoners/roach-decision-prisoners-right-to-vote/> (includes a number of newspaper articles)

ABC Radio, The Law Report – ‘Should Prisoners Be Allowed to Vote?’,
<http://www.abc.net.au/rn/lawreport/stories/2007/1945622.htm#transcript> (and podcast link)

Michael Pelly and Paul Malley, ‘Prisoners Retain Right to Have a Say’,
<http://www.theaustralian.com.au/news/prisoners-regain-right-to-have-a-say/story-e6frg6no-1111114307236>

Detailed case summary: Blackshield & Williams, *Australian Constitutional Law & Theory* (Federation Press)
<http://www.federationpress.com.au/pdf/RoachvElectoral%20Commissioner.pdf>

Chronology

- **17 July 2010** – Prime Minister announced that there would be an election for the Senate and House of Representatives.
- **19 July 2010** – Governor-General, acting on Prime Minister's advice, prorogued (dissolved) the House of Representatives until 21 August 2010 and issued writs for the election of Senators and members of the House of Representatives.
- **At 8pm on 19 July 2010** (by virtue of the Commonwealth Parliament's 2006 Amendment Act) the electoral rolls closed for new electoral enrolments. This early closure adversely affected the first plaintiff, Shannen Rowe.
- **At 8pm on 22 July 2010** (by virtue of the 2006 Amendment Act) the electoral rolls closed for the purposes of enrolment transfers from one electorate to another. This closure adversely affected the second plaintiff, Douglas Thompson. Douglas explained his motivation for being involved in the case to the ABC and said:

It wasn't a political motive for me at all. I just thought that the current law was wrong. I didn't have enough time and I know heaps of my friends didn't either and I just jumped at the chance to get involved with something that would give people more time to be able to put themselves on the [Cth] electoral roll or to change their details and make their vote count.

Prior to the 2006 Amendment Act, the *Commonwealth Electoral Act 1918* (Cth) had (since 1983) provided that there was a seven day period for enrolments, and transfers of enrolments, after the issue of the election writs.

Constitutional Issue for the High Court: Were the provisions of the 2006 Amendment Act which brought about an earlier closure of the electoral rolls constitutionally invalid?

YES. By a majority of 4:3 the High Court decided that these early roll closure provisions were invalid because they contravened ss 7 and 24 of the *Commonwealth Constitution*. This was because ss 7 and 24 requires that elected representatives be 'directly chosen by the people', which requires that the electoral system align with the principles of representative government

Valid	Invalid
Hayne J	French CJ
Heydon J	Gummow J
Kiefel J	Bell J
	Crennan J

The *Rowe* case concerned three issues:

- 1) did the earlier closure of the Commonwealth electoral rolls disentitle, disqualify or disenfranchise people who were otherwise legally entitled to vote?
- 2) if the people were so disentitled, disqualified or disenfranchised, was this for a substantial reason?
- 3) if yes, was this reason reasonably appropriate and adapted (proportionate) to serve an end consistent or compatible with the constitutionally prescribed system of representative government?

The majority held the early roll closure effected a disenfranchisement and secondly, that the reason for the disenfranchisement was not reasonably appropriate and adapted to serve an end consistent or compatible with the constitutionally prescribed system of representative government. Primarily, the majority took this view on the basis of evidence that the Australian Electoral Commission was able to maintain the integrity of the rolls with a 7 day period after the issuing of the writs before the rolls closed and because the 2006 Amendment Act had a significant impact on a person's entitlement to vote without evidence that the Amendments were necessary to prevent electoral fraud.

The minority considered that the 2006 Amendment Act did not effect a disenfranchisement. In separate judgments Hayne and Kiefel JJ considered that, even if there was a disenfranchisement, the reason for it was appropriate and adapted to achieving the integrity of the electoral rolls which was a reason compatible with the constitutionally prescribed system of representative government.

Why was this High Court case significant?

The *Rowe* case went further than *Roach* in finding constitutionally invalid Commonwealth electoral legislation which was procedural or practical in nature. The legislation did not stop a person of a particular category from voting. Instead, it reduced the time period during which a person could enrol (or transfer their enrolment) after a federal election was called. *Rowe* challenged the accepted position that the Commonwealth Parliament could choose what laws they made regulating the mechanics of federal elections.

Questions for Students:

1. Do you think it should have mattered that 2006 Amendment Act removed a 7 day grace period for enrolment which had existed since 1983? Should the Commonwealth Parliament be able to reverse well established aspects of the franchise?
2. Should it matter that the plaintiffs had breached their statutory obligations to enrol or transfer their enrolment within the timeframes required by the *Commonwealth Electoral Act 1918* (Cth) and were therefore ‘authors of their own misfortunes’?
3. It is accepted that the Commonwealth Parliament has some discretion to legislate in relation to the conduct of elections. If that is the case, when is it appropriate for the High Court to intervene and invalidate electoral legislation?
4. What did Justice Heydon, in the minority (at[271]), mean in asserting that the plaintiffs had: concentrated on the supposed impact of the impugned provisions on Australia's young adults as well as its wretched of the earth – its descamisados and other victims. The plaintiffs never demonstrated that that impact had constitutional relevance, or had any point other than an appeal to pathos.
5. Given the very narrow 2010 electoral victory of the ALP (Greens and Independents) over the Liberals, did the High Court’s decision in *Rowe* contribute to that victory?

Useful Links for Rowe:

Link to the Judgment: <http://www.austlii.edu.au/au/cases/cth/HCA/2010/46.html>

ABC Radio, The Law Report – ‘The Right to Vote’
<http://www.abc.net.au/rn/lawreport/stories/2010/2977163.htm> (with Podcast)

ABC Radio, PM – ‘High Court Overturns Electoral Law’
<http://www.abc.net.au/pm/content/2010/s2976057.htm>

‘Court by Surprise: The High Court Upholds Voting Rights’ <http://inside.org.au/court-by-surprise-the-high-court-upholds-voting-rights/>

Joint Standing Committee on Electoral Matters, Inquiry into the Conduct of the 2010 Federal Election and Matters Related Thereto: <http://www.aph.gov.au/house/committee/em/elect10/report/Chapter5.pdf>

‘GetUp! Wins Landmark High Court Challenge’:
<http://www.probonoaustralia.com.au/news/2010/08/getup-wins-landmark-high-court-challenge>

The Australian, ‘High Court Decision Could Change Election Result’:
<http://www.theaustralian.com.au/national-affairs/high-court-decision-could-change-election-result/story-fn59niix-1225902286714>

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