HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

ANTHONY JOHN MURPHY & ANOR PLAINTIFFS

AND

ELECTORAL COMMISSIONER & ANOR DEFENDANTS

Murphy v Electoral Commissioner
[2016] HCA 36
Date of Order: 12 May 2016
Date of Publication of Reasons: 5 September 2016
M247/2015

ORDER

The questions stated by the parties in the amended special case dated 1 April 2016, as amended by the addendum to the amended special case dated 11 May 2016, and referred for consideration by the Full Court be answered as follows:

Question 1

Do one or both of the first plaintiff and the second plaintiff have standing to seek the relief sought in paragraphs 1, 2, 3 and/or 4 of the Further Amended Application for an Order to Show Cause?

Answer

The second plaintiff has standing and it is otherwise unnecessary to answer the question with respect to the first plaintiff.

Question 2

Are any or all of sections 94A(4), 95(4), 96(4), 102(4), 103A(5), 103B(5) and 118(5) of the Commonwealth Electoral Act 1918 *(Cth) contrary to ss 7 and 24 of the Constitution and therefore invalid?*

Answer

No.

Question 3

If the answer to Question 2 in relation to a section is yes, do sections 152(1)(a) and 155 of the Act have the same or substantially the same operation or effect as the impugned provisions or any of them and, if so, are sections 152(1)(a) and 155 invalid and of no effect?

Answer

The question does not arise.

Question 4

If the answer to Question 2 or Question 3 in relation to a section is yes, is that section, or are those sections, severable from the rest of the Act?

Answer

The question does not arise.

Question 5

What if any relief should be granted?

Answer

None.

Question 6

Who should pay the costs of the special case?

Answer

The first plaintiff.

Representation

R Merkel QC, B K Lim and C J Tran for the plaintiffs (instructed by King & Wood Mallesons)

Submitting appearance for the first defendant

J T Gleeson SC, Solicitor-General of the Commonwealth and N J Owens with K E Foley for the second defendant (instructed by Australian Government Solicitor)

Intervener

C D Bleby SC with D F O'Leary for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

CATCHWORDS

Murphy v Electoral Commissioner

Constitutional law (Cth) – Legislative power – Franchise – Power of Parliament to regulate exercise of entitlement to enrol to vote – Provisions of *Commonwealth Electoral Act* 1918 (Cth) precluding consideration of claims for enrolment or transfer of enrolment and amendment of Electoral Rolls during "suspension period" from 8pm on day of closing of Electoral Rolls until close of polling for election – Whether burden on constitutional mandate that Parliament be "directly chosen by the people" – Whether burden justified by substantial reason – Relevance of *Roach v Electoral Commissioner* (2007) 233 CLR 162; [2007] HCA 43 and *Rowe v Electoral Commissioner* (2010) 243 CLR 1; [2010] HCA 46.

Words and phrases – "adequacy in its balance", "burden", "constitutional mandate of popular choice", "directly chosen by the people", "franchise", "necessity", "obvious and compelling alternative", "reasonably appropriate and adapted", "structured proportionality", "substantial reason", "suitability".

Constitution, ss 7, 10, 24, 30, 51(xxxvi).
Commonwealth Electoral Act 1918 (Cth), ss 94A(4), 95(4), 96(4), 101, 102(4), 103A(5), 103B(5), 118(5).

FRENCH CJ AND BELL J.

Introduction

1 The plaintiffs in this special case, which was referred to the Full Court by Nettle J on 1 April 2016, sought relief including a declaration that a number of provisions of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act") are invalid. The impugned provisions prevent the Electoral Commissioner from placing the name of a person on an Electoral Roll for a Division until after the close of the poll for an election for the Division, where the person's claim for enrolment or for transfer to the Roll from the Roll of another Division has been received after 8 pm on the day of the closing of the Rolls. The period from the closing of the Rolls to the close of the poll for an election is referred to in these reasons as the "suspension period". The impugned provisions also prevent the Electoral Commissioner, during the suspension period, from exercising statutory powers, without claim or notice, to update or transfer enrolments where there has been a change of address and to enrol unenrolled persons. They preclude removal, during that period, of an elector's name from a Divisional Roll where there has been an objection to that person's enrolment under Pt IX of the Act.

2 At the time of the hearing, the first plaintiff was enrolled on the Electoral Roll for the Division of Wills in the State of Victoria. Initially, his standing was challenged by the second defendant, the Commonwealth. The second plaintiff, who was on the Electoral Roll for the Division of Newcastle, intended to nominate herself as a candidate for election to the House of Representatives in that Division. She was an independent candidate for election to the House of Representatives in the Division in 2013. She was joined as a party, with the consent of the Commonwealth, at the hearing of the special case. She had not been endorsed by a registered political party. In order that she could contest the election, her nomination had to be signed by 100 persons who were entitled to vote at the election in the Division of Newcastle[1]. Her standing was not disputed and, on that basis, the challenge to the standing of the first plaintiff was not pursued.

3 The plaintiffs said that the suspension of the processing of claims, transfers, objections and amendments to the Roll initiated by the Electoral Commissioner precluded people otherwise eligible to enrol and vote at a particular federal election from doing so and produced an inaccurate and distorted Electoral Roll. The provisions were said, on that account, to have an effect adverse to the constitutional requirement for election of members of the Parliament by the choice of the people. That effect being brought about for no

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1 Act, s 166.

substantial reason and being disproportionate to any legitimate end served by the impugned provisions, they were said to be invalid.

4 In addition to declaratory relief, the plaintiffs sought a writ of prohibition pursuant to s 75(v) of the Constitution prohibiting the Electoral Commissioner from "giving effect to, or taking any steps in reliance upon" the impugned provisions. That claim involved a remedial double negative. It required the Electoral Commissioner to act as though the statutory obligations imposed on him, otherwise limited by the impugned provisions, were extended up to and including polling day.

5 The plaintiffs' case did not involve a challenge, as in *Roach v Electoral Commissioner*[2], to a disqualifying provision targeting a particular class of persons such as sentenced prisoners. Nor was it, as in *Rowe v Electoral Commissioner*[3], a challenge to a law removing an existing opportunity to enrol up to seven days after the issue of the writs for an election. In this case the plaintiffs said, in effect, that Parliament had not gone far enough when it left in place long-standing time limits, essentially dating back to the 1930s, on the processing of new and transferred enrolments, objections and amendments to the Rolls.

6 The questions in the special case are set out at the end of these reasons. At the conclusion of the hearing the Court answered those questions adversely to the plaintiffs, holding that none of the impugned provisions were invalid and that the first plaintiff should pay the costs of the special case. Our reasons for joining in those orders follow. It is necessary first to outline the legislative framework in which the impugned provisions appear.

The general legislative framework

7 The Act establishes the Australian Electoral Commission[4] and the office of the Electoral Commissioner as its Chief Executive Officer and one of its members[5]. Part IV of the Act provides that each State and Territory shall be distributed into Electoral Divisions[6] and that one Member of the House of

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2 (2007) 233 CLR 162; [2007] HCA 43.

3 (2010) 243 CLR 1; [2010] HCA 46.

4 Act, s 6.

5 Act, ss 6 and 18.

6 Act, s 56. Under s 55A, Pt IV applies to the Northern Territory as if it was a State if the Electoral Commissioner determines that the number of Members of the

(Footnote continues on next page)

Representatives shall be chosen for each Electoral Division[7]. Part VI provides for a Roll of electors for each State and Territory[8]. Each such Roll is made up of Rolls for the Electoral Divisions within the State or Territory which are to contain the names, addresses and prescribed particulars of each elector for the Division[9]. Part VII of the Act sets out the qualifications and disqualifications for enrolment and for voting. Section 93 sets out the conditions upon which persons "shall be entitled to enrolment." Australian citizens who have attained 18 years of age are so entitled[10]. Section 100 allows, but does not require, a person who has turned 16 but is under 18 to make a claim for enrolment. The term "Elector" is defined in the Act as "any person whose name appears on a Roll as an elector."[11] An elector whose name is on the Roll for a Division is "entitled to vote at elections of Members of the Senate for the State that includes that Division and at elections of Members of the House of Representatives for that Division."[12]

8 Part VIII of the Act deals with mechanisms for enrolment. The principal means by which a qualified person can be included on the Roll for a Division is by making a claim for enrolment[13]. The claim is to be processed by the Electoral

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House of Representatives to be chosen in the Northern Territory at a general election is 2 or greater. On 13 November 2014, the Acting Electoral Commissioner determined that 2 Members of the House of Representatives were to be chosen in the Northern Territory at a general election.

7 Act, s 57. There is provision for subdivisions of Divisions in the Act which are mentioned in a number of the sections summarised in these reasons. No Division is currently divided into subdivisions, and hence s 4(4) of the Act has the effect that references to subdivisions should be read as references to Divisions.

8 Act, s 81.

9 Act, ss 82(4) and 83(1). The addresses of eligible overseas electors and itinerant electors are not required: s 83(2).

10 Act, s 93(1)(a) and (b)(i). Non-citizens who would have been British subjects within the meaning of the relevant citizenship law had it continued in force and whose names were, immediately before 26 January 1984, on a Roll are also entitled: Act, s 93(1)(b)(ii).

11 Act, s 4(1).

12 Act, s 93(2).

13 Act, ss 98, 99 and 101.

Commissioner as provided by the Act[14]. Electors can apply to transfer from the Roll of one Division to the Roll of another[15]. Section 101 provides for compulsory enrolment for persons entitled to be enrolled for a Division other than by virtue of ss 94, 94A, 95, 96 or 100. Each person entitled to be enrolled for any Division whether by way of enrolment or transfer of enrolment, except residents of Norfolk Island, is required to "forthwith fill in and sign a claim and send or deliver the claim to the Electoral Commissioner." The Electoral Commissioner can enrol or transfer the enrolment of persons who have not made a claim for enrolment or transfer[16]. The Electoral Commissioner can also correct any Roll[17]. Alterations to the Roll to correct mistakes and to remove the names of deceased electors may be made at any time[18]. The removal of the name of a person from a Roll who is not entitled to enrol and had made a claim for enrolment containing a false statement may be effected at any time between the date of issue of the writ for an election for the relevant Division and before the close of polling for that election[19]. The Electoral Commissioner may enter the name of an elector who is not enrolled, and who has made a declaration vote, on the Roll for the Division in which the elector was living at the time of voting at a preliminary scrutiny of declaration votes[20] if the vote is in order and the omission of the elector's name from the Roll for the Division was due to an error made by an officer or to a mistake of fact[21].

9 Part XIII provides for writs to be issued by the Governor-General for elections to the House of Representatives, pursuant to s 32 of the Constitution, and for the election of Senators for the Territories[22]. The State Governors issue

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14 Act, s 102.

15 Act, s 99(2).

16 Act, ss 103A and 103B.

17 Act, s 105.

18 Act, s 105(3).

19 Act, s 106.

20 Preliminary scrutinies of declaration votes are continuously held from the last Monday before the close of the poll for the election until a time not earlier than 13 days after the close of the poll: Act, s 266.

21 Act, s 105(4) and Sched 3.

22 Act, ss 151, 152 and 154.

the writs for the election of Senators for each State, pursuant to s 12 of the Constitution[23]. The date fixed for the close of the Rolls is the seventh day after the date of the relevant writ[24]. The date fixed for the nomination of candidates must be not less than 10 days nor more than 27 days after the date of the relevant writ[25]. Polling day must be not less than 23 days nor more than 31 days after the date of nomination[26].

10 Part XVI of the Act, entitled "The polling", concerns arrangements to be made for the polling day. Section 208(1) requires the Electoral Commissioner to prepare a list of voters for each Division and to certify the list. A paper copy of the certified list for a Division is to be delivered to the presiding officer at each polling place before the start of voting[27]. A copy must also be delivered to each place at which pre-poll ordinary voting is available for voters enrolled for that Division[28]. The list is created from data extracted from the Australian Electoral Commission's IT system, known as "RMANS", in which each elector's details are stored. The Australian Electoral Commission's practice is to process all enrolment applications received prior to the close of the Rolls within 40 hours of their close. It aims to conclude production of the certified list approximately 48 hours after the close of the Rolls. The delivery of certified lists from printers occurs over a 10 day period with priority delivery to early voting centres. The certified list once prepared is not updated. Any error or omission may be remedied by proclamation specifying the matter dealt with and providing for the course to be followed[29].

11 There is an electronic version of the Electoral Rolls known as a "Notebook Roll" maintained by the Australian Electoral Commission to manage

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23 Act, ss 152 and 153. By convention, each Governor adopts the suggestion of the Governor-General, upon the advice of the Prime Minister, that the writ proclaim the same deadlines to apply as those in the writs issued for elections to the House of Representatives and for elections of Senators for the Territories: *Odgers' Australian Senate Practice*, 12th ed (2008) at 94-95.

24 Act, s 155.

25 Act, s 156.

26 Act, s 157.

27 Act, s 208(3).

28 Act, s 208(4).

29 Act, s 285(1).

any additional applications for enrolment or changes received before the suspension period, but not processed before the printing of the certified lists, including the addition of names from claims under s 101. Other changes may include the removal of names of deceased electors, the reinstatement of eligible electors previously removed by mistake and changes as a result of the detection of enrolments pursuant to claims including a false statement[30]. The Notebook Roll operates as an administrative mechanism to assist in processing updates to the Roll in order, ultimately, to facilitate the scrutiny of declaration votes. In addition, under s 208A of the Act, inserted in 2010[31], the Electoral Commissioner may arrange for the preparation of an "approved list of voters for a Division". This is a list in electronic form which contains the same information as the certified list for the Division most recently prepared[32]. The certified and approved lists for each Division are used to determine the entitlement of a person to cast an ordinary vote on polling day.

The impugned provisions

12 Three of the impugned provisions, ss 94A(4), 95(4) and 96(4), are found in Pt VII of the Act. Sections 94A, 95 and 96 respectively provide for applications for enrolment by persons residing outside Australia, by their spouses, de facto partners or children living outside Australia and by itinerant electors. In each case, the impugned subsection provides that if an application under the section to which it relates is received by the Electoral Commissioner after 8 pm on the day of the close of the Rolls for an election to be held in a Division, and the application relates to that Division, the person must not be added to the Roll for that Division until after the close of the poll for that election.

13 Section 102 sets out the actions to be taken by the Electoral Commissioner on receipt of a claim pursuant to s 101 for enrolment or transfer of enrolment. Section 102(4) provides that if such a claim is received by the Electoral Commissioner during the "suspension period" then "the claim must not be considered until after the end of the suspension period." The suspension period is defined as the period commencing at 8 pm on the day of the close of the Rolls for an election to be held in a Division and ending on the close of the poll for that election. As noted earlier, although the term "suspension period" is only defined

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30 Act, ss 105 and 106.

31 *Electoral and Referendum Amendment (Modernisation and Other Measures) Act* 2010 (Cth), Sched 4 item 8.

32 Act, s 4(1) definition of "approved list".

in the Act for the purposes of s 102 it is used in these reasons to refer to the same period in which each of the impugned provisions operates.

14 Section 103A(5) also prevents the Electoral Commissioner from taking action of his or her own motion to update or transfer a person's enrolment during the suspension period. Section 103B(5) imposes the same prohibition with respect to the power of the Electoral Commissioner under s 103B to enrol an unenrolled person without claim or notice from that person.

15 Section 118 appears in Pt IX of the Act, which deals with objections to the enrolment of a person in a Division. By s 118(5) the Electoral Commissioner must not, during the suspension period, remove an elector's name from the Roll of the Division under the powers conferred on him or her by s 118(3) and (4A).

History of the suspension period

16 The legislative scheme for enrolment and for a cut-off date for enrolment for a particular election is to be understood by reference to the history and purposes of the Electoral Roll. Some of that history was set out in *Rowe*[33]. The registration and listing of qualified electors on an Electoral Roll as a condition of the exercise of the right to vote dates back to the enactment of the *Representation of the People Act* 1832[34]. The purpose of registration was practical and originally directed to dealing with the complicated and diverse qualifications required for a person to become an elector[35].

17 The electoral laws of the Australian colonies in the late 19th century replicated key features of the British system, including its requirements for listing, enrolment and registration. At the time of Federation those colonial laws conditioned the right to vote in an election upon enrolment on the relevant Electoral Roll[36]. They also provided for closure of the Electoral Rolls to new

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33 (2010) 243 CLR 1 at 14-18 [10]-[17] per French CJ.

34 2 & 3 Will IV c 45, s 26.

35 (2010) 243 CLR 1 at 15 [12].

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

enrolments or transfers before polling day, albeit there were variations in the cut-off dates[37].

18 Enrolment and voting for federal elections from 1902 were regulated by the *Commonwealth Electoral Act* 1902 (Cth) and the *Commonwealth Franchise Act* 1902 (Cth). Section 3(1) of the present Act provided that these Acts and several amending Acts were to be repealed on dates fixed by proclamation, a process which concluded in 1934. Between 1902 and 1983 the Rolls closed on the day the writs for an election were issued. From at least the 1930s an executive practice developed of announcing the election a few days before the Governor-General was asked to dissolve Parliament and issue writs for the election of the Members of the House of Representatives. This administrative practice provided a grace period enabling persons wishing to enrol or transfer enrolment to do so before the issue of the writs.

19 In 1983 the statutory cut-off point for consideration of claims for enrolment or transfer of enrolments was extended beyond the date of the issue of the writs to the date of close of the Rolls, which was fixed as seven days after the issue of the writs[38]. The objective was "to make it easier for electors to get on the rolls and stay on the rolls"[39]. The Act was further amended in 2006 so that a claim for enrolment received between 8 pm on the date of the issue of the writs for an election and the close of polling for that election could not be considered until after the close of polling for the election. Transfer claims could be considered if they were received before 8 pm on the day of the close of the Rolls, which was fixed as the third working day after the issue of the writs[40]. However, following the decision in *Rowe* in which those amendments were held to be invalid, the text of the Act was amended to restore the seven day grace period[41].

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

38 *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth).

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

40 *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth), Sched 1 items 41 and 52.

41 *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act* 2011 (Cth), Sched 1 items 2-8.

Practical operation of the impugned provisions

20 To provide an indication of the practical impact of the suspension period, the special case included a table of the numbers of claims for new and updated enrolments received during that period for the 2004, 2007, 2010 and 2013 federal elections. They were as follows:

	Inter-State transfer	Intra-Division transfer	Intra-State transfer	New enrolment	Enrolment update (no change of address)	Total
2004	9831	0	72279	60597	21329	164037
2007	6352	0	67469	48235	21579	143636
2010	8644	0	86947	44636	21504	161733
2013	10241	76708	46430	52694	42512	228585

There were no unresolved objections at the beginning of the suspension periods in 2004 and 2007, but there were 22,579 in 2010. That figure was high because the Australian Electoral Commission did not anticipate the calling of the election. The figure at the 2013 election was 2,975.

21 The figures set out in the special case were said by the plaintiffs to demonstrate the magnitude of the practical "burden" that the impugned provisions imposed upon the constitutional mandate of popular choice. They were said to represent the lower limits of the number of persons effectively disenfranchised by the suspension period for each of the elections to which they related. There were potentially, it was suggested, additional persons who did not make claims because they knew of the suspension period, advice about it having been provided on the Australian Electoral Commission website. In the end, the significance of these figures depended upon the resolution of a fundamental difficulty with the plaintiffs' case arising out of the character of the impugned provisions as long-standing time limits for settlement of the Rolls prior to an election.

The plaintiffs' reliance upon *Roach* and *Rowe*

22 The plaintiffs submitted that:

1. A law which has the practical operation of effecting a legislative disqualification from what otherwise is the popular choice mandated by the Constitution is invalid unless the disqualification is for a substantial reason.

2. Such a law will be for a substantial reason only if it is reasonably appropriate and adapted to serve an end which is consistent or compatible with the constitutionally mandated system of representative government.

Those submissions were based upon the decisions of this Court in *Roach* and *Rowe*. The impugned provisions were said to be invalid in light of them.

23 In *Roach*, the Court was concerned with the validity of amendments to the Act, enacted in 2004 and 2006, disqualifying sentenced prisoners from voting at federal elections. The 2004 amendment disqualified persons serving sentences of three years or more. The 2006 amendment disqualified any person serving a sentence of imprisonment regardless of duration. The Court held the former disqualification to be valid and the latter disqualification to be invalid. *Roach* involved a law directly affecting the qualification of a person to be enrolled and to vote. Further, the law which was held invalid in that case had imposed a disqualification upon a class of persons not previously disqualified from voting.

24 In *Rowe*, the Court was concerned with the validity of the amendments to the Act, made in 2006, which had the effect of precluding consideration of a claim for enrolment or transfer of enrolment where the claim for enrolment was lodged after the issue of the writs and where the claim for transfer of enrolment was lodged after the close of the Rolls. The amendments removed the pre-existing seven day grace period allowing enrolment after issue of the writs and significantly abridged the opportunities for electors to transfer their enrolments[42].

25 The impugned laws in this case were similar to the impugned laws in *Rowe* only to the extent that they both provided for suspension periods during which claims for enrolment, transfers of enrolment, objections and corrections to the Roll could not be considered. The significant difference was that, unlike the present case, *Rowe* concerned laws which reduced existing opportunities for enrolment or transfer of enrolment prior to an election. The plaintiffs' case depended upon a generalisation of *Roach* and *Rowe* and a characterisation of the impugned provisions as imposing a burden upon the realisation of the constitutional mandate of choice by the people.

Some general propositions

26 There are three key propositions derived from the text of the Constitution which lie at the threshold of the special case:

1. Sections 7 and 24 of the Constitution provide that the members of the Senate and the House of Representatives shall be directly chosen, "by the people of the State" in the case of the Senate and "by the people of the Commonwealth" in the case of the House of Representatives.

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42 (2010) 243 CLR 1 at 12 [3] per French CJ.

2. Sections 8 and 30 of the Constitution, read with s 51(xxxvi), empower the Parliament to make laws providing for the qualification of voters[43]. It was the exercise of that power which was in issue in *Roach*.

3. Sections 10 and 31 of the Constitution, read with s 51(xxxvi), confer upon the Parliament power to make laws relating to the election of Senators and Members of the House of Representatives[44]. It was the exercise of that power which was in issue in *Rowe* and is in issue in this case.

27 While the limits of the legislative powers considered in *Roach* and *Rowe* were variously expressed by the majority Justices in those cases, they reflected an essentially common approach to the criterion of validity.

28 In *Roach*, Gleeson CJ held that the contemporary understanding of the constitutional term "chosen by the people" required nothing less than universal adult suffrage[45]. Parliament's power to define exceptions to that requirement was limited by the negative criterion that[46]:

> "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." (footnote omitted)

Gleeson CJ's use of the term "substantial reason" was a borrowing from Brennan CJ in *McGinty v Western Australia*[47]. Brennan CJ observed that, unaffected by context, "chosen by the people" admitted of different meanings including "some requirement of a franchise that is held generally by all adults or all adult citizens unless there be substantial reasons for excluding them."[48]

29 The word "substantial" appears in the common law and in statutes in areas as diverse as defamation, intellectual property, contract, criminal law,

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43 (2007) 233 CLR 162 at 173 [6] per Gleeson CJ.

44 (2010) 243 CLR 1 at 14 [8] per French CJ.

45 (2007) 233 CLR 162 at 174 [7].

46 (2007) 233 CLR 162 at 174 [7].

47 (1996) 186 CLR 140 at 170; [1996] HCA 48. A criterion foreshadowed, as Gageler J points out in his reasons at [84], in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 36, 69; [1975] HCA 53.

48 (1996) 186 CLR 140 at 170.

competition law and wills. It directs its readers' attention from form to substance. It generally indicates a narrowing qualification in some otherwise broadly expressed legal criterion and, according to context, may be a cautionary direction about the limits of the judicial power.

30 Plainly, neither Brennan CJ in *McGinty* nor Gleeson CJ in *Roach* meant the term "substantial reason" to be at large. Gleeson CJ said[49]:

> "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."

A rational connection between exclusion from the right to vote and community membership might be found in conduct manifesting such a rejection of civic responsibility as to warrant temporary withdrawal of a civic right[50]. Within that general framework, Gleeson CJ held the indiscriminate exclusion of all sentenced prisoners from the right to vote to be invalid. The notion of rational connection thus explained is embedded in the requirement for a "reason" in the term "substantial reason". It precludes arbitrary exclusions or exclusions not founded in any relevant normative or practical objective. The requirement of substantiality means that disqualifying legislation cannot be justified solely on the basis that the exclusions it creates have a formal, logical connection with the purpose it purports to serve.

31 The other members of the majority in *Roach*, Gummow, Kirby and Crennan JJ, like Gleeson CJ, quoted Brennan CJ's reference in *McGinty* to "substantial reasons" for excluding adults or adult citizens from the franchise[51]. They said that a reason would be "substantial" if it was, in language familiar in Australian public law, "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government."[52] It did not require a justification of the exclusion as "essential" or "unavoidable". Rather, the

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49 (2007) 233 CLR 162 at 174 [8].

50 (2007) 233 CLR 162 at 175 [8].

51 (2007) 233 CLR 162 at 198 [83].

52 (2007) 233 CLR 162 at 199 [85].

criterion of a "substantial reason" imported a notion of proportionality in the sense that[53]:

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

The terminology "reasonably appropriate and adapted" in this context marks the limits of legislative power and the borderlands of the judicial power. As Gleeson CJ observed in *Mulholland v Australian Electoral Commission*[54]:

> "For a court to describe a law as reasonably appropriate and adapted to a legitimate end is to use a formula which is intended, among other things, to express the limits between legitimate judicial scrutiny, and illegitimate judicial encroachment upon an area of legislative power."

32 Gleeson CJ referred to the long Australian history of judicial application of the term "reasonably appropriate and adapted" originally derived from the judgment of Marshall CJ in *McCulloch v Maryland*[55]. Four Justices of this Court said in *McCloy v New South Wales*[56] that, as used in Australian law, it describes a class of criteria developed over many years to determine whether legislative or administrative acts are within the constitutional or legislative grant of power under which they purport to have been done[57]. Such criteria have been applied to test the validity of the exercise of purposive powers[58], incidental powers, which

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53 (2007) 233 CLR 162 at 199 [85].

54 (2004) 220 CLR 181 at 197 [33]; [2004] HCA 41.

55 (2004) 220 CLR 181 at 199-200 [39] citing 4 Wheat 316 at 421 (1819).

56 (2015) 89 ALJR 857; 325 ALR 15; [2015] HCA 34 (French CJ, Kiefel, Bell and Keane JJ).

57 (2015) 89 ALJR 857 at 863 [3] per French CJ, Kiefel, Bell and Keane JJ; 325 ALR 15 at 19.

58 *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 130, 138-139 per Mason J, 172 per Murphy J, 232 per Brennan J, 259-260 per Deane J; [1983] HCA 21; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 295-296 per Mason CJ and Brennan J, 303 per Wilson J, 311-312 per Deane J, 336 per Toohey J, 344-346 per Gaudron J; [1988] HCA 10; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 37-40 [55]-[60] per French CJ; [2013] HCA 3.

must serve the purposes of the substantive powers to which they are incidental[59], and powers whose exercise may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom, including the implied freedom of political communication[60]. An extensive discussion of the history and application of the criterion appears in the judgment of Kiefel J in *Rowe*[61].

33 A law which excludes a class of adult citizens from an existing right of participation in a federal election and thus reduces the extent to which the election represents a choice of representatives "by the people" might be thought to fall into a category analogous with laws limiting or restricting the enjoyment of a constitutional guarantee, immunity or freedom. Such a law may be tested for validity under the general criterion — is it reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government? The particular aspect of the system of representative government in play in such a case is the mandate of choice by the people. It is true that the criterion does not set out "precise metes and bounds" which chart the generality of that mandate and which Parliament in the exercise of its powers to determine exceptions to or disqualifications from the franchise must respect[62]. Nevertheless it is a criterion of a kind long used in Australian courts in a variety of settings.

34 In *Rowe*, the impugned law diminished the opportunities for enrolment and transfer of enrolment which existed prior to its enactment[63]. French CJ characterised it as thereby effecting a "significant detriment in terms of the constitutional mandate", which would have to be weighed "against the legitimate

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59 *Davis v The Commonwealth* (1988) 166 CLR 79 at 98-100 per Mason CJ, Deane and Gaudron JJ, 101 per Wilson and Dawson JJ agreeing, 117 per Toohey J agreeing; [1988] HCA 63; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 30-31 per Mason CJ, 78 per Deane and Toohey JJ, 101 per McHugh J, 95 per Gaudron J agreeing with Mason CJ and McHugh J; [1992] HCA 46.

60 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 472 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ; [1990] HCA 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568; [1997] HCA 25; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 476-477 [101]-[103] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ; [2008] HCA 11.

61 (2010) 243 CLR 1 at 133-139 [431]-[455].

62 (2007) 233 CLR 162 at 206 [113] per Hayne J.

63 (2010) 243 CLR 1 at 38 [78].

purposes of the Parliament" which it was said to serve[64]. The detriment was "disproportionate to the benefits of a smoother and more efficient electoral system to which the amendments were directed."[65] That approach did not set up a sui generis test of validity. It provided an answer to the question whether the impugned law, notwithstanding its legal effect, was reasonably appropriate and adapted to serve a legitimate purpose of the Parliament consistent with the prescribed system of representative government. It was adopted in the context of an acceptance of the approach of the majority in *Roach*, including the proposition that a "substantial reason" for an exception to the franchise is needed in order to satisfy the general proportionality criterion[66]. The proportionality criterion was expressly applied by Gummow and Bell JJ. As their Honours pointed out, the Commonwealth in that case accepted that if the legal or judicial operation of a law was to disqualify adult citizens from enrolling and thus from exercising their franchise, the consistency of that law with ss 7 and 24 of the Constitution was to be determined in accordance with the reasoning in *Roach*[67]. Thus the consideration upon which the Commonwealth relied had to supply "a substantial reason in the sense used in the reasons of the two majority judgments in *Roach*."[68] Their Honours said that once it was shown that the 2006 amendments in issue in *Rowe* had the practical operation of effecting a legislative disqualification from participation in the popular choice mandated by the Constitution, the relevant question was that propounded by Gleeson CJ in *Roach*: "whether ... there has been broken the rational connection necessary to reconcile the disqualification with the constitutional imperative"[69]. Their Honours equated that question, via the term "substantial reason" used by Gleeson CJ, with the question formulated by Gummow, Kirby and Crennan JJ in *Roach* and expressed in terms of the general proportionality criterion[70].

35 Crennan J, the other member of the majority in *Rowe*, read ss 7 and 24 of the Constitution as mandating a franchise which would result in a democratic representative government, a concept the content of which had evolved to require

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64 (2010) 243 CLR 1 at 38 [78].

65 (2010) 243 CLR 1 at 39 [78].

66 (2010) 243 CLR 1 at 20-21 [23]-[25].

67 (2010) 243 CLR 1 at 56-57 [151].

68 (2010) 243 CLR 1 at 58 [157].

69 (2010) 243 CLR 1 at 59 [161] citing (2007) 233 CLR 162 at 182 [24].

70 (2010) 243 CLR 1 at 59 [161].

"a fully inclusive franchise — that is, a franchise free of arbitrary exclusions based on class, gender or race."[71] The impugned provisions in *Rowe* were not shown to be necessary or appropriate for the protection of the integrity of the Rolls, the purpose advanced in that case by the Commonwealth[72]. Her Honour there used the word "necessary" as not limited to what was essential or unavoidable but encompassing what was "'reasonably appropriate and adapted' to serve a legitimate end."[73]

36 As appears from the above, in their various ways the reasons of the majority in *Rowe* fell within the same general rubric of proportionality long applied in Australian public law. The Commonwealth in this case also accepted the applicability of that general rubric, and did not take issue with the result in *Rowe*.

37 A structured approach to the application of the general proportionality criterion to a law said to burden the implied freedom of political communication was recently set out in the joint judgment in *McCloy*. It was invoked by the plaintiffs in support of their case. That approach, foreshadowed in the judgment of Kiefel J in *Rowe*[74], involved an unpacking of the question whether a law found to burden the implied freedom, and to do so for a legitimate purpose, was "reasonably appropriate and adapted to advance that legitimate object"[75]. The analysis used to answer the proportionality question was undertaken by reference to three considerations drawn from the approach of European and, in particular, German courts[76]:

1. Suitability — whether the law had a rational connection to the purpose of the provision — a criterion which reflects that adopted by Gleeson CJ in *Roach*.

2. Necessity — whether there was an obvious and compelling alternative, reasonably practicable means of achieving the same purpose with a less restrictive effect on the freedom.

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71 (2010) 243 CLR 1 at 117 [367].

72 (2010) 243 CLR 1 at 120 [384].

73 (2010) 243 CLR 1 at 118 [374].

74 (2010) 243 CLR 1 at 140-142 [460]-[466].

75 (2015) 89 ALJR 857 at 862-863 [2]; 325 ALR 15 at 19.

76 (2010) 243 CLR 1 at 140 [460] per Kiefel J.

3. Adequacy in its balance — whether the extent of the restriction imposed by the impugned law was outweighed by the importance of the purpose it served.

The adoption of that approach in *McCloy* did not reflect the birth of some exotic jurisprudential pest destructive of the delicate ecology of Australian public law. It is a mode of analysis applicable to some cases involving the general proportionality criterion, but not necessarily all. For example, as Kiefel J observed in *Rowe*[77]:

> "A test of reasonable necessity, by reference to alternative measures, may not always be available or appropriate having regard to the nature and effect of the legislative measures in question."

In *Davis v The Commonwealth*[78], *Nationwide News Pty Ltd v Wills*[79] and *Australian Capital Television Pty Ltd v The Commonwealth*[80], as her Honour observed, want of proportionality was assessed by reference to a range of factors.

38 The three considerations relevant to proportionality set out in *McCloy* are capable of application to laws burdening or infringing a constitutional guarantee, immunity or freedom. In the case of the constitutional mandate of choice by the people, they may be relevant depending upon the character of the law said to diminish the extent of the realisation of that mandate. Apart from the suitability requirement, they do not have universal application in determining whether a law, a delegated legislative instrument or an administrative act is a valid exercise of the relevant grant of power, being reasonably appropriate and adapted to serve the purpose of the grant.

39 The plaintiffs in the present case were concerned with provisions reflecting long-standing limits on the times at which a qualified person could be registered on the Roll. Theirs was not a case about a law reducing the extent of the realisation of the constitutional mandate. It was ultimately a complaint that the legislation did not go far enough in the provision of opportunities for enrolment. The difficulty confronting their case was demonstrated by their attempt to apply the necessity consideration in *McCloy* by reference to what were said to be obvious and compelling legislative alternatives. One was enrolment up

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77 (2010) 243 CLR 1 at 136 [445].

78 (1988) 166 CLR 79.

79 (1992) 177 CLR 1 at 31.

80 (1992) 177 CLR 106; [1992] HCA 45.

to and including polling day, said to be demonstrated by the electoral systems of three Australian States. Another was a reduction of the suspension period by making it a fixed number of days counted back from polling day. These arguments invited the Court to undertake an hypothetical exercise of improved legislative design by showing how such alternatives could work. In so doing, they invited the Court to depart from the borderlands of the judicial power and enter into the realm of the legislature. The *McCloy* analysis was inapposite in this case.

Conclusions

40 The plaintiffs submitted that:

> "Any effective burden on the constitutional mandate of popular choice (such as a requirement to enrol in a particular manner or at a particular time, or even to vote in a particular manner or at a particular time) is constitutionally suspect and will be invalid unless justified by reference to a permissible substantial reason. The extent of the burden will inform the extent of justification required, but there should be no narrow approach to what constitutes an effective burden." (footnote omitted)

And further:

> "Many burdens may be justifiable, but they must ultimately serve 'the end of making elections as expressive of the popular choice as practical considerations properly permit'." (footnote omitted)

The notion of a "burden", which was central to the plaintiffs' argument, was indicative of the difficulty they had in seeking to generalise from the case of a change to the law adverse to the exercise of the franchise, to the omission of the legislature to maximise opportunities for the exercise of the franchise.

41 The suspension period is a design feature of the Act, which has existed for a long time and for legitimate reasons. As was submitted for the Commonwealth, by making participation in the electoral process dependent upon membership of the single class of persons defined as "electors" by reference to the content of the Rolls on the date upon which they are closed, the orderly and efficient conduct of elections is advanced. The legislative scheme establishes the Rolls as the means of defining the class of eligible participants in the choice by the "people" to which ss 7 and 24 of the Constitution refer. It defines not only those who can vote on polling day but those who can nominate or be nominated[81] or have their details provided to candidates so that campaign material may be

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81 Act, s 163.

provided[82]. It defines those who can cast a postal vote and a pre-poll vote[83] and have a provisional vote admitted to scrutiny[84].

42 It may be that in the light of modern technology, with appropriate electronic infrastructure and human and financial resources, a system could be devised which would allow enrolments to occur and alterations to be made to the Rolls up to and including polling day. Proposals for change have been made by the Australian Electoral Commission[85] and by the Joint Standing Committee on Electoral Matters[86], which were referred to in the special case, as were the legislative schemes in New South Wales, Victoria and Queensland. The plaintiffs also invoked the scheme in Queensland in support of a further "alternative" whereby the commencement of the suspension period would be determined by counting a fixed number of days backwards from the date of an election, rather than by counting forwards from the date of issue of the writs. The existence of such possibilities does not support a characterisation of the design limits of the existing Act as a "burden" upon the realisation of the constitutional mandate of popular choice. The impugned provisions do not become invalid because it is possible to identify alternative measures that may extend opportunities for enrolment. That would allow a court to pull the constitutional rug from under a valid legislative scheme upon the court's judgment of the feasibility of alternative arrangements. The plaintiffs' premise that the suspension period reflects a burden on the constitutional mandate of popular choice was not made out. The failure of that premise was fatal to the plaintiffs' attempts to generalise *Roach* and *Rowe* in support of their argument.

Answers to questions

43 The answers to the questions in the special case in which we joined were as follows:

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82 Act, s 90B.

83 Act, ss 183 and 200A, Sched 2.

84 Act, s 235.

85 Australia, Australian Electoral Commission, "Submission to the Joint Standing Committee on Electoral Matters on the Conduct of the 2010 Federal Election", (21 February 2011) at 61-63.

86 Australia, The Parliament, Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the Conduct of the Election and Related Matters*, (June 2011) at 37.

Question 1:

Do one or both of the first plaintiff and the second plaintiff have standing to seek the relief sought in paragraphs 1, 2, 3 and/or 4 of the Further Amended Application for an Order to Show Cause?

Answer:

The second plaintiff has standing and it is otherwise unnecessary to answer the question with respect to the first plaintiff.

Question 2:

Are any or all of sections 94A(4), 95(4), 96(4), 102(4), 103A(5), 103B(5) and 118(5) of the *Commonwealth Electoral Act 1918* (Cth) contrary to ss 7 and 24 of the Constitution and therefore invalid?

Answer:

No.

Question 3:

If the answer to Question 2 in relation to a section is yes, do sections 152(1)(a) and 155 of the Act have the same or substantially the same operation or effect as the impugned provisions or any of them and, if so, are sections 152(1)(a) and 155 invalid and of no effect?

Answer:

The question does not arise.

Question 4:

If the answer to Question 2 or Question 3 in relation to a section is yes, is that section, or are those sections, severable from the rest of the Act?

Answer:

The question does not arise.

Question 5:

What if any relief should be granted?

Answer:

None.

Question 6:

Who should pay the costs of the special case?

Answer:

The first plaintiff.

44 KIEFEL J. The plaintiffs challenged the validity of certain provisions of the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act"). They contended that these provisions are contrary to ss 7 and 24 of the Constitution. At the conclusion of the hearing of this matter the Court answered the questions which had been stated for it, the effect of which was that the provisions were held not to be invalid. I joined in the answers given by the Court. These are my reasons for doing so.

The provisions in question

45 The provisions sought to be impugned by the plaintiffs fell into two main categories. Sections 94A(4), 95(4), 96(4), 102(4) and 103B(5) provide that a person's name must not be added to the Electoral Roll for a Division during the period between 8:00pm on the day of the close of the Electoral Rolls and the close of the poll for the election ("the suspension period"). Sections 102(4) and 103A(5) provide that a claim for a transfer of enrolment must not be considered until after the end of the suspension period. The commencement of the suspension period is marked out by ss 152(1) and 155. Section 155 provides that the date fixed for the close of the Rolls is the seventh day after the date of the writ for the election, which is provided for in s 152(1).

46 The practical effect of these provisions is that when a writ for a federal election issues, a person who is not enrolled has seven days within which to do so or they will not be on the Roll and as a consequence not able to vote; and a person who wishes to transfer their enrolment to another Division has seven days within which to do so, otherwise they will not be able to vote in the Division in which they live.

47 The other provision which the plaintiffs challenged was s 118(5), which provides that a person's name must not be removed from the Electoral Roll during the suspension period. The plaintiffs sought to use this provision in aid of a submission concerning the distortion of the Rolls as a result of the suspension period. It is not directly relevant to questions of validity of the other impugned provisions.

48 A period of seven days has been provided for by statute for new enrolments, or transfers of enrolment, after the issue of the writs for the election ("the grace period") continuously since 1983, with one exception. The Electoral Act was amended in 2006 so as to remove the grace period for new enrolments and to limit the grace period to only three days for transfers of enrolment. The provisions effecting those changes were held to be invalid by a majority of the

Court in *Rowe v Electoral Commissioner*[87] and the changes were subsequently removed. The position now is that which was maintained prior to *Rowe*.

Standing

49 The first plaintiff was in fact enrolled to vote at a federal election. The Commonwealth challenged his standing to maintain these proceedings on the basis that he did not seek to have his rights or interests clarified by the orders he sought[88]. The second plaintiff was subsequently joined to the proceedings. She intended to nominate as a candidate for election to the House of Representatives. Section 166 of the Electoral Act requires a candidate in her position to be nominated by 100 persons whose names appear on the Electoral Rolls and are entitled to vote at the election for which the candidate is nominated. This provided the second plaintiff with a sufficient interest in the matter before the Court for standing, as the Commonwealth conceded. It is not necessary therefore to address the position of the first plaintiff.

The plaintiffs' argument

50 The plaintiffs relied upon what they described as a principle established in *Roach v Electoral Commissioner*[89] and *Rowe*, that a law which disqualifies a person from exercising the choice mandated by the Constitution is invalid unless the disqualification is for a substantial reason. It will be for a substantial reason only if it is "reasonably appropriate and adapted" to secure an end which is consistent and compatible with the maintenance of the constitutionally prescribed system of representative government. The plaintiffs sought to incorporate into this test of proportionality those tests stated in *McCloy v New South Wales*[90] as tools of analysis used in that case with respect to legislation which burdens the implied freedom of political communication.

51 The larger part of the plaintiffs' submissions in this matter were concerned with testing for proportionality. Their principal submission in this regard was that there are reasonably practicable alternative means available which would provide for a longer period of enrolment. In the first place, they contended that there is no reason why a person should not be permitted to enrol up to and including polling day. This could be achieved given advances in technology and without the requirement of substantial further resources. The second alternative

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87 (2010) 243 CLR 1; [2010] HCA 46.

88 See *Croome v Tasmania* (1997) 191 CLR 119 at 127; [1997] HCA 5.

89 (2007) 233 CLR 162; [2007] HCA 43.

90 (2015) 89 ALJR 857; 325 ALR 15; [2015] HCA 34.

was to calculate a suspension period back from polling day, rather than forward from the date of the issue of the writs. New South Wales and Victoria permit enrolment up to and including polling day; and in Queensland a person can enrol up to the night before polling day. It is to be inferred that the essential premise of the plaintiffs' argument is that legislation will not be valid unless it ensures that the maximum number of people are able to vote at elections.

Roach and *Rowe*

52 The concentration of the plaintiffs' submissions on proportionality testing reflects their assumption that this case is not materially different from the circumstances in *Roach* and *Rowe*. That assumption is not correct. *Roach* was concerned with legislation which disqualified prisoners from voting at federal elections. This case has a closer affinity to *Rowe*, but only by degree and without the particular aspect of the legislation there in question. As mentioned earlier, the legislative provisions in *Rowe* removed or substantially limited the grace period which had been in place since 1983, and the basis for its removal was contentious.

53 It must, however, be acknowledged that *Roach* and *Rowe* effected something of a turning in the law. Sections 7 and 24, in their reference to "chosen by the people", had been understood to refer to direct and popular choice. It had been accepted that the Constitution left it to the Parliament to legislate with respect to our system of representative government. The ability of Parliament to legislate necessarily extends to questions such as who is qualified to be elected, who may be the electors and a system for conducting elections. These matters are reflected in the provisions of the Electoral Act.

54 The majority judgments in *Roach*, upon which the majority judgments in *Rowe* were largely founded, recognised a limitation on legislative power with respect to the eligibility of persons to vote. The limitation was founded upon perceptions about the franchise, as being held generally by all adults and, implicitly, entrenched as such in conceptions of representative government[91].

55 The arguments of the parties in *Rowe* applied the joint judgment in *Roach* and addressed two questions. The first was whether the provisions in question disentitle, exclude or disqualify any citizen otherwise entitled to vote from voting. The second was whether any such disqualification was for a substantial

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91 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 173-174 [6]-[7] per Gleeson CJ, 198 [80], [83], 199-200 [86], 202 [95] per Gummow, Kirby and Crennan JJ.

reason or is disproportionate[92]. It was to those two topics that my reasons, in dissent, in *Rowe* were directed.

56 In *Rowe*, no disqualification or disenfranchisement such as that dealt with in *Roach* was in issue. However, the majority in *Rowe* proceeded upon the basis that a law which permits little time after the writs for the election have issued to enrol or transfer enrolment is also subject to the requirement that it be justified. Such a law was considered effectively to disentitle[93], disqualify[94] or exclude[95] persons otherwise qualified to be enrolled as electors from voting.

57 In *Rowe* the justification for the changes to the Electoral Act was said by the Commonwealth to be found largely in a report of the Joint Standing Committee on Electoral Matters with respect to the 2004 federal election[96]. However, the majority in *Rowe* did not consider that the laws were proportionate. French CJ[97] said that if a law's adverse legal or practical effect upon the exercise of the entitlement to vote is disproportionate to its advancement of the constitutional mandate, it may be invalid. His Honour did not accept some of the practical reasons put forward in the report as to why the earlier cut off had to be made, such as dealing with electoral fraud or encouraging electors to enrol or apply in time[98], and considered that the "heavy price" imposed by the amendments was disproportionate to the benefits of a smoother and more efficient electoral system which the amendments sought to achieve[99]. Gummow and Bell JJ also did not accept that the purpose of preventing systemic fraud, put forward as justification for the legislation, supplied a substantial reason for disqualifying a large number of electors and held that this disqualification went

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92 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 4-8.

93 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 12 [3] per French CJ, 119 [381], 121 [384] per Crennan J.

94 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 58 [160], 61 [167] per Gummow and Bell JJ.

95 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 119 [381] per Crennan J.

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

97 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 12 [2].

98 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 38 [75].

99 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 38-39 [78].

beyond any advantage to be gained to the integrity of the electoral process[100]. Crennan J did not consider the provisions to be either necessary or appropriate for the protection of the integrity of the Rolls[101]. There was no substantial reason for the amendments, in her Honour's view.

58 A further observation may also be made about *Roach* and *Rowe*, as relevant to the plaintiffs' argument. Neither of those decisions is authority for the proposition that it is a constitutional imperative that the maximum number of persons entitled to be enrolled and vote have the opportunity to be enrolled and vote.

Applying *Roach* and *Rowe*

59 The Commonwealth did not submit in these proceedings that *Roach* and *Rowe* were wrongly decided. This Court was asked to proceed upon the basis that they are to be applied.

60 The Commonwealth submitted that the first requirement of these decisions was not met. There was no disqualification because persons eligible to enrol were entitled to enrol before and during the grace period; they had a duty to do so; and they had been reminded by the announcement of the election to do so. Whilst I am attracted to such a submission – it reflects the view I took in *Rowe*[102] – it seems to me to repeat an argument which was implicitly rejected by the majority in *Rowe*, which considered that any detriment to, or burdening of, the ability to vote had to be justified. This is the topic to which I should now turn.

Justification?

61 The joint reasons in *Roach* required that there be a substantial reason for provisions which effect a disqualification from the entitlement to vote and that that requirement would be satisfied if the means adopted were not disproportionate to the legitimate end which they sought to achieve[103]. That is to say, a "substantial reason" implies something more than the means being for a legitimate purpose. Even so, to state that there is a substantial reason for a statutory provision, without more, is to state a conclusion in which there inheres a value judgment in respect of which no reasoning is exposed.

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100 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 61 [167].

101 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 120-121 [384].

102 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 128 [411].

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

62 Since the decisions in *Roach* and *Rowe*, this Court has confirmed the usefulness of traditional proportionality tests as tools of analysis in determining the limits of legislative power where legislation has the effect of restricting the implied freedom of political communication[104]. Amongst the reasons given for the adoption of that approach were that the question of justification should not turn on a matter of impression and that it should not be stated as a mere conclusion of proportionality, absent reasons[105].

63 The Commonwealth and South Australia, intervening to support the Commonwealth, made the obvious point that this case does not involve legislation affecting the implied freedom. On the other hand, the effect of the reasoning in *Roach* is that legislative power which burdens the franchise is to be justified. The reasoning applied in the joint judgment in *Roach* was based upon notions of representative democracy derived from ss 7 and 24 of the Constitution which had been employed in *Lange v Australian Broadcasting Corporation*[106]. The requirement of "proportionality", which was considered in *Roach*[107] to inhere in the question whether the disqualification of electors was for a "substantial reason", was said to have an "affinity" to what is called the second question in *Lange*[108]. And of course it was by reference to the questions posed by *Lange* that proportionality testing came to be applied, to an extent in *Unions NSW v New South Wales*[109], and then more fully in *McCloy*.

64 The alternative to utilising the tests stated in *McCloy* in order to conclude whether the provisions here were made for a "substantial reason" would be to ask whether they are "reasonably appropriate and adapted" to their legitimate end. This is a test more commonly utilised with respect to determining whether legislation is within a purposive head of power, but it has also been described and used as a kind of proportionality test for laws which affect constitutionally guaranteed freedoms. However, it does not identify any method by which one is to reason to a conclusion that a law is "reasonably appropriate and adapted". It must necessarily involve value judgments, as any form of proportionality testing

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104 *McCloy v New South Wales* (2015) 89 ALJR 857; 325 ALR 15.

105 *McCloy v New South Wales* (2015) 89 ALJR 857 at 875 [75], [77]; 325 ALR 15 at 35.

106 (1997) 189 CLR 520; [1997] HCA 25.

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

108 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [86].

109 (2013) 252 CLR 530; [2013] HCA 58.

must do, but, absent a method, such judgments and the method of reasoning are not required to be exposed by this test.

65 The aim of any testing for proportionality is to ascertain the rationality and reasonableness of a legislative restriction[110] in a circumstance where it is recognised that there are limits to legislative power. Proportionality analysis does not involve determining policy or fiscal choices, which are the province of the Parliament. Thus the test of whether there are alternative, less restrictive means available for achieving a statutory object, which assumes some importance in this case, requires that the alternative measure be otherwise identical in its effects to the legislative measures which have been chosen. It will not be equal in every respect if it requires not insignificant government funding[111].

66 The Roll is at the centre of the Commonwealth electoral system. Electors are defined as those persons whose names appear on the Roll[112]. Enrolment is the single qualification for voting on polling day, or by pre-polling or postal vote. Claims to enrolment are required to be made within a short time of a person becoming eligible for enrolment, on pain of penalty[113]. Claims for enrolment are investigated and determined[114] and objections to enrolment dealt with[115].

67 The Electoral Commissioner is obliged to prepare a certified list of persons who are entitled to vote for each Division and to deliver it to the presiding officer at each polling place before the commencement of voting[116]. The Commissioner may also provide an "approved list", which is a list in electronic form containing the same information as the most recent certified list[117]. A "Notebook Roll" is also maintained by the Australian Electoral Commission. It is not required by the Electoral Act. It is used in practice to deal

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110 *McCloy v New South Wales* (2015) 89 ALJR 857 at 873 [68]; 325 ALR 15 at 33.

111 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 324-325.

112 *Commonwealth Electoral Act* 1918 (Cth), s 4(1).

113 *Commonwealth Electoral Act* 1918 (Cth), s 101.

114 *Commonwealth Electoral Act* 1918 (Cth), s 102.

115 *Commonwealth Electoral Act* 1918 (Cth), ss 113-118.

116 *Commonwealth Electoral Act* 1918 (Cth), s 208.

117 *Commonwealth Electoral Act* 1918 (Cth), s 208A.

with applications for enrolment or changes to the Roll received before the suspension period but which have not been processed before the certified lists have been printed. It facilitates the scrutiny of provisional votes, which can be made where a person's name or address does not appear on the certified lists but the person declares that they are enrolled[118].

68 It is in this scheme that the closure of the Roll is to be considered. The Roll is closed seven days after the writs for election issue and shortly before the first step in the electoral process (nomination) occurs[119].

69 In the scheme established by the Electoral Act it is evident that there are practical reasons why the Roll is closed to further enrolment or transfer. It enables a number of steps to be undertaken to facilitate the efficient conduct of an election. The closure of the Roll prior to the commencement of the election process ensures there will be few delays in declaring election results, which would occur if persons were entitled to enrol at a point close to, or on, polling day. It achieves accuracy and certainty in the lists which are able to be produced when polling does take place. The provisions for the closure of the Roll bear a rational connection to their purposes[120].

70 It is appropriate to consider alternative statutory schemes in order to determine whether there are alternative, equally practicable means of achieving these purposes without closing the Rolls or closing them at the point presently provided for. This was the approach taken by the Court in *Betfair Pty Ltd v Western Australia*[121], where Tasmanian legislation on the same topic as the impugned Western Australian legislation showed that the legislative purpose could be achieved without restricting the freedom of interstate trade and commerce guaranteed by s 92 of the Constitution.

71 Until relatively recently, all of the States and Territories followed the Commonwealth model, allowing for the closure of the Rolls some days after the issue of the writs for the election, and this closure had the effect of suspending the processing of claims for new enrolments and transfer of enrolments. Legislation in Queensland and Victoria continues to provide that the Rolls close a specified number of days after the writs are issued[122]. However, in Queensland,

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118 *Commonwealth Electoral Act* 1918 (Cth), s 235.

119 *Commonwealth Electoral Act* 1918 (Cth), ss 155, 156.

120 *Unions NSW v New South Wales* (2013) 252 CLR 530.

121 (2008) 234 CLR 418; [2008] HCA 11.

122 *Electoral Act* 2002 (Vic), s 63(3); *Electoral Act* 1992 (Q), s 84(1)(b).

a person who is not enrolled may enrol or transfer their enrolment up to 6.00pm on the day before polling day if they are entitled to be, but are not, enrolled. Such persons must make a declaration vote at the polling booth[123]. In Victoria a person who is not enrolled on polling day, but claims to be entitled to be enrolled, may make a provisional vote despite the fact that the Rolls are "closed"[124]. The New South Wales legislation goes further: under it, the Roll does not close and the entitlement to vote does not depend upon enrolment[125]. In each of these States, the Roll is not in any final form at the conclusion of polling and claims to enrolment made in connection with a declaration or provisional vote must be determined after polling day and before the election result is announced.

72 Reference to these other statutory schemes shows that there is more than one electoral system to choose from. It does not show that these systems are capable of achieving the same objectives that the Electoral Act does. They reflect policy choices of those States' legislatures, which no doubt balance the delays and costs, which must inevitably be associated with keeping the Roll open, against other objectives.

73 It cannot be concluded that the systems chosen elsewhere would be as efficient as that which operates under the Electoral Act, with the level of certainty which is achieved by the closure of the Rolls and the suspension period. Nor can it be concluded on the facts available that adopting such a system would not require additional resources – for example, by way of staff and computer equipment – and therefore further funding by government. The alternative systems cannot therefore be said to be equally practicable.

74 Finally, it may be observed that the effect of the suspension period in closing the Rolls for enrolments and transfers is balanced by the certainty and efficiencies which are achieved. In this regard it is appropriate to take into account that many, if not most, of the persons who will be unable to enrol are already in breach of their obligation to do so and that persons who have transferred to, but are not yet enrolled in, another Division retain the ability to vote in their former Division[126].

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123 *Electoral Act* 1992 (Q), ss 106(1)(d), 115(d).

124 *Electoral Act* 2002 (Vic), s 108; Electoral Regulations 2012 (Vic), reg 41.

125 *Parliamentary Electorates and Elections Act* 1912 (NSW), s 106(2A).

126 *Commonwealth Electoral Act* 1918 (Cth), ss 229, 231, 235.

75 GAGELER J. Professor Albert Venn Dicey saw the Australian Constitution as rigid, but noted that its rigidity is tempered in three ways. One is the "very wide legislative authority" with which the Commonwealth Parliament is endowed. Another is that the Constitution provides the means for its own alteration. The other is that a large number of provisions of the Constitution remain in force only "until the Parliament otherwise provides": "they can therefore be changed like any other law by an Act of Parliament passed in the ordinary manner; in other words, the constitution is as to many of its provisions flexible"[127].

76 The flexibility to which Professor Dicey drew attention is not unbounded. It is expressly constrained by the terms in which s 51(xxxvi) of the Constitution confers authority on the Parliament to make laws with respect to "matters in respect of which this Constitution makes provision until the Parliament otherwise provides". Like other conferrals of legislative authority, that authority is conferred "subject to this Constitution".

77 This special case was concerned with three matters falling within the scope of the authority conferred by s 51(xxxvi). One matter, in respect of which provision is made in s 30, is the qualification of electors of members of the House of Representatives. Provision in respect of that matter has a consequential effect through s 8, which makes the qualification of electors of senators the same as the qualification of electors of members of the House of Representatives. The other matters are the method of election of senators, for which provision is made in s 9, and the method of election of members of the House of Representatives, for which provision is made in s 31. Those other matters overlap in practice with the first; they always have.

78 Legislation enacted by the Parliament under s 51(xxxvi) has always provided that, in order to vote at an election for the Senate or the House of Representatives, a person must be enrolled on the Electoral Roll for an Electoral Division. That was so under the *Commonwealth Electoral Act* 1902 (Cth) and remained so under the *Commonwealth Electoral Act* 1918 (Cth) ("the Act").

79 Enrolment on the Electoral Roll for an Electoral Division under the Act involves the taking of administrative action to enter a person's name on that Roll[128]. Taking that administrative action ordinarily depends on that person making a claim for enrolment or for transfer of enrolment[129]. The person is

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127 Dicey, *Introduction to the Study of the Law of the Constitution*, 6th ed (1902) at 481-482. See now Allison (ed), *The Law of the Constitution by A V Dicey*, (2013) at 333.

128 Section 102.

129 Sections 98(1), 99(1) and (2).

obliged to make such a claim forthwith on becoming entitled to do so as a consequence of meeting pre-requisites as to age, Australian citizenship, and residence in (or other relevant connection to) a Subdivision of the Electoral Division[130]. Only a person whose name appears on a Roll meets the statutory definition of an "elector"[131] and only a person who is an elector has an entitlement to vote at an election[132]. The result is that "[e]nrolment is not merely evidence of an elector's qualification to vote; enrolment is itself a qualification to vote"[133].

80 The scheme of the Act is to make the close of the Rolls on a fixed date a step in the conduct of an election for the Senate or the House of Representatives. Together with dates for nomination, polling and return, a date for the close of the Rolls must be fixed by the writ for an election[134]. The date fixed by the writ for the close of the Rolls must be the seventh day after the issue of the writ[135]. Only persons whose names appear on the Rolls as electors at the close of the Rolls can vote in the election whether on polling[136] or by pre-poll[137] or postal vote[138]. In the conduct of the polling, the Rolls are conclusive evidence of the right of each person enrolled as an elector to be admitted to vote[139]. The Court of Disputed Returns, if required to adjudicate a dispute about the election following the return of the writ, must assume the Roll to be correct and is prevented from inquiring into its correctness[140]: the Court cannot "go behind the Electoral Roll and

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130 Sections 93 and 101(1).

131 Section 4(1).

132 Section 93(2).

133 *Muldowney v Australian Electoral Commission* (1993) 178 CLR 34 at 40; [1993] HCA 32.

134 Section 152(1).

135 Section 155.

136 Part XVI.

137 Part XVA.

138 Part XV.

139 Section 221.

140 Section 361.

determine whether a person who is not on the roll is none the less entitled to be on the roll"[141].

81 The issue for substantive determination in the special case concerned the validity of the currently legislated time for cutting off enrolment before an election. That time is 8.00pm on the date fixed for the close of the Rolls. The cut-off is implemented by provisions having the effect of suspending all administrative action directed to enrolment from that time until the close of the poll for the election[142] with the result that claims for enrolment or transfer made during that period are not to be processed until after the election. Those provisions, which the plaintiffs impugned, were inserted into the Act in 2011 and 2012[143].

82 Stripped of distractions of detail and ignoring some vagueness of temporal focus, the plaintiffs' essential argument was that cutting off enrolment before an election at 8.00pm on the date fixed for the close of the Rolls was not within the authority conferred on the Parliament by s 51(xxxvi). That timing of the cut-off was said to be repugnant to the requirements of ss 7 and 24 of the Constitution that senators and members of the House of Representatives be "directly chosen by the people". The repugnance was argued to lie in the cut-off of enrolment at that time resulting in the practical exclusion from voting of some people entitled to enrolment without substantial justification.

83 Unable to accept that argument, I joined in formally answering the substantive questions posed in the special case to the effect that the provisions imposing the cut-off are not repugnant to ss 7 and 24 of the Constitution. My reasons are as follows.

84 The major premise of the plaintiffs' argument must be accepted; acceptance is compelled by unchallenged authority. The view that the constitutional phrase "directly chosen by the people" might import "some requirement of a franchise that is held generally by all adults or all adult citizens unless there be substantial reasons for excluding them" was canvassed by

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141 *Snowdon v Dondas* (1996) 188 CLR 48 at 75; [1996] HCA 27, quoting *Re Brennan; Ex parte Muldowney* (1993) 67 ALJR 837 at 840; 116 ALR 619 at 623; [1993] HCA 53.

142 Sections 94A(4), 95(4), 96(4), 102(4), 103A(5), 103B(5) and 118(5).

143 *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act* 2011 (Cth); *Electoral and Referendum Amendment (Maintaining Address) Act* 2012 (Cth); *Electoral and Referendum Amendment (Protecting Elector Participation) Act* 2012 (Cth).

Brennan CJ in *McGinty v Western Australia*[144]. The view had been foreshadowed by three members of the Court in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[145]. The view was subsequently taken up and acted upon by differently constituted majorities of four members of the Court in *Roach v Electoral Commissioner*[146] and in *Rowe v Electoral Commissioner*[147], in each case holding provisions of the Act repugnant to the requirements of ss 7 and 24 and therefore beyond the authority conferred on the Parliament by s 51(xxxvi) of the Constitution.

85 A substantial reason, equating to a substantial justification, for an exclusion from the franchise was seen by the majority in each of *Roach* and *Rowe* to require the provisions effecting the exclusion to be judged "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government"[148]. That standard was acknowledged to be one bearing "affinity"[149] to the second limb of the test articulated in *Lange v Australian Broadcasting Corporation*[150] as reformulated in *Coleman v Power*[151] for determining compatibility of a provision which effects a restriction of political communication with the implied constitutional freedom of political communication.

86 The exclusion from the franchise held to lack substantial justification in *Roach* was a legal disqualification from voting of persons answering a given description: persons serving a sentence of imprisonment for an offence against a

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144 (1996) 186 CLR 140 at 170; [1996] HCA 48.

145 (1975) 135 CLR 1 at 36, 69; [1975] HCA 53.

146 (2007) 233 CLR 162 at 174 [7], 182 [23], 198-199 [83], 199-200 [85]-[86]; [2007] HCA 43.

147 (2010) 243 CLR 1 at 19-21 [23]-[26], 56-62 [150]-[168], 118-121 [372]-[385]; [2010] HCA 46.

148 *Roach* (2007) 233 CLR 162 at 182 [24], 199 [85]; *Rowe* (2010) 243 CLR 1 at 20-21 [25], 38-39 [78], 58-59 [160]-[161], 120-121 [384].

149 *Roach* (2007) 233 CLR 162 at 199 [86].

150 (1997) 189 CLR 520 at 567; [1997] HCA 25.

151 (2004) 220 CLR 1 at 51 [95], 77-78 [196], 90-91 [236]; [2004] HCA 39. See *Roach* (2007) 233 CLR 162 at 199 [86].

law of the Commonwealth or of a State or Territory[152]. The exclusion from the franchise held to lack substantial justification in *Rowe* was a practical impediment to voting created by provisions which at that time set the cut-off for enrolment at 8.00pm on the day of the issue of the writ[153], and the cut-off for transfer of enrolment three working days later[154]. The provisions held invalid in each of those cases had been newly inserted into the Act in 2006[155].

87 Why the requirements of ss 7 and 24 of the Constitution that senators and members be directly chosen by the people should invalidate legislative provisions which operate without substantial justification to impose legal or practical exclusions from the franchise is not difficult to explain. The explanation can be no different from that given for why those same requirements invalidate legislative provisions which operate without substantial justification to impose legal or practical restrictions on communication pertaining to the exercise of the franchise. "The great underlying principle" of the Constitution "that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power"[156] must inform the core operation of ss 7 and 24 in guaranteeing participation in the political process to no lesser extent than the same principle informs the penumbral operation of those sections in guaranteeing freedom of political communication. Hence the affinity of the test of substantial justification adopted in *Roach* and *Rowe* to the second limb of the test for compatibility with the implied freedom of political communication articulated in *Lange*.

88 "Three great principles, representative democracy (by which I mean that the legislators are chosen by the people), direct popular election, and the national character of the lower House, may each be discerned in the opening words of s 24." The force of that observation, made by Stephen J in *McKinlay*[157], applies equally to the opening words of s 7, addressed to the composition of the Senate. His Honour continued:

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152 Section 93(8AA) of the Act as it appeared in *Roach*.

153 Section 102(4) as it appeared in *Rowe*.

154 Sections 102(4AA) and 155(1) as they appeared in *Rowe*.

155 *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth).

156 Harrison Moore, *The Constitution of the Commonwealth of Australia*, (1902) at 329, referred to in *McCloy v New South Wales* (2015) 89 ALJR 857 at 867 [27]-[28], 880 [110], 899 [219]; 325 ALR 15 at 24, 43, 67; [2015] HCA 34.

157 (1975) 135 CLR 1 at 56.

> "The principle of representative democracy does indeed predicate the enfranchisement of electors, the existence of an electoral system capable of giving effect to their selection of representatives and the bestowal of legislative functions upon the representatives thus selected. However the particular quality and character of the content of each one of these three ingredients of representative democracy, and there may well be others, is not fixed and precise."

89 Imprecision is a characteristic of the conception of representative democracy captured by that observation. That characteristic must be embraced for the conception to be understood and applied. The "high purpose" of the requirements of ss 7 and 24 of the Constitution that senators and members of the House of Representatives be directly chosen by the people, to adopt language once used by McHugh J, is "to ensure representative government by insisting that the Parliament be truly chosen in a democratic election by that vague but emotionally powerful abstraction known as 'the people', a term whose content will change from time to time"[158]. The Constitution commits to the judiciary, in the last instance, the function of ensuring fidelity to a very large constitutional idea. To attempt to pin it down more tightly would be to fail to grasp its meaning; it defies being diced or squashed to fit within a judicially constructed box.

90 The very nature of the conception enshrined in the language of ss 7 and 24 means that the point at which a choice by electors, for which provision is made in a law enacted by the Parliament under s 51(xxxvi), ceases to be describable as a choice by the people cannot be determined "in the abstract", must be a "question of degree" and must be a question which "depends in part upon the common understanding of the time"[159].

91 The understanding of the time, however, is not a concern of the moment or a hope for the future. What informs the content of the constitutional conception from time to time is the relatively stable and enduring understanding of the nature of our system of representative government, to be discerned by reference to the course of our national development up until that time.

92 What is therefore of critical importance is that judicial discernment of the content of the requirements of ss 7 and 24 that senators and members be directly chosen by the people have regard to stable and enduring developments that have occurred within our system of representative government.

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158 *Langer v The Commonwealth* (1996) 186 CLR 302 at 342; [1996] HCA 43.

159 *McKinlay* (1975) 135 CLR 1 at 36.

93 Of equal importance is that judicial enforcement of those requirements be sensitive to the inherent strengths and weaknesses of institutional structures. The legislative authority conferred on the Parliament by s 51(xxxvi), it must always be borne in mind, falls to be exercised by the Senate and the House of Representatives as constituted at the time of that exercise, either each voting separately by majority[160] or voting together in a joint sitting by absolute majority[161].

94 Responding in 1988 to terms of reference which required it to inquire into and report on the potential for revision of the Constitution to "adequately reflect Australia's status as ... a Federal Parliamentary democracy", the Constitutional Commission (chaired by Sir Maurice Byers QC and including Professor Enid Campbell, the Hon Sir Rupert Hamer, the Hon Edward Gough Whitlam QC and Professor Leslie Zines) stated in its Final Report[162]:

> "Democracy, like other forms of government, has to do with power relationships – the power which different people, in different capacities, have over one another. What distinguishes a democracy from other forms of government is that the people who are to be governed have an opportunity to decide, freely and at regular intervals, who is to have authority to govern them and according to what policies. The people express their choices by voting at periodic elections of candidates for legislative office, and sometimes other governmental offices as well. The franchise – entitlement to vote – in a democratic system is broadly based and each elector has only one vote."

The Constitutional Commission went on to state that "[a] democratic system of government is commonly thought to require a good deal more than the basic elements" described by Stephen J in *McKinlay*. "The electoral system", they stated, "has to ensure that electors are able to vote freely so that 'neither the incumbent government nor any other group can determine the electoral result by means other than indications of how they will act if returned to power.'"[163]

95 Underlying the relationship between judicial enforcement of the requirements of ss 7 and 24 that senators and members be directly chosen by the

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160 Sections 23 and 40 of the Constitution.

161 Section 57 of the Constitution.

162 Australia, *Final Report of the Constitutional Commission*, (1988), vol 1 at 127 [4.10].

163 Australia, *Final Report of the Constitutional Commission*, (1988), vol 1 at 127 [4.12].

people, on the one hand, and legislative exercise of the wide and flexible authority conferred by s 51(xxxvi) in respect of the qualification of electors and the conduct of elections, on the other hand, is the inherent potential for that legislative authority to be exercised to exclude from the political process persons whose participation is unwanted by, or inconvenient to, those who currently form majorities in the Senate and the House of Representatives. That point was made by Gummow and Hayne JJ when they observed that an appreciation of the interests involved is assisted by reference to the United States experience captured in the observation of Professor Laurence Tribe that "[f]ew prospects are so antithetical to the notion of rule by the people as that of a temporary majority entrenching itself by cleverly manipulating the system through which the voters, in theory, can register their dissatisfaction by choosing new leadership"[164].

96 *Roach* and *Rowe* illustrate the judiciary's role in safeguarding against the introduction by a current Parliament of restrictions on the franchise which would unjustifiably compromise the representative nature of a future Parliament. Those cases do not point to some broader judicial mandate.

97 Cutting off enrolment at 8.00pm on the day of the close of the Rolls has the practical effect of excluding, from voting in a particular election, persons who are entitled to enrol yet who through ignorance or inertia do not claim to enrol before that cut-off. The imposition of the cut-off having been challenged by the plaintiffs as incompatible with the core operation of ss 7 and 24, the substantive question raised for judicial determination was therefore whether that exclusion was for a substantial reason.

98 The problem for the plaintiffs was at the next level of the analysis. The problem was exacerbated by the plaintiffs' treatment of the question of whether there was a substantial justification for the exclusion as one which needed to be answered through the application of standardised "proportionality testing".

99 That approach led the plaintiffs to advance stylised propositions, acceptance of any one of which, they argued, was enough to show that the cut-off fell foul of the constitutional requirement for choice by the people. The propositions were advanced in cascading form.

100 There was, the plaintiffs put as their first proposition, "no rational connection" between the legislated cut-off for enrolment and what they accepted to be the legitimate legislative goal of ensuring enrolment before voting; the administrative processes required to be undertaken in order to ensure the conduct of an orderly election had not been shown to need so much time between

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164 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 237-238 [157]; [2004] HCA 41.

enrolment and voting. There were, the plaintiffs next put, "less restrictive means" of achieving the legitimate legislative goal of ensuring enrolment before voting which would give more time for enrolment; a viable alternative, variations of which have recently been adopted in electoral laws in some States, would be to permit enrolment up to or including on the day of polling. Finally, said the plaintiffs, the legislated cut-off was "not adequate in its balance"; such benefit as the cut-off might produce in terms of orderly electoral administration was outweighed by the detriment it caused in terms of the numbers of persons who are entitled to enrol yet do not claim enrolment before the cut-off.

101 My reservations about the appropriateness of importing such a structured and prescriptive, and ultimately open-ended, form of proportionality testing into our constitutional setting have been expressed elsewhere[165]. The plaintiffs' attempt to shoehorn their argument within it highlights the inappropriateness of attempting to apply such a form of proportionality testing here. What is at best an ill-fitted analytical tool has become the master, and has taken on a life of its own.

102 I can accept that each of the inquiries into which the plaintiffs invited the Court to enter is within the Court's institutional competence. What I cannot accept is that entering into any of those inquiries, other than what might perhaps be regarded as a variation of the first of them, is warranted by performance of the Court's constitutional role in the circumstances of this case.

103 Left out of the plaintiffs' analysis, or at least pushed to the bottom (to bob up if at all only at the final stage of balancing), is the important consideration that closure of the Rolls is and has always been a step in the conduct of an election under our national electoral law. From 1902 to 1983 the Rolls closed on the day of issue of the writ, albeit that an executive practice of announcing an election some days before the issue of the writ resulted in a "period of grace" in which to claim enrolment from at least the 1930s. Closure of the Rolls on the seventh day after the issuing of a writ was introduced in 1983[166], extending the statutory period for enrolment that had existed until then. The effect of the decision in *Rowe*, declaring relevant 2006 amendments to the Act to be invalid, was to continue the position introduced in 1983 until formally replaced by the challenged provisions in 2011 and 2012. Nothing of substance has changed.

104 The impugned provisions do no more than give contemporary expression to a standard incident of the traditional legislative scheme for the orderly conduct of national elections. That is the reason for them, and that reason is substantial.

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165 *McCloy v New South Wales* (2015) 89 ALJR 857 at 885-888 [141]-[152]; 325 ALR 15 at 49-52.

166 *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth).

Whether or not cutting off enrolment at a fixed time seven days after the issue of a writ might be regarded as outmoded, that cut-off is not so unfit for the purpose for which it was long ago designed that it can no longer be said to be reasonably appropriate and adapted to serve that purpose.

105 Stricter scrutiny is not warranted, and greater justification is not required. Unlike *Roach* and *Rowe*, this is not a case in which provisions impugned have expanded an exclusion from the franchise.

106 Recall that the provisions held invalid in each of *Roach* and *Rowe* were novel when introduced into the Act in 2006. Extrinsic material in *Roach* showed that the new disqualification from voting of all persons serving any sentence of imprisonment for an offence could be foreseen to result in the disenfranchisement from time to time of perhaps up to 10,000 persons, many of them indigenous, who were serving short terms of imprisonment yet otherwise entitled to vote. The agreed facts in *Rowe* demonstrated that the new contraction of the cut-off for enrolment to the date of the issue of the writs resulted at the 2010 general election in disenfranchising about 100,000 persons who had then made claims for enrolment after the issue of the writs and before the close of the Rolls. The agreed facts also allowed for the inference to be drawn that the burden of that disenfranchisement was shouldered by persons newly qualified for enrolment in the age bracket of 18 to 25.

107 The point of recalling those circumstances is not to dwell on the absolute numbers of those disenfranchised but rather to indicate the tendency of the disenfranchisement in each of *Roach* and *Rowe* to freeze out of the political process discrete minority interests. That tendency engaged to a significant degree the central concern underlying the constitutional tampering of the Parliament's wide and flexible authority to determine the qualification of electors and the method of election through insistence on a judicially enforceable core requirement that senators and members of the House of Representatives remain directly chosen by the people.

108 The circumstances of those cases are a long way from the circumstances of this case. The most that could be said in this case was that the agreed facts supported an inference that significantly more persons could have been expected to enrol in time to vote at the 2013 and 2016 general elections if the time of the cut-off for enrolment, reimposed in 2011, had not been that introduced in 1983 but some other time closer to or including the time of polling.

109 There was an agenda that should be acknowledged. Under the guise of inviting the Court to assess the rationality of the timing of the cut-off, to examine the availability of less restrictive alternative means of achieving its purpose, and to weigh the adequacy of its balance, the plaintiffs would have had the Court engage in a process of electoral reform. Through the application of an abstracted top-down analysis, they would have had the Court compel the Parliament to

maximise the franchise by redesigning the legislative scheme to adopt what the plaintiffs put forward currently to be best electoral practice.

110 To seek to compel such a result by those means might be all well and good in a constitutional system in which a function of the judiciary is understood to be the enhancement of political outcomes in order to achieve some notion of Pareto-optimality[167]. That is not our system. The plaintiffs' efforts to expand the franchise would be better directed to the Parliament than to the Court.

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167 Eg Alexy, *A Theory of Constitutional Rights*, (2002) at 105; Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 364-365.

111 KEANE J. The plaintiffs challenged the validity of certain sections of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"). Their contention was that the sections of the Act that suspend the enrolment of persons who seek to enrol to vote in federal elections, and the transfer of enrolment of persons already enrolled, during the period from 8 pm on the day of the close of the rolls for the election until the completion of polling ("the suspension period") are contrary to ss 7 and 24 of the Constitution.

112 Enrolment has been a condition of the right to vote since Federation[168]. Enrolment was voluntary until the obligation on adult citizens to enrol was introduced in 1911[169]. Voting was voluntary until the obligation to vote was introduced in 1924[170]. The roll has been used to identify those persons who are obliged to vote since the introduction of compulsory voting. The roll has been, and is, used to determine whether a person has the support of a sufficient number of electors to be nominated as a candidate for election[171]. The roll must be available for public inspection to allow for objections to be made to the enrolment of a person[172]. The roll also serves to identify persons entitled to cast a vote before polling day[173].

113 Since Federation, the rolls for federal elections have always closed before polling day. Between 1902 and 1983, rolls for federal elections closed on the day the writs for a general election were issued. In 1983, the *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth) ("the 1983 Amendment Act") introduced a period of time between the issue of the writs and the close of the rolls ("the grace period") during which claims for enrolment or transfer of enrolment could be accepted. This was a period of seven days after the issue of the writs.

114 The grace period was removed for new enrolments and "significantly abridged for transfers of enrolment"[174] by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth) ("the 2006

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168 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 17 [16]; [2010] HCA 46.

169 *Commonwealth Electoral Act* 1911 (Cth), s 8.

170 *Commonwealth Electoral Act* 1924 (Cth), s 2.

171 *Commonwealth Electoral Act* 1918 (Cth), s 166(1)(b).

172 *Commonwealth Electoral Act* 1918 (Cth), ss 90A, 114-118.

173 *Commonwealth Electoral Act* 1918 (Cth), ss 200A, 200BA, 200C, 200D.

174 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 12 [3].

Amendment Act"). In *Rowe v Electoral Commissioner*[175], two citizens challenged certain provisions of the 2006 Amendment Act: one had turned 18 shortly before the 2010 election had been announced and had not been enrolled when the writs for that election had issued; and the other had moved from one electoral division to another and his claim to transfer his enrolment had been lodged after the rolls had closed under the 2006 Amendment Act. This Court upheld their challenge to the validity of those provisions. Subsequently, the Act was amended to restore the grace period[176].

The proceedings

115 The plaintiffs contended that, notwithstanding the legislative restoration of the grace period, the suspension period impedes enrolment, which in turn reduces the opportunity for citizens to vote. The plaintiffs did not challenge the requirement of enrolment as a qualification to vote, but contended that the failure of the Act to provide for enrolment on polling day is contrary to the Constitution, and renders the suspension period invalid.

116 Thus, the plaintiffs argued that the suspension period, moderated by the grace period, which has been part of our electoral law since 1983 (save for the life of the challenged provisions of the 2006 Amendment Act), must now be seen to operate as a burden on the choice by the people required by the Constitution. This argument depends on two propositions: first, that an electoral law which does not maximise the opportunity of every potential voter to enrol to vote is inconsistent with choice by the people as contemplated by ss 7 and 24 of the Constitution; and secondly, that this inconsistency has emerged over time to invalidate laws (which may previously have been valid) by reason of changes in the technological resources available to maximise voting opportunities. Neither of these propositions should be accepted. This Court's decision in *Rowe* does not require a different conclusion.

117 Pursuant to r 27.08 of the High Court Rules 2004 (Cth), the plaintiffs and the second defendant ("the Commonwealth") agreed to state questions of law for the opinion of the Court in a special case. At the conclusion of the hearing of this matter, the Court answered the questions posed by the parties as follows:

Question 1: Do one or both of the first plaintiff and the second plaintiff have standing to seek the relief sought in paragraphs 1, 2, 3 and/or 4 of the Further Amended Application for an Order to Show Cause?

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175 (2010) 243 CLR 1.

176 By the *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act* 2011 (Cth).

Answer: The second plaintiff has standing and it is otherwise unnecessary to answer the question with respect to the first plaintiff.

Question 2: Are any or all of sections 94A(4), 95(4), 96(4), 102(4), 103A(5), 103B(5) and 118(5) of the *Commonwealth Electoral Act 1918* (Cth) contrary to ss 7 and 24 of the Constitution and therefore invalid?

Answer: No.

Question 3: If the answer to Question 2 in relation to a section is yes, do sections 152(1)(a) and 155 of the Act have the same or substantially the same operation or effect as the impugned provisions or any of them and, if so, are sections 152(1)(a) and 155 invalid and of no effect?

Answer: The question does not arise.

Question 4: If the answer to Question 2 or Question 3 in relation to a section is yes, is that section, or are those sections, severable from the rest of the Act?

Answer: The question does not arise.

Question 5: What if any relief should be granted?

Answer: None.

Question 6: Who should pay the costs of the special case?

Answer: The first plaintiff.

118 The following are my reasons for joining in the answers given by the Court. It is necessary to begin by summarising the impugned provisions of the Act in the context of the Act as a whole.

The Act and the impugned provisions

Overview

119 The Act establishes the structure by which the choice by the people is to be made. By way of overview, it may be noted that the Act provides for the entitlement to vote, the creation of the electoral roll and the enrolment of voters, objections to enrolment, voting, counting and scrutiny of votes, the number of members of the House of Representatives, the creation of electoral divisions ("Divisions") for the House of Representatives, the registration of political

parties and the nomination of candidates. All these matters are germane to the choice by the people contemplated by ss 7 and 24 of the Constitution.

120 Section 4(1) defines terms used in the Act. Relevantly, an "Elector" is "any person whose name appears on a Roll as an elector." The "Roll" is "an Electoral Roll under this Act." A "declaration vote" is a "postal vote", a "pre-poll declaration vote", an "absent vote", or a "provisional vote".

121 Part II of the Act provides for the administrative functions of the Australian Electoral Commission ("the AEC"), the Electoral Commissioner ("the Commissioner") and staff of the AEC. Part III provides for the representation of the States and Territories in the Senate and the House of Representatives. Part IV provides for the distribution of each State and Territory into Divisions. There is currently no Division that is divided into Subdivisions. Accordingly, references in the Act to a Subdivision should be read as references to the relevant Division.

122 Sections 81 and 82 provide that there shall be a roll of the electors for each State and for each Territory and a roll for each Division. Section 83 provides for the form of the rolls. Section 111 permits the Commissioner to record or store particulars of a roll on a mechanical or electrical device.

123 Section 93 provides that persons who have attained 18 years of age and who are Australian citizens are entitled to be added to a roll for a Division. Section 98 provides that names may be added to a roll pursuant to claims for enrolment or transfer of enrolment.

124 Sections 99B and 100 allow persons who are due to be granted citizenship between the issue of the writs and polling day, or who are due to attain the age of 18 years in that period, to enrol to vote at the election.

125 Section 101(1) provides that, subject to exceptions not presently relevant, any person who is entitled to be enrolled for any Division "whether by way of enrolment or transfer of enrolment, and whose name is not on the Roll, shall forthwith fill in and sign a claim and send or deliver the claim to the ... Commissioner." Section 101(4) provides that, subject to an exception which is presently immaterial, every person "who is entitled to have his or her name placed on the Roll" whose name is not on the roll at the expiration of 21 days from the date on which the person became so entitled commits an offence.

126 Section 102 provides that the Commissioner must, upon receipt of a claim for enrolment or transfer, enter the claimant's name on the roll or notify the claimant that the claim is not in order and has been rejected. The Commissioner may also make any inquiries that he or she thinks necessary before dealing with a claim.

127 Section 114 provides for objections to enrolment. Electors may make objections to the enrolment of another person. The Commissioner shall object to the enrolment of a person if there are reasonable grounds for believing that the person is not entitled to be enrolled. The determination of objections to enrolment is dealt with by the process set out in ss 116 and 118.

128 Pursuant to ss 12, 32 and 33 of the Constitution, an election commences upon the issue of writs for elections. Section 152(1) of the Act provides that the writs for the election of senators for States, senators for Territories or members of the House of Representatives shall fix the date for: the close of the rolls; the nomination; the polling; and the return of the writs. Section 155 of the Act fixes the date for the close of the rolls as seven days after the date on which the writs are issued.

129 Section 208(1) provides that the Commissioner must arrange for a certified list of voters for each Division. Section 208(2) provides that the list must include the name of each person who is on the roll for the Division, will be at least 18 years old on polling day and is not excluded from voting because the person is serving a sentence of imprisonment of three years or longer. Section 208(3) provides that the Commissioner must deliver to the presiding officer at each polling place, before the start of voting, a copy of the certified list for the Division.

130 An "approved list" is defined in s 4(1) to mean a list in electronic form that contains the same information as the most recent certified list of voters for a Division and is approved by the Commissioner for use in connection with voting under the Act. Section 208A provides that the Commissioner may arrange for the preparation of approved lists and make such lists available for use by an officer in connection with voting under the Act.

131 Outside of the scheme of the Act, the AEC also maintains a version of the rolls known as the "Notebook Roll". The Notebook Roll is used to manage applications for enrolment or changes to the roll, including the removal of electors and reinstatement of eligible voters, received before the suspension period but not processed before the printing of the lists. The Notebook Roll is electronic and can be printed for use by AEC officials. The purpose of maintaining the Notebook Roll is to assist in processing updates to the roll in order to facilitate the scrutiny of declaration votes.

132 Declaration votes include provisional votes under s 235, which applies to a person claiming to vote if the person's name cannot be found on the certified or approved lists for the Division in which the person claims to vote, or because of some other procedural irregularity in the person's details on the lists, or due to the person's responses to certain questions about the person's details on the lists, or if the person is provisionally enrolled. Section 235(2) provides that a person to whom s 235 applies may cast a provisional vote if the person signs a declaration

in the approved form directed to the Divisional Returning Officer ("DRO") for the Division in which the person claims to be enrolled.

133 Part XXII of the Act deals with disputed elections and returns. It provides, by s 354, for a Court of Disputed Returns, the jurisdiction of which is enlivened by a petition under s 355. By virtue of s 361(1), the jurisdiction of the Court of Disputed Returns does not extend to an inquiry "into the correctness of any Roll."

The impugned provisions

134 Section 102(1) provides that, where the Commissioner receives a valid claim for enrolment or transfer of enrolment pursuant to s 101, the Commissioner must enter the name of the claimant on the roll for the Division in respect of which the claim was made. Subject to an exception for delays caused by postal service malfunction, s 102(4) provides that a claim under s 101 will not be considered if it is received during the suspension period.

135 Section 94A provides for the application for enrolment of persons outside Australia who intend to resume residing in Australia.

136 Section 95 provides for the application for enrolment of the spouse, de facto partner or child of an eligible overseas elector.

137 Section 96 provides for the application for enrolment of itinerant electors.

138 Sub-section (4) of each of ss 94A, 95 and 96 provides that the Commissioner must not add to the roll the name of any person who makes an application for enrolment under those sections that is received by the Commissioner during the suspension period.

139 Section 103A(5) provides that where a person lives at an address other than the person's address entered on a roll, the Commissioner must not take action to enter the person's name on a new roll within the suspension period.

140 Section 103B(5) provides that where a person is entitled to enrolment and has lived at an address in a Division for at least one month and is not enrolled, the Commissioner must not take action to enter the person's name on the roll for the relevant Division within the suspension period.

141 Section 118(5) provides that where an objection is made pursuant to s 114 to the enrolment of a person for a Division, the Commissioner must not remove a person's name from the roll for a Division within the suspension period.

The Constitution

142 It is necessary now to refer to ss 7 and 24 of the Constitution and to the context in which they appear.

143 Section 7 of the Constitution provides, relevantly:

> "The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate."

144 It may be noted that the language in which s 7 is cast treats the direct choice by the people of each State as something different from the activity of voting. Significantly, given that the plaintiffs' argument proceeded upon the view that choice by the people is synonymous with voting, the activity of voting is spoken of in s 7 as an aspect, indeed an essential aspect, but not the totality, of the choice by the people.

145 Section 41 of the Constitution confirms that the choice by the people contemplated by ss 7 and 24 is not co-extensive with voting, at least in so far as the right to vote is conferred by federal law. It provides relevantly that:

> "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 … be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth."

146 Section 24 of the Constitution provides, relevantly:

> "The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators."

147 It may be noted here that the references in ss 7 and 24 to *direct* choice by the people were included to ensure that modes of indirect representation, such as selection by State legislatures or by an electoral college, not be adopted by the Parliament[177].

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177 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 21, 44, 56, 61; [1975] HCA 53; *McGinty v Western Australia* (1996) 186 CLR 140 at 279; [1996] HCA 48.

148 Section 8 of the Constitution provides:

> "The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once."

149 This provision (together with ss 9, 27, 29 and 30) is a vital part of the context in which ss 7 and 24 appear in the Constitution. The terms of s 8 make it clear that the electors for the Senate were not required by the Constitution to be all the people of the Commonwealth.

150 Section 9 of the Constitution provides, relevantly:

> "The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States."

151 Section 27 of the Constitution provides:

> "Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives."

152 Section 29 of the Constitution provides, relevantly:

> "Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division."

153 Section 30 of the Constitution provides:

> "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."

154 It was left by the Constitution to the Parliament to determine, subject to s 41 of the Constitution, the qualifications, for example, of age and gender, of the electors through whom the choice by the people would be made. As Gummow J said in *McGinty v Western Australia*[178]:

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178 (1996) 186 CLR 140 at 279.

"the selection of those from among the population who were to be empowered to make the electoral choice was left by s 24 to s 30 of the Constitution."

155 And so, at Federation, although infants and women were indisputably people of the Commonwealth, they were not qualified as electors[179]. Nor was it thought that choice by the people of the Commonwealth required compulsory voting by all of the people who might be qualified to vote[180].

156 The provision for Parliament to "otherwise provide" in ss 29 and 30 reflects a deliberate decision to allow the Parliament to choose the form of representative government and the electoral system by which it would be established[181]. In this regard, s 51(xxxvi) of the Constitution provides that the Commonwealth Parliament may make laws with respect to matters in respect of which the Constitution "makes provision until the Parliament otherwise provides".

157 Sections 12, 32 and 33 of the Constitution provide for writs to be issued for elections of senators for each State, general elections of the House of Representatives and vacancies in the House of Representatives. A writ commands the Commissioner to hold an election and states the dates for the close of the rolls, the close of nominations, the polling day and the date for the return of the writ. Under s 12, the State Governors issue the writs for the States' Senate elections, which by convention follows a request by the Governor-General, and s 32 provides that writs issued by the Governor-General in Council for general elections of members of the House of Representatives "shall be issued within ten days from the expiry of a House of Representatives or from the proclamation of a dissolution thereof." These provisions contemplate a process which commences with the issue of the writs for the elections.

158 It was left to the Parliament to address the issues which arise in relation to the organisation of the structure and operation of the process whereby the choice

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179 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 173-174 [5]-[6]; [2007] HCA 43.

180 *Judd v McKeon* (1926) 38 CLR 380 at 383, 385, 390-391; [1926] HCA 33.

181 *McGinty v Western Australia* (1996) 186 CLR 140 at 184, 269, 280-282; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 [6], 207 [64], 236-237 [154]; [2004] HCA 41; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 22 [29], 49-50 [125], 121 [386].

by the people was to be made. As was said by French CJ, Kiefel, Bell and Keane JJ in *McCloy v New South Wales*[182]:

> "Sections 7 and 24 contemplate legislative action to implement the enfranchisement of electors, to establish an electoral system for the ascertainment of the electors' choice of representatives[183] and to regulate the conduct of elections 'to secure freedom of choice to the electors'.[184]"

The plaintiffs' submissions

159 As noted earlier, the plaintiffs took no issue with enrolment as a necessary condition of the entitlement to vote; they argued that, because enrolment on polling day is now technologically possible, the constitutional mandate to maximise voting opportunity now requires nothing less than the adoption of polling day enrolment.

160 Citing the reasons of Gummow and Bell JJ in *Rowe*[185], the plaintiffs argued that a burden on voting is justifiable in terms of ss 7 and 24 only if it serves "the end of making elections as expressive of the popular choice as practical considerations properly permit." They argued that the practical effect of the impugned provisions is the same as the provisions struck down in *Rowe* in that they prevent enrolment to vote by persons who would otherwise be entitled to vote.

161 The plaintiffs argued that the suspension of enrolment prior to polling day, even moderated by the grace period, can now be seen, by reason of the practical possibility of maximising the number of voters, to be a burden on the choice by the people of a State or a Division. The plaintiffs then argued that the validity of the burden on the constitutional mandate should be determined by a test which bears an affinity to the second limb of the test articulated in *Lange v Australian Broadcasting Corporation*[186] and applied by this Court in *McCloy*.

162 Applying that analysis, the plaintiffs submitted that there are two obvious and compelling alternatives to the suspension period which could be adopted to

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182 (2015) 89 ALJR 857 at 869 [42]; 325 ALR 15 at 27; [2015] HCA 34.

183 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 56; *McGinty v Western Australia* (1996) 186 CLR 140 at 182.

184 *Smith v Oldham* (1912) 15 CLR 355 at 358; [1912] HCA 61.

185 (2010) 243 CLR 1 at 57 [154].

186 (1997) 189 CLR 520 at 567; [1997] HCA 25.

achieve the same end without impeding the constitutional mandate to maximise the opportunity of citizens to vote[187]. The first would be to permit enrolment up to and including polling day, as may now occur under the electoral laws of the States of New South Wales and Victoria. The second alternative would be to provide a suspension period calculated back from the date of the election rather than forwards from the date of the writs. This would permit people to enrol or update their enrolments for a longer period than under the impugned provisions. An example of this alternative was said to be afforded by the law in Queensland, where people can enrol for State elections until 6 pm on the day before the election.

The Commonwealth's submissions

163 In the Commonwealth's submission, it is not possible to view the function of the impugned provisions as something separate from the function of the roll itself. The use of the roll facilitates the production of certified and approved lists for use on polling day, thus creating certainty as to the persons entitled to vote, thereby avoiding delays and uncertainty at the polling booth, and facilitating the prompt and efficient scrutiny of votes after the completion of the poll. The "closure" that is inherent in the concept of a roll was said to facilitate these aspects of the electoral process.

164 The Commonwealth submitted that the roll represents a choice by Parliament as to the nature of the electoral system in which a citizen's qualification as an elector is determined by the criterion of enrolment. It is therefore wrong to speak of a person who is not enrolled when the rolls close as "otherwise entitled to vote". As Brennan ACJ said in *Muldowney v Australian Electoral Commission*[188], "[e]nrolment is not merely evidence of an elector's qualification to vote; enrolment is itself a qualification to vote."

165 The Commonwealth argued that the roll and its closure before polling is central to the electoral system devised by the Parliament, and in particular the necessity to ensure that the roll is accurate as a statement of the entitlement to vote before the poll takes place. The centrality of the roll was said to be confirmed by s 361 of the Act, which "assum[es] the Roll to be correct" for the purposes of an inquiry by the Court of Disputed Returns into whether votes were improperly admitted or rejected, and does not permit that Court to "inquire into the correctness of any Roll."

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187 *McCloy v New South Wales* (2015) 89 ALJR 857 at 876 [81]; 325 ALR 15 at 36.

188 (1993) 178 CLR 34 at 40 (footnote omitted); [1993] HCA 32; cf *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 16 [13], 18 [17], 52 [133].

166 The Commonwealth argued that the suspension period, as moderated by the grace period, does not operate to disqualify citizens from the franchise; rather, it suspends any changes being made to the roll for a short period to allow for the orderly conduct of the election. Any person who is unenrolled at the time of the issue of the writs will not be prevented from voting by virtue of the suspension period because every such person has the opportunity to enrol during the grace period.

167 The Commonwealth submitted that *Rowe* did not support the contention that any provision that operates to prevent a person from enrolling at any time disqualifies that person from the franchise[189]. It was said that the challenge which succeeded in *Rowe* was to a law which would allow the executive government to abrogate an opportunity for enrolment to vote which citizens had enjoyed for many years by reason of the grace period. It was said that nothing in *Rowe* cast doubt on the validity of the arrangements which included the grace period.

168 The Commonwealth disputed the plaintiffs' contention that the validity of the impugned provisions should be determined by "proportionality analysis" of the kind discussed in *Lange* and *McCloy*. In the Commonwealth's submission, the existence of an alternative measure by which the popular choice might be determined does not demonstrate the incompatibility of the existing measure with choice by the people. In addition, it was said that a *Lange*-style analysis should not be applied because it is inconsistent with the broad conferral of power by the Constitution upon the Parliament in relation to the creation of the electoral system to apply a prescriptive proportionality test to the validity of the provisions made by the Parliament.

169 The Commonwealth also noted that it is not an agreed fact, and there is no evidence before the Court, that the AEC currently has the capability to process enrolment claims on polling day at polling stations.

The Attorney-General for South Australia

170 The Attorney-General for South Australia intervened in support of the Commonwealth, arguing that the present case does not involve a "disqualification" of any would-be voter, and against testing the validity of the suspension provisions by recourse to a proportionality analysis.

Standing

171 The first question posed by the special case was as to the plaintiffs' standing to make their challenge. The first plaintiff was enrolled to vote for the

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189 (2010) 243 CLR 1 at 38-39 [78], 58-59 [160], 119 [381].

Division of Wills in the State of Victoria. He intended to vote in that Division for his representative and senators at the then forthcoming federal election. On this basis, the Commonwealth objected that he "has no more interest than anyone else in clarifying what the law is"[190], in that he did not seek to have his "rights and position clarified" by the orders he sought by way of relief[191].

172 In order to avoid that difficulty, the first plaintiff applied for, and the Commonwealth consented to, the joinder of Ms Scurry as the second plaintiff in the action. Ms Scurry intended to become an independent candidate for the Division of Newcastle, for which she had previously stood as an independent candidate. The Commonwealth conceded that Ms Scurry had standing to make the arguments advanced by the plaintiffs and that the question as to standing posed by the parties in the special case should be answered accordingly.

173 The Commonwealth's concession was rightly made. On the footing that Ms Scurry would, in fact, be a candidate for election, she had an interest in the validity of laws which would have affected her candidacy. She had an interest beyond that of the general public in the entitlement of electors to vote. In this regard, she was required to obtain the signatures of "not less than 100 electors entitled to vote at the election" to support her nomination as a candidate[192].

174 In addition, a candidate at an election who fails to obtain a certain number of votes forfeits the deposit[193] which is required to accompany the candidate's nomination form[194]. Further, subject to achieving a certain minimum number of eligible votes polled in the election[195], a candidate is entitled to be paid $1.50 for each first preference vote cast in his or her favour[196]. Further, a candidate is entitled to dispute the outcome of the election in his or her Division[197].

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190 *Kuczborski v Queensland* (2014) 254 CLR 51 at 106 [176]; [2014] HCA 46.

191 *Pharmaceutical Society of Great Britain v Dickson* [1970] AC 403 at 433, cited with approval in *Croome v Tasmania* (1997) 191 CLR 119 at 127; [1997] HCA 5.

192 *Commonwealth Electoral Act* 1918 (Cth), s 166(1)(b)(i).

193 *Commonwealth Electoral Act* 1918 (Cth), s 173(1).

194 *Commonwealth Electoral Act* 1918 (Cth), s 170(2)(b).

195 *Commonwealth Electoral Act* 1918 (Cth), s 297.

196 *Commonwealth Electoral Act* 1918 (Cth), s 294.

197 *Commonwealth Electoral Act* 1918 (Cth), s 355(c).

175 Accordingly, it was not necessary to determine whether the first plaintiff had standing to bring these proceedings in order to answer the question posed as to standing in the affirmative.

Maximising the opportunity to vote

Constitutional bedrock and the Parliament

176 Sections 7 and 24 of the Constitution were described in *Roach v Electoral Commissioner*[198] as "constitutional bedrock". On this foundation, the political sovereignty of the people of the Commonwealth through their elected representatives is established[199]. It is not to go beyond the ordinary and natural reading of the constitutional text to understand ss 8, 9, 27, 29 and 30 of the Constitution as authorising only laws which are compatible with the choice by the people contemplated in ss 7 and 24. The question is whether the impugned provisions are not compatible with that choice.

177 While it is not to be supposed that the Parliament may impede the making of the choice by the people contemplated by ss 7 and 24 of the Constitution, to say this is not to postulate a theoretical ideal[200] of representative democracy by which the measures enacted by Parliament are to be judged. It is not permissible to deduce from one's "own prepossessions"[201] of representative democracy a set of irreducible standards against which the validity of Parliament's work may be tested. As Brennan CJ said in *McGinty*[202]:

> "It is logically impermissible to treat 'representative democracy' as though it were contained in the Constitution, to attribute to the term a meaning or content derived from sources extrinsic to the Constitution and then to invalidate a law for inconsistency with the meaning or content so attributed."

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

199 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 548 [17], 578 [135]; [2013] HCA 58.

200 *McGinty v Western Australia* (1996) 186 CLR 140 at 169, 244-245.

201 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 44.

202 (1996) 186 CLR 140 at 169.

178 Parliament's broad powers to make laws to establish and regulate the process by which the choice by the people is to be made are not constrained by some judicially enforceable standard of representative democracy. If they were, this Court's decisions rejecting the argument that the Constitution required that electoral laws provide, as near as reasonably possible, for each vote to have the same value in electing candidates to the House of Representatives might well have been decided differently[203].

179 In the context in which ss 7 and 24 appear, the choice by the people which those sections contemplate is required by the Constitution to be effected pursuant to an electoral system to be established by the Parliament; but while a broad discretion is reposed in the Parliament, it is not beyond judicial review[204]. In *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[205], McTiernan and Jacobs JJ said that the electoral arrangements made by the Parliament might be such that "choice by electors could cease to be able to be described as a choice by the people of the Commonwealth."

180 In *Langer v The Commonwealth*[206], Toohey and Gaudron JJ explained that the phrase "chosen by the people", understood in its context, "prohibits any feature [of legislation] that prevents it being said that the Senate or the House of Representatives is … composed of persons 'chosen by the people'." These observations do not, however, support the notion that a failure to maximise voting opportunity has the prohibited effect. Only in the reasons of Gummow and Bell JJ in *Rowe* is there arguable support for the view that the constitutional role of the Parliament in relation to the electoral system is constrained by a mandatory requirement of maximum participation in voting[207]. And, as will be said, to ascribe that view to their Honours' observations is to misstate their effect.

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203 See *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 17, 44, 55-57, 61-62; *McGinty v Western Australia* (1996) 186 CLR 140 at 167-168, 175, 183-185, 229-230, 282-283, 284-289.

204 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7].

205 (1975) 135 CLR 1 at 36.

206 (1996) 186 CLR 302 at 333; [1996] HCA 43. See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7], 197-198 [78]-[79].

207 (2010) 243 CLR 1 at 50-52 [126]-[133], see also at 20-21 [24]-[25], 38-39 [78], 117 [367]-[368].

A burden on the mandate?

181 The first step in the plaintiffs' argument was that the choice contemplated by ss 7 and 24 of the Constitution can only be achieved by electoral arrangements which maximise the opportunity for citizens to vote on polling day. If it were indeed the case that the constitutional requirement of choice by the people were synonymous with the activity of voting on polling day, the plaintiffs' argument would gain a foothold in the jurisprudence which prohibits legislation that prevents choice by the people[208]. But the plaintiffs erred in fixing their focus narrowly upon the act of voting as if it exhausted the content of the concept of choice by the people. They thereby removed from view the broader aspects of the electoral system which are necessary to facilitate that choice and against which the desirability of maximising voting opportunities must be balanced. They did not attempt to demonstrate that the overall balance achieved by the Act prevents it being said that the Senate or House of Representatives is composed of persons chosen by the people. In short, they failed to identify a burden on the constitutional mandate of choice by the people; rather, their case was no more than a complaint that better arrangements might be made to fulfil the mandate.

182 In *McGinty*[209], Gummow J noted, with approval, the statement by Reid and Forrest[210] that the Constitution left it to the Parliament to specify:

> "a whole range of matters including: the method of voting to elect the members of the respective houses; the question of whether members of the House of Representatives would be elected by single-member or multi-member divisions; … who would be authorised to vote; the question of voluntary or compulsory registration of voters and of voting itself; the control of electoral rolls; the conduct of the ballot; … the location of responsibility for the administration of the electoral law".

183 To view ss 7 and 24 of the Constitution as concerned solely with voting on polling day is to fail to appreciate that an election is not a single-day event but a process commenced by the issuing of the writs and concluded by their return, and that the Parliament is required by the Constitution to address all the steps involved in between, to ensure that the sovereign citizenry are able to make a free, informed, peaceful, efficient and prompt choice of their legislators.

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208 *Langer v The Commonwealth* (1996) 186 CLR 302 at 333; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7], 197-198 [78]-[79].

209 (1996) 186 CLR 140 at 283-284.

210 Reid and Forrest, *Australia's Commonwealth Parliament: 1901-1988*, (1989) at 86-87.

184 The Constitution looks to the Parliament, via ss 8, 9, 27, 29 and 30, for the establishment of an electoral system in which the competing considerations relevant to the making of a free, informed, peaceful, efficient and prompt choice by the people are balanced by the Parliament. It cannot be disputed that provisions apt to ensure peace and good order at places where the franchise is to be exercised can readily be seen to facilitate, rather than to impede, the choice by the people required by the Constitution. The constitutional mandate to Parliament to organise an electoral system encompasses the nomination of candidates, the qualification of electors, the logistics of the poll, voting by electors, the scrutiny of votes and the declaration of the poll. And the discharge of this mandate requires attention to the importance of an informed electorate, orderly and peaceful polling, efficient scrutiny of votes, as well as promptitude, certainty and finality in the declaration of the poll.

185 The closure of the rolls before polling day can readily be seen as addressed to issues relating to the certainty of the class of electors by whom candidates are nominated and to whom they may wish to direct their candidacy. In addition, enrolment as the qualification for voting, and the requirement of the closure of the rolls before polling day, can rationally be seen as integral to the facilitation of an orderly and peaceful poll, efficient scrutiny of votes and a prompt and certain declaration of the poll, all of which is compatible with choice by the people.

186 As noted above, the plaintiffs placed substantial reliance upon observations of Gummow and Bell JJ in *Rowe*[211]. The decision in *Rowe* will be discussed more fully in due course, but it is convenient to emphasise here that their Honours were not endorsing the view that ss 7 and 24 contemplate a "sans-culottes" frenzy of the spontaneous manifestation of the popular will. In the passage of their Honours' reasons on which the plaintiffs relied, their Honours were speaking specifically of the legislative removal of the grace period. It was on this basis that their Honours said that:

> "the legislation fails as a means to what should be the end of making elections as expressive of the popular choice as practical considerations properly permit."

187 These remarks cannot fairly be understood as directed to the overall balance of the Act while it included the grace period: they were specifically directed to the legislative alteration of the balance; and it was that alteration which was seen as the burden on the franchise. That this is the fair reading of their Honours' observations is apparent from the express recognition that

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211 (2010) 243 CLR 1 at 57 [154].

practical considerations of the kind referred to above may properly permit compromise on the achievement of maximum voting opportunity.

Parliament and the Court

188 To require the assessment of qualification to enrol at the polling booth can also be expected to require the provision of resources in addition to those currently necessary if delays to voting and consequent inconvenience to those already enrolled and waiting to vote are to be avoided. While this Court's power and responsibility to declare what the law is requires this Court to declare the invalidity of laws which exceed the legislative power of the Parliament[212], it is not a recognised part of the role of the judiciary within our system of separated powers to require the executive government or the legislature to raise and spend public funds in order to effect what might be thought to be desirable improvements in the public life of the community[213]. Alexander Hamilton, in his celebrated essay No 78 of *The Federalist Papers* (1788), described "the judiciary, from the nature of its functions", as the "least dangerous" branch of government because it "has no influence over either the sword or the purse". It is the executive which "holds the sword of the community" and the legislature which "not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated."

189 The plaintiffs sought to meet this difficulty by suggesting that no extra resources would be required to implement a program of polling day enrolment because the same resources would be expended before or after polling on processing and verification of the entitlement to vote. This suggestion cannot be accepted. It proceeds upon the naïve assumption, unsupported by any agreed fact in the special case, that the concentration of resources to accelerate the performance of the same work in a shorter time will not carry with it additional expense.

190 It is also to be noted that the plaintiffs sought to invalidate the suspension of the process of objection to enrolment as part of their claim for polling day enrolment. The possibility that objections to enrolment might be made and determined at the polling booth on election day can be expected to require the availability of further resources if delays to voting and the disruption of voting are to be avoided. In addition, the resolution of objections to enrolment at the polling booth, in an environment fraught with the emotions of political conflict, may disrupt the efficient and peaceful conduct of voting.

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212 *Marbury v Madison* 5 US 137 at 177 (1803); *New South Wales v Kable* (2013) 252 CLR 118 at 138 [51]; [2013] HCA 26.

213 *Dietrich v The Queen* (1992) 177 CLR 292 at 323; [1992] HCA 57.

Creeping unconstitutionality

191 The facts agreed in the special case establish that some would-be voters may not be enrolled at the end of the grace period, and that some would-be voters who have transferred their residence from one Division to another may not be able to enrol to vote in the Division of their now current residence. The plaintiffs argued that this state of affairs is unacceptable in terms of ss 7 and 24 because advances in technology mean that practical arrangements are now available to avoid it. Thus, the plaintiffs argued that laws which have the effect of excluding from voting a person who is entitled to enrol to vote can now be seen to be invalid due to a change in the factual context in which they operate. It was said that the impugned provisions may well have previously been valid, but that they have become invalid by reason of their current operation given the availability of technology which might be deployed to facilitate maximum voting by the adoption of polling day enrolment.

192 It may be accepted that, as a practical matter, some would-be electors will be denied the opportunity to vote, even with the benefit of the grace period, and that some of these would-be electors will not be enrolled for reasons which do not involve a failure on their part to heed the requirements of s 101 of the Act. That being said, there was no suggestion that the number of persons so affected is greater, either in absolute or relative terms, than has always been the case previously in numerous elections the validity of which was not impugned.

193 The plaintiffs eschewed the suggestion that their argument implied that the provisions of the Act challenged in this case were invalid at the time of previous elections. But it is not apparent that technological advances which would facilitate polling day enrolment were not available at federal elections held when the suspension period was moderated by the grace period; and so it is difficult to see why the plaintiffs' argument does not point to that unattractive conclusion. The plaintiffs, no doubt appreciating that the destabilising implications of their argument are not attractive, maintained a pious agnosticism when pressed as to whether the logic of their argument implies, as it seems to, that those elections were held under laws which had, surreptitiously it seems, become invalid.

194 There are two difficulties with the plaintiffs' argument that the impugned laws, though valid when made, became invalid because changes in the milieu in which the Act operates produced a change in the practical operation of the law. The first difficulty with this argument is that the practical operation of the Act, in its present terms, has not changed since 1983; its practical operation is the same as it was, save for the period when the challenged provisions of the 2006 Amendment Act were in force. What has changed was said to be the availability of technologies which, if adopted, might improve the practical operation of the legislation.

195 Secondly, the plaintiffs' contention was that the Parliament was obliged by the Constitution to appreciate and act upon the new facts and update the electoral laws in order to achieve the postulated improvements. That argument could be accepted only if maximising the opportunity to vote were a critical determinant of whether an electoral system is compatible with choice by the people. For the reasons already given, this is not the case. It would also blur the separation of powers under the Constitution by opening the way for the judiciary to instruct the Parliament in the exercise of the power of the purse.

196 While it is not necessary to go further here, it may also be said that, if one looks at the matter more broadly, the dearth of authority supporting the plaintiffs' contention that a law valid when made may become invalid by changes in the milieu in which it operates suggests that the plaintiffs' argument is unorthodox at a fundamental level. The plaintiffs relied on a statement by Dixon J in *Andrews v Howell*[214] for the proposition that the ambit of a constitutional power to legislate may vary with changes of the facts. But Dixon J was, of course, referring to the power to make laws for the defence of the Commonwealth conferred by s 51(vi) of the Constitution. Speaking of the defence power, his Honour observed that[215]:

> "though its meaning does not change, yet unlike some other powers its application depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law."

197 Dixon J was making the point that the operation of a power to make laws for the defence of the Commonwealth may expand or contract depending upon the exigencies of the nation's defence.

198 The plaintiffs also relied upon observations of Williams J in *Armstrong v The State of Victoria [No 2]*[216] in which his Honour gave three examples of an Act which is valid when passed becoming invalid by reason of a change in circumstances. One example was a Commonwealth Act passed in wartime which could only be justified by the defence power as extended in wartime; such an Act would become invalid in peacetime "when that power had contracted … to such an extent that it is no longer wide enough to support it". The second example was of a State Act which is rendered invalid under s 109 of the Constitution as a result of the enactment of an inconsistent Commonwealth law. The third example was that s 92 of the Constitution might render invalid an

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214 (1941) 65 CLR 255 at 278; [1941] HCA 20.

215 (1941) 65 CLR 255 at 278.

216 (1957) 99 CLR 28 at 73-74; [1957] HCA 55.

impost valid at its inception as a reasonable regulation of inter-State trade[217] which ceased to be reasonable because of changes in the circumstances of inter-State trade.

199 Each of the examples given in *Armstrong* is a far cry from the present case. No question arises as to the operation of s 109 of the Constitution; and the operation of the freedom of trade, commerce and intercourse guaranteed by s 92 of the Constitution may depend upon the exigencies of trade, commerce and intercourse. More relevantly for present purposes, there is no analogy between the defence power and the powers conferred on the Parliament by ss 8, 9, 27, 29, 30 and 51(xxxvi) of the Constitution. It is the function of Parliament to make laws in order to change the world. To assert that changes in the world may unmake laws made by Parliament is to assert the existence of an exception to this understanding of the role of Parliament. In this regard, the defence power in s 51(vi) of the Constitution is indeed exceptional.

200 It is well settled that the subject matter of the power to make laws for the defence of the Commonwealth differs in an important respect from most of the others mentioned in s 51, namely that the defence of the Commonwealth "is not a class of transaction or activity, or a class of public service, undertaking or operation, or a recognized category of legislation, but is a purpose."[218] In determining whether a given legislative measure is within the defence power, the capacity of the measure to assist that purpose must be "discernible by the Court"[219] by reference to the state of the world. It is, to say the least, arguable that the subject matter of legislative power conferred by ss 8, 9, 27, 29, 30 and 51(xxxvi) of the Constitution is, in contrast to the defence power, activities and undertakings of a public nature, rather than a purpose. Further, ss 7 and 24 may be said to describe a standard characteristic of the Houses of Parliament[220]. It is not necessary to resolve this broader question, which may be left for another day.

201 One further point raised by the plaintiffs may conveniently be addressed here. It was suggested on behalf of the plaintiffs that those transferring to a new Division might not be allowed to vote at all; but that suggestion did not take

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217 In accordance with the then accepted test of validity under s 92 of the Constitution: *Hughes and Vale Pty Ltd v The State of New South Wales [No 2]* (1955) 93 CLR 127 at 174-177, 192-194, 210, 214-215; [1955] HCA 28.

218 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 273, see also at 192-193, 253-256; [1951] HCA 5. See also *Stenhouse v Coleman* (1944) 69 CLR 457 at 471; [1944] HCA 36.

219 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 273.

220 See *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 218-220 [156]-[162].

account of ss 93(2), 229 and 231 of the Act, which allow such a person to vote in the electorate in which he or she was enrolled. Further, the possibility of a small number of such voters voting for the Division in which they were until recently resident hardly justifies the plaintiffs' description of that outcome as a "distortion" of choice by the people. If maximising voting opportunities is not a sine qua non of an electoral system to facilitate choice by the people, neither is the maximising of the geographical appropriateness of the franchise.

The *Lange* test

202 The plaintiffs argued that the effect of the suspension period, even moderated by the grace period, was disproportionate to any legitimate end it might be said to serve. The plaintiffs invoked by analogy the *Lange* test for the validity of laws which burden political communication, as recently applied by this Court in *McCloy*[221]. The analogy is not helpful in this case. As noted above, the plaintiffs' unduly narrow focus on maximising voting means that they failed to identify a burden on the constitutional mandate to which a *Lange*-style analysis might be applied.

203 It was the perceived need to ensure that ss 7 and 24 of the Constitution were not frustrated by laws which affected the freedom of political communication indispensable to their effective operation that led to the formulation of what is now called the *Lange* test[222]. Relevantly, the second limb of the *Lange* test determines whether a burden on political communication is justifiable by asking whether the burden[223]:

> "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 government and the freedom of political communication which is its indispensable incident."

204 When the provisions impugned in this case are considered, as they must be, as integral and unremarkable elements of an electoral system authorised by ss 8, 9, 27, 29, 30 and 51(xxxvi), there is no discernible "burden" on the requirements of ss 7 and 24 which calls for justification by a *Lange*-style analysis[224].

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221 (2015) 89 ALJR 857 at 866 [24]; 325 ALR 15 at 23-24.

222 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

223 *Monis v The Queen* (2013) 249 CLR 92 at 161 [175]; [2013] HCA 4.

224 cf *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199-200 [85]-[86].

205 The considerations which gave rise to the formulation of the *Lange* test are not engaged here. No question of the scope of an implication from the Constitution arises: we are concerned with the effect of express provisions of the Constitution. No question arises as to whether the pursuit of some legitimate end or purpose not expressly addressed by the Constitution is reconcilable with those express provisions. That being so, there is no occasion to apply the abstract locutions of the second limb of the *Lange* test. The only question is whether the impugned laws can be seen to be compatible with the requirements of ss 7 and 24 of the Constitution, bearing in mind Parliament's powers under ss 8, 9, 27, 29, 30 and 51(xxxvi).

206 It may be noted here that in *Rowe*[225] the Court was invited by the Commonwealth to uphold the validity of the challenged provisions of the 2006 Amendment Act using an approach akin to the *Lange* test. The Commonwealth took a different course in this case. It is not entirely clear that the majority in *Rowe* accepted the Commonwealth's invitation to apply the second limb of the *Lange* test as determinative of the question before the Court, as opposed to using that analysis as a means of testing the conclusion that a perceived burden on the franchise was not compatible with choice by the people. In this regard, French CJ applied[226] the approach of Gleeson CJ in *Roach*[227], who did not apply a *Lange*-style analysis. Gleeson CJ said[228]:

> "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."

207 French CJ characterised the challenged provisions of the 2006 Amendment Act as an impediment to the exercise of choice by the people, and looked for a substantial reason for the impediment consistent with the constitutionally mandated choice; and his Honour could see none. When his Honour described those provisions as creating a detriment upon the mandate of choice by the people which was disproportionate to the benefit to the fulfilment of the mandate, his Honour was explaining his conclusion that the law

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225 (2010) 243 CLR 1 at 7-8.

226 (2010) 243 CLR 1 at 19-20 [23].

227 (2007) 233 CLR 162 at 178-180 [17]-[19].

228 (2007) 233 CLR 162 at 174 [7] (footnote omitted).

could not rationally be seen to be supported by a substantial reason "for the detriment it inflicts upon the exercise of the franchise."[229]

208 Gummow and Bell JJ seemed to accept the Commonwealth's invitation to apply a *Lange*-style analysis[230], but apparently did so as a checking exercise[231] as to whether the challenged provisions were invalid on the ground that they lacked "a substantial reason" for what their Honours described as a "disqualification" from the franchise[232]. It should also be noted that when their Honours concluded that those provisions had "broken the rational connection necessary to reconcile the disqualification with the constitutional imperative"[233], their Honours were focused upon the only justification advanced as the legitimate end of the abrogation of the grace period, which was the prevention of fraudulent enrolment[234]. In contrast, in the present case, the Commonwealth advanced a broader explanation for the suspension period coupled with the grace period to show that it was not a burden on the operation of ss 7 and 24 of the Constitution, but rather an integral aspect of the system adopted for its attainment.

209 Crennan J, the other member of the majority, held that the challenged provisions were invalid because there was no[235]:

> "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."

210 Her Honour's position thus appears substantially to accord with the approach of French CJ. In the present case, the absence of an opportunity to maximise voting does not mean that there has been a departure from the constitutional mandate which must be justified by a substantial reason. The

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229 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 20-21 [25], see also at 38-39 [78].

230 (2010) 243 CLR 1 at 59-61 [161]-[167].

231 (2010) 243 CLR 1 at 60 [163].

232 (2010) 243 CLR 1 at 61 [166]-[167].

233 (2010) 243 CLR 1 at 59 [161].

234 (2010) 243 CLR 1 at 60-61 [164]-[167].

235 (2010) 243 CLR 1 at 121 [384].

impugned provisions are not a burden on the mandate, but rather an integral part of the system adopted for its fulfilment.

211 In any event, even if a *Lange*-style analysis were to be applied here, the alternatives to the suspension and grace periods advanced by the plaintiffs are not shown to be the kind of compelling and obvious alternatives to achieve the same outcome as is achieved by the Act. Even if it were accepted that those measures might be adapted without any increase in the public funds required to resource them, it cannot be said that they would achieve a balance in terms of voter participation, orderliness of voting, efficiency of scrutiny, and promptitude and finality in the conclusion of the electoral process "equal" to or "better" than that achieved by the Act.

212 It should be noted in this regard that the State laws to which the plaintiffs referred take a different view of the appropriate time at which the right to vote must be established. Under the *Parliamentary Electorates and Elections Act* 1912 (NSW) ("the NSW Act"), the electoral roll does not close; but the right to vote does not depend exclusively on enrolment. Thus, under s 106(2A) of the NSW Act, a person who is not enrolled, but who claims to be entitled to be enrolled, may make a provisional vote. In such a case, the question whether the person was, in truth, entitled to vote is to be determined after polling day.

213 The same position obtains under the *Electoral Act* 2002 (Vic) and Electoral Regulations 2012 (Vic) ("the Victorian law") by virtue of s 108 and reg 41. Under the Victorian law, however, the electoral roll closes seven days after the issue of the writs for the election.

214 Under the *Electoral Act* 1992 (Q) ("the Queensland Act"), the electoral roll closes between five and seven days after the issue of the writs. A person who is not enrolled may make a declaration vote under s 115(d) of the Queensland Act if he or she is "entitled to be enrolled". Under s 106(1)(d), such a person has, after the close of the rolls, but before 6 pm on the day before polling day, to make a claim for enrolment. A declaration vote under s 115(d) is admitted to scrutiny if the person's entitlement to vote is established. Again, the decision as to whether the person is entitled to vote is to be made after the election. Whether postponing the determination of whether a would-be voter is qualified to enrol to vote until after the poll has been taken is "better" than resolving the issue before the poll is taken is a question in relation to which reasonable minds may differ.

215 Measures which seem good to State Parliaments do not provide yardsticks against which the constitutionality of Commonwealth laws can be measured. State Parliaments may be expected to have different priorities in relation to optimising the balance of considerations which bear upon their choice of electoral system. Considerations of promptitude and finality in scrutiny and the declaration of the poll which are accorded relatively high importance by the

Commonwealth may not exert the same strong claim on State Parliaments; but that does not mean that either is right or wrong.

216 The various polities of the federation exist in different environments which can be expected to give rise to different priorities. Members of State Parliaments are able to form executive governments within the relatively benign environment guaranteed by membership of the federation. In that environment, the prompt conclusion of the electoral process to enable the formation of an executive government may not be regarded as a matter of particular urgency. In such an environment a leisurely approach to the resolution of disputes as to the right to vote may be acceptable. In contrast, because of the responsibility of the Commonwealth for Australia's external affairs and the security of the nation, the Parliament of the Commonwealth can be expected to accord a higher priority to the prompt conclusion of the electoral process in order to expedite the formation of a responsible executive government in a world of uncertain and rapidly changing situations.

217 Finally under this heading, it must be said that it is not correct to say, as the plaintiffs did, that the irrationality of the suspension period as a bar to polling day enrolment by unenrolled citizens is demonstrated by the availability of provisional voting under s 235 of the Act. These provisions require that a person whose name cannot be found on an approved list, or whose address does not appear on a certified list compiled from the roll, sign a declaration in the approved form directed to the DRO for the Division that he or she claims to be enrolled in. The efficacy of the provisional vote depends on the truth of that claim. In other words, the Act's provisions for provisional voting are themselves predicated upon the provisional voter actually being enrolled.

Rowe v Electoral Commissioner

218 In *Rowe*[236], this Court was concerned with the validity of certain provisions of the 2006 Amendment Act. The amendment had the effect of removing the grace period so that any citizen who lodged a claim for enrolment or for the transfer of enrolment after the issue of writs for a general election could not vote at the election or in the Division to which he or she had moved. If the writs were issued by the executive government at the same time as a general election was announced, citizens who were then unenrolled would be excluded from participation in the election as voters. The possibility that such an outcome might be achieved by the executive government to the detriment of the citizenry was adverted to when the 1983 Amendment Act was introduced. In the second

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236 (2010) 243 CLR 1.

reading speech for the Bill introducing the 1983 Amendment Act, the Minister said[237]:

> "the Bill provides that there must be a sufficient time between the announcement of an election and the close of rolls for that election. ... [W]ithout this sort of provision the cynical exercise of the strict terms of the law could effectively stop many thousands of people enrolling and voting."

219 In *Rowe*, this Court held, by majority, that the challenged provisions of the 2006 Amendment Act were invalid. It was argued by the plaintiffs here that the decision in *Rowe* is determinative of the present case in their favour. That suggestion cannot be sustained.

220 Nothing in *Rowe* casts doubt upon the validity of the suspension period moderated by the grace period.

221 In argument in *Rowe*[238], Senior Counsel for the plaintiffs in that case, who is, as it happens, Senior Counsel for the plaintiffs in the present case, accepted that "[t]here was no recognisable defect with the seven day period" which had been abolished by the 2006 Amendment Act. The majority accepted the argument that the vice of the challenged provisions lay in the legislative removal of the grace period. Without the grace period, the suspension period was apt to remove the then existing opportunity of citizens to enrol to vote after the writs for the election issued. In the present case, it was contended that, even though the grace period has been restored, so that the Act is now materially in the same terms as it was before the 2006 Amendment Act, the impugned provisions of the Act were invalid.

222 Whether the issue presented in *Rowe* was analysed by the majority as one of legislative disqualification of some citizens from the franchise[239], and whether that analysis is correct, are questions which it is not necessary to resolve now: no party sought to argue that *Rowe* was wrongly decided. What is clear is that the provisions of the Act impugned by the plaintiffs in the present case are not apt to allow the executive government to disqualify any citizen from exercising the franchise. While it is true to say that they may operate to prevent some citizens who are unqualified to vote when the roll closes becoming qualified to do so, that is not an impediment to enrolment, much less to the choice by the people

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

238 (2010) 243 CLR 1 at 5.

239 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 58-59 [157]-[160].

contemplated by the Constitution, just as it was not an impediment to that choice at elections held before the 2006 Amendment Act and after the challenged provisions of that Act were held to be invalid.

223 In this regard, it is worth recalling that in *Roach*[240], what was at stake was "legislative disqualification of some citizens from exercise of the franchise." In the joint reasons of Gummow, Kirby and Crennan JJ, their Honours adopted[241] the proposition stated by Brennan CJ in *McGinty*[242] that "the phrase 'chosen by the people' … [requires] a franchise that is held generally by all adults or all adult citizens unless there be substantial reasons for excluding them."

224 The legislation challenged in this case does not effect a disqualification of citizens as electors of the kind considered in *Roach*. In *Roach*, the majority were speaking of a legislative disqualification from voting of citizens even if they were enrolled to vote.

225 The legislation challenged by the plaintiffs in the present case affords citizens not enrolled at the issue of the writs the very opportunity to enrol which was abrogated by the legislation struck down in *Rowe*. While it may be that reasonable minds may differ as to whether the challenged provisions of the 2006 Amendment Act were apt to permit a disqualification of citizens from enrolment or voting (as the division within the Court in *Rowe* attests), it is simply an abuse of language to say that those citizens who do not avail themselves of the opportunity to enrol afforded by the grace period have been disqualified from enrolment or from voting.

Conclusion

226 It is important to bear in mind that whether voting should be compulsory or voluntary has long been held to be within the discretion of the Parliament[243]. If it is open to the Parliament to authorise voluntary, rather than compulsory, voting as an aspect of the choice by the people, it is not to be supposed that it is beyond the discretion of the Parliament to permit some leakage from the compulsory franchise on the part of those who are less than astute to discharge

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240 (2007) 233 CLR 162 at 198 [82], see also at 198-199 [81], [83]-[84].

241 (2007) 233 CLR 162 at 198 [83].

242 (1996) 186 CLR 140 at 170.

243 *Judd v McKeon* (1926) 38 CLR 380 at 383, 385, 390-391.

their civic duty to enrol. To conclude otherwise would truly be to "strain at a gnat, and swallow a camel."[244]

227 The plaintiffs' argument that nothing less than polling day enrolment can satisfy the requirements of ss 7 and 24 of the Constitution draws no support from the Constitution. The proposition that only one judgment about the appropriate period of time between the issue of the writs for an election and the closing of the rolls is available to the Parliament is distinctly inconsistent with the broad conferral of power on the Parliament by ss 8, 9, 27, 29, 30 and 51(xxxvi) of the Constitution to create the system whereby the choice by the people is to be made. Indeed, to accept the argument that the requirements of ss 7 and 24 can only be satisfied by electoral laws which maximise the opportunity for voting above all other considerations germane to that choice is to make a nonsense of the absence of an express statement to that effect in these sections themselves.

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244 Matthew 23:24. See Gleeson, "The Shape of Representative Democracy", (2001) 27 *Monash University Law Review* 1 at 7.

228 NETTLE J. In this matter, the plaintiffs contended that provisions of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"), which suspend the processing of claims for enrolment and transfer of enrolment during the period that starts seven days after the issue of writs and ends at the completion of polling ("the suspension period"), are inconsistent with ss 7 and 24 of the Constitution and therefore invalid. On 12 May 2016, I joined with the other members of the Court in rejecting that contention. What follows are my reasons.

Standing

229 The second plaintiff intended to nominate as a candidate for election to the House of Representatives for the seat of Newcastle at the then forthcoming federal election. Under the Act, a candidate in the second plaintiff's position must be nominated by 100 persons, all of whom must appear on the Electoral Roll ("the Roll") and be entitled to vote at the election for which the candidate is nominated[245]. Once nominated, a candidate may engage in competition for votes at the election[246]. There are also financial implications for a candidate depending on the number of first-preference votes he or she obtains[247]. Consequently, the second plaintiff had a special interest in the size, composition and validity of the pool of electors from which she may have sought nomination and votes, and thus had a sufficient interest in the validity of the Act to challenge it in this Court. On that basis, it became unnecessary to consider the question of the first plaintiff's standing[248].

The alleged inconsistency

230 Section 7 of the Constitution relevantly provides for the election of senators as follows:

> "The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate."

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245 *Commonwealth Electoral Act* 1918 (Cth), s 4(1) definition of "Elector", ss 93, 166.

246 *Commonwealth Electoral Act*, s 162.

247 *Commonwealth Electoral Act*, ss 170, 173, 294, 297.

248 *Williams v The Commonwealth* (2012) 248 CLR 156 at 223-224 [112] per Gummow and Bell JJ (French CJ agreeing at 181 [9], Hayne J agreeing at 240 [168], Crennan J agreeing at 341 [475], Kiefel J agreeing at 361 [557]); [2012] HCA 23.

Section 24 of the Constitution relevantly provides for the election of members of the House of Representatives as follows:

> "The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators."

231 The plaintiffs contended that ss 94A(4), 95(4), 96(4), 102(4), 103A(5), 103B(5) and 118(5) of the Act were inconsistent with the requirement, in ss 7 and 24 of the Constitution, that senators and members be "directly chosen by the people". Those provisions of the Act provide that any claim[249] for compulsory enrolment or transfer of enrolment[250]; any claim for enrolment by an overseas person[251], an overseas person's family member[252] or an itinerant person[253]; and any objections to enrolments[254], received by the Electoral Commissioner ("the Commissioner") after 8 pm on the day seven days after the issue of writs for an election are not to be processed until after the election.

232 The plaintiffs' argument was said to be based on the decision of this Court in *Rowe v Electoral Commissioner*[255]: that amendments to the Act which purported to bring forward the commencement of the suspension period, from 8 pm on the day seven days after the issue of writs to 8 pm on the day of the issue of writs (and, for claims for transfer of enrolment, 8 pm on the day three days later), were invalid because they were not reasonably appropriate and adapted to serve a legitimate end consistent with the maintenance of the constitutionally prescribed system of representative government.

233 The plaintiffs submitted that it was implicit in *Rowe* or logically followed from it that a legislative provision which, as from seven days after the issue of writs, suspends the processing of claims for enrolment and transfers of enrolment

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249 Otherwise than by virtue of ss 94, 94A, 95, 96 or 100: *Commonwealth Electoral Act*, s 101(1).

250 *Commonwealth Electoral Act*, ss 102(4), 103A(5), 103B(5).

251 *Commonwealth Electoral Act*, s 94A(4).

252 *Commonwealth Electoral Act*, s 95(4).

253 *Commonwealth Electoral Act*, s 96(4).

254 *Commonwealth Electoral Act*, s 118(5).

255 (2010) 243 CLR 1; [2010] HCA 46.

of persons otherwise eligible to vote disentitles a person otherwise eligible to vote and is inconsistent with the maintenance of the constitutionally prescribed system of representative government mandated by the text and structure of the Constitution (in particular Ch I and ss 7, 24 and 128).

The decision in *Rowe*

234 *Rowe* was decided following this Court's decision in *Roach v Electoral Commissioner*[256]. In *Roach*, it was held that legislation that disqualified persons serving a sentence of imprisonment on the day of a federal election from voting at the election was invalid as it was contrary to ss 7 and 24 of the Constitution. As noted, in *Rowe* it was held that amendments to the Act that changed the commencement point of the suspension period, from seven days after the issue of writs to the day of issue of writs (and, for claims for transfer of enrolment, three days later), were invalid because they were not reasonably appropriate and adapted to serve a legitimate end consistent with the maintenance of the constitutionally prescribed system of representative government.

235 *Rowe*, however, is a complex decision. It was decided by a bare majority of four to three (French CJ, Gummow and Bell JJ and Crennan J, Hayne, Heydon and Kiefel JJ dissenting) and the judges who comprised the majority differed in their reasoning.

236 French CJ held that the amendments were invalid because they removed a legally sanctioned opportunity for enrolment, which caused detriment in legal effect or practical operation to the normative framework of a representative democracy based on direct choice by the people, and because the measure of the detriment was disproportionate to any benefit of the amendments in terms of the fulfilment of the constitutional mandate[257]. Gummow and Bell JJ (in a joint judgment) held that the amendments were invalid because the Act as amended failed as a means to the end of making elections as expressive of popular choice as practical considerations properly permit – in particular, the amendments effected a disqualification from the entitlement to vote in the sense considered in *Roach* – and the supposed legislative purpose of the amendments, preventing electoral fraud, was not a sufficient, substantial reason to justify the disqualification[258]. Crennan J held that, although the amendments differed from the disqualification considered in *Roach*, and although maintaining the integrity of the Roll (by preventing electoral fraud) was a purpose that was compatible with ss 7 and 24 of the Constitution, the amendments operated to disentitle or

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256 (2007) 233 CLR 162; [2007] HCA 43.

257 *Rowe* (2010) 243 CLR 1 at 38-39 [78].

258 *Rowe* (2010) 243 CLR 1 at 57 [154], 61 [167].

exclude persons who were otherwise legally eligible to vote from the franchise embedded in the constitutional imperative of choice by the people and, thus, the amendments were not necessary and appropriate for the integrity of the electoral system[259].

237 The judges who comprised the minority also differed in their reasoning. Hayne J held that the amendments did not constitute a disqualification of the kind considered in *Roach*[260]. In his Honour's view, there was no constitutional imperative to make elections as expressive of popular choice as practical considerations properly permit and neither s 7 nor s 24, alone or in combination, provided for a system of representative government in which there can be no closing of the Roll at or very soon after the issue of writs[261]. Heydon J stressed that, at the time of the inclusion of the words "chosen by the people" in the Constitution, the conception of being chosen by the people was undoubtedly consistent with legislative provisions preventing persons who were not on the Roll at the time of the issue of writs from voting in an election, and that the so-called "'higher' standards", established by later legislation and the operation of executive discretion, did not alter the requirements of constitutional validity[262]. Kiefel J held that, although the amendments were not directed to voting and did not disqualify any group from voting in the sense that was contemplated in *Roach*, and although the Parliament's power to legislate with respect to elections should not be seen as fixed by reference to a requirement that the greatest number of people possible should vote, the amendments affected the entitlement to enrol and thereby raised questions about proportionality[263]. In the result, however, her Honour held that, having regard to the integrity of the Roll, the object of encouraging compliance with the statutory obligation to enrol and the short duration of the effect of the amendments on the opportunity to enrol, and since there was nothing to suggest that a shorter period of disentitlement would be equally effective in encouraging compliance, the amendments did not intrude too far into the present system of voting, with the result that any burden imposed by the provisions was justified[264].

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259 *Rowe* (2010) 243 CLR 1 at 119 [381], 120-121 [384].

260 *Rowe* (2010) 243 CLR 1 at 66 [187].

261 *Rowe* (2010) 243 CLR 1 at 76 [223].

262 *Rowe* (2010) 243 CLR 1 at 97 [293], 102 [311].

263 *Rowe* (2010) 243 CLR 1 at 128 [411], 130-131 [422]-[424], 147 [487].

264 *Rowe* (2010) 243 CLR 1 at 145-147 [479]-[489].

238 In summary, each of French CJ and Crennan J held that legislative amendments which reduced the time available to enrol to vote by seven days were prima facie detrimental to and, to that extent, inconsistent with the imperative of choice by the people mandated by ss 7 and 24 of the Constitution; and that such a detriment could only be justified if it were proportionate to the benefit to the integrity and efficiency of the electoral system achieved by the amendments (or, in the case of Crennan J, if the amendments were necessary and appropriate for the integrity of the electoral system). To similar but not identical effect, Gummow and Bell JJ held that legislative amendments which reduced the time available to enrol to vote by seven days could only be saved if there were a sufficient, substantial reason to justify that effect. Kiefel J held that although the provisions did not disqualify any group of persons from voting, they raised questions of proportionality because they affected a person's ability to enrol and thus vote at a particular election. In contrast, Hayne and Heydon JJ both held that legislative amendments which had the effect of closing the Roll from a point shortly after the issue of writs, and which did no more than reduce the time to enrol so as to conclude at 8 pm on the day of the issue of writs, were not inconsistent with ss 7 and 24 of the Constitution and so were not invalid.

239 According to orthodox conceptions, "[e]very decision has its *ratio*"[265]. In view of the differences in reasoning just identified, however, the ratio of *Rowe* appears to go no further than that, where a provision of an amending Act reduces the time between the issue of writs and the closing of the Roll, and thereby reduces the period in which claims for enrolment and transfer of enrolment may be processed before an election, the amending Act is liable to be held invalid unless it is seen to be based on a substantial reason, such as to produce benefits in the integrity and efficiency of the electoral system, sufficient to warrant the perceived detrimental effect of the reduction upon the constitutional imperative of choice by the people.

240 *Rowe* is not authority for the proposition that a reduction in the time available in which to enrol amounts to a disqualification from voting in the sense conceived in *Roach*, and it is not authority for the proposition that "chosen by the people" in ss 7 and 24 of the Constitution mandates making elections as expressive of the popular choice as practical considerations properly permit. Neither proposition commanded the assent of all members of the majority or the assent of any members of the minority.

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265 Mason, "The Use and Abuse of Precedent", (1988) 4 *Australian Bar Review* 93 at 104.

The plaintiffs' argument

241 This is not a case of reduction in the time for enrolment. The statutory grace period ending seven days after the issue of writs has existed for more than 30 years since it was introduced by the *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth). Hence, *Rowe* is not controlling. Counsel for the plaintiffs submitted that the plaintiffs' case nevertheless built on *Rowe* in a manner that accords with the imperative of choice by the people mandated by ss 7 and 24 of the Constitution and thus with what counsel contended should now be recognised as the resultant necessity for maximum opportunity for participation in elections. In counsel's submission, those propositions derived support from obiter dictum observations of French CJ and of Gummow and Bell JJ in *Rowe* concerning the possibility that improvements in technology might mean that it is practicable to keep the Roll open until polling day. Counsel referred in particular to French CJ's statement that[266]:

> "This is not to suggest that particular legislative procedures for the acquisition and exercise of the entitlement to vote can become constitutionally entrenched with the passage of time. Rather, it requires legislators to attend to the mandate of 'choice by the people' to which all electoral laws must respond";

and to Gummow and Bell JJ's statement that[267]:

> "Two things are to be said respecting this legislative history. The first is that the plaintiffs make no challenge to the seven day period. It may be that developments in technology and availability of resources will support the closure of the rolls at a date closer to election day. But this is a matter of speculation and inappropriate for further consideration here."

242 As finally propounded, the plaintiffs' argument thus became that the constitutional imperative of choice by the people renders invalid any provision that closes the Roll on or before polling day unless it is demonstrated that the provision is necessary to ensure the integrity of the electoral process. Reference was made to the electoral systems now operating in New South Wales and Victoria as evidence that it has become reasonably practicable to provide for enrolment up to and even on polling day. The existence of those systems was said to show that it is no longer necessary to close the Roll before polling day to ensure the integrity of the process. On that basis, it was contended that, whether or not the impugned provisions were valid at the time of their enactment, they had since become invalid.

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266 *Rowe* (2010) 243 CLR 1 at 19 [22].

267 *Rowe* (2010) 243 CLR 1 at 53 [140].

Chosen by the people

243 Unencumbered by more recent authority, one might not have hesitated to reject the plaintiffs' argument. As Hayne J observed in *Rowe*[268], the constitutional prescription of the form of representative government is so spare that the Parliament is, to a large extent, left free to determine the way in which the notion of representative government is to be given effect at the federal level. Certainly, that freedom is limited by the overarching requirements of ss 7 and 24 that the Houses be "directly chosen by the people". But, as Hayne J observed[269], quoting from *Mulholland v Australian Electoral Commission*[270], "care is called for in elevating a 'direct choice' principle to a broad restraint upon legislative development of the federal system of representative government". Why, then, should it be thought that the very minor discipline of closing the Roll seven days after the issue of writs offends the constitutional imperative of "chosen by the people"?

244 As against that, however, authority now establishes that "chosen by the people" bespeaks universal adult suffrage and thus an "entitlement to vote"[271]. To restrict the time in which persons may enrol to vote can have a substantive effect on the entitlement to vote, which, in turn, affects the franchise[272]. To justify such a restriction, there must be a "substantial reason" for it. And the establishment of a substantial reason sufficient to justify the restriction requires that the restriction be seen as "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government"[273]. Accordingly, this case fell to be decided in accordance with those requirements.

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268 (2010) 243 CLR 1 at 70 [200]; see also at 130 [420] per Kiefel J.

269 *Rowe* (2010) 243 CLR 1 at 70 [200].

270 (2004) 220 CLR 181 at 237 [156] per Gummow and Hayne JJ; [2004] HCA 41.

271 *Rowe* (2010) 243 CLR 1 at 18-19 [18]-[22] per French CJ, 51-52 [132]-[133], 57 [154], 58 [157] per Gummow and Bell JJ, 116-117 [366]-[368] per Crennan J. See also *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 36 per McTiernan and Jacobs JJ; [1975] HCA 53; *Roach* (2007) 233 CLR 162 at 174 [7] per Gleeson CJ.

272 *Rowe* (2010) 243 CLR 1 at 38-39 [78] per French CJ, 57 [154] per Gummow and Bell JJ, 119 [381] per Crennan J.

273 *Roach* (2007) 233 CLR 162 at 199 [85] per Gummow, Kirby and Crennan JJ; see also *Rowe* (2010) 243 CLR 1 at 59 [161] per Gummow and Bell JJ, 77 [225] per Hayne J (in dissent in the result), 119 [381], 120-121 [384] per Crennan J.

A substantial reason

245 Even so, as French CJ observed in *Rowe*[274], it is necessary to keep in mind in applying those requirements that the Constitution gives the Parliament considerable discretion in selecting the means to regulate elections and so to require persons otherwise qualified to vote to enrol to vote. Hence, as his Honour emphasised, the validity of the means chosen by the Parliament does not depend on some finely calibrated weighing of detriment and benefit. The means chosen are not to be adjudged invalid merely because the Court may think that there is another and apparently superior way of achieving the same objective. The criterion of validity is whether the means chosen are appropriate and adapted, and in that sense proportionate[275], to the achievement of the objective. In effect, that provides the Parliament with a fair amount of room in which to move.

246 Here, as the Commonwealth emphasised, the means chosen in the Act accord primacy to the integrity and reliability of the Roll. Thus, s 4(1) of the Act defines an elector as any person whose name appears on a Roll as an elector. Part VI of the Act provides that there shall be a Roll of the electors for each State and Territory and for Division Rolls and Subdivision Rolls, which together comprise the Roll for the State or Territory. Part VII provides for the qualifications and disqualifications for enrolment. Section 93(2) provides that an elector whose name is on the Roll for a Division is entitled to vote at elections of members of the Senate for the State that includes that Division and at elections of members of the House of Representatives for that Division. Part VIII regulates the procedure for enrolments. Section 101 makes it compulsory to enrol within 21 days of becoming entitled to do so and renders it an offence to fail to comply. Section 102 provides for the steps to be taken by the Commissioner on receipt of a claim for enrolment. Part IX provides for objection to enrolments. Part X provides for the review of the Commissioner's decisions pertaining to enrolments.

247 The central importance of the Roll is then reflected in the procedure for the commencement of an election and in each of the steps leading from commencement to completion of the election. Part XIII of the Act provides for the issue of writs for the commencement of elections in accordance with ss 12, 32 and 33 of the Constitution and requires that a writ for an election shall fix the dates for the close of the Roll, nomination, polling and return of the writ. The dates for those events are set by ss 155 to 159: with the close of Rolls seven days

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274 (2010) 243 CLR 1 at 22 [29].

275 *Roach* (2007) 233 CLR 162 at 199 [85] per Gummow, Kirby and Crennan JJ.

after the issue of writs[276]; nominations following not less than 10 days and not more than 27 days after the date of the writs[277]; the date of polling being not less than 23 days nor more than 31 days after the date of nominations[278]; the day of polling being a Saturday[279]; and the date fixed for the return of writs being not more than 100 days after the issue of writs[280]. Part XIV provides for nominations of candidates. For example, certain nominations must be signed by not less than 100 electors entitled to vote at the election for which the candidate is nominated. Part XVI provides for polling. Section 208 provides for the Commissioner to prepare certified lists of the names of each person whose name is on the Roll, who will be 18 years old on polling day and who is not serving a term of imprisonment of more than three years. Section 203 requires the provision of "all necessary certified lists of voters and approved lists of voters" for polling day. Section 208A allows for approved (electronic) lists of voters to be prepared from the certified lists, which, in turn, are prepared from the Roll.

248 Taken together those provisions comprise a system of enrolment, objection, review, nomination and polling in which the several steps and stages appear as separated by periods of time directed to achieving an acceptable degree of order and certainty within the constraints of finite resources.

249 The Roll is also an essential reference point for processes in the electoral cycle that depend on the number and distribution of electors likely to vote at the next election, including:

(i) the proportionate distribution of States and Territories into Divisions ahead of the issue of writs[281];

(ii) the assessment of whether a political party has sufficient support to be registered[282];

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276 *Commonwealth Electoral Act*, s 155.

277 *Commonwealth Electoral Act*, s 156.

278 *Commonwealth Electoral Act*, s 157.

279 *Commonwealth Electoral Act*, s 158.

280 *Commonwealth Electoral Act*, s 159.

281 *Commonwealth Electoral Act*, ss 56-78.

282 *Commonwealth Electoral Act*, s 123(1) definitions of "eligible political party" and "Parliamentary party", s 126.

(iii) the assessment of whether a candidate has sufficient support to be nominated for election as a senator or a member of the House of Representatives[283];

(iv) the provision of accurate information to interested members of the public, any of whom can attend the office of a Divisional Returning Officer and view the Roll for that Division[284];

(v) the preparation of a certified list of voters for each Division, and distribution of it to each polling place before the start of voting[285] and to candidates, political parties, senators, members of the House of Representatives and State and Territory electoral authorities[286]; and

(vi) the making and resolution of objections to voter enrolment[287].

It is necessary for the integrity of the system so established that the Roll be maintained as accurately as possible on a day-to-day basis as well as on polling day.

250 Evidently, the impugned provisions and the legislative offence provisions regarding late and inaccurate enrolment[288] are directed to the achievement of the requisite degree of accuracy. By requiring potential electors to enrol within a defined time, penalising potential electors who fail to comply with their enrolment obligations, and preventing the processing of claims for enrolment and transfer of enrolment within the suspension period, the impugned provisions and the legislative offence provisions are calculated to persuade electors to comply with their obligations to enrol, to make the Roll as accurate as possible on a day-to-day basis and to allow sufficient time to ensure the accuracy of the Roll in advance of an election. Taken as a whole, the means chosen in the Act to regulate elections, and require persons otherwise qualified to vote to enrol to vote, may thus be seen as directed to the achievement of a degree of order and certainty which enhances the democratic process consistently with the system of representative government prescribed by the Constitution.

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283 *Commonwealth Electoral Act*, s 166.

284 *Commonwealth Electoral Act*, s 90A(1).

285 *Commonwealth Electoral Act*, ss 208, 208A.

286 *Commonwealth Electoral Act*, s 90B.

287 *Commonwealth Electoral Act*, ss 113-118.

288 *Commonwealth Electoral Act*, s 101.

Alternative means

251 So to conclude is not to overlook the availability of alternative means, which might be regarded as a relevant consideration in the determination of whether the suspension period is reasonably appropriate and adapted to serve the identified ends[289].

252 As the plaintiffs contended, there are other systems which take less time between steps and thereby enable the Roll to be kept open until closer to an election. Some of the facts stated in the special case show that it is now possible for potential electors in State elections in New South Wales and Victoria to enrol up to and on polling day in one form or another. But nothing in the special case establishes or provides a basis to infer that the systems in New South Wales and Victoria are capable of achieving the same level of order and certainty as the system prescribed by the Act. To the contrary, it appears that the New South Wales and Victorian systems have the potential to lead to more disputes about who is entitled to vote, more consequent disputes about the outcome of elections, those disputes remaining unresolved for longer and consequent greater uncertainty for longer about the outcome of elections. There are indications, too, that, even in the short time for which the present system in Victoria has been in operation, the ability for voters to enrol up to and on polling day has led to an increased level of voter insouciance to the consequences of failing to enrol within the prescribed time and a consequent increased and increasing level of enrolment delinquency.

253 It may also be, as the plaintiffs contended, that it would be possible to shorten the time between steps within the system prescribed by the Act by the allocation of additional personnel and other resources to the tasks involved. Presumably, the more personnel and other resources applied to those tasks, the faster they might be completed. But who is to say what further resources should be applied to the administration of the electoral system and at what costs to other, competing priorities? To a large extent those are questions of policy in which this Court has no role to play.

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289 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568; [1997] HCA 25; *Monis v The Queen* (2013) 249 CLR 92 at 214 [347] per Crennan, Kiefel and Bell JJ; [2013] HCA 4; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 556 [44] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; [2013] HCA 58; *Tajjour v New South Wales* (2014) 254 CLR 508 at 550 [36] per French CJ, 565-566 [90] per Hayne J, 581 [152] per Gageler J; [2014] HCA 35; *McCloy v New South Wales* (2015) 89 ALJR 857 at 884-885 [135] per Gageler J, 899 [222] per Nettle J, 915-916 [328] per Gordon J; 325 ALR 15 at 48, 68, 89; [2015] HCA 34.

254 Ultimately, within the relatively broad discretion conferred on the Parliament to select means to regulate elections, it is open for the Parliament to prefer the relative order and certainty of the Act's system to the relative disorder and uncertainty of the New South Wales or Victorian real time enrolment/voting paradigm and to apply no more resources to the task than have already been allocated.

Suspension period not invalid

255 *Rowe* suggests that, if the time available for enrolment were to be further restricted, there might come a point at which the detriment of the increased restriction on the ability to enrol and therefore vote would appear disproportionate to any benefit to the fulfilment of the constitutional mandate. But, as matters stand, the burden imposed on the entitlement to vote by the existing requirement that the Roll be closed seven days after the issue of writs has not been shown to answer that description.

Conclusion

256 Bearing in mind the objectives of order and certainty which the Act appears designed to achieve, the requirement that the Roll be closed seven days after the issue of writs has not been shown to be invalid. On the basis of the facts disclosed in the special case, the restriction presents as appropriate and adapted to the achievement of an end, namely, an acceptable degree of order and certainty within the constraints of finite resources, which is consistent or compatible with the system of representative government mandated by the Constitution.

257 It is for these reasons that I joined in the orders that were made on 12 May 2016.

258 GORDON J. At the time this matter was heard, the first plaintiff was enrolled to vote under the *Commonwealth Electoral Act* 1918 (Cth) ("the Act") in the Division of Wills in Victoria. The second plaintiff was enrolled to vote in the Division of Newcastle in New South Wales and intended to seek nomination as a candidate for election to the House of Representatives for the seat of Newcastle at the 2016 federal election.

259 The plaintiffs contended that specific provisions of the Act, which suspend certain additions and amendments to the Electoral Rolls from seven days after the issue of the writs for elections ("the suspension period"), prevented persons otherwise entitled to do so from enrolling and voting up to and including on polling day and were therefore invalid. These are my reasons for rejecting that contention and for joining in answering the questions of law stated for the opinion of the Full Court under r 27.08.1 of the High Court Rules 2004 (Cth) in the way they were answered following oral argument.

The constitutional framework

260 The Constitution is for the "advancement of representative government"[290]. The term "representative government" is not defined and does not appear in the text of the Constitution. Nevertheless, the institution of "representative government"[291] has been said to be "written into"[292] the Constitution. The institution of "representative government", like the closely related institution of "responsible government", is part of the "fabric on which the written words of the Constitution are superimposed"[293]. The text of the Constitution, and its structure, define how and the extent to which the

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290 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557; [1997] HCA 25 citing *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 178; [1926] HCA 58.

291 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 70-71; [1992] HCA 46; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 137-138, 149, 168, 228-230; [1992] HCA 45; *Lange* (1997) 189 CLR 520 at 557-559; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 [6], 205-207 [61]-[65], 236 [154]; [2004] HCA 41; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7], 186-187 [44]-[45]; [2007] HCA 43.

292 See *ACTV* (1992) 177 CLR 106 at 184.

293 *ACTV* (1992) 177 CLR 106 at 135 citing *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 413; [1926] HCA 8. See also *Lange* (1997) 189 CLR 520 at 557-558.

Constitution gives effect to the institution of representative government[294]. As the Court explained in *Lange v Australian Broadcasting Corporation*, "the Constitution provides for that form of representative government which is to be found in the relevant sections"[295]. The relevant question then is: "What do the terms and structure of the Constitution prohibit, authorise or require?"[296]

261 The starting point is s 1, contained in Pt I of Ch I of the Constitution, which vests the legislative power of the Commonwealth in the Parliament. Parts II, III and IV of Ch I establish that there are two Houses of the Parliament – the Senate and the House of Representatives – composed of senators and members respectively. Sections 7 and 24 of the Constitution, read in context, require those senators and members "to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively"[297]. The Constitution then empowers the Parliament to make laws regulating those elections[298], and the qualification of electors[299]. Indeed, since the Parliament first exercised those powers by enacting the *Commonwealth Electoral Act* 1902 (Cth) ("the 1902 Electoral Act") and the *Commonwealth Franchise Act* 1902 (Cth) ("the 1902 Franchise Act"), the Constitution, in effect, has required the Parliament to maintain laws of that kind[300]. The Commonwealth also has power to make laws that determine the Electoral Divisions in each State[301].

262 Although that legislative power is effectively a "plenary power over federal elections"[302], it is subject to express and implied limitations contained in

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294 *Lange* (1997) 189 CLR 520 at 566-567 citing *McGinty v Western Australia* (1996) 186 CLR 140 at 168, 182-183, 231, 284-285; [1996] HCA 48.

295 (1997) 189 CLR 520 at 567.

296 *Lange* (1997) 189 CLR 520 at 567.

297 *Lange* (1997) 189 CLR 520 at 557.

298 ss 9, 10, 31 and 51(xxxvi) of the Constitution.

299 ss 8, 30 and 51(xxxvi) of the Constitution.

300 That is the consequence of the phrase "[u]ntil the Parliament otherwise provides" in ss 10, 30 and 31 of the Constitution. Those powers are exclusive to the Commonwealth: *Smith v Oldham* (1912) 15 CLR 355 at 358, 360; [1912] HCA 61.

301 ss 29 and 51(xxxvi) of the Constitution.

302 cf *Smith* (1912) 15 CLR 355 at 363.

the Constitution[303]. The mandate in ss 7 and 24 that senators and members be "directly chosen by the people" operates as one such limitation[304]. The Parliament may not establish an electoral system that does not comply with that requirement. On occasion, this Court has held laws invalid on that basis[305]. Accepting that "directly chosen by the people" is a "broad expression to identify the requirement of a popular vote"[306], "care is called for in elevating a 'direct choice' principle to a broad restraint upon legislative development of the federal system of representative government"[307].

263 There are other limitations on the relevant power[308]. But outside those limitations, the Constitution does not prescribe the features of any particular electoral system. That design was deliberate[309]. The result is that, subject to limitations deriving from the text and structure of the Constitution, the Parliament is left with a broad choice as to the features of the electoral system[310].

264 Those features are not limited to minor matters; they include fundamental features about how elections are carried out. As Gleeson CJ observed in *Roach v Electoral Commissioner*, "[i]mportant features of our system of representative democracy, such as compulsory voting, election of members of the House of

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303 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 14 [8]; [2010] HCA 46.

304 *Mulholland* (2004) 220 CLR 181 at 206 [61]-[62].

305 See, eg, *Roach* (2007) 233 CLR 162; *Rowe* (2010) 243 CLR 1.

306 *McGinty* (1996) 186 CLR 140 at 279; see also at 285.

307 *Mulholland* (2004) 220 CLR 181 at 237 [156]; *Roach* (2007) 233 CLR 162 at 197 [77]; *Day v Australian Electoral Officer (SA)* (2016) 90 ALJR 639 at 645 [19]; 331 ALR 386 at 393; [2016] HCA 20.

308 See, eg, ss 8, 9, 29 and 30 of the Constitution. See also the discussion of s 9 in *Day* (2016) 90 ALJR 639 at 649-650 [39]-[44]; 331 ALR 386 at 399-400.

309 See, eg, *Official Report of the National Australasian Convention Debates*, (Adelaide), 15 April 1897 at 672-675; *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 16 March 1898 at 2445-2446. See also *McGinty* (1996) 186 CLR 140 at 279-280.

310 *McGinty* (1996) 186 CLR 140 at 184; *Langer v The Commonwealth* (1996) 186 CLR 302 at 343; [1996] HCA 43; *Mulholland* (2004) 220 CLR 181 at 207 [64], 236-237 [154]; *Rowe* (2010) 243 CLR 1 at 22 [29], 49-50 [125], 106 [325], 121 [386].

Representatives by preferential voting, and proportional representation in the Senate", as well as suffrage for women and indigenous persons, "are the consequence of legislation, not constitutional provision"[311]. In addition, since 1902, the electoral system prescribed by Parliament has extended to laws relating to the franchise more broadly, the requirement to enrol to vote, the process for electing senators and members and the exercise of the right of an elector to vote. The scope of those subject matters demonstrates the breadth of the legislative power granted to the Parliament by the Constitution.

Enrolment as a condition of the right to vote

265 A distinction between persons being qualified to vote and persons being enrolled or registered and listed as qualified electors on an Electoral Roll, as a condition of the exercise of the right to vote, existed in Australian colonial laws before Federation[312]. Those laws included provisions to close the Electoral Rolls to new enrolments or transfers of enrolment prior to polling day[313].

266 From 1902, enrolment for and voting in federal elections were regulated under the 1902 Electoral Act and the 1902 Franchise Act. Under the 1902 Electoral Act, all persons qualified to vote at an election for the Senate or House of Representatives were qualified and entitled to have their names placed upon the Electoral Roll for the Division in which they lived[314]. Under the 1902 Franchise Act, subject to certain exceptions and qualifications, the persons whose names were on the Electoral Roll for any Division were then entitled to vote at the election of senators and members of the House of Representatives[315]. Enrolment was voluntary until 1911[316].

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311 (2007) 233 CLR 162 at 173 [5]. See also *Mulholland* (2004) 220 CLR 181 at 188 [6]-[7].

312 *Rowe* (2010) 243 CLR 1 at 17 [15]-[16]. For the position in England and Wales before Federation, see *Representation of the People Act* 1832 (2 & 3 Will IV c 45).

313 *Rowe* (2010) 243 CLR 1 at 17 [16].

314 s 31 of the 1902 Electoral Act.

315 s 3 of the 1902 Franchise Act.

316 The obligation on qualified persons to enrol was introduced by s 8 of the *Commonwealth Electoral Act* 1911 (Cth).

267 The Commonwealth Electoral Roll has been available for use in State and Commonwealth elections under joint Roll arrangements since 1905[317], and has been used to determine who had an obligation to vote since the introduction of compulsory voting in 1924[318].

268 Between 1902 and 1983, the Rolls closed on the day the writs for an election were issued. From at least the 1930s, however, there was an executive practice of announcing the election some days before the Governor-General was asked to dissolve Parliament and issue writs for the election of the members of the House of Representatives[319]. This provided a grace period, the length of which was a matter of discretion of the Executive, for persons wishing to enrol or transfer enrolment to do so prior to the issue of the writs. In 1983, the cut-off point for consideration of claims for enrolment or transfer of enrolment was extended beyond the date of the issue of the writs to the date of close of the Rolls, which was fixed as seven days after the issue of the writs[320].

269 In 2006[321], the Act was amended to provide that a claim for enrolment received between 8 pm on the day the writs issued and ending at the close of polling for that election could not be considered until after the close of polling. Claims for transfer of enrolment could be made within three working days of the issue of the writs. A majority of the Court in *Rowe v Electoral Commissioner*[322] found those amendments to be invalid, and the Parliament subsequently amended the text of the Act to reflect the effect of the orders made in *Rowe*, restoring the seven day grace period[323]. It is the "suspension period" that follows the seven

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317 See s 18 of the *Commonwealth Electoral Act* 1905 (Cth), which inserted s 30 into the 1902 Electoral Act.

318 Compulsory voting was introduced by s 2 of the *Commonwealth Electoral Act* 1924 (Cth) and found to be valid in *Judd v McKeon* (1926) 38 CLR 380; [1926] HCA 33.

319 *Rowe* (2010) 243 CLR 1 at 31 [59].

320 See ss 29 and 45 of the *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth).

321 Items 20, 24, 28, 41-45 and 52 of Sched 1 to the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth).

322 (2010) 243 CLR 1.

323 Items 2-8 of Sched 1 to the *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act* 2011 (Cth).

day grace period that the plaintiffs contended is invalid. The validity of the suspension period was not challenged by the plaintiffs in *Rowe*[324].

The Act

270 The electoral system provided by the Parliament is that senators and members are "directly chosen by the people"[325] by a process defined and regulated by the Act. It is a system that provides for the creation of Electoral Divisions; identifies the franchise; includes a requirement to enrol to vote; sets out the process for an election of senators and members, commenced by the issue of a writ for an election and ended by its return, and the nominations of candidates; prescribes the qualifications to be entitled to vote; regulates the exercise of the right of an elector to vote; and provides for the declaration of a poll after voting. It is necessary to examine some aspects of that system and the relationship between them.

Entitled to be enrolled

271 The franchise is addressed in s 93 of the Act. In general terms, all citizens aged 18 and over are entitled to enrol to vote. Any person qualified to enrol, who lives at an address in a Division, and has lived at that address for the last month, is entitled to have their name "placed on" the relevant Roll for that Division[326]. If such a person was previously enrolled at an address in a different Division, the person is entitled to have their name "transferred" to the relevant Roll for the Division in which they now live[327]. Every person entitled to enrol, by way of either enrolment or transfer of enrolment, and whose name is *not* on the relevant Roll, is obliged to make a claim for enrolment or transfer of enrolment under the Act[328]. A person whose name is not on the relevant Roll within 21 days from the date of entitlement is guilty of an offence[329].

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324 (2010) 243 CLR 1 at 53 [140].

325 ss 7 and 24 of the Constitution.

326 s 99(1) of the Act.

327 s 99(2) of the Act.

328 s 101(1) of the Act. This does not apply to persons who are entitled to be enrolled by virtue of ss 94, 94A, 95, 96 or 100. Some of these provisions will be addressed below.

329 s 101(4) and (6) of the Act.

The Roll

272 An "Elector" is "any person whose name appears on a Roll as an elector"[330]. Entitlement to vote as an elector depends on a person being entitled to be enrolled[331], and enrolled[332], on the Roll. The "Roll" is an "Electoral Roll under this Act"[333]. Part VI of the Act deals with Electoral Rolls. There is a Roll of electors for each State and for each Territory[334] and a Roll for each Division[335]. All the Division Rolls for a State or Territory form the Roll for that State or Territory[336]. The Rolls must set out the surname, given names and place of living of each elector and other particulars as are prescribed[337]. Names may be added to Rolls pursuant to claims for enrolment or transfer of enrolment or claims for "age 16 enrolment"[338]. There is no prescribed form for the Rolls. A computerised record of a Roll is permitted[339].

273 There are specific mechanisms for three particular classes of persons (persons outside Australia[340], persons having an entitlement to be placed on the Roll because of a relationship with an eligible overseas elector[341] and itinerant electors[342]) to apply to the Electoral Commissioner for enrolment. In respect of those categories of persons, the plaintiffs challenged the validity of ss 94A(4), 95(4) and 96(4), which each provide that if a person's application to be enrolled

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330 s 4(1) of the Act.

331 See ss 93(1), 94, 94A, 95, 96 and 99(1)-(2) of the Act.

332 ss 93(2)-(8AA) and 221 of the Act.

333 s 4(1) of the Act.

334 s 81(1) of the Act.

335 s 82(1) of the Act.

336 s 82(4) of the Act.

337 s 83(1) of the Act, subject to two exceptions presently not relevant.

338 s 98(1) of the Act.

339 s 111 of the Act.

340 s 94A of the Act.

341 s 95 of the Act.

342 s 96 of the Act.

is received during the suspension period, the Electoral Commissioner must not add the applicant's name to the relevant Roll until after the close of the poll.

274 As seen, qualification as an "elector" being dependent on enrolment is a mechanism adopted by the legislature to assist in the orderly and efficient conduct of elections. There are other aspects of that mechanism directed to the same end, some of which were also challenged by the plaintiffs.

275 As noted earlier, a claim to be entitled to participate (whether by enrolment or transfer of enrolment) is required to be made under s 101[343]. Each claim may be investigated before being determined by the Electoral Commissioner[344]. The plaintiffs also challenged the validity of s 102(4), which provides that if a person's claim under s 101 is received during the suspension period, the claim must not be considered until after the end of the suspension period.

276 The Act permits the Electoral Commissioner to update the Roll in two ways without a claim having been made. First, s 103A(2) of the Act permits the Electoral Commissioner to give 28 days' notice to a person that the Electoral Commissioner is satisfied that the person lives at another address and therefore the Electoral Commissioner proposes to update or transfer that person's enrolment. Second, under s 103B(2) of the Act, if the Electoral Commissioner is satisfied that a person is entitled to enrolment, has lived at an address for at least one month and is not enrolled, the Electoral Commissioner may give 28 days' notice to that person that the Electoral Commissioner proposes to enter the person's name and other particulars on the relevant Roll.

277 In both situations, the Electoral Commissioner may take action before the end of 28 days if the person indicates that they do live at the proposed address and, in the case of s 103B, are entitled to enrolment[345]. The plaintiffs challenged the validity of ss 103A(5) and 103B(5), which provide that the Electoral Commissioner must not take the proposed action within the suspension period.

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343 As noted above, s 101(1) does not apply where a person is entitled to be enrolled by virtue of ss 94, 94A, 95, 96 or 100.

344 s 102 of the Act.

345 ss 103A(4) and 103B(4) of the Act.

278 The enrolment of a person may be objected to on certain grounds[346]. The Act prescribes how to object[347] and the objection process[348]. The plaintiffs challenged the validity of s 118(5), which provides that the Electoral Commissioner must not remove an elector's name from the relevant Roll within the suspension period.

Elections

279 An election commences with the issue of election writs[349]. By s 152 of the Act, writs issued for the election of senators or members of the House of Representatives fix the date for the close of the Rolls, the nomination of candidates, the polling and the return of the writ. Section 155 prescribes that the date fixed for the close of the Rolls is the seventh day after the date of the writ. The suspension period is from 8 pm on the day of the close of the Rolls until the close of polling. The plaintiffs did not directly challenge the validity of ss 152 and 155 but contended that to the extent that they prevented enrolments or transfers after the close of the Rolls, they should be read down to prevent that operation.

280 Part XIV of the Act provides for nomination of candidates for the Senate or the House of Representatives. A person cannot be nominated unless the person is, or is qualified to become, an elector entitled to vote at a House of Representatives election[350]. If a candidate is not endorsed by a registered political party[351] or is not an independent senator or member immediately prior to Parliament's dissolution[352], the nomination must be signed by not less than 100 electors entitled to vote at the election for which the candidate is nominated[353]. The date fixed for the nomination of candidates is not less than 10 days and not

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346 s 114 of the Act.

347 s 115 of the Act.

348 ss 116 and 118 of the Act.

349 See ss 12, 32 and 33 of the Constitution and Pt XIII of the Act.

350 s 163 of the Act.

351 s 166(1)(b)(ii) of the Act.

352 s 166(1C) of the Act.

353 s 166(1)(b)(i) of the Act.

more than 27 days after the date of the writ[354]. The date fixed for polling is between 23 and 31 days after the nominations[355].

281 An elector whose name is *on the Roll* for a Division is entitled to vote at elections of senators for the State or Territory that includes that Division and elections of members of the House of Representatives for that Division[356]. As seen earlier, entitlement to vote is dependent on an elector's name being on the Roll.

282 Polling is dealt with in Pt XVI of the Act. It is the duty of every elector to vote at each election[357]. The Electoral Commissioner provides a certified list of voters for each Division, which includes the name, sex and date of birth for each person *on the Roll* for the Division, who will be at least 18 years old on polling day and who is not subject to a term of imprisonment of three years or longer[358]. In conducting the poll, subject to two exceptions[359], the Electoral Rolls in force at the time of the election are "conclusive evidence" of the right of each person on the Rolls to vote as an elector[360], unless the person answers the questions put to them prior to voting[361] in a way which demonstrates they are not entitled to vote.

283 Postal voting is permitted under Pt XV of the Act. Pre-poll voting by electors is provided for under Pt XVA of the Act. An elector may apply for a postal vote or a pre-poll vote on the grounds set out in Sched 2 to the Act[362].

284 Part XIX of the Act provides for the return of the writs. The date fixed for the return of a writ must be within 100 days of the issue[363]. The names of

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354 s 156 of the Act.

355 s 157 of the Act.

356 ss 93, 97 and 221(1)-(2) of the Act.

357 s 245(1) of the Act.

358 ss 203(1)(b) and 208 of the Act.

359 The exceptions are a person who has been placed on a Roll because of a claim made under s 100 and who will be under 18 on polling day and a person subject to a term of imprisonment of three years or longer.

360 s 221(3) of the Act.

361 ss 200DI and 229 of the Act.

362 ss 183 and 200A(1) of the Act.

363 s 159 of the Act.

candidates elected are declared and certified, the writs are returned[364] and there is a transition to the formation of a new government.

Other uses of the Rolls

285 The Rolls are central to the maintenance of the institution of representative government in other ways.

286 First, the Rolls ensure that Electoral Divisions reflect election of senators and members of the House of Representatives "directly chosen by the people". As seen earlier, an elector's name is *on the Roll* for a Division. Each State and Territory is distributed into Electoral Divisions[365], with one member of the House of Representatives chosen for each Division[366]. The Act provides a complex procedure for redistribution of the Divisions in a State or Territory[367]. A trigger for a redistribution may be an assessment (which is conducted monthly) of the extent to which the number of electors enrolled in each Division differs from the average divisional enrolment[368]. The Rolls contain the data from which that assessment is made.

287 Second, the Rolls are available to be used by others. A copy of a Roll for a Division or each State and Territory is available for public inspection[369]. Information in relation to the Rolls and certified lists of voters also must be provided by the Electoral Commission to particular persons and organisations[370]. In particular, "as soon as practicable after the close of the Rolls", candidates in elections for the House of Representatives must receive a copy of the certified list of voters for the Division for which they are seeking election[371].

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364 ss 283 and 284 of the Act.

365 s 56 of the Act. See also s 55A regarding the Northern Territory.

366 s 57 of the Act.

367 See ss 59-68 of the Act.

368 ss 58 and 59(2)(b) and (10) of the Act.

369 s 90A of the Act.

370 s 90B of the Act.

371 Item 1 in the table in s 90B(1) of the Act.

The system

288 As the above discussion demonstrates, the electoral system chosen by the Parliament has a detailed, coherent structure. That system includes practical and logical steps directed to the orderly and efficient conduct of elections, which result in senators and members of the House of Representatives being "directly chosen by the people" as required by ss 7 and 24 of the Constitution, leading to the formation of a government.

289 It is against that background that the plaintiffs' complaints are to be considered.

The plaintiffs' complaints

290 The plaintiffs complained about the suspension period effected by ss 94A(4), 95(4), 96(4), 102(4), 103A(5), 103B(5) and 118(5) of the Act ("the impugned provisions"). The plaintiffs contended that the text and structure of the Constitution prohibit the suspension period[372] because the impugned provisions prevent persons otherwise entitled to do so from enrolling (or transferring their enrolment) and voting on polling day, thereby effecting a legislative disenfranchisement, disqualification or exclusion of persons otherwise entitled to vote. The plaintiffs also contended that the impugned provisions distort the popular choice mandated by the Constitution.

Limit on Commonwealth legislative power

291 Whatever choice is made by the legislature about the qualification to enrol, the entitlement to vote and the method of voting, universal adult suffrage may only be subject to a limitation for a substantial reason[373].

292 In *Roach*, the Court dealt with a case where the Parliament, in exercise of its legislative power to determine the qualification of electors[374], had enacted provisions that had a legal effect on the franchise by prohibiting persons serving a term of imprisonment from voting. In *Rowe*, although the provisions challenged were not directed towards the qualification of electors, they had a substantial practical effect on who participated in the "choice". The provisions challenged in both cases were held invalid. The basis for that invalidity was that

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372 *Lange* (1997) 189 CLR 520 at 567.

373 *Roach* (2007) 233 CLR 162 at 174 [7], 198-199 [83]; cf *McGinty* (1996) 186 CLR 140 at 170 as discussed in Twomey, "*Rowe v Electoral Commissioner* – Evolution or Creationism?", (2012) 31 *University of Queensland Law Journal* 181 at 186.

374 ss 8, 30 and 51(xxxvi) of the Constitution.

the provisions, in the context of the electoral system as a whole, had the effect that the electoral system established by the Act did not provide for senators and members of the House of Representatives to be "directly chosen by the people" as required by ss 7 and 24 of the Constitution[375].

293 In *Roach*, Gummow, Kirby and Crennan JJ identified that there will be a "substantial" reason for a restriction on the franchise if the reason 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"[376]. Their Honours noted that "[t]he affinity to what is called the second question in *Lange* will be apparent"[377].

294 The questions in *Lange* were directed to whether a law will be invalid for infringing the implied freedom of political communication. More recently, in *McCloy v New South Wales*[378], a majority of the Court altered the traditional formulation of that test and adopted a framework of "structured" proportionality.

295 Here, the plaintiffs proceeded on the basis that, because of the "affinity" between the test outlined in *Roach* and the second question in *Lange*, the validity of the impugned provisions fell to be determined in accordance with the "structured" proportionality approach of the joint judgment in *McCloy*. The Commonwealth, while accepting that some form of proportionality testing was appropriate, rejected the suggestion that it should take the form adopted by the joint judgment in *McCloy*. The Attorney-General for South Australia, who intervened to make submissions only on the issue of the relevant test, supported the Commonwealth's approach.

296 The concept of proportionality is applied in a variety of areas in Australian jurisprudence[379]. It should not be assumed that, because a particular test for proportionality has been adopted in one particular constitutional context, it can

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375 See *Roach* (2007) 233 CLR 162 at 173 [6], 182 [24], 187-188 [46]-[49], 199-200 [85]-[86], 202 [95]; *Rowe* (2010) 243 CLR 1 at 19 [22], 38-39 [78], 56-57 [150]-[151], 58-59 [160], 61 [166], 107 [328], 118-119 [375], 119 [381], 121 [384].

376 (2007) 233 CLR 162 at 199 [85].

377 (2007) 233 CLR 162 at 199 [86] (footnote omitted).

378 (2015) 89 ALJR 857; 325 ALR 15; [2015] HCA 34.

379 See *McCloy* (2015) 89 ALJR 857 at 863 [3]; 325 ALR 15 at 19.

be uncritically transferred into another context, constitutional or otherwise[380], even within the same jurisdiction.

297 The "structured" proportionality approach adopted by the joint judgment in *McCloy* is inappropriate in the constitutional context in this case. That can be demonstrated by considering the "necessity" stage of the *McCloy* test.

298 The "necessity" stage of the *McCloy* test would require a court to inquire as to whether there exists an "obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect"[381] on the franchise. If that inquiry is answered positively, then a law will (not may) be invalid[382].

299 There are questions about whether such a rigid inquiry (which alone may result in the invalidity of legislation) is appropriate at all in the Australian constitutional context, where the judicial branch of government cannot exercise legislative or executive power.

300 However, for present purposes, it is enough to consider the immediate constitutional context. There is a critical difference between the implied freedom of political communication considered in *McCloy* and the issues in this case.

301 The Parliament is required to enact laws which provide for an electoral system[383]. The consequence of the constitutional framework is that the Parliament is effectively under an obligation to maintain laws of that kind. The legislature must design and maintain a comprehensive system that meets the constitutional mandate. In designing that system, the legislature will be faced with a multitude of options for how the system is to operate and, in doing so, will be required to balance a wide range of matters and values. Those options will be presented at a number of different points as the Parliament addresses many different stages of the electoral process. Each of those different stages must ultimately interact to create a coherent whole. It is not a matter of devising and

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380 See *McCloy* (2015) 89 ALJR 857 at 874 [72]; 325 ALR 15 at 34. See also *Mulholland* (2004) 220 CLR 181 at 200 [39]; *Roach* (2007) 233 CLR 162 at 178-179 [17]; *McCloy* (2015) 89 ALJR 857 at 885 [139], 917 [339]; 325 ALR 15 at 49, 91-92.

381 *McCloy* (2015) 89 ALJR 857 at 863 [2]; 325 ALR 15 at 19.

382 cf *McCloy* (2015) 89 ALJR 857 at 885 [135], 899 [222], 915-916 [328]; 325 ALR 15 at 48, 68, 89.

383 See [261]-[264] above. cf Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 400.

drafting a single provision or division of an Act. There are countless variations of such a system.

302 That positive role given to Parliament, together with the broad scope of the legislative power with respect to elections, distinctly marks out the present constitutional context from any inquiry about the implied freedom of political communication.

303 And that is also why, in any case, it is not appropriate to apply the "necessity" stage of the *McCloy* test as rigidly as *McCloy* would suggest. To do so would create too great a risk of the judicial branch intruding on the legislative function conferred on the Parliament by the Constitution[384]. And at a practical level, the judiciary is not equipped to make definitive judgments about whether there are obvious, compelling and practical alternatives to particular provisions that are part of an *entire legislative scheme* that the Parliament is required to enact to comply with ss 7 and 24 of the Constitution. That flows from the distinctions that are "to be maintained between powers described as legislative, executive and judicial" by reference to "distinctions generally accepted at the time when the Constitution was framed between classes of powers requiring different 'skills and professional habits' in the authorities entrusted with their exercise"[385].

304 The difficulties in assessing an integrated legislative scheme were demonstrated in this case when considering the electoral systems in New South Wales, Queensland and Victoria. While they demonstrate that alternative schemes do exist, upon close examination the difficulties in making effective comparisons become apparent. Those difficulties would only be heightened by considering hypothetical alternatives. Those observations are not to endorse particular labels such as "deference", "margin of appreciation" or "zone of proportionality". Rather, they are observations grounded in, and derived from, fundamental constitutional principle in this country.

305 None of that denies that comparisons with alternative laws may be instructive[386]. But they are not determinative. That accords with the earlier warning that "care is called for in elevating a 'direct choice' principle to a broad

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384 See *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473; [1990] HCA 1; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 576-577 [130]-[132]; [2013] HCA 58.

385 *R v Davison* (1954) 90 CLR 353 at 381-382; [1954] HCA 46.

386 See *Lange* (1997) 189 CLR 520 at 568; *Unions NSW* (2013) 252 CLR 530 at 556 [44].

restraint upon legislative development of the federal system of representative government"[387].

Impugned provisions are valid

306 Turning to the present case, is part of the universal adult suffrage excluded or the franchise restricted by the impugned provisions, which form part of the electoral system prescribed by the Act? If so, is there a "substantial reason" for that exclusion or restriction?

307 Terms such as "exclusion", "detriment", "disentitlement", "disenfranchisement" and "disqualification" were used in the different reasons for judgment in *Roach* and *Rowe*. Some of these terms are unhelpful. Most are not defined or not defined consistently. To take "disqualification" as an example, it may mask a distinction between legal disqualification in the *Roach* sense and cases such as the present where persons who are qualified to vote are unable to vote for some other reason[388]. Here, the plaintiffs contended that there was a restriction on, exclusion from, or distortion of the franchise.

No restriction on, or exclusion from, the franchise

308 Is there a relevant restriction on, or exclusion from, the franchise in this case? The answer is "No".

309 First, there was no legislative diminution of an existing opportunity to enrol, transfer or vote. That is not to endorse the legislative diminution of opportunities to enrol, transfer or vote as being a legitimate criterion to determine the constitutional validity of legislation affecting the franchise. As a matter of constitutional interpretation, treating legislative diminution as a criterion raises complicated issues[389]. It is enough to note that when the grace period was restored by the decision in *Rowe* and reflected in the enactment of the impugned provisions by Parliament in 2011, that amounted to a restoration of the opportunity to enrol, transfer or vote to the position that first existed in 1983.

310 The plaintiffs' reliance on *Rowe* to contend that there was a restriction on the franchise in the present case was misplaced. The outcome in *Rowe* does not

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387 *Mulholland* (2004) 220 CLR 181 at 237 [156]; *Roach* (2007) 233 CLR 162 at 197 [77]; *Day* (2016) 90 ALJR 639 at 645 [19]; 331 ALR 386 at 393.

388 See *Rowe* (2010) 243 CLR 1 at 66 [187].

389 See *Rowe* (2010) 243 CLR 1 at 102 [310]-[311]. See also Twomey, "*Rowe v Electoral Commissioner* – Evolution or Creationism?", (2012) 31 *University of Queensland Law Journal* 181 at 183-195.

dictate the answer to the present case. There was no consensus between the majority in *Rowe* on this issue. For example, French CJ placed significance on the fact that the impugned provisions in *Rowe* operated to diminish opportunities to enrol and transfer that had previously existed under the Act[390]. That fact was not determinative for the other members of the majority.

311 In numerical terms, the question of whether there is a relevant restriction on, or exclusion from, the franchise might be said to be answered by the facts agreed in the special case. For each of the four federal elections prior to the 2016 election, there has been an increase in the number of provisional votes cast. Such a vote may be cast in certain circumstances where a person claims to vote, but there is a specific reason why their entitlement to vote cannot be verified at the time[391]. In the 2004 election, 180,865 provisional votes were cast, with 112,560 counted for the Senate and 90,512 counted for the House of Representatives. In the 2013 election, 202,246 provisional votes were cast, with 95,619 counted for the Senate and 48,299 counted for the House of Representatives. The principal explanation for the difference between the votes in fact counted for the Senate and the House of Representatives in each election is that the Senate vote was accepted and counted, whereas the House of Representatives vote was rejected, when an enrolment was valid for the State but not for the Division.

312 In addition, in each of the four federal elections prior to the 2016 election, people lodged claims for enrolment or updates of enrolment during the suspension period[392]. In 2004, 164,037 people lodged claims: 60,584 were new enrolments and 103,453 were to update enrolment. At the close of the Rolls, approximately 1.2 million people were eligible to be enrolled but were not enrolled. In 2013, 228,585 people lodged claims: 52,692 were new enrolments and 175,893 were to update enrolment. At the close of the Rolls, 1,212,616 people were eligible to be enrolled but were not enrolled. It can be inferred that, in each of these cases, a number of people who were probably qualified to vote, but not enrolled to vote, were ineligible to cast a vote or their vote was not counted for one or both of the Senate and the House of Representatives.

313 None of these facts taken singularly or collectively provides an answer to the relevant constitutional question. To treat them as doing so would overlook both the nature of the limitation imposed by ss 7 and 24 of the Constitution, and fundamental components of the electoral system provided for by the Act.

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390 (2010) 243 CLR 1 at 38-39 [78].

391 s 235 of the Act.

392 It can be noted that "update" in this context includes any changes to a person's enrolment details, and is not limited to a change of the person's address.

314 The electoral system provided for by the Parliament must result in senators and members of the House of Representatives being "directly chosen by the people". Numbers alone cannot establish that senators or members have not been chosen in accordance with that constitutional mandate.

315 That proposition may be tested in this way. Many people who are qualified to enrol fail to do so. Those numbers are not insignificant. Others are enrolled, but do not vote[393]. No one suggests that even if a large proportion of the enrolled population decided not to vote at a particular election the result of that election would not "yield" Houses of Parliament constituted by senators and members directly chosen by the "people"[394].

316 These observations expose a fundamental flaw in the plaintiffs' argument. The plaintiffs assumed that the Constitution requires the Parliament to enact legislation to provide for "elections as expressive of the popular choice as practical considerations properly permit"[395]. That assumption cannot be sustained. It finds no support or foundation in the text or structure of the Constitution, or elsewhere[396].

317 Further, the plaintiffs' numerical argument proceeded on the basis that polling day has constitutional significance. According to the plaintiffs, polling day is when the people "choose". That proposition does not emerge from the text or structure of the Constitution. Moreover, the contention is inconsistent with the interpretation of the phrase "shall be incapable of being chosen" in s 44 of the Constitution, which has been held to refer to "the process of being chosen"[397]. Section 44 concerns the disqualification of persons from being "chosen" as senators or members. In that way, it is directly linked to ss 7 and 24. There is no reason to think the word "chosen" has a different meaning in the different sections.

318 Accordingly, the numbers are not an answer because whether senators and members are "directly chosen by the people" necessarily requires consideration of the electoral system provided for by the Act, which extends to and includes the franchise, qualification to enrol to vote, entitlement to vote, the process for

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393 *Rowe* (2010) 243 CLR 1 at 96 [288].

394 *Rowe* (2010) 243 CLR 1 at 64 [182].

395 *Rowe* (2010) 243 CLR 1 at 57 [154].

396 *Rowe* (2010) 243 CLR 1 at 73 [210], 75-76 [220].

397 *Sykes v Cleary* (1992) 176 CLR 77 at 99-100; [1992] HCA 60. See also *Langer* (1996) 186 CLR 302 at 332-333. cf *Rowe* (2010) 243 CLR 1 at 58-59 [160].

electing senators and members and the exercise of the right of an elector to vote, ultimately leading to the formation of a government.

319 Moreover, the choice made by the electors is not one made only on the day of the poll. Every person qualified to enrol for a Division, either by way of enrolment or transfer, and whose name is *not* on the Roll, is obliged to make a claim for enrolment or transfer of enrolment under the Act[398]. A person whose name is not on the Roll within 21 days from the date of entitlement is guilty of an offence[399]. That obligation is not tied to polling day. Moreover, electors can and do vote prior to polling day. Polling day is simply the last possible time a qualified elector can vote.

320 Finally, the suspension period does not prevent any group of electors from voting. In contrast to *Roach*, the impugned provisions are not directed to the qualification of electors. Generally, a person who cannot vote on polling day because of the suspension period could have voted if they had complied with their statutory obligations[400].

321 It is simply not possible or appropriate to isolate one aspect of the system (the suspension period) and contend that, considered in isolation from the rest of the system, it results in the exclusion of part of universal adult suffrage or restriction on the franchise and, instead, the system must enable persons to enrol and vote on polling day. There is no relevant restriction on, or exclusion from, the franchise. The elected senators and members can still be said to be directly chosen by the "people".

No distortion

322 The plaintiffs also contended that because of the requirement that senators are to be chosen "for each State" by the "people of the State" and that members are to be chosen by the "people of the Commonwealth", the impugned provisions effected a distortion of the popular choice. The distortion was said to arise because the franchise must be geographically perfect in the sense that a person can only vote in the Division and State in which they are resident.

323 That argument wrongly assumed that the Constitution dictates that a person can only be considered to be a person of a State or of the Commonwealth if they have a particular geographic connection. There is no basis for that assumption in the text or structure of the Constitution. Indeed, if the plaintiffs'

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398 s 101(1) of the Act.

399 s 101(4) and (6) of the Act.

400 Subject to those whose eligibility to vote only arises during the suspension period.

argument was correct (and it is not), it would render unconstitutional those provisions which permit persons to vote who no longer reside in Australia.

Substantial reason

324 In any event, even if there was an exclusion from, or restriction on, the franchise (and neither of those was established in this case), the features of the electoral system chosen by the legislature (which have been set out earlier) demonstrate that there is a substantial reason for the impugned provisions.

325 The suspension period reflected in the impugned provisions must be considered in the context of the coherent electoral system chosen by the legislature, which extends to and includes qualification to enrol to vote, entitlement to vote, the process for electing senators and members and the exercise of the right of an elector to vote, ultimately leading to the formation of a government.

326 As stated earlier, the system is coherent and structured. That structure is rational, logical, efficient and prompt, and provides for an orderly process for senators and members of the House of Representatives to be "directly chosen by the people" as required by ss 7 and 24 of the Constitution, and the subsequent formation of a government. The formation of a representative government is the purpose for which the system exists.

327 The impugned provisions form a part of that system and are directed to achieving that end. Not only is the end consistent and compatible with the maintenance of the constitutionally prescribed system of representative government, the end is for the maintenance of that system.

328 Consideration of whether the impugned provisions are reasonably appropriate and adapted to achieving the identified end cannot be done by isolating one aspect (the suspension period) of the electoral system. The electoral system, which the legislature must design and maintain, has a coherent structure. Isolation of the impugned provisions is artificial and, in this case, distracts attention from consideration of the whole structure.

329 The Rolls are a central component of that system[401]. Indeed, ss 152(1)(a) and 155 specifically acknowledge the inevitability of the Rolls "closing", and provide for the date on which that is to occur. Each of the impugned provisions simply recognises the logical corollary of the closing of the Rolls – namely, the suspension of changes to the Rolls while they are "closed".

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401 See [271]-[287] above.

330 The Rolls close (and the suspension period commences) only three days before the earliest date upon which the first step of the process by which senators and members are chosen takes place (the close of nominations under s 156 of the Act), where some candidates require the signatures of 100 "electors" entitled to vote at the election for which the candidate is nominated[402]. And, on the closure of the Rolls, the nominated candidates for the House of Representatives are provided with a list of the electors in their Division – who will directly decide whether they should be elected.

331 Moreover, as noted earlier, any consideration of alternative measures in this case was of limited utility. The alternatives put forward by the plaintiffs demonstrated that an electoral scheme or system may be designed in a variety of ways. However, none of them could be considered a "compelling" alternative when its implementation would require substantive consequential amendment to the broader legislative scheme and raise questions about the allocation of financial resources.

332 The preceding analysis explains why, even if there was an exclusion from, or restriction on, the franchise, or a distortion of the popular choice, the impugned provisions are reasonably appropriate and adapted to serve an end. That *end* was and remains an orderly process for senators and members of the House of Representatives to be "directly chosen by the people" as required by ss 7 and 24 of the Constitution.

Conclusion

333 The impugned provisions form part of a system. They do not relevantly exclude part of universal adult suffrage, restrict the franchise, or produce a distortion of the popular choice. To the extent that the impugned provisions may be considered to effect such an exclusion, restriction or distortion, there is a substantial reason for them doing so. The impugned provisions are not invalid.

Standing

334 The question of standing can be dealt with shortly. At the time of the hearing, the second plaintiff was enrolled to vote but intended to seek nomination as a candidate for election to the House of Representatives. She had a sufficient interest to raise the issues based on the requirement that she would have needed the signatures of 100 "electors" to seek nomination as a candidate. It is unnecessary to address the standing of the first plaintiff.

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402 s 166(1)(b)(i) of the Act.

Result

335 For these reasons, I joined in the answers given to the questions reserved.