Disqualification from entitlement to vote

Louise Hulmes reports on *Murphy & Anor v Electoral Commissioner & Anor* [2016] HCA 36.

Overview

On 12 May 2016, in answer to questions posed in a special case, the High Court held that certain provisions of the *Commonwealth Electoral Act 1918* (Cth) (the Act) are not invalid for inconsistency with the requirement in ss 7 and 24 of the Constitution that the parliament be 'directly chosen by the people'. On 5 September 2016, the High Court delivered its delayed reasons.

There were six questions stated by the parties in the special case and referred for consideration, with Question 2 being the central question in the challenge and therefore the focus of this case note:

> Question 2
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> 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?
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> Answer
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> No.

The judges of the High Court answered all six questions in the same form, for different reasons, in six judgments.[1]

The impugned provisions and the relevant Constitutional provisions

Sections 94A(4), 95(4), 96(4), 102(4) and 103B(5) of the Act 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 rolls and the close of 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. Section 118(5) provides that a person's name must not be removed from the roll during the suspension period.

As Kiefel J noted,[2] the practical effect of the impugned 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 will not be able to vote. Similarly, 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.

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.

The plaintiff's case

The plaintiffs submitted that the suspension period precluded people otherwise eligible to enrol and vote from doing so and produced an inaccurate and distorted roll. Based on the decisions of the High Court in *Roach v Electoral Commissioner*[3] and *Rowe v Electoral Commissioner*,[4] the plaintiffs submitted that:[5]

- 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 it is for a substantial reason; and
- 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.

In *Roach*, the High Court held that legislation that disqualified people serving a sentence of imprisonment on the day of the federal election was invalid as it was contrary to ss 7 and 24 of the Constitution.

In *Rowe,* the High Court held by majority that amendments to the Act to remove the grace period (that is, to change the commencement point of the suspension period from seven days after the issue of writs to the day of issue of writs (and for transfers of enrolment, three days later)) were invalid.

The judgments

As noted above, six separate judgments were delivered. A majority of the High Court found that the plaintiffs could not establish that the impugned provisions amounted to a burden on the Constitutional mandate of popular choice and the High Court was unanimous in finding that, even if there was a relevant burden, it was justified by a substantial reason.

French CJ and Bell J noted that 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. The significant difference was that *Rowe* concerned laws which reduced existing opportunities for enrolment or transfer of enrolment prior to an election.[6] The plaintiffs' approach depended on generalising the principles in *Rowe* and *Roach.*

French CJ and Bell J also considered whether the plaintiffs' argument that the proportionality approach articulated in *McCloy v New South Wales*[7], in the context of the implied freedom of political communication, could be invoked the present case. They stated that the three considerations relevant to proportionality (namely, suitability, necessity and adequacy

in balancing the law and the purpose it served) are capable of application to laws infringing a Constitutional guarantee, but were not appropriate in the present case. The present case was concerned with provisions reflecting long-standing limits on the times at which a qualified person could be registered on the roll; it was not a case about a law reducing the extent of the realisation of the Constitutional mandate.[8]

French CJ and Bell J concluded by noting that the impugned provisions do not become invalid because it is possible to identify alternative measures, using modern technology, that may extend opportunities for enrolment. The plaintiffs' premise that the suspension period reflects a burden on the Constitutional mandate of popular choice was not made out.[9]

Kiefel J inferred that the premise of the plaintiffs' argument was that legislation will not be valid unless it ensures the maximum number of people can vote at elections.[10] However, Kiefel J stated that neither *Roach* nor *Rowe* was authority for that proposition.[11] Rather, *Roach* required that there be a substantial reason for provisions which effect disqualification from the entitlement to vote and that requirement would be satisfied if the means adopted were not disproportionate to the legitimate end they sought to achieve. After examining the provisions of the Act, Kiefel J found that the provisions for the closure of the roll had a rational connection to their purposes.[12]

Gageler J stated that the substantive question for judicial determination was whether the imposition of a cut-off time for enrolment was an exclusion for a substantial reason.[13] Gageler J had reservations about the 'stylised propositions' advanced by the plaintiffs in support of their argument and stated that this highlighted the inappropriateness of attempting to apply such a form of proportionality testing.[14] Gageler J stated that there was a substantial reason for the impugned provisions: to give contemporary expression to a standard incident of the traditional legislative scheme for the orderly conduct of national elections.[15]

Keane J stated that the plaintiffs failed to identify a burden on the Constitutional mandate of choice by the people, stating that their case was 'no more than a complaint that better arrangements might be made to fulfil the mandate'.[16] Keane J also noted that the Constitution looks to the parliament for the establishment of an electoral system in which the competing considerations are balanced by parliament; an election is not a single day event.[17] In addition, Keane J expressly rejected the suggestion that the impugned laws, though valid when made, became invalid because of changes in technology and the circumstances in which the Act operates.[18] Further, Keane J found that nothing in *Rowe* cast doubt upon the validity of the suspension period moderated by the grace period in this case.[19]

Nettle J noted that the impugned provisions are calculated to persuade electors to comply with their obligations to enrol and to allow sufficient time to ensure the accuracy of the roll in advance of the election. Nettle J held that, taken as a whole, the means chosen to regulate elections are directed to achieving a greater degree of order and certainty which enhances the democratic process consistently with the system of representative government.[20] Nettle J noted that although alternative systems were available which might take less time and allow the roll to be kept open until closer to an election, there was no basis to infer that alternative systems are capable of achieving the same level of certainty and order as the system prescribed by the Act.[21] There is a relatively broad discretion conferred on parliament to select the means to regulate elections and it is open for parliament to prefer the relative order and certainty of the Act's system.[22]

Gordon J noted that the electoral system chosen by parliament has a detailed, coherent structure and includes practical and logical steps directed to the orderly and efficient conduct of elections.[23] Gordon J found that there was a critical difference between the implied freedom of political communication considered in *McCloy* and the issues in this case, in circumstances where parliament has a positive obligation to enact laws for an electoral system.[24] Finally, Gordon J held that the impugned provisions did not provide a relevant restriction on, or exclusion from, the franchise in this case[25] and that in any event, even if there was such a restriction or exclusion, the features of the Australian electoral system demonstrate that there is a substantial reason for the impugned provisions.[26]

Endnotes

1. French CJ and Bell J at [6], Kiefel J at [44], Gageler J at [83], Keane J at [118], Nettle J at [257], Gordon J at [259].
2. Kiefel J at [46].
3. (2007) 233 CLR 162.
4. (2010) 243 CLR 1.
5. French CJ and Bell J at [22].
6. French CJ and Bell J at [25].
7. (2015) 325 ALR 15; [2015] HCA 34.
8. French CJ and Bell J at [39].
9. French CJ and Bell JK at [42].
10. Kiefel J at [51].
11. Kiefel J at [58].
12. Kiefel J at [69].
13. Gageler J at [97].
14. Gageler J at [101].
15. Gageler J at [103].
16. Keane J at [181].
17. Keane J at [183]-[184].
18. Keane J at [194].
19. Keane J at [220].
20. Nettle J at [250].
21. Nettle J at [252].
22. Nettle J at [254].
23. Gordon J at [288].
24. Gordon J at [300]-[303].
25. Gordon J at [309].
26. Gordon J at [324].