A PROGRESSIVE COURT AND A BALANCING TEST: *ROWE V ELECTORAL COMMISSIONER* [2010] HCA 46

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I. INTRODUCTION

Rowe v Electoral Commissioner[1] *("Rowe")* is a case about the legislative curtailment of a right. It demonstrates how the French Court intends to deal with constitutional interpretation as well as how it will determine whether a burden on a right is constitutionally valid or not. The right in question in this case is the right to vote, which is, strictly speaking, a statutory right, although it has become such an integral part of the fabric of Australia's system of representative government, established by the Constitution, that it is treated by the Court as a constitutional right.

Even though this case elicited six separate opinions, there is a clear preference by the High Court (five justices to two), in terms of constitutional interpretation, for a progressive or "living force" reading of the constitutional text.[2] This is a reading whereby the evolving standards of society are relevant to the interpretation of the text of the Constitution.[3]

Rowe is merely the latest in a line of High Court cases that have accepted, in one form or another, this type of constitutional

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1 [2010] HCA 46.

2 For explanations and postulations as to the different types of constitutional interpretation techniques used by the High Court over the years, see Justice Susan Kenny "The High Court of Australia and modes of constitutional interpretation" (FCA) [2007] FedJSchol 11; James A. Thomson, "Constitutional Interpretation: History and the High Court: A Bibliographical Survey" (1982) 5 *U.N.S.W. L. J.* 309; Carl McCamish, "The Use of Historical Materials in Interpreting the Commonwealth Constitution" (1996) 70 *Aust. L. J.* 638; Sir Anthony Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 *Fed. L. Rev.* 1; and Haig Patapan, "Politics of Interpretation" in *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge: Cambridge University Press, 2000).

3 See, for example, a discussion of the theory of the constitution as a "living force" by Deane J in *Theophanus v Herald & Weekly Times Ltd* (1994) 182 C.L.R 104, 171-4, relying on the explanation of "living force" in Andrew Inglis Clark, *Studies in Australian Constitutional Law*, 21 (first published 1901, 1997 ed).

interpretation with respect to rights jurisprudence.[4] It is not clear that this method of constitutional interpretation will continue to be used in cases other than those involving constitutional or statutory rights. However, it is clear that this is a legitimate, and currently the most favoured, method for dealing with cases involving legislative infringements on rights, and certainly, the right to vote.

The method of constitutional interpretation used by the High Court is relevant because, as Justice Kenny has shown, "a judge's choice of preferred interpretive mode matters."[5] A progressivist interpretation of the Constitution with respect to cases involving constitutional rights will mean that "discrete and insular minorities"[6] are more likely to have their rights protected, because modern thinking recognises these minority groups as deserving of equal rights (as opposed to at Federation where white men were generally the only protected class).[7]

In order to determine whether a right has been so curtailed by legislation that the legislation is no longer constitutionally valid, some sort of test must be used. In cases involving rights, the High Court has used various terms to describe the test and the relevant factors that comprise the test. This case ushers in a new wave of thinking about the oft-cited test from *Lange v Australian Broadcasting Corporation*[8] ("*Lange*"): namely, whether a measure 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." The justices explain that this test includes concepts such as "proportionality",[9] "disproportionality",[10] "close scrutiny",[11]

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4 This is, of course, subject to debate, but see, for example, *Roach v Australian Electoral Commissioner* [2007] HCA 43; *Sue v Hill* (1999) 199 C.L.R 462; *Australian Capital Television* v *the Commonwealth* 177 C.L.R 106; and *Nationwide News Proprietary Ltd v Willis* (1992) 177 C.L.R 1. In cases involving federalism, the Court seems rooted in "textualism" or "structuralism", see, for example, Justice Susan Kenny "The High Court of Australia and modes of constitutional interpretation" (FCA) [2007] *FedJSchol* 11.

5 Justice Susan Kenny, "The High Court of Australia and modes of constitutional interpretation" (FCA) [2007] *FedJSchol* 11, note 47 and accompanying text.

6 I have borrowed this term from the famous Footnote 4 in *United States v Carolene Products Compnay* 304 U.S. 144 (1938): this was the case in the US that set up the "levels of scrutiny" test, that the court in Australia, I argue, is moving towards in this case.

7 See paras [18]-[22] of French CJ in *Rowe* for a discussion of those who did not have the right to vote at Federation.

8 (1997) 189 CLR 520, 561-562.

9 French CJ at [24], Gummow and Bell JJ at [161]-[163], Hayne J at [263], Crennan J at [374], and Kiefel J, throughout her judgment discusses proportionality in the Australian and international context, [436]-[466].

"substantial reason",[12] "compelling...problem",[13] and "discriminatory burden"[14] and in doing so, I argue, implicitly establish a balancing test. *Rowe* suggests that the test for how far the Parliament may curtail a right will involve the balancing of many factors, rather than the interpretation of the unclear "reasonably appropriate and adapted" test from *Lange*.

This article sets out the jurisdiction, facts, and arguments advanced by each side, and then analyses the court's findings. The analysis of the court's findings is split into three sections: the methods of constitutional interpretation used; the discussion of the nature of the right at issue; and the factors that are relevant to the "reasonably appropriate and adapted" test. I conclude that the Court has a favoured method of constitutional interpretation for rights cases (a progressivist reading), and the implication of the judgments in this case evidence that a balancing test for cases involving the legislative curtailment of a right has been implicitly established.

II. THE JURISDICTION

On 26 July, 2010 Shannen Alyce Rowe and Douglas Thompson took the Electoral Commissioner, and the Commonwealth of Australia to the High Court, in its original jurisdiction, to argue that Items 20, 24, 28, 41, 42, 43, 44, 45 and 52 of Sched I to the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) (the "Amendment Act") (and consequently ss 102(4), 102(4AA) and 155 of the *Commonwealth Electoral Act 1902* (Cth)) (the "CEA") were unconstitutional. The plaintiffs applied for a declaration and for writs of mandamus. Justice Hayne referred the matter to the Full Court on 29 July, 2010 and the argument was heard by the Full Court on 4 and 5 August, 2010. The application was amended at the hearing so that the declaration sought related to the validity of some other provisions of the Amendment Act. The plaintiffs argued that the provisions were invalid by reason that they were:

- contrary to ss. 7 and 24 of the Constitution (which

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10 French CJ at [2], [24-25], [73], and [78], Gummow and Bell JJ at [161], Heydon J at [268]-[269], [289], Crennan J at [374], and Kiefel J at [402], [429], and [444] ff.

11 French CJ ([24]), Gummow and Bell JJ ([161])and Kiefel J (429]) all quote Gleeson CJ in *Roach* on this issue.

12 French CJ at [23]-[25], Gummow and Bell JJ at [123], [140], [157], and [166]-[167], Hayne J at [184], [186], [224]-[225], and [248]-[249], Crennan J at [374], [376], [384], and Kiefel J at [403], [406], and [429].

13 French CJ at [78], Kiefel J "compelling justification" at [451].

14 French CJ at [73].

require that members of Parliament be "directly chosen by the people");

- beyond the legislative powers of the Commonwealth conferred by s. 51(xxxvi) and s. 30 of the Constitution or any other head of legislative power; and/or

- beyond what is reasonably appropriate and adapted, or proportionate, to the maintenance of the constitutionally prescribed system of representative government.[15]

On 6 August, 2010 the Court, by a majority, declared the challenged provisions invalid, and extended the finding to include additional sections of the CEA (ss. 94A(4)(a), 96(4), and 95(4)), which relate to enrolment of persons living outside Australia, itinerant electors, and the eligibility of spouses, de facto partners or children of eligible overseas electors for enrolment.

The Court issued its reasons for judgment on 15 December, 2010, and revealed that the decision was a 4-3 split, with the majority being French CJ, Gummow, Bell, and Crennan JJ. French CJ, Gummow and Bell JJ, and Crennan J issued separate judgments, as did Heydon J, Hayne J, and Kiefel J.

III. THE FACTS

The items in question were introduced by the Amendment Act of the Howard government in 2006, and affected the close of electoral rolls once an election has been announced. The Amendment Act changed the deadlines for enroling to vote and updating one's enrolment. The new provisions prevented one from enroling (s. 102(4) of the CEA) after 8pm on the date of issue of election writs, and prevented one from updating one's enrolment (a "transfer of enrolment" in the language of s. 102(4AA) of the CEA) after 8pm on the day of the close of the electoral roll. Section 155 of the CEA provided that the electoral roll would close on the third working day after the issue of the writs. Section 152(2) of the CEA provided that election writs were deemed to have been issued at 6pm on the day they were released. This meant that new enrolments had a 2 hour period for enrolments, and transfers of enrolments had a 3 day period for action following the issue of an election writ. The law from 1983 to 2006 had allowed for enrolments

15 Citing *Roach v Australian Electoral Commissioner* [2007] HCA 43.

and transfers of enrolment for seven days following the issue of election writs. From 1902 to 1983 the electoral rolls closed for a federal election on the day of issue of the writs, however there was a practice of announcing elections a significant time before the issue of writs. For example the time between announcement and issue of writs from 1940 and 1983 varied from 5 to 63 days. The practice changed in 1983, when, without notice, the election was announced and the writs were issued that afternoon.[16]

The 2010 election was announced by the Prime Minister on Saturday, 17 July, 2010, with the election writs issued on 19 July, 2010. On 23 July, 2010 Rowe attempted to enrol for the first time and Thompson attempted to change his enrolment address. Both were rejected due to ss. 4 and 4AA of the CEA and on 26 July, 2010 they filed their action in the High Court.

IV. THE ARGUMENTS

THE PLAINTIFFS' SUBMISSIONS

The plaintiffs characterised enrolment to vote as a means to achieve a constitutional end of exercising a right to vote. They argued that the Amendment Act affected the substance of the right to vote, rather than being merely a procedural issue. Their submissions addressed the question of how to determine whether a curtailment of a right was constitutionally valid or not.[17]

The plaintiffs argued that the Constitution should be interpreted in a dynamic or progressive way, per Gleeson CJ in *Roach v Australian Electoral Commissioner*[18] ("*Roach*") (citing McTiernan and Jacobs JJ in *McKinlay v Commonwealth*[19] ("*McKinlay*")): the term "chosen by the people of the Commonwealth" is to be applied to different circumstances at different times.[20] According to the plantiffs this meant that historically (i.e. up to 1983) the closure of rolls on the day of the issue of writs was not a problem, but as the practice changed in 1983, a new rule had to be enacted in order for the relevant provisions of the CEA to remain constitutional, and as such the change to the rule

16 Plaintiffs' Amended Outline of Submissions, pp. 1-5.
17 Plaintiffs' Amended Outline of Submissions, p. 12.
18 *Roach v Australian Electoral Commissioner* (2007) 233 CLR 162, 174.
19 *Attorney-General (Cth); Ex rel Mckinlay v Commonwealth* (1975) 135 CLR 1.
20 Plaintiffs' Amended Outline of Submissions, p. 12.

in 2006, without a change in practice, made the Amendment Act constitutionally invalid.

The plaintiffs argued that the correct test for whether a legislative curtailment of the right to vote is constitutionally invalid should be that set out in *Roach*. Under *Roach* two questions must be considered:[21] 1. Whether the impugned provisions disenfranchise any group of adult citizens, and 2. Whether the disenfranchisement is for a "substantial reason" or "disproportionate" as those terms were explained in *Roach*. The first question was swiftly answered by the plaintiffs based on their explanation of the disenfranchisement suffered by a number of people (set out below). The second, they submitted, involved the balancing of a variety of factors.

In relation to the first issue, whether there was a disenfranchisement of a group of adult citizens, the plaintiffs set out the following facts:

- The change in practice to issue a writ on the same day as the announcement of an election, in 1983, resulted in "substantial disenfranchisement" (this assertion was not elaborated on), and the law that introduced a 7 day period between the issue of the writs and the close of the rolls remedied this disenfranchisement.

- The AEC had explained in the Statement of Agreed Facts and in a Report to the Joint Standing Committee on Electoral Matters in 2000 that an early close of rolls would not improve the accuracy of the rolls, in fact it would cause them to be less accurate (due to the spike in enrolments and transfers after the announcement of an election), that identity fraud is not a problem and therefore would not be solved by an early closing of rolls, and that the 7 day period guaranteed the franchise to large numbers of people who might otherwise have missed out on voting.[22]

- The disenfranchisement that resulted from the Amendment Act disproportionately affected young, first-time voters, new Australian citizens, itinerant populations, the Indigenous population, those with

[21] Plaintiffs' Amended Outline of Submissions, p. 13.

[22] JSCEM, "Report on the Conduct of the 2007 Federal Election and Matters Related Thereto" (June 2009), p. 148.

disabilities,[23] and those in rural and remote areas.[24]

- The plaintiffs were disenfranchised by the 2006 law, and approximately 100,000 adult citizens were in a position analogous to the plaintiffs.

On the second question, that of whether this disenfranchisement caused the law to be invalid, the plaintiffs submitted three standards against which to measure the legislation:[25]

- whether there was a "substantial reason" for the disenfranchisement;
- whether the disenfranchisement was "proportionate" to the benefit received from the curtailment; and
- whether the disenfranchisement was "reasonably appropriate and adapted to the maintenance of a constitutionally prescribed system of representative government."

The plaintiffs set out an explanation for why their case met each test: They submitted that there was no "substantial reason" for the removal of the 7 day period - in fact the only reason proffered was to preserve integrity and prevent voter fraud, and there was no evidence of such fraud having occurred. In fact, if anything, there was some evidence that the integrity of the rolls would be weakened by the Amendment Act.[26] As there was no mischief to be addressed, the plaintiffs argued that the curtailment of the right to vote was not "proportionate" to any benefit received.

The plaintiffs therefore argued that the impugned provisions operated in an arbitrary and disproportionate manner, and that the provisions were not appropriate and adapted because they served no legitimate end. To the extent they did serve a legitimate end, the provisions were not appropriate and adapted and they affected a particular class of voters which were statistically more likely to vote for particular parties.

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23 Plaintiffs' Amended Outline of Submissions, p. 10.
24 Plaintiffs' Amended Outline of Submissions, p. 11.
25 Plaintiffs' Amended Outline of Submissions, pp. 14-15.
26 Plaintiffs' Amended Outline of Submissions, p. 7, citing "AEC Submission No 26 to the JSCEM inquiry into the integrity of the electoral roll dated 17 October 2000" at [12.2.5].

THE SECOND DEFENDANT'S SUBMISSIONS

The first defendant appeared before the Court in order to provide any relevant assistance to the Court, but did not provide substantive submissions. The argument opposing the plaintiffs was therefore provided by the second defendant's submissions.

The second defendant characterised enrolling to vote as a condition precedent to exercising the right to vote.[27] This, it argued, established the Amendment Act as one relating to the procedural regulation of a right, rather than one affecting the substance of the right. The second defendant did not explain which method of constitutional interpretation should be used, it simply looked to *Roach* and *Lange* for the appropriate test of constitutional validity.

The second defendant agreed with the plaintiffs that the relevant test for whether a legislative curtailment of the right to vote was constitutionally invalid should be that set out in *Roach*.[28] It agreed that the first limb of the test should be whether anyone was disenfranchised by the statute. In terms of the second limb of the test, it argued that a two tier system of analysing rights cases had developed.[29]

Under the two-tier test, the second defendant submitted, one must first distinguish between laws that have the direct purpose of restricting political communication, and those that do so incidentally. The former require "strict" or "close" scrutiny, only being supported where there is a "compelling justification". The second defendant submitted that the laws in *Roach* were like the former, but the laws in *Rowe* were an example of the latter - that is, the Amendment Act only *incidentally* impinged on the right to vote. It submitted that the test for this case should be whether there was some disqualification from adult suffrage, and if so whether the disqualification was for a "substantial reason", rather than requiring a "compelling justification".[30]

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27 Second Defendant's Submissions, p. 8.

28 Second Defendant's Submissions, p. 15.

29 The second defendant gave the following citation for this two tier test: "*Mullholland* 220 CLR 181, 200 per Gleeson CJ (a passage cited in the *Roach* at 199); *Levy v Victoria* (1997) 189 CLR 579, 618-619 per Gaudron J; *Coleman v Power* (1004) 220 CLR 1, 52 per McHugh J. See also *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106 at 143 per Mason CJ; at 169 per Deane and Tooehy JJ; at 234-5 per McHugh J; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 76-77 per Deane and Toohey JJ; *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 299-300 per Mason CJ; at 337-339 per Deane J; 388 per Gaudron J."

30 Second Defendant's Submissions, pp. 15-16.

In answer to the first question, the second defendant submitted that because voters have a duty to enrol and keep their enrolment up to date, there was no disenfranchisement as a consequence of the Amendment Act (rather, the personal actions of the plaintiffs caused the so-called "disenfranchisement"). Perhaps realising that the Court may be against it on this, the second defendant assumed the statute caused disenfranchisement and then looked to whether that harm was justified by a "substantial reason" for the Amendment Act.

The second defendant argued that the purpose of the 2006 Amendment Act was to prevent risk to the integrity of the electoral roll. The JSCEM Report noted that there was no experience of fraud, but the concern was with the opportunity for fraud to be practised. The second defendant argued that the provisions were analagous to those that regulate the time, place, and manner of political communications,[31] and given that there was evidence of mischief (some level of electoral fraud) the measure was reasonably appropriate and adapted to serve an end consistent with a system of representative government. The second defendant argued that even if the accuracy of the rolls was lessened by the Amendment Act, the integrity of the rolls was a different issue, and as their integrity was enhanced by the legislation, the "end" achieved by the Amendment Act was one which was consistent with the maintenance of a constitutionally prescribed system of government. The "end" being "the orderly conduct of elections in which there can be confidence that persons who are not entitled to vote do not vote".

The second defendant noted that "[w]hether the provisions are *necessary* for this purpose, and whether other better approaches are possible, are matters for debate" by the Parliament, not for the court to determine.[32]

THE PLAINTIFFS' REPLY

The plaintiffs' reply contended that there was a less restrictive means of achieving the same end - that is, the date of the close of the rolls could be extended by a few days and then there would be an electoral roll with more integrity and still a low chance of voter fraud, without a significant impact on the franchise.[33]

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31 The Second Defendant referred to the citations set out in an earlier footnote. That footnote is set out in its entirely in note 29 above.

32 Second Defendant's Submissions, pp 21-22.

33 Plaintiff's Outline of Submissions in Reply, p 6.

V. THE FINDINGS

The Court issued six opinions, three in favour of striking down the legislation (French CJ, Gummow and Bell JJ, and Crennan J), and three in favour of upholding the legislation (Heydon J, Hayne J, and Kiefel J). Even though the court was fairly evenly split on the ultimate outcome, the reasoning used by the justices demonstrated a fairly clear preference (5-2) for a progressivist method of constitutional interpretation, and implicit in all the judgments was an acceptance of a balancing test for determining whether a legislative curtailment of rights is constitutionally valid.

The four justices in the majority, and Kiefel J used similar methods of constitutional interpretation and considered similar characteristics to be relevant when weighing the burden and the importance of the right at issue in order to reach their results (with Kiefel J finding a different balance between the burden and importance of the right). Hayne J and Heydon J's use of similar conservative constitutional interpretation and reliance on parliamentary supremacy above evolving standards of the right to vote, caused them to find that the Parliament has a much greater scope for defining rights, even if they have become constitutional rights, than the dynamic constitutionalists on the Court. The differences between the decisions are most usefully analysed in three areas: methods of constitutional interpretation; the nature of the right at issue; and the test used to determine whether a legislative curtailment of a right is constitutionally valid. Each area is addressed below.

METHODS OF CONSTITUTIONAL INTERPRETATION

Five of the High Court justices affirmed their favour for dynamic or progressive constitutional interpretation. The two judges who had served on the High Court for the longest period, Hayne J and Heydon J, each referred to versions of originalism.

Chief Justice French explained that implicit in the authority of s51(xxxvi) "was the possibility that the constitutional concept would acquire, as it did, a more democratic content than existed at federation."[34] His Honour found that rather than a condition precedent, the requirement of 'enrolment' was a qualification for voting. Although the right to vote is, strictly speaking, a right

[34] *Rowe* at [18].

conferred by statute, French CJ cited with approval Gleeson CJ in Roach (addressing *McKinlay*): "the words of ss 7 and 24, because of changed historical circumstances, including legislative history, have come to be a constitutional protection of the right to vote."[35]

In line with his preference for a progressivist interpretation of the Constitution, French CJ explained that the right to vote was subject to "the common understanding of the time" (citing McTiernan and Jacobs JJ in *McKinley*) and that that must come from "durable legislative development" not "judicial understanding."[36] In this, French CJ affirmed an adherence to the long established acceptance of parliamentary supremacy as a guiding principle of Australian constitutional interpretation. The Chief Justice later reaffirmed this adherence when he explained that "Parliament has considerable discretion" to determine how it will achieve a stated goal, such that even if the court can find another way to achieve that goal, it will not be proper for the Court to substitute its judgment for the Parliament's (unless the Parliament actually exceeds the limits of the Constitution).[37]

Gummow and Bell JJ, like French J, set out a preference for dynamic constitutional interpretation, citing Gleeson CJ in Roach, that "the words 'chosen by the people of the Commonwealth' were to be applied to different circumstances at different times".[38] This was also cited with approval by Crennan J (who did not discuss in detail her methodology of constitutional interpretation).[39] Like French CJ, Gummow and Bell JJ also accepted the principle of parliamentary supremacy as guiding and fundamental.[40]

Kiefel J voiced support for dynamic constitutional interpretation, explaining that "it is difficult to identify what is essential to representative government, not the least because ideas about it may change over time."[41] Her Honour explained in support of Gleeson CJ's view in *Mullholland v AEC*[42] that "a notable feature of our system of government is how little the detail of it is to be found in the Constitution and how much is left to be filled in by Parliament."[43]

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35 *Rowe* at [20].
36 *Rowe* at [19].
37 *Rowe* at [29].
38 *Rowe* at [123].
39 *Rowe* at [326].
40 *Rowe* at [123], citing Gleeson CJ in *Roach* p 174.
41 *Rowe* at [417].
42 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 188.
43 *Rowe* at [418].

In contrast to the rest of the High Court, Hayne J and Heydon J each favoured more conservative methods of constitutional interpretation. Hayne J adopted a "text and structure" method, not referring to content derived from sources other than the Constitution.[44] Nevertheless, His Honour noted that (citing Gibbs J in *McKinley*): "The Constitution does not lay down particular guidance on these matters; the framers of the Constitution trusted the Parliament to legislate with respect to them if necessary"[45] and further that:

> *In hindsight, the changes that have been made to the federal electoral system since federation may be described as evolutionary. It may be that hindsight would permit the observer to describe the changes as moving generally in a direction that represents a "development" of the particular form of representative government that practised or established in Australia.*[46]

Nevertheless, Hayne J ultimately found that the evolution of the concept of "representative government" could not evolve into a constitutional norm because there is no textual or structural foundation for it.[47] Hayne J found that underpinning the Constitution is a firm belief in Parliamentary supremacy, which is evident in the "constitutional intention to permit the Parliament to decide many important questions about the structure and content of the electoral system *without* constitutional restriction beyond the requirement that each house be directly chosen by the People."[48] Despite this, His Honour did not feel the need to explain what "directly chosen by the people" meant in detail.[49] Rather, Hayne J found that there is a difference between factual participation in an election and the legal opportunity for the people to participate,[50] and that compulsory voting was not a necessary corollary of ss. 7 and 24 of the Constitution.[51] Given these, Hayne J found that the case before him could only have a legal basis if the Constitution required maximum participation and His Honour found that it did not. Hayne J explained that the Parliament could change the acceptable limits to the qualifications of adult suffrage as "common understanding" and "generally accepted Australian standards" are irrelevant, being that they "have not footing

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44 *Rowe* at [192].
45 *Rowe* at [194]
46 *Rowe* at [201]
47 *Rowe* at [203].
48 *Rowe* at [204].
49 *Rowe* at [211].
50 *Rowe* at [218].
51 *Rowe* at [219], citing *Judd v McKeon* (1926) 38 CLR 380.

in established doctrines of constitutional interpretation."[52] Hayne J concluded that it was up to Parliament to determine what the democratic system of government looked like,[53] and given their choices, there was no disqualification from adult suffrage by the Amendment Act.[54]

Heydon J adopted an "originalist" method of constitutional interpretation,[55] explaining this to mean that "the question is what meaning skilled lawyers and other informed observers considered those words to bear in the 1890s." His Honour skipped over the fact that there was no indigenous suffrage and a restriction on female suffrage at this time by stating that "[t]he failure of the federation age to offer universally applicable systems of suffrage conforming entirely to the most advanced modern models is not a reason to ignore what the means and applications of the words 'chosen by the people' in the federation age were."[56]

THE NATURE OF THE RIGHT AT ISSUE

The main point of difference between the three majority judgments was in relation to the nature of the infringement on the right to vote. The second defendant argued that *Lange* set up a two tier test, whereby the Court should analyse whether there is a direct infringement of a right or whether the infringement is indirect. If there is a direct infringement, "strict" or "close" scrutiny should be applied, and a law will only survive if there is a "compelling justification for it". If the infringement on the right is indirect, then there need only be a "substantial reason" for the law. It was accepted that *Roach* was an example of a direct infringement of a right. The justices each addressed whether *Rowe* involved an infringement of a right in the same way as *Roach*.

French CJ agreed with the second defendant that *Rowe* was a fundamentally different case to *Roach*, in that *Roach* was about a direct exclusion of a group of adult citizens from the franchise, while *Rowe* involved a less direct disenfranchisement,[57] however the Chief Justice did not accept that an indirect or procedural law would always be constitutionally valid, because, as was clear in this case, it could still

52 *Rowe* at [266].
53 *Rowe* at [222].
54 *Rowe* at [225].
55 *Rowe* at [292]ff.
56 *Rowe* at [303].
57 *Rowe* at [23].

disenfranchise people and therefore required "substantial justification."[58]

Gummow and Bell JJ disagreed with French CJ on this point. They analysed the difference between a substantive and procedural infringement on a right and concluded that "The interrelation ... between the requirements for enrolment and those for voting entitlement is such that failure to comply with the former denies the exercise of the latter by persons otherwise enfranchised".[59]

Crennan J differed from both French CJ and Gummow and Bell JJ on this question. Her Honour accepted that the provisions differed from *Roach,* but also found that they operated to "disentitle or exclude persons (otherwise legally eligible) from the right to vote".[60] Crennan J also differed from the other justices in the majority in that Her Honour found that the purpose of maintaining integrity of the electoral roll was a purpose compatible with ss. 7 and 24 of the Constitution.[61]

Both Hayne J[62] and Kiefel J[63] agreed with French CJ and the second defendant that the case was fundamentally different from *Roach* in that it involved the exercise of the entitlement to vote, rather than a question of disqualification from voting.

Heydon J also found that *Rowe* was a different case from *Roach*,[64] but found that this was because the plaintiffs failed to comply with simple obligations under the CEA, while Vicki Lee Roach was completely prohibited from voting.

LEGISLATIVE CURTAILMENT OF A RIGHT TEST

The test that was developed in *Lange*,[65] and relied upon in *Roach,* was cited by all members of the Court:[66]

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58 *Rowe* at [26]. French CJ later explained that this was still the case even though the plaintiffs contributed to their own disenfranchisement by not enroling or transfering their enrolment in time [28] (a point which was decisive for Heydon J, see *Rowe* at [284]).

59 *Rowe* at [154].

60 *Rowe* at [381].

61 *Rowe* at [381].

62 *Rowe* at [185]-[187].

63 *Rowe* at [411].

64 *Rowe* at [284].

65 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, at 569 per Brennan CJ, Dawson Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

66 French CJ at [24] , Gummow and Bell JJ at [111], Crennan J at [374], Hayne J at [264], Heydon J at [283], Kiefel J at [425].

> *Whether the law is "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of a constitutionally prescribed system of representative government"*

The Court found, through its many explanations of what this might mean and what factors could be used to determine whether a law is "reasonably appropriate and adapted" or not, that this test on its own was not sufficient for a Court to determine whether a legislative curtailment of a right was constitutionally valid. The justices set out a variety of factors that they considered relevant to the test. The fact that each justice (with the exception of Crennan J who did not explain the test in any detail) listed a variety of relevant factors, suggests that the message of this case is that in fact the "reasonably appropriate and adapted" test is merely a balancing test, where a number of factors will be relevant to a determination.

French CJ explained the test for the degree to which the Amendment Act could curtail the right to vote in a number of ways:

- Whether there was a "substantial reason for exclusion" (citing Gleeson CJ in *Roach*,[67] and later Gummow, Kirby and Crennan JJ in *Roach*);[68]
- Whether the exception had a "rational connection with ... the capacity to exercise free choice;"[69]
- Whether the exception was "reasonably appropriate and adapted to serve an end which is consistent or compatible with observance of the relevant constitutional restraint upon legislative power;"[70]
- Whether the exception is "disproportionate or arbitrary" (citing Gummow, Kirby, and Crennan JJ in *Roach*);[71]
- Whether the justification for the law is "on balance, beneficial because it contributes to the fulfillment of the

67 *Rowe* at [23].
68 *Rowe* at [24].
69 *Rowe* at [23].
70 *Rowe* at [24].
71 *Rowe* at [24].

mandate" (the mandate being "chosen by the people");[72]

- Whether the law addresses a "compelling practical problem;"[73]

In conclusion French CJ found that, rather than addressing any "compelling practical problem", the Amendment Act in fact contributed to the enhancement and improvement of the enrolment system. The Chief Justice concluded that the heavy price imposed by the Amendment Act was "disproportionate" to the benefits of a smoother more efficient electoral system to which the amendments were directed.

Gummow and Bell JJ outlined similar factors to those of French CJ for how to determine whether the legislative curtailment of the right was constitutionally valid:

- Whether the "rational connection" between the disqualification and the constitutional imperative has been broken;[74]

- Whether the disqualification is for a "substantial reason;"[75]

- Whether the disqualification 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;"[76]

- Whether upon "close scrutiny" the disqualification is "disproportionate or arbitrary;"[77]

- They noted that a test of "reasonable proportionality" will not always be helpful;[78]

- They agreed with Mason J (as he then was) that "the

72 *Rowe* at [25].
73 *Rowe* at [78].
74 *Rowe* at [161].
75 *Roach*, 219 per Gummow, Kirby and Crennan JJ.
76 *Roach*, 219 per Gummow, Kirby and Crennan JJ.
77 *Roach*, 219 per Gummow, Kirby and Crennan JJ.
78 *Rowe* at [162] citing *Industrial Relations Act Case* (1996) 187 CLR 416, at 487-488, per Brennan CJ, Toohey, Gaudron, McHugh, and Gummow JJ.

> motives which inspire legislators are not relevant in the determination of validity;"[79]

Given these factors, Gummow and Bell JJ found that a legislative purpose of preventing electoral fraud before it is able to occur did not supply a "substantial reason" for the practical operation of the 2006 Act in disqualifying large numbers of electors.

Crennan J, unlike the other justices, did not go into detail on which test should be used to determine whether the curtailment of the right to vote was constitutionally valid. Her Honour explained the meaning of "chosen by the people" at length,[80] and in doing so expressed the gravitas of the right to vote to the Australian system of representative government. In conclusion, Crennan J explained that the impugned provisions were not "necessary or appropriate" to achieve their end, and that the Amendment Act constituted a failure to recognise the "centrality of the franchise to a citizen's participation in the political life of the community."[81]

Hayne J adopted the "reasonably adapted an appropriate" test,[82] but found that the first step in resolving the question was whether the impugned law "detracted in some significant way" from the existence of the franchise, and whether that detraction was "for a substantial reason." He explained that a reason would be substantial if it fulfilled the "reasonably appropriate and adapted" test, and it did not have to be "essential" or "unavoidable". Despite setting out this structure for analysis, Hayne J ended up balancing a variety of factors just as the other judgments had done.[83] His Honour noted that there was essentially no difference between the "reasonably appropriate and adapted" test and one of "proportionality."[84] Accordingly, Hayne J found that ultimately the factors to be balanced were the relevant end (that is, the intention of the Parliament is crucial to the test)[85] and any disqualification caused by the legislation.

It was relevant to Heydon J that the plaintiffs had not complied with their statutory duties (to enrol upon turning 18 and to transfer

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79 *Rowe* at [166] citing *R v Toohey Ex parte Northern Land Council* (1981) 151 CLR 170 at 225-226.

80 *Rowe* at [333]-[368].

81 *Rowe* at [384].

82 *Rowe* at [181].

83 *Rowe* at [184].

84 *Rowe* at [263].

85 This is in direct contrast to Gummow and Bell JJ who found that the intention of the Parliament should not be considered in such analysis, at [166].

enrolment upon moving). His Honour found that their inaction could not form the basis for invalidating the provisions of the Amendment Act. Heydon J also purported to use the "reasonably appropriate and adapted" test, but explained that this meant that if there was a "substantial reason" for the disqualification then the test would be satisfied.

Kiefel J established a new version of the "reasonably appropriate and adapted" test - the "reasonable necessity assessed by the availability of alternative measures" test.[86] Kiefel J first traced the history of the "reasonably appropriate and adapted" test from the US case of *McCulloch v Maryland*[87] (although the U.S. version of the test is now quite different to the Australian version).[88] Her Honour referred to a "reasonable necessity" test, drawn from Stephen J in *Permean Wright Consolidated Pty Ltd v Trewhitt*[89] (a s. 92 case). Kiefel J then elucidated this test with an explanation that one should look to the "availability of alternative, practicable and less restrictive measures,"[90] and explained[91] that the reasonable necessity test had been accepted in *Betfair Pty Ltd v Western Australia*[92] and was consistent with *Cole v Whitfield*.[93]

Having established the doctrinal underpinning of the "reasonable necessity" test, Kiefel J explained that it fit within the *Lange* rubric and concluded that the relevant test for legislative curtailment of rights cases should be: whether the law is a "reasonable necessity assessed by the availability of alternative measures."[94] Her Honour considered other tests of proportionality in Australian law[95] and in European law,[96] and finally the tests set out in *Roach* and *Lange* and concluded that they could be described as tests of proportionality as well.[97]

While the reasoning of Kiefel J was very similar to French CJ, and Gummow and Bell JJ, in the end Kiefel J concluded that the "the denial

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86 Rowe at [443].
87 17 U.S. 316 (1819).
88 *Rowe* at [431]-[432].
89 (1979) 145 CLR 1, at 31.
90 Rowe at [439], citing Mason J in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 616.
91 *Rowe* at [440].
92 (2008) 234 CLR 418.
93 (1988) 165 CLR 360 at 409.
94 *Rowe* at [443].
95 *Rowe* at [445]-[455].
96 *Rowe* at [456-466].
97 *Rowe* at [467]-[478].

of enrolment and voting for an election, for a legitimate reason, does not intrude too far upon the system of voting."[98]

VI. CONCLUSION

Rowe affirms that the right to vote, free from legislative hindrance, is firmly protected by the Australian Constitution. It also foreshadows the method of constitutional interpretation we are likely to see from the French Court, perhaps only with respect to cases dealing with the legislative curtailment of a right, or perhaps more expansively. The chosen method is clearly part of the progressivist, or living force, school of constitutional interpretation, but what particular iterations of this method will develop remains to be seen.

[98] *Rowe* at [489].