

Before the High Court

Roach v Commonwealth: Is the Blanket Disenfranchisement of Convicted Prisoners Unconstitutional?

DANIEL GUTTMAN*

Abstract

All citizens incarcerated in prison on the day of the next Commonwealth election, regardless of the length of their sentence, have been deprived of their vote by a recent amendment to the *Commonwealth Electoral Act 1918* (Cth). A constitutional challenge to this amendment will soon be heard by the High Court of Australia. This article argues firstly, that the High Court should find that ss 7 and 24 of the Constitution support an implied constitutional freedom to vote and secondly, that the jurisprudence from overseas, the empirical and philosophical research on the disenfranchisement of prisoners, and the frailties of the Commonwealth's public justification for the amendment all support a finding that the amendment is unconstitutional, as a blanket ban on prisoner voting cannot be said to be reasonably and appropriately adapted to a legitimate government end.

1. Introduction

The right to vote is fundamental to representative democracies and it is well recognised in most Western democracies that this right should be extended to all citizens, subject to the narrowest of exceptions. Despite the fact that the trend in Western democracies has been the gradual expansion of the franchise, the one group of citizens which has often found itself the target of disenfranchisement is incarcerated persons.¹

* The author has been counsel at the Constitutional Law Branch of the Ministry of the Attorney General of Ontario in Toronto, Ontario, Canada since 2001. This article is a shortened version of an independent research paper developed in the course of a LLM, completed at the University of New South Wales in 2007. The author would like to thank Professor George Williams for suggesting the topic and for his comments on an earlier draft of the paper. The views expressed in this article are the author's own and do not purport to represent the position of the Ministry of the Attorney General of Ontario or the Government of Ontario as a whole.

¹ In Canada and South Africa, the courts have struck down legislation disenfranchising prisoners and thus there are no current restrictions on a prisoner's right to vote (each of these States have a constitutional right to vote that extends to all citizens). In Europe, as of 1 January 2006, 18 countries allow prisoners to vote without restriction, while 12 states bar all prisoners from voting, and in 12 states the right to vote of prisoners could be limited in some other way (Austria, Bosnia and Herzegovina, France, Greece, Italy, Luxembourg, Malta, Norway, Poland, Romania and Spain). In New Zealand, legislation disenfranchises those who are incarcerated for a period of three years or more. In the United States, the Constitution specifies that the extent of the franchise is to be decided by each individual state. 48 of the 50 states have enacted some form of ban on prisoner voting, and many states ban convicted felons from voting even after their release.

The following paper explores the constitutional validity of the Commonwealth's recent legislation which disenfranchises all citizens who are serving a 'sentence of imprisonment' at the time of an election. This issue is slated to be heard by the High Court of Australia in June this year, in the case of *Roach v AEC and Commonwealth of Australia*. The exploration of this issue in this paper is not a prediction on how the High Court will decide in *Roach*, but details how the analysis might unfold based on first principles.

2. Overview of Australian Legislation which Disenfranchises Prisoners

In 2006, the Commonwealth passed the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) which amended the *Commonwealth Electoral Act ('CEA') 1918* (Cth). Section 93(8AA) of the *CEA* prohibits all convicted felons serving a sentence of imprisonment from voting in any Senate or House election. The section states:

93(8AA). A person who is serving a sentence of imprisonment for an offence against the law of the Commonwealth or of a State or Territory is not entitled to vote at any Senate election or House of Representatives election.

The purpose of this paper is to examine whether s 93(8AA) of the *CEA* is inconsistent with the Australian Constitution. Part 1 examines the argument that legislation which deprives any citizen of the Commonwealth from voting in an election burdens an as yet unrecognised implied constitutional freedom that requires the government to justify any restriction on the franchise. The question here is whether a freedom entitling all citizens to vote (subject to reasonable limitations) can be implied from the text and structure of the Constitution. Part 2, which can be viewed as an alternative analysis, examines the question of whether legislation that removes the ability of some citizens to vote burdens the implied right to freedom of political communication already recognised by the High Court. The argument made in this section is that voting is the highest and purest form of political expression and therefore, legislation that restricts this type of expression burdens the implied freedom and must survive judicial review. Part 3 examines the question of whether the burden on the implied freedom of political communication or the implied freedom to vote (assuming it exists) is reasonably 'appropriated and adapted' to a legitimate governmental aim.

3. Implied Rights in the Constitution

In the early 1990s, the High Court began to explore the idea that the Constitution contains, by implication, a commitment to certain fundamental freedoms or democratic values operating as judicially enforceable limits on the legislative powers of the Commonwealth.² This culminated in 1992, when a majority of the

2 Tony Blackshield & George Williams, *Australian Constitutional Law & Theory: Commentary & Materials* (3rd ed, 2002) at 1158.

High Court recognised that the Constitution implies a freedom of political communication, holding that the system of representative and responsible government established by the Constitution implied to prohibited legislative action that interferes with the political expression necessary for the proper operation of the system of government established by the Constitution.³

In *Lange v Australian Broadcasting Corporation*,⁴ a unanimous High Court explained this as follows:

Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that all Members of the House of Representatives and Senate shall be “directly chosen by the people” of the Commonwealth and States respectively.... Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election, and between the electors themselves were central to the system of representative government, as it was understood at federation. While the system of representative government for which the Constitution provides does not expressly mention freedom of communication, it can hardly be doubted, given the history of representative government and the holding of elections prior to federation that the elections for which the Constitution provides were intended to be free elections

That being so, ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of political communication between the people concerning political or governmental matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power

If the freedom is to effectively serve the purpose of ss 7 and 24 and related sections, it cannot be confined to the election period. If the freedom to receive and disseminate information were confined to election periods, the electors would be deprived of the greater part of the information necessary to make an effective choice at the election.⁵

The Court has since rejected the concept that the Constitution contains a ‘free standing’ implication of representative government.⁶ Rather, it has held that the constitutional concept of representative government that forms the basis of the implied freedom of political communication is limited to those specific aspects of representative government that can be identified in the text or structure of the Constitution.⁷

3 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

4 (1997) 189 CLR 520.

5 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559–61 (the Court).

6 *McGinty v Western Australia* (1996) 186 CLR 140.

7 *McGinty* (1996) 186 CLR 140 at 171, 180–3 (Brennan CJ), 233 (McHugh J) and 281–3 (Gummow J).

4. *The Freedom to Vote should be Recognised as an Implied Constitutional Right*

The freedom to vote is an essential element of representative government which is protected by the text and structure of the Constitution. On a purely textual analysis, ss 7 and 24 of the Constitution extend the right to vote to all ‘people’. Sections 7 and 24 of the Constitution require a ‘choice’ by the people, which s 7 makes clear is to be made by electors ‘voting’. Section 7 states:

7. 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.

In s 24, the provision refers explicitly to ‘people of the Commonwealth’ rather than ‘people of the State’ as follows:

24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth⁸

As stated by the High Court in *Lange*, the requirement set out in ss 7 and 24 ‘embraces all that is necessary to effectuate the free election of representatives at periodic elections’.⁹

A. *Judicial Consideration of the Term ‘directly chosen by the people’ Supports the View that Sections 7 and 24 of the Constitution Extend a Freedom to Vote*

(i) A First Step: McKinlay v Commonwealth

In *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*, the High Court was asked to consider the question of whether the Constitution required adherence to the principle of ‘one vote, one value’.¹⁰ The Court concluded (Murphy J dissenting) that it did not.¹¹

In his dissent, Murphy J commented on the proper interpretation of the term ‘directly chosen by the people’ in s 24. In his view, the use of the words, ‘chosen by the people’ were themselves a guarantee of democracy. He noted that this phrase was ‘clearly cut from the US Constitution’ and summarized his view as follows:

The literal and commonsense construction [of s. 24]... is a choosing by all people capable of choosing, only excluding those incapable, such as minors and those of unsound mind. It may have been accepted in 1900 that “chosen by the people” could exclude women and people without certain property [However] because

8 As Tony Blackshield & George Williams, above n 2 comment at 1101, while: ‘s 24 does not expressly refer to elections, s 25 makes it plain that the House is to be directly chosen by the people of the Commonwealth voting at elections.’

9 *Lange* (1997) 189 CLR 520 at 557 (the Court).

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

11 *McKinlay* (1975) 135 CLR 1 (Barwick CJ, McTiernan, Gibbs, Stephen, Mason & Jacobs JJ).

of silent constitutional principles, this is no longer so. In 1975, any law of the Parliament which deprived persons of a right to representation or to vote on the ground of sex or lack of property would be incompatible with the command that the House of Parliament be directly “chosen by the people”. It would contravene s. 24 and thus be unconstitutional.¹²

(ii) *A Growing Recognition that ss 7 and 24 Extend an Enforceable Freedom to Vote*

Murphy J’s view that s 24 puts limits on the Commonwealth’s ability to restrict the franchise was a lone dissent¹³ and for the next 20 years, from 1975–1995, there was little more said by the High Court on this issue. However, in the last decade, there have been a number of cases relevant to the meaning of this term. In the most important case — *McGinty v Western Australia* (1996) 186 CLR 140 - the High Court had a chance to reconsider the significance of these words in the Constitution. *McGinty* involved a challenge to the electoral boundaries set by Western Australia legislation.

In that case, four of six judges made statements supporting the proposition that the phrase ‘directly chosen by the people’ guarantees universal suffrage. In considering the meaning of the phrase, Brennan CJ stated:

the phrase “chosen by the people” admits of different meanings. It might connote that candidates are chosen by popular direct election as distinct from election by an electoral college; or it might connote some requirement of equality or near equality of voting power among those who hold the franchise; or it might go further and 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. [Emphasis added.]¹⁴

On this latter point, Brennan CJ did not expand since *McGinty* did not involve the extent of the franchise. Toohey J expressed a similar point of view:

the essential feature of representative democracy is government by the people through their elected representatives. “[T]he powers of government belong to, and are derived from, the governed, that is to say, the people”. In 1900, the popular perception of what this entailed was certainly different to current perceptions. For instance, the franchise did not include all, or even a majority, of the population. *But according to today’s standards, a system which denied universal adult franchise would fall short of a basic requirement of representative democracy.* The point is that, while the essence of representative democracy remains unchanged, the method of giving expression to the concept varies over time and according to changes in society. It is the current perception which is embodied in the Australian Constitution. [Emphasis added.]¹⁵

12 *McKinlay* (1975) 135 CLR 1 at 68–9 (Murphy J).

13 In their joint decision in *McKinlay* (1975) 135 CLR 1, McTiernan and Jacobs JJ gave careful thought to the meaning of ss 7 and 24. Their joint decision influenced subsequent judgments.

14 *McGinty* (1996) 186 CLR 140 at 170 (Brennan CJ).

15 *McGinty* (1996) 186 CLR 140 at 201 (Toohey J).

Gaudron J, in a relatively short concurrence, substantially adopted the reasons of Toohey J. She expanded on his reasoning, stating as follows:

Notwithstanding the limited nature of the franchise in 1901, present circumstances would not, in my view, permit senators and members of the House to be described as “chosen by the people” within the meaning of ss 7 and 24 of the *Constitution* if the franchise were to be denied to women or to members of a racial minority or to be made subject to a property or educational qualification.¹⁶

Thus, after *McGinty* and *Lange*, there is strong support for the position that legislation which prohibited citizens from voting would burden an implied constitutional freedom to vote. This position is consistent with representative democracy. As emphasised by the Canadian Supreme Court in *Reference re Provincial Electoral Boundaries (Sask)*:

in a representative democracy each citizen is entitled to be *represented* in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative. In a democracy, every citizen has the right to play a meaningful role in the selection of elected representatives who, in turn, are responsible for making decisions embodied in legislation for which they will be accountable to their electorate.¹⁷

B. The Extent of the Freedom to Vote in the Constitution

The extent of a freedom to vote in the Constitution would depend on the definition given to the term ‘people’ in ss 7 and 24 of the Constitution. While arguments can be made to the contrary, in my opinion the better view is that the term ‘people’ as employed in this context is a reference to all citizens.¹⁸ Along with being consistent with the stated positions of five of the High Court judges post *McGinty* and *Lange* as examined earlier, this view of the meaning of the term is:

- (1) Consistent with Quick’s and Garran’s interpretation of the term;
- (2) Is the precise view recently expressed by McHugh J in *Hwang v Commonwealth*;¹⁹ and
- (3) Consistent with Australia’s international human rights obligations.

(i) Quick’s and Garran’s View of the Meaning of ‘directly chosen by the people

In their text, *The Annotated Constitution of the Australian Commonwealth*, Quick and Garran equate the reference to ‘people’ in ss 7 and 24 with ‘citizens’ as follows:

16 *McGinty* (1996) 186 CLR 140 at 221–2 (Gaudron J). For a similar statement, see Gummow J at 287.

17 *Reference re Provincial Electoral Boundaries (Sask)* [1991] 2 SCR 158 at 183 (McLachlin J).

18 The word citizen is not used in the Constitution except in s 44(i) in reference to ‘a citizen of a foreign power’.

19 *Hwang v Commonwealth* (2005) 222 ALR 83; see at 87 (McHugh J).

Attention may be drawn to the expression “the people of the Commonwealth” for the purposes of contrasting it with another, to be found in Section 7 “the people of the states”. A federation is defined by some authorities as a State having a dual system of government; hence in a federation it is said that there is a dual citizenship. It follows that each natural-born or naturalised subject of the Queen permanently residing within the limits of the Commonwealth is entitled to be considered as a citizen of the Commonwealth and at the same time, a citizen of the State in which he resides. Every such person thus owes a double duty, and can claim a double right, a duty to the Commonwealth, as the great community embracing all people Such a person also owes a duty to the particular State in which he resides In one capacity such a person is described by the Constitution as one of “the people of the Commonwealth”; in the other he is one of “the people of the State”. *From this dual citizenship, and in order to assist in its preservation, every person living under such a form of government has a duality of political rights and powers.* He is entitled, not only in assist in carrying on the government of his State, as a part of the Commonwealth, but to assist in the government of that wider organization of the nation itself. *In the latter work, taken and considered by itself, he has also a dual right and power; viz, to join in returning members to the House of Representatives in which centralizing, consolidating, nationalising, and progressive elements of the community are represented, and also to assist in returning members of the State, in which the moderating, restraining, conserving and provincial elements of the community are represented. The duty of a citizen having these dual functions, and of the Federal Parliament so dually constituted, will be to recognise and harmonise all these apparently conflicting yet necessary and inevitable forces.* [Emphasis added.]²⁰

Thus, Quick’s and Garran’s interpretation supports the view that the term ‘people’ in ss 7 and 24 of the Constitution should be interpreted as citizens.

(ii) *Hwang v Commonwealth*

In one of his final decisions before his retirement, McHugh J, sitting alone, had the opportunity to consider the meaning of ‘people of the Commonwealth’ in the case of *Hwang v Commonwealth*. Hwang involved a challenge to the *Australian Citizenship Act 1948* (Cth) on federalism grounds. In the course of striking out the challenge, McHugh J found that ‘there was no doubt’ that the reference in the Constitution to ‘people of the Commonwealth’ was ‘a synonym for citizenship of the Commonwealth’.²¹ He equated the two terms, based on the wording of the Preamble of the Constitution and on Quick’s and Garran’s interpretation of the term.

(iii) *International Law Instruments Recognise that Limitations on Voting Must be Justified*

Among the rights guaranteed by the *International Covenant on Civil and Political Rights* (‘ICCPR’) — one of the founding international human rights instruments — is the right of every citizen to vote, which is protected under Article 25 of the Convention in the following terms:

20 John Quick & Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 449–450.

21 *Hwang* (2005) 222 ALR 83 at 87 (McHugh J).

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote...

Australia, as a party to the Convention, has signified its intention to protect domestically the rights in the covenant. Additionally, by ratifying the Optional Protocol of the *ICCPR*, Australia has ceded jurisdiction to the UN Human Rights Committee to consider specific individual complaints that allege that Australia is in breach of particular articles of the covenant.

The *ICCPR* recognises that every citizen shall have the right and opportunity to vote. While that right is not absolute, derogations from that standard should be explained and justified by the State in question. In General Comment No. 25(57) adopted by the UN Human Rights Committee under Article 40(4) of the *ICCPR* dated 12 July 1996, the Committee stated, *inter alia*, concerning the right guaranteed under Article 25:

- 14. In their reports, State parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.

Thus, Australia's international legal obligation is to ensure that if conviction for an offence is to be used as a basis for suspending the right to vote, the period of suspension is proportionate to the offence and the sentence.

Therefore, the view that 'directly chosen by the people' in ss 7 and 24 of the Constitution should be equated with all citizens is supported by Australia's international legal obligations to adhere to Article 25 of the *ICCPR*. If the term 'people' is found to be ambiguous, in at least Kirby J's view, the ambiguity must be resolved in a manner that conforms, rather than departs, from Australia's international human rights obligations.²² Interpreting ss 7 and 24 in a manner that limits restrictions on the franchise to only those that are reasonably appropriate and adapted would be consistent with this obligation.

²² *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 417 (Kirby J). See Tony Blackshield & George Williams, above n 2 at 892–9 for a full discussion.

5. *Section 93(8AA) of the CEA Burdens an Implied Freedom to Vote of Incarcerated Prisoners*

Section 93(8AA) of the *CEA* prevents those who are serving a sentence of imprisonment at the time of an election from voting. Thus, if ss 7 and 24 support an implied freedom to vote, this provision would burden the recently recognised freedom. Similar provisions in South Africa, Canada and the United Kingdom were all found by reviewing courts to infringe a right to vote. In the Canadian case, *Sauvé v Canada (No 2)*, the government in fact conceded the infringement, relying only on its argument that the infringement was justified.²³

It could be argued that ss 7 and 24 do not confer a freedom to vote but merely impose an obligation of the Commonwealth and States to hold elections. However, in my view this argument would miss the point. The same argument was easily dealt with by the European Court of Human Rights ('ECHR') in relation to the relevant provision of the European Convention on Human Rights ('European Convention') – Article 3 of Protocol No.1 – which guarantees the right to vote in the European Union in a manner similar to ss 7 and 24 of the Australian Constitution. Article 3 of Protocol No.1 states as follows:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

The ECHR found that notwithstanding its wording, Article 3(P1) guarantees individual rights, including the right to vote and stand for election. The Court held that the unique phrasing of Article 3(P1) was intended to give greater solemnity to the States' commitment to free elections, as well as to emphasise that this was one of the few areas where the State was required to take positive measures (in addition to the obligation to refrain from interfering with the right).²⁴

Thus, the case law from the ECHR promotes the view that ss 7 and 24 support a freedom to vote that can be relied on by individuals who have had their vote taken away by the government. In any event, it is unclear what would be the significance of a finding that ss 7 and 24 do not create a freedom to vote that can be relied on by individuals, but only imposes an obligation that the Commonwealth must extend the franchise to all citizens, subject to a finding that a limitation is reasonably and appropriately adapted to a legitimate government aim. There is a good argument that for our purposes, that argument raises a distinction without a difference.

If it were found that s 93(8AA) of the *CEA* burdens the implied freedom, the pivotal question would be whether it satisfies the standard of review. Before I turn to that question, I will address the alternative argument that s 93(8AA) burdens the implied freedom of political communication.

23 *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 [*Sauvé (No 2)*].

24 *Hirst v United Kingdom (No 2)* (Application No 74025/01) (2005) ECHR (Grand Chamber) at [57].

6. *Is Voting in an Election Protected by the Implied Freedom of Political Communication?*

A. *Introduction*

Above, I argue that s 93(8AA) of the *CEA* burdens an as yet unrecognised right to vote in the Constitution. In the alternative, the next part of this paper examines whether, if it is found that ss 7 and 24 do not support a constitutional freedom to vote, the act of voting constitutes a political communication such that it is nevertheless protected by the Constitution, under the implied freedom of political communication. If that is the case, then a law such as s 93(8AA) of the *CEA*, which restricts the ability of some people to vote, is unconstitutional, unless it is found to be reasonably and appropriately adapted to a legitimate end.

B. *Analysis*

As set out earlier, the High Court has identified three elements of representative government from the text and structure of the Constitution. The first is the requirement that the members of the Senate and House be directly chosen by the people. The Court has also established that the implied freedom of political communication exists only to the extent necessary to enable these three aspects of government to function. The implied freedom of political communication is limited to ‘what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution’.²⁵

Applying *Lange*, the following question must be considered to assess the validity of s 93(8AA) of the *CEA* which seems on its face to infringe the implied constitutional freedom of political communication of prisoners:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government ... If the first question is “yes” and the second is answered “no”, the law is invalid.²⁶

Thus, the first question is to consider whether the act of voting constitutes engaging in a political communication.

(i) *Completing a Ballot Constitutes a ‘Communication’ on Political or Government Matters*

It seems obvious that a completed ballot is a communication by an elector to the Australian Electoral Commission and, indirectly, to the candidates (as well as to any political parties which have endorsed those candidates) of the elector's preferences in relation to those candidates. While it may be obvious to some that

²⁵ *Lange* (1997) 189 CLR 520 at 561 (the Court).

²⁶ *Lange* (1997) 189 CLR 520 at 567–8 (the Court).

voting is the highest form of political expression and the end purpose of the constitutional protection of political communication, it is not clear from the judgments in *Mulholland v Australian Electoral Commission* that the High Court would find that a completed ballot is a political communication protected by the implied freedom.²⁷

At issue in *Mulholland* was the validity of the ‘500’ and ‘no overlap’ rules in federal voting legislation. Mulholland was a candidate running for the Democratic Labour Party (‘DLP’). Because the DLP had not satisfied the 500 member requirement (the ‘500 rule’), the party affiliation of candidates running for the DLP was not included on the ballot-paper.²⁸

The primary constitutional question raised by *Mulholland* regarding the implied freedom of political communication was whether the communication between the Electoral Commission (or candidates or political parties) and electors via the ballot-paper was a political communication; specifically, whether the inclusion of candidate’s party affiliation on the ballot-paper was a political communication as defined in *Lange*. The Court unanimously upheld the law but split on the reasons for doing so.

Four of the judges found that the inclusion of a candidate’s party on the ballot paper was not a protected political communication.²⁹ Gleeson CJ, McHugh and Kirby JJ were the three members of the Court to find that the ballot-paper was a political communication that satisfied the first question of the *Lange* test. McHugh J explained his finding on these issues below:

In my opinion, the Full Court correctly held that the ballot-paper is a communication on political and government matters. For the purposes of the *Constitution*, communications on political and government matters include communications between the executive government and the people. Representative government and responsible government are the pillars upon which the constitutional implication of freedom of communication rests. Communications between the executive government and public servants and the people are as necessary to the effective working of those institutions as communications between the people and their elected representatives. As Deane J pointed out in *Cunliffe v The Commonwealth*, freedom of communication on political and government matters “extends to the broad national environment in which the individual citizen exists and in which representative government must operate.”³⁰

27 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

28 *Mulholland* (2004) 220 CLR 181.

29 In the view of these judges, the law did not interfere with the political communication of individuals since it only operated to restrict what a statutory body (the Australian Electoral Commission) could convey on the ballot-paper. This was based inter alia on their view that the implied freedom of political communication does not include the freedom to receive information. See for example Heydon J at 304.

30 *Mulholland* (2004) 220 CLR 181 at 219 (McHugh J). Gleeson CJ and Kirby J’s explanations ran along similar lines.

McHugh J went further and stated in obiter that an elector who completed and filed a ballot was engaging in political communication (for instance, that the completed ballot-paper was a political communication between the elector and the Commission, and also indirectly, the candidates):

The primary purpose of a ballot-paper is to record the voter's preferences among the candidates standing for election to Parliament in the voter's electorate. It is part of a process for the casting, counting and recording of votes to elect Parliamentary representatives which is the end to which the Constitution's implication of freedom of communication is directed. It does not convey information, ideas, opinions and arguments that may enable *other voters* to make an informed judgment as to how they should vote. Nor does it seek to persuade *candidates* in the election to modify or adjust their policies In so far as the elector makes a communication by marking the ballot-paper and lodging it in the ballot-box, the elector's primary purpose is to inform the Commission — the body charged with conducting the election — which candidate or candidates the elector wishes to have elected.

... the marked ballot-paper, when lodged in the ballot-box, is a communication on such matters. That is because the marked ballot-paper contains a statement — anonymous though it is — that this candidate or these candidates should be elected to Parliament. In that respect, such a statement is no different from a statement made by an elector in the course of an election meeting claiming that X is the person who should represent the electorate.

Accordingly, a ballot-paper is a communication on political and government matters.³¹

The discussion excerpted above from McHugh J's judgment was the only discussion in the case of whether the *completed* ballot-paper was a political communication *by an elector* protected by *Lange*.³² His judgment on this issue is on 'all fours' with similar judgments from the Canadian Supreme Court. For example, in *Haig v Canada*, the Supreme Court of Canada found that '[t]he casting of a ballot in a referendum is undoubtedly a means of expression'.³³ This was so obvious that it was not disputed that voting is a form of expression.³⁴

31 *Mulholland* (2004) 220 CLR 181 at 220–1 (McHugh J).

32 Some of the statements made in the judgments of Callinan J and Heydon J and in the joint judgment of Gummow and Hayne JJ could be viewed as extending to this issue, but these judges did not directly address the question of whether a completed ballot-paper was protected by *Lange*.

33 *Haig v Canada (Chief Electoral Officer)* [1993] 2 SCR 995 at [35] (L'Heureux-Dubé J).

34 *Haig* [1993] 2 SCR 995 at [52] (L'Heureux-Dubé J), McHugh J's judgment is also consistent with the implicit finding in the Supreme Court of Canada's decision in *Figuroa v Canada (Attorney General)*, [2003] 1 SCR 912 at [97] (Lebel J) that a complete ballot is expression.

(ii) *Section 93(8AA) of the CEA Burdens Prisoners' Freedom of Communication about Government or Political Matters by Prohibiting them from Voting*

The second limb of the first question in the *Lange* test inquires into whether government has burdened the freedom of political communication. Thus, the question is whether the *CEA* burdens the freedom of political communication of prisoners.

In *Mulholland*, McHugh J surprisingly found that the law restricting the placement of a candidate's party's affiliation did not burden the right of an unregistered party to communicate. He stated that 'because the DLP has no right to make communications on political matters by means of the ballot-paper other than what the Act gives, Mr Mulholland's claim that the Act burdens the DLP's freedom of political communication fails.'³⁵

Of the three judges to consider this question, McHugh J was the only judge to reach this conclusion.³⁶ Kirby J found that the '500' and 'no overlap' rules burdened the implied freedom of political communication. He stated 'the existence of a burden on political communication could only be denied by the adoption of self-fulfilling criteria as to what constitutes a 'burden' or by the application of constitutional sleight of hand.'³⁷

In dismissing the Commission's argument that the law did not burden expression, Kirby J inter alia rejected the argument seemingly accepted by McHugh J, that the freedom of communication which the Constitution protects is limited to 'rights' sustained by the common law or statutory provisions existing outside the Constitution itself. Kirby J explained why this latter argument was particularly dangerous:

This approach, pushed to extremes, could effectively neuter the implied freedom of communication. It could do so although this Court has repeatedly affirmed it. The common law adapts to the Constitution. Where necessary, the common law would, in my opinion, afford remedies designed to uphold such an important constitutional protection.³⁸

In my view, the High Court would have to take a very narrow view to find that s 93(8AA) of the *CEA* did not burden the freedom of political communication of prisoners. The Commonwealth has a constitutional obligation to hold elections. It is this obligation which gives rise to the implied freedom of communication, for without the freedom of communication there is no guarantee that electors will have the information they need to make an informed choice. Section 93(8AA) prevents

35 *Mulholland* (2004) 220 CLR 181 at 223 (McHugh J).

36 Gleeson CJ did not feel the need to address this point. Rather, after finding that the placement of a candidate's party affiliation on the ballot was indeed a protected form of communication, he immediately turned to the reasonably appropriate and adapted test without expressly considering the possibility that the impugned rules may not "burden" the implied freedom: *Mulholland* (2004) 220 CLR 181 at 196 (Gleeson CJ).

37 *Mulholland* (2004) 220 CLR 181 at 275 (Kirby J).

38 *Mulholland* (2004) 220 CLR 181 at 276 (Kirby J).

a certain portion of the population from expressing their ultimate view to the candidates on their candidacy. Thus, it interferes with the expression of those prisoners who are prevented from voting.

If it were found that s 93(8AA) of the *CEA* burdens the implied freedom of political communication or an as yet unrecognised implied freedom to vote in an election, the pivotal question would be whether it satisfies the standard of review, which is discussed next.

7. A Complete Ban on Prisoner Voting is Not Reasonably Appropriate or Adapted

Assuming that an implied freedom to vote in the Constitution does in fact exist, the question then becomes what restrictions on the right to vote are constitutionally permissible. An implied right to vote, like the implied right to political communication, is not absolute and clearly some restrictions are justified. However, the jurisdictions that have considered this issue have come to the conclusion that restrictions on the right to vote should be narrow. This is because, as jurisdictions like the European Court of Human Rights have noted, any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature and the laws which it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of the right to vote.³⁹ Thus, restrictions must not diminish the integrity and effectiveness of an electoral procedure aimed at identifying the will of people through universal suffrage.

Most democratic societies recognise that prisoners continue to be protected, even after incarceration, by all of the fundamental rights and freedoms guaranteed to citizens save for the right to liberty. For example, under the European Convention, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention. Thus, most societies have rejected the argument that a prisoner forfeit his or her rights merely because of their status as persons detained following conviction. Where tolerance and broadmindedness are the acknowledged hallmarks of a democratic society, automatic disenfranchisement cannot be based purely on the fact that a person breached a law of the State. For instance, it would seem unlikely that the High Court would find that prisoners do not enjoy an implied freedom of political communication (although laws which burden this freedom may be justified on the basis of safety concerns or security of the prison).

8. The Approach to Prisoner Enfranchisement in Other Jurisdictions

When assessing whether a law meets the standard of review, the High Court of Australia has found it useful to consider how courts from other Western democracies have assessed similar laws.⁴⁰ Thus, it is significant that South Africa,

³⁹ The exclusion on the basis of age has traditionally been viewed as a justifiable restriction on the franchise.

Canada and the Council of Europe have all found that blanket bans cannot meet the proportionality test. The fact that other Western democracies have uniformly come to this conclusion⁴¹ is relevant to the determination of whether s 93(8AA) of the *CEA* survives the standard of review.⁴² Below, I will look at the decisions of Canada, South Africa and the European Court of Human Rights in some detail.⁴³

(i) *Canada*

In 1992, the Canadian Supreme Court unanimously struck down a federal legislative provision that barred all convicted felons serving sentences of imprisonment from voting.⁴⁴ The Court, in a short paragraph, upheld the Appeal Court's decision that found that the complete ban infringed the right to vote expressly guaranteed in s 3 of the *Canadian Charter of Rights and Freedoms* ('the *Charter*') and found that the infringement could not be justified under s 1 of the *Charter*.

In response to the Supreme Court decision, the Canadian government introduced amendments that limited the ban to prisoners serving a sentence of two years or more. The amended legislation was subsequently challenged. In *Sauvé v Canada (Chief Electoral Officer)* [*Sauvé (No 2)*], the Supreme Court narrowly struck down the more limited ban.⁴⁵ As it was obvious that the ban infringed s 3 of the *Charter*, the question was whether the infringement would be justified under s 1 of the *Charter*. In a 5-4 decision, the majority held that it was not justified. Writing for the majority, McLachlin CJ stated '[T]he right to vote, which lies at the heart of Canadian democracy, can only be trammelled for good reason. Here, the reasons offered do not suffice.'⁴⁶

McLachlin CJ was not satisfied that the government had established a pressing and substantial objective in preventing federal inmates from voting. Her Honour also found the impugned provision failed all three branches of the proportionality part of the justification test.⁴⁷

Regarding the government's first stated objective of promoting 'civic responsibility and respect for the law', McLachlin CJ found that denying penitentiary inmates the right to vote was more likely to send messages that undermined respect for the law and democracy than messages that enhanced those values.⁴⁸ The legitimacy of the law and the obligation to obey the law flowed directly from the right of every citizen to vote. To deny prisoners the right to vote

40 *Mulholland* (2004) 220 CLR 181 at 213 (McHugh J)

41 With the exception of the United States Supreme Court which is grounded in its unique finding that Section 2 of the 14th amendment of the US Constitution expressly gives the States the authority to disenfranchise prisoners.

42 For example, see *Mulholland* (2004) 220 CLR 181 at 213 (McHugh J).

43 These are the only jurisdictions that I am aware of that have considered the issue of whether a blanket ban on prisoner voting is proportional.

44 *Sauvé v Canada*, [1992] 2 SCR 438; [*Sauvé (No 1)*].

45 *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

46 *Sauvé (No 2)* [2002] 3 SCR 519 at [1] (McLachlin CJ).

47 *Sauvé (No 2)*, [2002] 3 SCR 519 at [21] (McLachlin CJ).

48 *Sauvé (No 2)* [2002] 3 SCR 519 at [32] (McLachlin CJ).

was to lose an important means of teaching them democratic values and social responsibility and ran contrary to democratic principles of inclusiveness, equality, and citizen participation. This was inconsistent with the respect for the dignity of every person that lay at the heart of Canadian democracy and the *Charter*.

As regards to the second objective of imposing additional punishment, her Honour found that the Government had offered no credible theory about why it should be allowed to deny a fundamental democratic right as a form of state punishment. In any event the partial ban could not be regarded as a legitimate form of punishment since it was arbitrary — it was not tailored to the acts and circumstances of the individual offender and bore little relation to the offender's particular crime — and did not serve a valid criminal law purpose, as neither the record nor commonsense supported the claim that disenfranchisement deterred crime or rehabilitated criminals.

In a strong dissent, Gonthier J found the infringement of the right to vote by the partial ban was justified and he would have upheld the legislation. He found that the objectives of the measure were pressing and substantial. The first objective, that of enhancing civic responsibility and respect for the rule of law, related to the promotion of good citizenship. The social rejection of serious crime reflected a moral line which safeguarded the social contract and the rule of law, and bolstered the importance of the nexus between individuals and the community. The 'promotion of civic responsibility' might be abstract or symbolic, but symbolic or abstract purposes could be valid of their own accord and must not be downplayed simply for the reason of them being symbolic.⁴⁹

As the second objective is concerned with the enhancement of the general purposes of the criminal sanction, the measure clearly had a punitive aspect with a retributive function. It was a valid objective for Parliament to develop appropriate sanctions and punishments for serious crime.⁵⁰ The disenfranchisement was a civil disability arising from the criminal conviction.⁵¹ Gonthier J also concluded that the ban was proportionate, as he found the measure was rationally connected to the objectives and carefully tailored to apply to perpetrators of serious crimes. The disenfranchisement of serious criminal offenders served to deliver a message to both the community and the offenders themselves that serious criminal activity would not be tolerated by the community. Society, on this view, could choose to curtail temporarily the availability of the vote to serious criminals to insist that civic responsibility and respect for the rule of law, as goals worthy of pursuit, were pre-requisites to democratic participation.⁵²

49 *Sauvé (No 2)*, [2002] 3 SCR 519 at [150] (Gonthier J).

50 In Canada, the *Criminal Code*, R.S.C. 1985, c. C-19 specifies that those sentenced to 2 years or more are to serve their time in a federal penitentiary rather than a provincial jail. Thus, sentences of 2 years or longer are reserved for more serious crimes.

51 *Sauvé (No 2)*, [2002] 3 SCR 519 at [159] (Gonthier J).

52 *Sauvé (No 2)*, [2002] 3 SCR 519 at [164] (Gonthier J).

(ii) *South Africa*

Under the South African Constitution, the right of every adult citizen to vote in elections for legislative bodies was set out in unqualified terms. Section 19(3)(a) of the Constitution states:

Every adult Citizen has the right to vote in elections for any legislative body established in terms of the Constitution and to do so in secret.

The right to vote is not absolute. It is subject to limitation in terms of s 36(1) of the Constitution which provides:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:

- the nature of the right;
- the importance of the purpose of the legislation;
- the nature and extent of the limitation;
- the relation between the limitation and its purpose; and
- less restrictive means to achieve that purpose.

In *Minister of Home Affairs v National Institution for Crime Prevention and the Re-Integration of Offenders (NICRO)*, the South African Constitutional Court considered a ban on prisoner voting.⁵³ Nine of the 11 judges of the Court found that the legislation at issue infringed the right to vote and could not be justified. As the Government conceded that the legislation infringed the right to vote, the analysis centred on the issue of justification.⁵⁴

The government did not attempt directly to justify the legislation on traditional policy grounds for disenfranchising prisoners (as attempted by Canada in *Sauve No 2*). Rather, the government attempted to justify the infringement on logistical and financial grounds.⁵⁵ It argued that because of limited resources, the Government could not make special arrangements for every category of people for whom special arrangements were necessary. Rather than putting the scarce resources of the State at the disposal of convicted prisoners, such resources should be used for the provision of facilities to enable law abiding citizens, such as the physically disabled or aged, who faced difficulties in registering or voting. The government summed up its argument as follows:

In a country in which crime is a major problem and there is a strongly negative attitude to criminals it would be highly insensitive, and indeed irresponsible, to say to law-abiding citizens that some of the resources which could have been

53 *Minister of Home Affairs v National Institution for Crime Prevention and the Re-Integration of Offenders (NICRO) and others* [2004] 5 BCLR 445 (CC).

54 *Minister of Home Affairs* [2004] 5 BCLR 445 (CC) at [32] (Chaskalson CJ),

55 *Minister of Home Affairs* [2004] 5 BCLR 445 (CC) at [49] (Chaskalson CJ),

utilised to ameliorate the effect of the obligation to get themselves to their voting stations have been diverted to those who have infringed their rights. Confidence in the electoral process could be seriously undermined.⁵⁶

The Court easily rejected this argument. It found that the blanket ban could not be justified pursuant to s 36 as it could not be said that it was the least restrictive means to achieve the Government's purpose. Furthermore, the Government had not led sufficient evidence to substantiate its claim with regard to logistics and financial constraints on the allocation of resources.

Madala J (in dissent) found that the legislation was justified, stating:

the temporary removal of the vote and its restoration upon the release of the prisoner is salutary to the development and inculcation of a caring and responsible society. Even if the prisoner loses the chance to vote by a day, that will cause him or her to remember the day he or she could not exercise his or her right because of being on the wrong side of the law. You cannot reward irresponsibility and criminal conduct by affording a person who has no respect for the law the right and responsibility of voting.⁵⁷

In an interesting partial dissent, Ngcobo J found that the legislation had been too broad in that it did not exclude from the ban those prisoners who had not exhausted their appeals. While otherwise finding the legislation was justified, Ngcobo J stated:

The problem with the present limitation is that it makes no distinction between those prisoners who are serving a prison sentence while awaiting the outcome of an appeal and those whose appeals have been finalised. If an outcome of the appeal comes after the elections, the person would have been wrongly deprived of the right to vote.⁵⁸

The decision in *NICRO* built on the earlier case of *August v Electoral Commission*.⁵⁹ In that case, the Constitutional Court considered the application of prisoners for a declaration and orders that the Electoral Commission take measures enabling them and other prisoners to register and vote while in prison. There had been no legislation barring prisoners from voting, but the State had not provided prisoners with that opportunity. The question of whether legislation barring prisoners would be justified under the Constitution was not raised in this case. The Court held that in the absence of such legislation, prisoners had the constitutional right to vote and neither the Commission nor the court had the power to disenfranchise them. Thus, the Commission was under an obligation to make reasonable arrangements for prisoners to vote. In the case, the Court noted and underlined the importance of the right as follows:

56 *Minister of Home Affairs* [2004] 5 BCLR 445 (CC) at [54] (Chaskalson CJ), citing affidavit of the Government's expert Mr. Gilder.

57 *Minister of Home Affairs* [2004] 5 BCLR 445 (CC) at [106] (Madala J).

58 *Minister of Home Affairs* [2004] 5 BCLR 445 (CC) at [152] (Ngcobo J).

59 [1999] 4 BCLR 363 (CC).

The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts.⁶⁰

The court found that the right to vote, by its very nature, imposed positive obligations upon the legislature and the Executive, and that the *Electoral Act* must be interpreted in a way that gave effect to constitutional declarations, guarantees and responsibilities.

(iii) *Council of Europe*

As seen earlier, Article 3 of Protocol No. 1 requires European Countries that are party to the European Convention on Human Rights to hold elections to ensure that the members of the legislature are chosen by ‘the people’. This article was considered for the first time in *Mathieu-Mohin and Clerfayt v Belgium*.⁶¹ In that case, the ECHR found that this article was of prime importance as it ‘enshrines a characteristic principle of democracy’. The Court found that the article enshrines the right to vote and the right to stand for election to the legislature.⁶² Since *Mathieu*, the Court has been consistent in recognising that the rights guaranteed by this are crucial to establishing and maintaining the foundations of an effective and meaningful democracy.

The Court has of course recognised that the right enshrined in Article 3 of Protocol No.1 is not absolute. However, it has stated:

any conditions imposed must not thwart the free expression of the people in the choice of the legislature — in other words they must reflect, not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of people through universal suffrage. Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates. *Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of the Article.*⁶³

Early case law of the European Convention organs accepted various restrictions on certain convicted persons. It was not until the case of *Hirst v United Kingdom* delivered 6 October 2005, that the European Court of Human Rights had the occasion to consider the lawfulness of a general and automatic disenfranchisement of convicted prisoners, in the context of considering whether a blanket ban on prisoners voting enacted in the United Kingdom was inconsistent with Article 3 of Protocol No.1. The Court found that the ban violated Article 3 and that the restriction on voting rights did not pursue any legitimate aim and had not been proportionate. The details of that decision will be fully canvassed in the analysis of whether s 93(8AA) is reasonably appropriate and adapted, discussed below.

60 *August* [1999] 4 BCLR 363 (CC) at [16] (the Court).

61 *Mathieu-Mohin and Clerfayt v Belgium*, Judgment of March 2, 1987, Series A No. 113 at 22–3.

62 *Mathieu-Mohin and Clerfayt*, Judgment of March 2, 1987, Series A No. 113 at 51.

63 *Hirst (No 2)* (application no. 74025/01) (2005) ECHR 74025/01 (Grand Chamber) at [62].

9. *Is s 93(8AA) of the CEA Reasonably and Appropriately Adapted?*

If the High Court were to find that s 93(8AA) burdens the implied freedom of political communication or a newly recognised implied freedom to vote, it would then have to consider whether the law was reasonably appropriate and adapted to a legitimate end. In my view, there is a good argument that s 93(8AA) of the *CEA* does not pass the standard of review. The following section considers whether a blanket ban has a legitimate aim and whether it is proportionate. As recognised by the highest courts of other Western democracies, blanket bans are particularly problematic as, they are, for example, ‘disproportionate, arbitrary and impair the essence of the right’ to vote.⁶⁴ Blanket bans by their nature cannot take into account differences in the nature or seriousness of the offence committed and may have a disproportionate effect on certain prisoners, depending on whether their imprisonment coincides with the holding of an election.

(i) *There are Good Arguments that s 93(8AA) of the CEA has No Legitimate Aim*

Felon Disenfranchisement is Not an Appropriate Form of Punishment

Other jurisdictions, including the European Court of Human Rights and the Canadian Supreme Court have found that felon disenfranchisement is not an appropriate form of punishment. In *Hirst*, the ECHR stated as follows:

It could be argued that the disenfranchisement of a convicted prisoner is appropriate as part of a convict’s punishment. However, there is a strong argument that punishment cannot legitimately remove fundamental rights other than the deprivation of liberty. Moreover, depriving the vote is inconsistent with the stated rehabilitative aim of prison.⁶⁵

The position arrived at by the Canadian Supreme Court is similar. In *Sauve No.2*, the Supreme Court of Canada stated that the Government had offered no credible theory about why it should be allowed to deny a fundamental democratic right as a form of state punishment. Depriving prisoners of the right to vote could not be regarded as a legitimate form of punishment: it was arbitrary, since it was not tailored to the acts and circumstances of the individual offender and bore little relation to the offender’s particular crime, and did not serve a valid purpose of punishment.⁶⁶

Australia’s Public Justification for the Blanket Ban is Not Persuasive

It is difficult to discern what the Commonwealth’s purpose for the enactment of the blanket ban on prisoner voting was. Essentially, the justification for the blanket ban seems to boil down to the argument that those who commit offences do not

⁶⁴ *Hirst (No 2) (application no. 74025/01)* (2005) ECHR 74025/01 (Grand Chamber) at [45].

⁶⁵ *Hirst (No 2) (application no. 74025/01)* (2005) ECHR 74025/01 (Grand Chamber).

⁶⁶ For a full discussion, see Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and Democracy* (2006) at 35–7.

deserve the right to vote. As The Hon. Senator Eric Abetz stated in the Second Reading of the Bill:

... There are those who are now suggesting that everybody should be entitled to vote, including prisoners, and that this is somehow a fundamental right. It has long been the case in Australia, especially in state jurisdictions, that, if you are serving a period of imprisonment, you do not get the vote. We as a government happen to believe that if through the judicial system you have been sentenced to a period of incarceration—in other words, you have been removed from society by society through the judicial system—then, during that period of your removal from society, you forfeit the right to vote

Let us get a grip on reality with this. The concern of citizens is their removal from society by the judicial system because they have so offended against the rules and laws of our society that they are deemed to be unworthy to walk the streets. I know some academic said that I put it deliciously simple by saying that chances are that, if you are unfit to walk the streets, you are unfit to vote. I suppose the reason they say that it is deliciously simple is because there is no argument in principle against that proposition. If you are removed from society then chances are that you should not be entitled to vote.⁶⁷

Senator Abetz appears to be arguing that those who breach the rule of law should lose their entitlement to vote. He seems to be relying on the ‘social contract’ argument that ‘those who do not obey the laws of the land are barred from receiving the benefits of society including the right to vote’.⁶⁸ However, there is no explanation why this should be the case and Senator Abetz does not address the philosophical frailties of this position. His position ignores the fact that modern constitutional systems are not based on a social contract but on the fundamental human rights concept that all people, including prisoners, have rights simply by virtue of being human. For example, in *Sauve*, the majority of the Canadian Supreme Court dismissed this argument, noting that ‘it does not follow [from the social contract] that the failure to [obey the laws] nullifies the citizen’s continued membership in the self-governing polity.’⁶⁹ This is because inter alia, the right of the State to punish a criminal is tied to ‘society’s acceptance of the criminal as a person with rights and responsibilities.’⁷⁰ Moreover, ‘prisoners retain the link they have with society by serving their sentences. To disregard their right to vote is a fundamental breach of the social contract’.⁷¹

Finally, Senator Abetz does not comment on the relationship between the blanket ban and the rehabilitation of an offender, one of the most important aims of a custodial sentence. He also does not explain why the disproportionate impact of a blanket ban is not unfair or how a blanket ban is consistent with the stated

67 Commonwealth, *Parliamentary Hansard*, Senate, 16 June 2006 (Senator Eric Abetz).

68 G Robins, ‘The Rights of Prisoners to Vote: A Review of Prison Disenfranchisement in New Zealand’ (2006) 4 *New Zealand Journal of Public and International Law* 165 at 190.

69 *Sauve (No 2)* [2002] 3 SCR 519 at [47] (McLachlin CJ).

70 *Sauve (No 2)* [2002] 3 SCR 519 at [24], [36] (McLachlin CJ).

71 Robins, above n 68 at 193.

objectives of the law (for instance, someone who receives a three-year sentence for a serious crime the day after the election is unaffected by the ban and is able to vote in the next election, while a person who has the unfortunate luck to be incarcerated the week before the election for seven days for a minor crime loses their vote). If the goal of the legislation is, as stated by Senator Abetz, to prevent those who are not morally entitled to vote from voting, the means employed by s 93(8AA) seem arbitrary at best.

To conclude on the issue of legitimate aim, there is no convincing reason in my view, beyond imposing additional punishment, to remove the vote from convicted prisoners. This additional sanction is not in keeping with the idea that the punishment of imprisonment is limited to the deprivation of liberty and therefore prisoners do not forfeit their other fundamental rights save in so far as this is necessitated by, for example, considerations of security. Prisoners, as all citizens, have an interest in political issues and should be entitled to express their views. The Commonwealth prisoner ban appears to be simply concerned with moral judgement. It is unacceptable for the right to vote to be made subject to the moral judgments imposed by persons who have been elected; in other words, it is unacceptable for the elected to choose the electorate.⁷²

(ii) *Section 93(8AA) is Not Proportionate*

Even if s 93(8AA) had a legitimate end, there is a strong argument that it is not proportionate. The fact that the ban applies to every person incarcerated for a sentence of imprisonment and does not vary with the seriousness of the offence committed or the personal circumstances of the offender, demonstrates that the effect of the ban is arbitrary and not tailored to individual cases. Indeed, rather than depending on the seriousness of the crime committed, the prohibition on voting has a varying effect which depends solely on the arbitrary fact of whether the sentence of imprisonment coincides with the timing of an election. These points have been central themes in the decision of the highest courts of Canada, South Africa and the Council of Europe finding that blanket bans on prisoner voting are not proportionate.

A ban tailored to the most serious offences would diminish the certainty of an arbitrary effect to a more acceptable level: every prisoner who received the ban would be prohibited from voting in at least one election, no matter the timing of the election. Moreover, it could be argued that such a ban, if set at the length of the normal electoral cycle (ie, three years or more), 'would minimise the problem of arbitrary application' that accompanies a blanket ban.⁷³ In addition, as suggested in the partial dissent in *NICRO*, *supra*, exempting those who have appealed their sentence from the limitation would also better tailor the ban to those who have

72 In the United States, many commentators have remarked that a high percentage of those disenfranchised have a tendency, because of their socio-economic backgrounds, to vote for more liberal parties, and thus felon disenfranchisement has been criticised as an illegitimate mechanism prone to abuse for political reasons.

73 See Robins, above n 68 at 170. It is these considerations which in part, led New Zealand to draw the line at three years in its *Elections Act*.

truly breached the social contract. A partial ban tied to the electoral cycle, which takes into account appeals, would appear to meet the Commonwealth's objective while minimising any burden on the implied freedom to vote or of political communication.

10. Conclusion: The Blanket Disenfranchisement of Prisoners is not Constitutional

The preceding sections have discussed the possible purposes of a blanket ban on prisoner voting and have found these purposes wanting. Aside from being politically expedient, taking away the vote from prisoners does not satisfy a legitimate aim of punishment and, crucially, interferes with rather than promotes the rehabilitation of prisoners. In addition, the blanket ban is not proportionate, as its effect is not tied to the severity of the offence committed but rather to the relationship between the timing of the offence and the next election.

These are the primary considerations that have led the final appellate courts of Canada, South Africa and the Council of Europe to hold that blanket bans on prisoners voting are not justifiable in free and democratic societies. If, as this paper argues, the right to vote is guaranteed by ss 7 and 24 of the Constitution, then, on the basis of the jurisprudence from other jurisdictions, the empirical and philosophical research on the disenfranchisement of prisoners, and the failure of the Commonwealth to justify publicly the law in a coherent and thorough manner, the High Court of Australia could well find the blanket ban in s 93(8AA) of the *CEA* to be unconstitutional. While the High Court could decide otherwise in *Roach*, the foregoing demonstrates that it would have to take a narrow view of the Constitution to do so.

