ROWE: PRACTICAL DISENFRANCHISEMENT

FACTS: Concerned the changing of the long standing process that the electoral roll shld be closed 7 days after writs for an election were issued → now closed on day of.

- Many people who were obliged to vote but waited for writs to be issued were excluded from voting.

GOVT RATIONAL 2 FOLD:

- Shut down on potential electoral fraud → gives them ample time to ensure the register is properly checked.
- Grace period discouraged people from enrolling when they are obliged to do so → information used for more than just voting → government allocations.

HELD: INVALID by MAJORITY:

- 'directly chosen by the people' ss7 & 24 CC contravened by early closure of rolls bc electoral system required to align w/ principles of representative govt.
- Practically disenfranchising many.
- **Gummow Bell** – preference participation over irresponsibility to enrol in first place → The Electoral Act is designed to facilitate maximum participation in electoral process of those otherwise qualified to vote, not to support disenfranchisement.

1 – Did earlier closure of Cth electoral rolls disentitle, disqualify or disenfranchise people who were otherwise legally entitled to vote?

- YES – was not complete disenfranchise, but conditional disenfranchise by missing deadline to vote.
- Not a blanket exclusion as in Roach – distinguishable because not excluding a class.
- BUT – effective disenfranchisement of 100,000 otherwise eligible voters (**Gummow J)** – especially impacted young Australians.

2 – If people were so disentitled, disqualified, or disenfranchised, was this for a substantial reason?

- NO substantial reason.
- Cth alleged was to avoid electoral fraud, but no evidence that this was (1) an actual problem and (2) that this measure would remedy it.

MINORITY VIEW: People not disqualified as they had every chance to enrol & chose not to:

- Hayne, Heydon, Kiefel JJ → Plaintiff's not disqualified by legislation as they failed to enrol.
- **Heydon** looked at arbitrary nature of 1 day, 2 days or 5 days as limit noting 'these temporal differences are of such crucial decisiveness as to mark the differences b/w validity & invalidity.'
    - Have to respect these mechanical provisions are for the parl to legislate upon & Roach is not concerned about maximising participation.
    - Roach is not authority for proposition that it's constitutional imperative that the max number of persons entitled to be enrolled have opportunity to be enrolled & vote.
    - Plaintiff's demanding too much of an intrusion into legislative space by HCA – Proportionality does not involve determining policy & fiscal choices.
- French CJ judgement in MAJORITY subject to heavy criticism for his adoption of 'durable legislative development':
    - Based on concept of 'evolution of representative govt' – evolution only moves in 1 direction w/ each step in liberalising franchise setting the benchmark for which there can be no retreat w/out substantial reason.
    - Further said experimentations of parl that expanded franchise went as far to give some constitutionally binding effect that cld not be reversed.
    - Noted by Twomey, there's nothing to support idea expansion of franchise cannot be reversed:
        - In past, parl has chosen to both expand & diminish franchise.
        - Why wld diminishment not be similarly entrenched as expansion under same line of reasoning.
        - Twomey notes the diminishment of franchise for native Aus' and no one wld accept that as an irreversible change entrenched in constitution somehow.

MURPHY:

POSITION FOLLOWING ROWE: There remained the 7 day window from the issuing of writs for election to when the electoral rolls closed.

FACTS: Challenges the fact the roll should be held open ALL the way up until polling day because of miracles of modern technology.

HELD: VALID 7 day window & HC unanimously dismiss challenge that roll should be held open all way up:

- If a right is NOT being TAKEN AWAY – less likely to be constitutionally invalid.
- Unanimous HELD – Constitutionally valid or minorities affected.

Distinguished Roach & Rowe:

- Roach: While also dealing w/ closing the rolls – distinguished because Roach dealt w/ taking away existing rights (not here).
- Also, there were ways that people could extend their deadline for enrolling even with this provision.
- Essentially, can't just use maximising voting turnout as a right.
- Substantial reason: Makes polling system more efficient & accurate: In crafting electoral laws there is incentive to draft laws to keep them elected.
- Roach & Rowe exclude people – minority interests are excluded: If can show excluded minorities, likely invalid.

- **Significant difference in Rowe** is it concerned the reduction of existing opportunities to vote but you can't invalidate a law because it doesn't absolutely maximise voting all the way up until polling day.
  - This would allow court to pull constitutional rug out from under a valid legislative scheme upon the court's judgement of feasibility of alternative arrangements.
  - Essentially the Plaintiff coming to court & asking for electoral reform & that is not within the purview of court.
- Gagelar J posits idea that in many cases it's the duty of the court to step back & allow parl to perform their duties & where they do not represent the will of the people then they will be voted out.
  - Courts should only step in where there can be no trust placed in parliament to do their job.
  - Follows that line of reasoning in Kiefel's judgement considering the very narrow temporal differences & that the court should not overstep their legislative function.

PALMER (2019):
FACTS: Whether AEC practice of publishing indicative two-candidate preferred count pursuant to s274(2A)-(2C) of Cth Electoral Act 1918 (Cth) while polling booths remained open in some jurisdictions wld distort voting system by compromising representative parliament.
HELD: Indicative TCP count does not compromise ss7 and 24 CC – directly chosen by people:
- Publication of TCP information does not constitute Commission giving approval to a particular candidate or outcome.

RUDDICK (2022):
FACTS: Amendment introduced by Electoral Legislation Amendment (Party Registration Integrity) Act 2021 (Cth) which constrained political parties from having confusingly similar party names, abbreviations, or logos from earlier registered parties.
HELD: Amendment VALID:
- The amendments don't impair or burden quality of any electoral choice by people or freedom of political communication.
- Act provides means for voter confusion to be dealt w/ in an effective manner – this does not burden implied freedom of communication to same extent.

MINORITY:
- Amendment restricts/distorts informed choice of people as electors, by preventing presentation to them of a candidate's affiliation w/ their political party on a ballot paper & preventing candidate from communicating that affiliation & what it entails to electors.
- No substantial reason for restrictions.

ONE VOTE / ONE VALUE: WA:

- Issues w/ equality of voting power.
- Smaller electorates require less votes to be elected than larger electorates.
- Voter inequity in senate is guaranteed by Constitution – ie 12 senators in Tas vs 12 Senators in NSW, even though NSW has a population 4x Tassie.
- Problematic in WA:
  - Rural seats
  - Lack of quality representation
  - Gerrmandering (ie drawing boundaries to favour a political party or certain class of persons).

COMMONWEALTH:

- **S24 CC – does not require 1 vote 1 value, however there may be a point where there is such inequality that it is no longer a 'choice by the people'.**
- McKinlay: Discusses whether 'directly chosen by the people' in s24 requires 1 vote 1 value.
  - HELD: s24 does not require 1 vote 1 value – does not require an absolute equality for every person (something that is very hard to achieve).
  - However, there is a point where in these circumstances, a margin becomes sufficiently large to take away from equality of choice within s24 CC → 10% is the unwritten rule (McTiernan & Jacobs JJ).

WESTERN AUSTRALIA:

- Following enactment of WA Electoral Act Provisions, each district must represent w/in a 10% range the average number of electors in the district.
- S73(2)(c) CA1889 WA – "A bill that… expressly or impliedly provides that the LC or LA shall be composed of members directly chosen by the people".
- McGinty: Discusses whether CAAA1899 & Electoral Districts Act (governing distribution for LA and LC) constitutionally valid in spite of inequalities?
  - HELD: s24CC & s73(2)CA1889 WA did not require equality of voting power bw WA electorates.
  - Even if there was 1 vote 1 value requirement at Cth level, it could not be applied to state electoral systems.

- ➔ HELD – s3 is valid & not too general or broad. Future issue - what is the limit for broadness to be supported by s51?
- Evatt J: Considers hypothetical example that DL lets Exec make regulations upon subject matter of trade & commerce among other states & countries.
  - ➔ If an entire head of power under s51 is given to Exec – threshold crossed & DL invalid because too broad.
  - ➔ *Parl is 'not competent to "abdicate" its powers of legislation'.* Can only hand over bits of Parl power, not entirety of power under s51.
- NOTE – Exception to limit of DL to not cross s51 threshold is emergencies such as COVID-19 where greater tolerance to give broader powers to exec.

Plaintiff s157/2002:

- Totally open discretionary powers granted to immigration minister that allowed him to determine 'what aliens can and what aliens cannot come to and stay in Australia'.
- *'The structure of the CC does not preclude Parl from authorising in wide & general terms subordinate legislation under any of its heads of its legislative power'.*
- LIMIT – If a power is SO wide, it lacks connection w/ a head of legislative power, then invalid DL.
- Lacks *'The hallmark of exercise of legislative power'* – not really giving any guidance as to how a rule can be applied per se, rights or duties.

Common law power: PREROGATIVE POWERS

- The powers that are derived from the monarch at CL and are unique to the crown (Williams v Cth – French CJ).
  - Right to declare war, make peace, execute treaties, coin money, pardon offenders, conduct inquiries under royal commissions, immunities (Evatt J).
- Prerog powers exist at CL and can be exercised absent enabling legislation:
  - May be abrogated or regulated by legislation.
  - Cannot be extended by legislation.
    - Limits for which exec may impose obligations/restraints on citizens without stat authority are well settled by historic monarch at CL & incapable of extension (British Broadcasting Corp v Johns).
      - Court's aim to work out its scope.

Tampa Case (Ruddock):

FACTS: 400 refugees rescued in international waters by ship – prevented from docking in Australia & were expelled – raises the question as to **whether *Migration Act* had dispelled the prerog power to determine which aliens can enter Australia**.

- French CJ: Focused on Australia's status as a sovereign nation from the point of federation allowed it to determine who could and couldn't enter onto its territory.
  - Infers the Cth had prerogative powers that extended beyond those traditionally identified under CL by virtue of the broad nature of s61.
  - Can be abrogated or modified by Parl.
  - The **greater the significance of the power for national sovereignty**, the **less likely** it is that Parl had intended to **extinguish that power**, absent any clear wording to the contrary.

Must ask whether the Act evinces a clear and unambiguous intention to deprive the Executive of the power to _____.

- Black CJ in dissent: The *Migration Act* is very comprehensive & leaves very few gaps such that the 'conclusion to be drawn is that the Parliament intended that in the field of **exclusion, entry & expulsion of aliens, the Act should operate to the exclusion of any executive power derived otherwise than from powers conferred by the Parliament**.
  - 1 – Open to nations to exclude aliens who do not have legal authority to enter.
  - 2 – BUT cannot automatically conclude Executive has power in 1.
  - Survey concludes it is doubtful as to whether prerog powers exist at CL anymore & Black CJ says not necessary to conclude on this matter.

- Remains unclear as the HCA refused leave to appeal as the rescuers had already been relocated to other countries following the Federal Court findings.

French CJ (Majority) vs Black CJ:

- French focused on other sources of power under s61 & that s61 shouldn't be understood purely in terms of powers historically vested in England but for serving purpose for Australian constitution & introduce powers that were not historically vested in the Crown.
  - Exec power needed from a modern nation of Aus.

- Clear there is a non-statutory power to exclude aliens & *Migration Act* does not displace this power – therefore, Executive were entitled to rely on non-statutory power under s61.
- Black focused on historical precedence regarding prerogative powers – look to England & try identify scope of exec power by reference to monarch.
  - Concludes the existence of prerogative power is uncertain & *Migration Act* is comprehensive & takes priority.

CPCF v Minister for Immigration & Border Protection:

FACTS: 153 asylum seekers were intercepted, taken to India & then Cocos Islands.
ISSUE: Was the detention on the boat & exclusion from Australia a valid exercise of Executive power?

- French CJ, Crennan, Gageler and Keane JJ – The actions were validly authorised under s72(4) of the *Maritime Powers Act.*
- Hayne, bell and Kiefel J – Although there was valid statutory support of the action, they doubted the findings under Tampa to say the power could be exercised in the absence of legislative support.
  - There is a danger to conflate the breadth and depth of executive power – just because the nation needs the power to determine entrants, that is not to say the Exec are the ones who ought to do it.
- Keane J – Joined majority in saying there was valid legislative backing, but cited Black's dissent in Tampa in saying there was no valid authority under the prerogative powers found under s61.

DOES THE PREROGATIVE POWER EXIST TO EXPEL ILLEGAL ALIENS??

- Tampa:
  - Majority did not explicitly say yes, but inferred s61 could be read as such.
  - Minority explicitly rejected, considered long abrogated by statute.
- CPCF:
  - Majority only Keane J dealt with, considered (in obiter) the prerogative did allow exclusion of illegal aliens.
  - Minority expressly rejected, considered expulsion was already bestowed by statute (Hayne and Bell JJ) and had in any case long been abrogated by statute (Kiefel J).

Common law power: CAPACITY TO CONTRACT & SPEND:

DEFINITION:

Per ***Williams v The Cth*** **(French CJ),** this refers to the increasing use of government contracts for the performance of governmental functions, and as a regulatory tool.

- Where the executive spends on projects, infrastructure, etc. which they otherwise do not have a legislative backing for in order to expand their power.
- Source of this power is found in s61 Constiution.
- ***Williams v Cth (No 2):*** The govt need to have legislation authorising expenditure in a particular area to contract and spend in that area.

- French CJ in *Pape*: There's no substantive spending power granted to Exec under Constitution.
- Prior to *Williams*: Cth believed they had unlimited right to enter into any contract as any ordinary person could. Was 'justified' on basis expenditure did not affect rights & duties, unlike coercive regulatory power – unanimously rejected by HCA.
- Effect of Williams (No 1): Need legislation to permit exec spending.

Williams (No 1):

FACTS: National Schools Chaplaincy Program saw the Cth fund chaplain in schools by individual funding agreements – the case related to *Darling Heights School* funding agreement.
ARGUMENT: An appropriation act made under s81 didn't give power to spend, but merely to put money aside for a particular purpose – was the broad prerogative power sufficient?

1 – BROAD ARGUMENT -- Cth has power to contract & spend as an ordinary person – justified by non-coercive nature:

- Hayne and Kiefel JJ rejected broad & found it unnecessary to determine the correctness of the narrow submission because they were of view the NSCP could not have been the subject of a valid law under s51.
- Rejected on the basis that there are substantial differences b/w the ordinary person & the Cth & fundamentally the spending of public money required strict adherence to the principles of representative & responsible govt.
  - Spending of public moneys required stringent scrutiny.
- Would also undermine the Senate's role as a legislative check on the spending of public money as they would only be able to oversee the appropriation bills, but not the expenditure.
  - Even then the Senate only has limited power wrt appropriation.
  - French CJ – 'the function of the senate may not be vestigial'.

- Undermine the role of grants made under s96 entirely – everything could be done under executive power & then making incidental legislation to support it.
    - The very presence of s96 is evidence that Exec power did not extend so far.
    - Gummow & Bell JJ: s96 gives Parl a means for provision of financial assistance to states. Consensual aspect of s96 (where states can accept/reject grants) would be bypassed by direct exec spending.
- When paired with s51(xxxix) has the capacity to be overly exploited – if they didn't have a legitimate head of power they could enter into contracts & pass legislation which was 'incidental' to that function of the executive.
    - Has the capacity to see a huge encroachment on the constitutionally prescribed division of powers.

2 – NARROW ARGUMENT – the 'common assumption':

- Could engage in contracts if there was a head of power that would permit enabling legislation but merely hasn't been enlivened – even without legislation, the fact you could is sufficient.
- Rejected 6-1.
- Gummow Bell JJ – such a proposition would undermine the basal assumption of legislative predominance inherited from the UK and would distort the relationship between Ch I and Ch II.
- Hayne, Kiefel JJ – No need to decide the point because they didn't see that even if this narrow argument were to hold that there was any valid head of power to provide chaplains under s51.
- Heydon J accepted narrow submission & found NSCP to be within exec power because supported by s51(xxiiiA) constitution.

HELD: Both broad & narrow arguments rejected by majority:

- French CJ, Gummow, Bell JJ and Crennan J rejected and held: NSCP could only be supported by legislation enacted by parliament.
- If the executive wants to enter contracts & spend money, **there needs to be legislation that gives effect to that power** (i.e. needs statutory power to do so).
    - Reason: Exec is responsible to Parl & accountable to Parl for how money is spent. Responsibility & accountability can be ensured by having legislation.

WHEN CAN EXECUTIVE EXPEND MONEY (POST-WILLIAMS 1):

According to findings in Williams, the Cth has the authority to expend money that has been legally appropriated under s83 when the expenditure is:

1 – Authorised by the Constitution:

- S82 – allows the Consolidated Revenue Fund to be used to pay for costs, charges and expenses incidental to its collection, management and receipt.
- Payment of ministers & members of Parl provided under s48 and 66 (now provided for).
- Most importantly today the Cth makes grants to the states on certain terms & conditions – s96:
    - Boundaries of Cth discretion has crept into the states through tied grants.
    - Grants must be consensual – states can refuse them
        - Would be undermined.

2 – Made in execution of statute or expressly authorised by statute:

- Properly passed legislation made under a valid head of power is ideal.
    - This process involves potential for proper parliamentary scrutiny & authorisation of the executive actions – representative & responsible govt.
- This came into question in *Williams (No 2).*

3 – Supported by Common Law Prerogative power:

- Valid argument that carrying out of prerogative powers may be valid for spending.
- Most prerogative powers (going to war, declaring immunities, imposing royalties) don't actually require spending of money.

4 – Made in the ordinary administration of government:

- In *Williams* the ordinary administration of functions of government was noted as distinct exception.
- There was ambiguity over the source of such an exemption.
    - S64 - *to administer such departments of State of the Commonwealth*
        - French CJ view – authorises the spending on the ordinary administration of the departments & agencies of the Parliament.
    - The application of prerogative powers to establish & maintain a parliament.
    - The status of the crown as a legal person, giving it the capacity of legal person, which can be exercised in accordance w/ principles of responsible govt.

SWISS CHEESE APPROACH:

- Australia is unique in that it does not have a constitutionally entrenched bill of rights – swiss cheese approach.
- We adopted this approach because framers believed the core principles of representative/responsible govt and our common law inheritance wld adequately protect our human rights.
- Kruger, Dawson J – "the framers preferred to put their faith in the democratic process for the protection of individual rights & saw constitutional guarantees as restricting that process".
- Roach, Gleeson CJ – the framers "admired and respected British institutions, including parliamentary sovereignty".
- Australia's approach to human rights protection is made up of:
    - 1 – Constitutional guarantees;
    - 2 – Domestic legislation and;
    - 3 – Common law rights.
    - 4 – International human rights law.
    - 5 – State & Territory human rights charters.

1 -- CONSTITUTIONAL GUARANTEES:

- Deane J in Street – "The constitution contains a significant number of express or implied guarantees of rights and immunities. The most important of them is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by Chapter III courts (s71).
- Express rights:
    - Guarantee of trial by jury – s80.
    - Guarantee of freedom of interstate trade, commerce, and intercourse – s92.
    - Guarantee of free exercise of religion – s116.
    - Guarantee against being subject to inconsistence demands by contemporaneously valid laws – s109/118.
    - Guarantee against discrimination on the basis of state residency – s117.
    - Protection against the acquisition of property on unjust terms – s51(31).
- Implied rights:
    - Implied right to vote – s7 + s24 – Roach, these provide an implied right to vote.
    - Implied right of political communication – ACT Pty Ltd v Commonwealth.
    - Implied right to a fair trial – Dietrich v R.
- This forms part of the "Swiss cheese" makeup – ie no constitutionally entrenched bill of rights, but few express rights and an emerging body of implied rights. Patches of human rights protection, holes everywhere, but somehow makes together some patch work.

2 – DOMESTIC LEGISLATION (PARLIAMENT/STATUTE):

- Best way to achieve rights protection is through legislation (eg Racial Discrimination Act, Age Discrim. Act).
- However, can be said that Parliament could be a threat to us because they can make legislation that impacts on our fundamental rights/suspend legislation to protect our human rights.

Something moving in the right direction, but still not fully sufficient is the ***Human Rights (Parliamentary Scrutiny Act) 2011 (Cth):***

BACKGROUND TO HUMAN RIGHTS SCRUTINY ACT:

- Govt response to Human rights consultation chaired by Frank Brennan. Govt response in 2010 was the national human rights framework – inc this model.
- Provides all bills checked in compliance w/ 7 human rights treaties.
    - Created human rights framework & mechanisms to scrutinise.
- Every bill introduced, person introducing bill must provide statement of compatibility of that bill w/ seven human right treaties – but legislation can still be pushed through because this is merely advisory, not binding.

S7 of the Act: Parliamentary Joint Committee on Human Rights:

- Recommended to scrutinise bills, delegated legislation, and existing laws for compatibility w/ human rights.
- Inquire into human rights matters referred by the Attorney-General.

NEGATIVES:

- Statements of compatibility can be ignored, limited legal implications.
- Risks becoming a box ticking exercise.
- No legal costs for non-compliance.
- No external check No legal scrutiny.
- Issues re too many human rights to check. Too much legislation passed – hard to balance thorough reports with efficiency (scrutinising both bills and existing acts – scope is wide).

POSITIVES: