

# Elections

## Federal Elections

Questions to be asked

1. Who do we vote for? Who can become a candidate?
2. How do we vote? Who gets to vote?

Is X eligible to be a candidate?

Relevant provisions: s16, s34, s43.

S34 gives parliament power to decide the criteria ('Until the Parliament otherwise provides...');

- the product of this is the *Commonwealth Electoral Act 1918 s163*;
- 1). A person who
  - A) has reached the age of 18 years
  - B) is an Australian citizen; and
  - C) is either
    - I) an elector entitled to vote at a House of Representative election; or
    - Ii) a person qualified to become such an elector
    - Is qualified to be selected as a senator or a member of the House of Representatives
- Note that this also applies to the Senate because of s16

## Other limitations

S43: A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other house (i.e. you cannot be a member of both Houses)

S44: renders incapable various categories of people, including those

- Under allegiance to a **foreign power**
- Attainted of treason or convicted and under sentence, or subject to be sentenced, for any offence punishable by imprisonment for one year or longer; or
- Undischarged bankrupt or insolvent; or
- Holding any **office of profit under the Crown, or any pension payable during the pleasure of the Crown.....**
  - **NOTE:** does not apply to the office of any of the Queen's Minister of State for the Commonwealth of State or if you are in the army etc etc etc.
- Has any direct or indirect pecuniary interest in any agreement with the Public Service of Commonwealth otherwise than as a member .....

Issue: Is X holding an office of Profit under the Crown?

Authority: *Sykes v Cleary* (The school-teacher on leave running for MP)

## Rules:

S44 – not clear

Majority decision:

- 'Crown' meant the government
- This rule applies to the whole process of being chose – i.e. you have to resign before you run for Parliament

Issue: What is 'entitled to the rights or privileges of a subjects?'

Sykes v Cleary

- Need to take 'all reasonable steps' to divest himself/herself of any conflicting allegiance
  - i.e. need to take 'all reasonable steps' to renounce conflicting allegiance (i.e. citizenship)
- What is reasonable will turn on the situation of the individual, the requirement of the foreign law and the extent of the connection between the individual and the foreign State
- This applies to the whole process of being chose

Sue v Hill

*Decision:* Australia is independent of the UK; if you hold a dual citizenship of AUS/UK, you need to renounce/take all reasonable steps to renounce that citizenship/allegiance with UK

What is directly chosen?

1. Is still a choice if you are forced to vote? – yes
2. What is someone else's choice has more weighting than your own?
  - a. Can Parliament regulate political parties?
  - b. How much leeway does parliament have when deciding choices?
    - a. *Mulholland v AEC* : a lot
      - i. 'a notable feature of our system of representative and responsible government is how little of the detail of that system is to be found in the Constitution, and how much is left to be filled in by Parliament'
      - ii. '..Constitution gives Parliament a wide range of choice'
      - iii. Basically that *Mulholland* determined that the Parliament has a lot of flexibility – it's good that the Parliament has a lot of flexibility in changing rules
      - iv. Court will not step in unless Parliament stepped very far

Nationwide News v Willis, ACT v Commonwealth

- The High Court recognised an implied right of freedom of political communication
- Brennan J: 'once recognised that a *representative democracy is constitutionally prescribed, the freedom of discussion is firmly entrenched in the Constitution*'

Issue: Does s24 require that electoral divisions contain, as far as practicable, an equal number of people or electors?

- ii. McKinley: No for issue 1;
  1. *The only true guide is to read the language of the Constitution itself* – Barwick J
  2. Dissent: 'the absence of any other means of redress for those deprived of an equal share of representation, even where it is grossly unequal'
    - a. i.e. 'legislators who hold office because of an unbalanced electoral system will not act to change the system. '
    - b. i.e. 'the more unbalanced it becomes, the more severe are the consequences of correction and the more reluctance are the legislators to change it'

Issue: does the Constitution guarantee a system of representative democracy?

1. Yes; 5:2; but couldn't agree on what representative democracy requires
- iii. McGinty: still did not embrace voting equality guarantee ('The WA voting equality case'
  1. *Even if there was a voting equality guarantee in the Commonwealth Constitution, it would not extend to the States*
  2. Minority found there was though, but only through WA constitution

3. NOTE: ALWAYS BRING IT BACK TO THE CONSTITUTION; always argue that it is 'undemocratic in so far that it's incompatible with sX of the Constitution'

Issue: do we have a constitutionally protected right to vote?

- S41: NOT a guaranteed right to vote; this is to protect the SA women to apply; so only apply to those women (*R v Pearson ex p Sipka; King v Jones*)
  - Note: dissent from Murphy J : s41 is one of the few guarantees of the rights to vote under the constitution
  - Nationally defeated when amending Constitution to insert a new s41 expressly guarantee right to vote failed in 1988

Issue: Do we have an implied right to vote?

- found in ss7 and 24 of the Constitution
- affirmed in *Roach v Electoral Commissioner* : 'Because [the right to vote] is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion...would not be consistent with choice by the people'

*Substantial here means* : 'there would need to be some rationale for the exception; the definition of the excluded class or group would need to have a rational connection with the identification of community membership or with the capacity to exercise free choice'

*Rational Connection is required; furthermore the response need be proportional*: "A reason [is substantial] if it be reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government ... [what must be considered is] the notion of 'proportionality'".

This principle of proportionality is expanded upon in *Rowe v Electoral Commissioner*: "An electoral law which denies ... the right to vote to any of the people who are qualified ... can only be justified if it serves the purpose of the constitutional mandate. If the law's **adverse legal or practical effect** upon the exercise of the entitlement to vote is **disproportionate** to its advancement of the constitutional mandate, then it may **be antagonistic to that mandate. If that be so, it will be invalid**".

Issue: is the Parliament using a sledgehammer to crack a nut –situation????

- *Roach*: was it constitutional for the Commonwealth Parliament to blanket-ban all person serving sentences of imprisonment from voting?
  - **The blanket ban was unconstitutional and inconsistent with the constitutional system of representative government**
  - Look at why and how they did it
    - *Framework in Roach*:
      - 1. **Parliament has a source of power** to legislate on the voting system (eg ss8, 30, 51)
      - 2. **Acknowledge that Parliament does not have absolute flexibility in legislation; Parliament is subjected to the Constitution**
      - 3. **Then ask: is the restriction reasonably appropriate and adapted to serve an end which is consistent/compatible with the maintenance of the constitutionally prescribed system of representative government?**
        - *What is the aim/purpose of the restriction?*
        - *Is that aim compatible with the constitutionally prescribed system of representative government?*

- *Is it suitable?*
  - *Can it achieve the goal?*
  - *Is it necessary? – is there an alternative way to achieve the same goal?*