VOTING RIGHTS OF EXPATRIATES AND THE *AUSTRALIAN CONSTITUTION*

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The Commonwealth Electoral Act 1918 *(Cth) limits voting rights of an Australian citizen living overseas. That right will expire after six years' non-residency (possibly extended). This provision affects hundreds of thousands of Australian citizens. It is potentially at odds with the seriousness with which the High Court takes the universality of the adult franchise, reflected in decisions like* Roach v Electoral Commissioner *and* Rowe v Electoral Commissioner. *The Court insisted denial of adult suffrage be for a substantial reason, and be proportionate to a legitimate objective, to be constitutionally valid. This article argues denial of the vote to long-term expatriate Australian citizens may not pass these tests. It then considers an alternative, whether Parliament could pass a law stripping citizenship from long-term expatriates, thus severing their right to vote, which is typically linked with citizenship. It argues there is significant doubt whether a head of power supports such law. There are limits to Parliament's ability to define who is an 'alien' for the purposes of s 51(xix), and other heads of power are untested. Further, if the power were exercised by a Minister, it might infringe ch III of the* Constitution*, given the High Court's decision in* Alexander v Minister for Home Affairs *and* Benbrika v Minister for Home Affairs.

I INTRODUCTION

The question of who is entitled to vote is critical in the system of representative government that the *Australian Constitution* contemplates and reflects. The *Constitution* contains little mention of the entitlement to vote, reflecting a general intention by the founding fathers to leave the vast majority of the detail regarding elections and voting to the Parliament.[1] The *Constitution* sets out very limited parameters. Pursuant to this very flexible model, the scope of the franchise has grown substantially since Federation, to embrace women and Indigenous Australians, and to progressively remove past requirements that those who wished to vote were required to own a certain amount of property. A reduction in the age

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1 *McGinty v Western Australia* (1996) 186 CLR 140, 183–6 (Dawson J), 269 (Gummow J) ('*McGinty*'); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 188 [6]–[7] (Gleeson CJ), 207 [64] (McHugh J), 237 [155] (Gummow and Hayne JJ) ('*Mulholland*').

of majority enfranchised more individuals. The trend has been a gradual expansion (ratchet) of the franchise, reflecting an enlightened view of the nature of the Australian populace.[2] Identification of who is entitled to the franchise reflects a nation's view of itself.

While the *Australian Constitution* generally provides Parliament with very broad scope to frame provisions regarding voting, there are limits. Some of these are express. For example, voters must choose elected officials directly.[3] The number of members of the House of Representatives must be, as nearly as practicable, twice the number of senators.[4] Candidates for office must not owe allegiance to a foreign power or be a citizen of a foreign power.[5] Others are implied. For example, we will see that the High Court has developed something of an implied right to vote,[6] in the face of an express right to vote that was largely rendered impotent by an earlier High Court decision.[7] The High Court has struck out measures that closed off electoral rolls on the date an election was called.[8] In both of these cases, the High Court has been extremely defensive of a right to vote, repeating its fundamental importance in Australia's system of representative government, and requiring very strong justification for it to be restricted. In both cases a majority of the High Court struck out as unconstitutional attempts to limit the franchise, by excluding those who were incarcerated and those who were not on the electoral roll on the day the election was called. Acute concern that the franchise be as broad as possible, and attempts to limit it subject to very stringent scrutiny, was evident.

In this context, the article will consider provisions of the *Commonwealth Electoral Act 1918* (Cth) ('*Electoral Act*') that place serious obstacles in the path of an Australian citizen living overseas (an 'expatriate') who wishes to continue to exercise their right to vote in Australian elections, though they have lived away from Australia for a long time. These restrictions affect a significant number of people — in 2005 it was estimated more than 'three-quarters of a million Australians [were] living overseas permanently or long-term'.[9] It will argue that such provisions are vulnerable to a constitutional challenge, given the earlier High Court decisions alluded to above, and case law elsewhere which has struck out

2 *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 20–1 [24]–[25] (French CJ), 70–1 [200]–[201] (Hayne J), 116–17 [365]–[367] (Crennan J) ('*Rowe*'). As to the 'ratchet' theory of constitutional interpretation see Graeme Orr, 'The Voting Rights Ratchet: *Rowe v Electoral Commissioner*' (2011) 22(2) *Public Law Review* 83; Anne Twomey, '*Rowe v Electoral Commissioner*: Evolution or Creationism?' (2012) 31(2) *University of Queensland Law Journal* 181, 193.

3 *Australian Constitution* ss 7, 24.

4 Ibid s 24.

5 Ibid s 44.

6 *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*').

7 *Australian Constitution* s 41, as interpreted in *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 ('*Pearson*').

8 *Rowe* (n 2).

9 Senate Legal and Constitutional References Committee, Parliament of Australia, *They Still Call Australia Home: Inquiry into Australian Expatriates* (Report, March 2005) v.

provisions purporting to deny expatriates the right to vote. It will canvas existing theories seeking to explain the nature of the franchise, and consider the evolving nature of citizenship worldwide, and the 'people' in Australian constitutional law. Secondly, if such a measure is vulnerable to constitutional challenge, the article considers the validity of Commonwealth legislation that simply removes the citizenship of those Australians living overseas for a certain time, an alternative path to the same end of disenfranchising (some) expatriates.

This discussion takes place in light of recent reforms in the United Kingdom. That jurisdiction had in the past limited the right of United Kingdom expatriates living overseas to vote in that jurisdiction's elections. Initially, a citizen of that jurisdiction living overseas could vote in elections held within 5 years of their departure from the United Kingdom.[10] This was extended and restricted over time, but until recently a period of 15 years applied.[11] Further, the law required that the person register as an overseas voter, and to renew this registration annually. Recent statutory reforms in the United Kingdom have removed (and will remove) any time bar to a United Kingdom citizen living overseas wishing to vote in a United Kingdom election,[12] and will remove the registration and registration renewal requirements. It has been estimated that well over 100 nations around the world permit citizens living outside of the country to vote.[13]

This article is structured as follows. Part II considers current relevant law in relation to voting rights of expatriates in Australia. It also considers provisions regarding voting rights more generally, both the express provisions and the implications the High Court has drawn from them. These are considered potentially highly relevant to the question of the voting rights of expatriates. Part III considers relevant Canadian decisions concerning the right to vote of prisoners (which reached similar conclusions to the equivalent High Court of Australia decision) and the right to vote of expatriates (which the Australian High Court has not considered). In both cases, the Supreme Court of Canada held the measures denying such individuals the right to vote to be invalid. Part IV considers

10 *Representation of the People Act 1985* (UK) s 1, as enacted.

11 *Political Parties, Elections and Referendums Act 2000* (UK) s 141. The English Court of Appeal (Civil Division) had dismissed a challenge to the 15 year rule on the basis it infringed art 3 of Protocol 1 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998) ('*European Convention on Human Rights*') (protecting a right to free elections involving the free expression of the opinion of the people): *R (Preston) v Wandsworth London Borough Council* [2013] QB 687 ('*Preston*'). This decision will be discussed: see below Part III(B).

12 *Elections Act 2022* (UK) pt 2. See Neil Johnston and Elise Oberoi, 'Overseas Voters' (Research Briefing, House of Commons Library, Parliament of the United Kingdom, 28 June 2023) 17–18.

13 Andrew Ellis et al, Institute for Democracy and Electoral Assistance and Instituto Federal Electoral, *Voting from Abroad: The International IDEA Handbook* (14 November 2007) 12–13. George Williams noted that the Australian regime limiting the ability of expatriates to vote was one of the more restrictive in the world, adding it was also inconsistent with Australian aspirations around citizenship: Commonwealth, *Parliamentary Debates*, Senate, 27 July 2004, 47.

arguments in favour of the High Court finding the existing measures constitutionally invalid. Part V considers arguments in favour of validity. Part VI then considers, if measures denying Australian expatriates the right to vote in Australian elections are potentially invalid, whether a viable alternative for the federal parliament would be to pass a law simply denying such individuals Australian citizenship, and so the voting right typically attached to it in respect of adults of sound mind. Part VII concludes.

II ENTITLEMENT TO VOTE IN AN ELECTION OF THE AUSTRALIAN PARLIAMENT

A *Specific Provisions Regarding Voting Entitlement, Including Expatriates*

Section 93 of the *Electoral Act* states the general rule that all those who are at least 18,[14] and who are either Australian citizens[15] or British subjects on the electoral roll immediately before 26 January 1984, are entitled to vote in an election for the Australian Parliament. This is subject to exceptions. These relate to those of unsound mind,[16] those convicted of treason,[17] and those serving a term of imprisonment of at least three years.[18] A previous provision that forbade those imprisoned for any length of time from voting was declared unconstitutional, as will be elaborated upon below.[19] Section 93 does *not* include a specific requirement of residency in relation to the prima facie right to vote. This is to some extent a change from the past, where residence was clearly a cornerstone of the franchise. The section clearly reflects Parliament's intention to place citizenship, not residence, as the 'cornerstone' of the franchise.[20] The Supreme Court of Canada

14 This article will focus on entitlement to vote at a *federal*, not state or territory, election in Australia.

15 Citizenship is also connected with voting rights in international law: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 25 ('*International Covenant on Civil and Political Rights*'): Every citizen shall have the right and the opportunity … without unreasonable restrictions … [t]o vote'. Human Rights Committee, *General Comment No 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 57th sess, CCPR/C/21/Rev 1/Add 7 (12 July 1996). This gives examples of reasonable restrictions — age, mental capacity, conviction of a serious crime, but does not mention residency: at [10], [14]. Paragraph 15 discusses the right to run for office, stating that those otherwise eligible to run should not be barred from doing so by 'unreasonable or discriminatory requirements such as … residence'.

16 *Commonwealth Electoral Act 1918* (Cth) s 93(8)(a) ('*Electoral Act*').

17 Ibid s 93(8)(b).

18 Ibid s 93(8AA). See Graeme Orr, 'Ballotless and Behind Bars: The Denial of the Franchise to Prisoners' (1998) 26(1) *Federal Law Review* 55, 58–9 ('Ballotless and Behind Bars').

19 *Roach* (n 6).

20 Kim Rubenstein, *Australian Citizenship Law* (Thomson Reuters, 2nd ed, 2017) ('*Australian Citizenship Law*'). 'Citizenship is the necessary qualification for voting in Commonwealth

has referred to the trend over time for residency to assume less importance in relation to voting, given globalisation.[21] The logic of the current understanding of voting entitlement is that someone could be entitled to vote as a citizen although they have not been resident in Australia for many years. Obviously, this is only where they meet the requirements of citizenship, which typically though not exclusively require being born in Australia.

Further, s 94 of the *Electoral Act* provides for a category of 'eligible overseas elector'. This is an elector who has ceased to reside in Australia, or intends to cease to reside here, if they intend to resume residence in Australia within six years of leaving.[22] If the application is made (to become an 'eligible overseas voter') while the person is still resident in Australia, it must be made within three months of their intended departure date.[23] If the application is made when the person no longer resides in Australia, it must be made within three years of their departure.[24] The person must notify the Electoral Commissioner if they do not cease to become resident within three months as expected, become resident in Australia again during the six year period, or abandon their intention to reside here again.[25] The requirement to resume residency in Australia within six years of departure can be extended by one further year, if the person applies within three months of the six year period ending.[26] More than one renewal is possible. Thus, it is possible that an Australian expatriate can vote at Australian elections, but this is voluntary, subject to reasonably onerous application provisions of which some would be unaware.

B *Relevant Constitutional Provisions Regarding Voting and Implications Drawn from Them: Prior to* Roach *and* Rowe *Decisions*

Sections 7 and 24 respectively provide for the direct election by the people of representatives for the Senate and House of Representatives. In the case of s 24, the House of Representatives is to be chosen by 'people of the Commonwealth'; in the case of s 7, the Senate is to be chosen by 'people of the State'. Within these broad parameters, Parliament has broad discretion to provide for qualifications of

elections … [b]y contrast, in New Zealand voting rights are linked to residence rather than citizenship': at 23, citing *Electoral Act* (n 16) s 93(b) and *Electoral Act 1993* (NZ) s 74.

21 '[C]itizenship, not residence, defines our political community and underpins the right to vote': *Frank v A-G (Canada)* [2019] 1 SCR 3, 27 [35] (Wagner CJ for Wagner CJ, Karakatsanis, Moldaver and Gascon JJ) ('*Frank*'). Justice Rowe expressed similar views: at 49 [84].

22 *Electoral Act* (n 16) s 94(1). The history of voting by Australians abroad commenced with military balloting in World War I. For more on this history see Bryan Mercurio and George Williams, 'The Australian Diaspora and the Right to Vote' (2004) 32(1) *University of Western Australia Law Review* 1, 10–11.

23 *Electoral Act* (n 16) s 94(1A).

24 Ibid s 94 (1B).

25 Ibid s 94(5).

26 Ibid s 94(8).

electors.[27] It has been repeatedly noted that the founding fathers intended many aspects of representative government, including provisions relating to elections and voting, to be legislated by Parliament and not be the subject of extensive express constitutional constraint;[28] this is reflected in repeated references to 'until Parliament otherwise provides' in constitutional provisions regarding elections and voting.[29] This provides some general basis for an argument defending the constitutionality of the provisions considered in this article. However, this discretion is not unlimited, and is constrained by constitutional requirements such as those found in ss 7 and 24,[30] of most relevance in the current context.

It is noteworthy that it is a statutory provision, *not* a constitutional provision, which connects the right to vote with citizenship and adulthood.[31] This makes sense, once it is recalled that the concept of Australian citizenship did not exist at the time the *Australian Constitution* was drafted.[32] At least most of those living in Australia at the time of Federation would have been considered 'British subjects'. It was only accepted approximately 50 years later, with the passage of the *Australian Citizenship Act 1948* (Cth) which sets out entitlement to citizenship.[33] It can be plausibly argued that a constitutional basis for the voting rights of citizens exists. This would be the argument that the reference to 'the people of the Commonwealth' in s 24 and 'the people of the State' in s 7 is a reference to Australian citizens, such that denial of the vote to Australian citizens is, prima

27 This is the effect of ss 8 and 30 of the *Australian Constitution*.

28 *Roach* (n 6) 173–4 [5]–[6] (Gleeson CJ); *Rowe* (n 2) 70–1 [200]–[201] (Hayne J), 106 [325] (Crennan J), 121 [386] (Kiefel J); *Mulholland* (n 1) 194–5 [26] (Gleeson CJ), 207 [64] (McHugh J), 237 [155] (Gummow and Hayne JJ).

29 *McGinty* (n 1) 280 (Gummow J). This is partly explicable on the basis that the participants in the convention debates were unable to reach a consensus on many aspects of the electoral system.

30 *Rowe* (n 2) 107 [328]–[329] (Crennan J).

31 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560, 572 [31]–[33] (Kiefel CJ, Keane and Gleeson JJ) ('*Alexander*'); Helen Irving, 'Still Call Australia Home: The *Constitution* and the Citizen's Right of Abode' (2008) 30(1) *Sydney Law Review* 131, 131; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 54 (Gaudron J); Kim Rubenstein 'Citizenship in Australia: Unscrambling Its Meaning' (1995) 20(2) *Melbourne University Law Review* 503, 505 ('Unscrambling Its Meaning').

32 The only reference to 'citizen' in the *Australian Constitution* is in s 44, concerning disqualification for running as a candidate for federal office, and this pertains to citizenship of a foreign power: Sangeetha Pillai, 'The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis' (2014) 37(3) *Melbourne University Law Review* 736, 741 ('The Rights and Responsibilities of Australian Citizenship'). Sangeetha Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited' (2013) 39(2) *Monash University Law Review* 568, 571 ('Non-Immigrants, Non-Aliens and People of the Commonwealth'): 'the *Australian Constitution* is textually silent on any notion of a national citizenship'.

33 This is someone born in Australia to an Australian citizen or permanent resident, ordinarily resident for at least 10 years after birth, a child (who is an Australian resident) adopted by an Australian citizen, or a child abandoned in Australia (unless and until citizenship of another country is proven: *Australian Citizenship Act 2007* (Cth) ss 12–14 ('*Australian Citizenship Act 2007*').

facie, a breach of those constitutional provisions.[34] This argument will be explored further below. Connection between citizenship and political rights such as voting harks back to original democratic ideals in Aristotelian times.[35]

Generally, anything contained in legislation (with the exception of anything to which a valid manner and form provision applies)[36] is subject to being amended by a later parliament. On this view, ss 7 and 24 might only apply to those chosen by Parliament from time to time to be eligible to vote. However, the position in this context is somewhat different. The High Court has found, as will be seen below, that statutory changes in the franchise over time have in effect constrained Parliament's future choices regarding the franchise. In this highly unusual way, statutory changes have come to provide greater content to something of a right to vote in the *Australian Constitution*, as we will see.

Section 41 potentially provides something of a right to vote in federal elections for those eligible to vote at state elections. However, the practical application of this provision was effectively neutered by the High Court when it confined the right to those on the electoral rolls at the time of Federation.[37]

The history of the franchise in the colonies prior to Federation reflects a general broadening of the franchise, at least among white men with some wealth/property.[38] At the end of the 19th century, the franchise had begun to extend to women in some of the colonies. The new *Australian Constitution* was recognised as being one of the most 'democratic' for the times.[39] Notwithstanding this, race-based restrictions remained, including against Indigenous Australians.[40] Women were not guaranteed the right to vote across the new nation at Federation.[41] Thus, it is historical fact that, at Federation, the *Australian Constitution*, including

34 Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth' (n 32) 574–6; *DJL v Central Authority* (2000) 201 CLR 226, 278 [158] (Kirby J); *Hwang v Commonwealth* (2005) 80 ALJR 125 ('*Hwang*').

35 Pillai, 'The Rights and Responsibilities of Australian Citizenship' (n 32) 752.

36 *Australia Act 1986* (UK) s 6.

37 *Pearson* (n 7); *Snowdon v Dondas [No 2]* (1996) 188 CLR 48. '[T]he practical effect of s 41 is now spent': at 72 (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ), citing *Pearson* (n 7) 279–80 (Brennan, Deane and Dawson JJ); Elisa Arcioni, '*R v Pearson; Ex parte Sipka*: Feminism and the Franchise' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 55, 57–9 ('Feminism and the Franchise').

38 *Roach* (n 6) 194–5 [69] (Gummow, Kirby and Crennan JJ), quoting WG McMinn, *A Constitutional History of Australia* (Oxford University Press, 1979) 62.

39 *McGinty* (n 1) 271 (Gummow J), quoting James Bryce, *Studies in History and Jurisprudence* (Clarendon Press, 1901) vol 1, 536.

40 *Commonwealth Franchise Act 1902* (Cth) ('*Franchise Act*') merely picked up existing state provisions, some of which did not entitle Indigenous Australians to vote: Arcioni, 'Feminism and the Franchise' (n 37) 57–8.

41 The *Franchise Act* (n 40) s 3 gave women the right to vote in federal elections. Legislation in some states was amended within a few years of this to recognise the right of women to vote in state elections, in line with other states that had conferred such rights in the late 19th century. For example, this occurred in Victoria in 1908: *Adult Suffrage Act 1908* (Vic) s 4.

ss 7 and 24, did *not* reflect universal suffrage. It was only *after* Federation that further developments occurred, including the progressive erosion and eventual removal of a requirement of property ownership in order to be eligible to vote,[42] further extension of voting rights of women, and extension to racial minorities, including Indigenous Australians.[43] In these ways, Australia became 'more democratic' over time,[44] as the franchise was progressively extended.[45] And the fact that the founding fathers left many electoral matters to Parliament might be interpreted to reflect a belief that representative government should be a dynamic, rather than static, concept.[46] It has certainly proven to be so.

These progressive developments had constitutional implications. They would alter the operation of the requirement that members of Parliament be 'chosen by the people'.[47] While those words did not preclude limiting the franchise to males with property ownership in 1901, changes in the franchise since then have had an effect on the meaning of the constitutional phrase 'chosen by the people'. This process is described by McHugh J in *Langer v Commonwealth*:

> Because the franchise was limited at the time of Federation, it is plain that s 24 was enacted on the assumption that a member of the House of Representatives could be 'chosen by the people' even though women and many adult males were not eligible to vote in the election … [referring to the purpose of s 24]. That purpose is to ensure representative government by insisting that the Parliament be truly chosen in a democratic election by … 'the people', a term whose content will change from time to time. In the light of the extension of the franchise during this [20th] century … it would not now be possible to find that the members of the [Parliament] were 'chosen by the people' if women were excluded from voting or if electors had to have property qualifications before they could vote.[48]

42 *Rowe* (n 2) 112 [345] (Crennan J).

43 *Commonwealth Electoral Act 1962* (Cth) ('*Electoral Act 1962*') at national level; some states had previously recognised the right of Indigenous Australians to vote.

44 *Rowe* (n 2) 18 [18] (French CJ); *Langer v Commonwealth* (1996) 186 CLR 302 ('*Langer*'). 'One matter that furthers the democratic process is full, equal and effective participation in the electoral process': at 334 (Toohey and Gaudron JJ).

45 *Rowe* (n 2) 116–17 [366] (Crennan J).

46 *McGinty* (n 1) 280 (Gummow J); *Mulholland* (n 1) 237 [155] (Gummow and Hayne JJ), 254–5 [213] (Kirby J).

47 *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 ('*McKinlay*'). '[T]he long established universal adult suffrage may now be recognized as a fact and as a result it is doubtful whether … anything less than this could now be described as a choice by the people': at 36 (McTiernan and Jacobs JJ). See also Elisa Arcioni, 'The Core of the Australian Constitutional People: "The People" as "The Electors"' (2016) 39(1) *University of New South Wales Law Journal* 421, 428 ('The Core of the Australian Constitutional People').

48 *Langer* (n 44) 342. See also *McGinty* (n 1). '[A]ccording to today's standards, a system which denied universal adult franchise would fall short of a basic requirement of representative democracy': at 201 (Toohey J), after acknowledging that in 1900, the franchise was limited mostly to (some) male property owners. Justice Gaudron states at 221–2, after acknowledging that at Federation such limits existed:

> Notwithstanding the limited nature of the franchise in 1901, present circumstances would not … permit [parliamentarians] to be described as "chosen by the people" within … ss 7 and 24 … if the franchise

As Kirby J put it, '[w]hat might in 1901 have been regarded as acceptable for a parliament "directly chosen by the people" might not pass muster today'.[49]

First stirrings of the idea that the words 'chosen by the people' might imply constitutional limitations on Parliament's ability to define the franchise appeared in the mid-1970s.[50] Until and during this time, the orthodox view tended to emphasise that the founding fathers intended to leave virtually the entire landscape of electoral law to be shaped by the Parliament at any given time.[51]

Cases in the mid-1990s established that the requirement that the Parliament be chosen by the people did not preclude a system of compulsory preferential voting,[52] did not confer a person with a right to choose whomever they wished to represent them in Parliament,[53] and did not require a one-vote, one-value model of voting.[54] Nonetheless, the goal of ss 7 and 24 was 'effective representation of all citizens'.[55] Later it was determined that a requirement for registration of political parties, and a minimum requirement of 500 members, did not infringe ss 7 and 24.[56] It was also recognised that the people of the Commonwealth were sovereign and held the sovereign power.[57]

C *Implications from Constitutional Provisions Regarding Representative Government: Political Free Speech Cases,* Roach *and* Rowe

In two landmark decisions in 1992, the High Court accorded great significance to ss 7 and 24.[58] It held that these sections contemplated a system of representative government. They reflected a notion that the sovereignty of the people would be exercised on their behalf by elected representatives. The representatives were

> were to be denied to women or members of a racial minority or to be made subject to a property or educational qualification.

49 *Mulholland* (n 1) 261 [233].

50 *McKinlay* (n 47) 36 (McTiernan and Jacobs JJ).

51 Ibid 19–20 (Barwick CJ), 46 (Gibbs J), 57–8 (Stephen J), 61–2 (Mason J).

52 *Langer* (n 44) 333 (Toohey and Gaudron JJ).

53 Ibid 341 (McHugh J), 349 (Gummow J).

54 *McGinty* (n 1) 174 (Brennan CJ), 179, 188 (Dawson J), 224, 245–6 (McHugh J), 256–7, 284 (Gummow J), 191, 202 (Toohey J dissenting), 222 (Gaudron J dissenting).

55 Ibid 204 (Toohey J).

56 *Mulholland* (n 1) 210 [70] (McHugh J). The minimum number was increased to 1500 in 2021: *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth) sch 1, amending *Electoral Act* (n 16) s 123(1)(a)(i).

57 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137 (Mason CJ) ('*Australian Capital Television*'); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72 (Deane and Toohey JJ) ('*Nationwide News*'); *McGinty* (n 1) 237 (McHugh J); *Mulholland* (n 1) 256–7 [220] (Kirby J).

58 *Australian Capital Television Pty Ltd* (n 57); *Nationwide News* (n 57).

accountable to the sovereign people, and had a responsibility to take into account the views of the people.[59] In these cases, the Court discerned an implied freedom of political communication derived from ss 7 and 24. This freedom could be utilised to challenge the validity of laws restricting political communication. The High Court views communication about political matters to be critical to the system of representative government our *Australian Constitution* prescribes.[60] In *Lange v Australian Broadcasting Corporation* ('*Lange*'), all members of the High Court settled upon an approach to determining challenges to measures based on the implied freedom. This approach asked two questions: (a) whether the challenged measure burdened the implied freedom on its face or in effect; and, if so (b) whether the measure was reasonably appropriate and adapted to serve the legitimate end in a manner which is compatible with maintenance of representative government.[61] Though a majority of the High Court later adopted a modified approach, it is important to set out the *Lange* approach here, for two reasons. Two members of the High Court (Gageler and Gordon JJ) continue to use this approach and, secondly, the two main cases in which the High Court has considered voting in the context of the implied freedom (discussed below) were both decided under this approach. This was the original context in which a constitutional implication from the system of representative government was drawn.

This later occurred again in the context of voting rights. In *Roach v Electoral Commissioner* ('*Roach*'), the High Court considered the constitutional validity of s 93(8AA) of the *Electoral Act*. The provision was challenged on the basis it was incompatible with constitutional representative government. At the relevant time, the provision disqualified all those who were serving sentences of imprisonment, regardless of its duration, from voting at a federal election. It had replaced an earlier provision which disqualified those serving a sentence of at least three years' imprisonment from voting. A majority of the Court held the former provision invalid, while all members of the Court held the latter provision valid.[62]

Members of the Court articulated the fundamental nature of the franchise to Australia's democratic system of representative government.[63] Chief Justice

59 *Australian Capital Television* (n 57) 137–8 (Mason CJ), 232–3 (McHugh J); *Nationwide News* (n 57) 72 (Deane and Toohey JJ).

60 *Nationwide News* (n 57) 47 (Brennan J), 71–2 (Deane and Toohey JJ).

61 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561–2 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*'), as slightly modified by a majority of the Court in *Coleman v Power* (2004) 220 CLR 1, 32 [32]–[33] (Gleeson CJ), 79 [200] (Gummow and Hayne JJ), 99 [257]–[259] (Kirby J), 112–13 [298] (Callinan J), 127 [335] (Heydon J).

62 *Roach* (n 6) 182 [25] (Gleeson CJ), 204–5 [104] (Gummow, Kirby and Crennan JJ), 223 [175]–[176] (Hayne J dissenting), 226–8 (Heydon J dissenting).

63 *Roach* (n 6). Chief Justice Gleeson stated that the franchise was 'critical' to representative government: at 174 [7]. Justices Gummow, Kirby and Crennan stated that voting was 'at the very heart of the system of government for which the *Constitution* provides': at 198 [81]. See also *Mulholland* (n 1) whereby Kirby J noted that the idea of representative democracy 'lies at the heart of the democratic character of the *Constitution*, by which the sovereign people of Australia control their destiny in the deployment of governmental power': at 256 [220].

Gleeson stated that ss 7 and 24 had 'come to be a constitutional protection of the right to vote'.[64] It is important to 'unpack' this observation. The phrase 'come to be' is interesting, but (respectfully) correct wording in explaining what occurred. It is commonly accepted that universal suffrage did not exist at the time of Federation. Sections 7 and 24 were part of the *Australian Constitution* at that time. Their text has not changed since Federation. If they did not, but do now, provide constitutional protection of a right to vote, and something like universal suffrage, this has *not* come about by constitutional amendment. It must only have come about via statutory change. Indeed, Gleeson CJ referred to 'legislative history' in discussing the 'changed historical circumstances' leading to the constitutional protection of voting rights.[65] This is an extremely rare example where developments in statutory law have effectively altered the meaning to be ascribed to a constitutional provision.[66] This is odd because statutes are made under, and pursuant to, the *Australian Constitution*. It inverts the relationship when a statute made under and pursuant to the *Australian Constitution* effectively alters the content of a constitutional provision. But this is what has occurred here.

The 'constitutional right to vote' was not absolute, and Parliament retained the right to create exceptions to universal adult suffrage. However, Parliament's choices here were constrained by constitutional requirements. Specifically, inclusion of the words 'directly chosen by the people' in ss 7 and 24 effectively conferred a right to vote.

Chief Justice Gleeson stated that a 'substantial reason' was required to exclude adult citizens from the franchise;[67] otherwise, the election would not reflect a choice by the people. Arbitrary exclusions from the franchise were not acceptable.[68] Any exception would need to have an identified rationale, and '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'.[69] Chief Justice Gleeson indicated citizenship would meet this criterion —

64 *Roach* (n 6) 174 [7].

65 Ibid 174 [7].

66 This is not unprecedented, however. The High Court took into account statutory changes in determining the meaning of 'alien' in s 51(xix) of the *Australian Constitution*. 'The powers conferred by s 51(xix) supports legislation determining those to whom is attributed the status of alien': *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 35 [2] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing at 87 [190]) ('*Shaw*'). See also *Singh v Commonwealth* (2005) 222 CLR 322 ('*Singh*'). 'Alienage is a status, and, subject to the qualification just mentioned, Parliament can decide who will be treated as having that status for the purposes of Australian law': at 329 [4] (Gleeson CJ). The question of the meaning of 'alien' will be relevantly considered later in the article.

67 *Roach* (n 6) 174 [7]. In *McGinty* (n 1), Brennan CJ had suggested that 'chosen by the people' could mean different things: at 170. One possibility was a general franchise held by all adults or adult citizens 'unless there be substantial reasons for excluding them'. In *Mulholland* (n 1), Kirby J said that the requirement that Parliament be chosen by the people meant that the choice must not be 'unduly controlled' by the Australian Electoral Commission, political parties or outside influences or requirements: at 256 [217].

68 *Roach* (n 6) 174 [8] (Gleeson CJ).

69 Ibid.

it would be rational for Australia to confine the right to vote to Australian citizens, they being connected with membership of the Australian community.[70] His Honour observed that citizenship 'represents full and formal membership of the community of the Commonwealth of Australia'.[71] Chief Justice Gleeson noted that a Supreme Court of Canada decision had struck out as invalid both a blanket limitation on the right of Canadian prisoners to vote, and one restricted to prisoners serving at least a two year jail term.[72] That Court found that the measures failed proportionality analysis. Chief Justice Gleeson observed that care was required in considering Canadian precedents here, given the different way in which that jurisdiction determined whether measures were constitutionally valid.[73] That said, his Honour concluded held aspects of the Canadian case law were 'instructive' for Australia.[74]

Chief Justice Gleeson concluded the Australian provision denying the franchise to anyone serving a sentence of imprisonment was arbitrary. That it was applied regardless of the nature of the crime they had committed or their term of imprisonment 'broke the rational connection' between the measure and 'the constitutional imperative of choice by the people'.[75]

Justices Gummow, Kirby and Crennan noted that voting reflects notions of citizenship, and the fact that someone was a member of the Australian federal body politic.[76] Further, the interest and duty of a citizen to their society survived imprisonment. Justices Gummow, Kirby and Crennan adopted the wording of Gleeson CJ, asking whether the voting disqualification was for a '"substantial" reason'.[77] Their Honours equated this with the *Lange* test, stating that a measure that was for a substantial reason would be reasonably appropriate and adapted to a legitimate end consistent with representative government.[78] Their Honours also

70 Ibid 174–5 [8].

71 Ibid 177 [12].

72 Ibid 177–8 [15].

73 Ibid 178 [15]. Similarly, Gummow, Kirby and Crennan JJ noted differences between the Canadian context — involving an express right to vote, and express proportionality analysis in determining whether or not a measure is compatible with the *Canadian Charter of Rights and Freedoms*: *Canada Act 1982* (UK) c 11, sch B pt I: at 200 [87]. This was in contrast with the Australian test at the time, involving consideration of whether the impugned measure was reasonably appropriate and adapted to achieving a legitimate objective compatible with representative government. Justices Gummow, Kirby and Crennan noted the question in Australia was different to that in Canada: at 204 [101]. While true at the time, as will be shown later, Australian law in this area has adapted to incorporate proportionality analysis, bringing it closer to the Canadian approach (though not identical to the Canadian approach).

74 *Roach* (n 6) 179 [17].

75 Ibid 182 [24].

76 Ibid 199 [84].

77 Ibid 199 [85].

78 Ibid.

equated it with a test of proportionality.[79] Proportionality had been utilised in the Canadian *Sauvé v Attorney-General (Canada)* ('*Sauvé*') decision to determine whether or not a restriction on prisoner voting was compatible with the *Canadian Charter of Rights and Freedoms* ('*Canadian Charter*'), as will be seen below.

The joint reasons stated that some of the existing disqualifications met this test. For example, the restriction preventing those of unsound mind from voting was for a substantial reason compatible with representative government — it protected the integrity of the electoral process. However, the challenged measure, denying the right to vote to those incarcerated for any duration, did not. The measure indiscriminately applied without regard to the offence committed, length of incarceration, personal circumstances of the offender, or their culpability.[80] Justices Hayne and Heydon dissented.

The High Court then considered the constitutional validity of a legislative amendment that provided that the electoral roll would close on the day that the writs for the election were formally issued.[81] Prior to the amendment, the electoral rolls would close seven days after the writs had been issued. The effect of the change was that some would-be voters were precluded from registering, and thus voting. By a majority of 4:3, the High Court struck out the amendment as a breach of the requirements of ss 7 and 24.

Chief Justice French emphasised that the requirement Parliament be directly chosen by the people was 'constitutional bedrock'.[82] Laws denying individuals the right to vote could only be justified if they served the purpose of the constitutional mandate. His Honour embraced proportionality analysis — if the practical impact of the measure on voting entitlement was disproportionate to advancement of the constitutional mandate, it would be invalid.[83] Chief Justice French took a similar view to that apparent in the majority reasons in *Roach*, indicating that the phrase 'directly chosen by the people' had evolved in meaning since Federation to now embrace universal adult franchise (subject to limited exceptions).[84]

Chief Justice French noted that, as a result of the legislative amendment the subject of this challenge, about 100,000 would-be voters who applied after the new cut-off, but within the old cut-off period of seven days after the issue of the writs, were not added to the rolls and thus could not vote.[85] This meant a significant number of individuals were disenfranchised. This detriment had to be weighed against the benefit of the amendment. Chief Justice French viewed it as slight — a parliamentary report had not found significant difficulties with the old seven-day

79 Ibid.

80 Ibid 200–1 [88]–[92] (Gummow, Kirby and Crennan JJ).

81 *Rowe* (n 2).

82 Ibid 12 [1], citing *Roach* (n 6) 198 [82] (Gummow, Kirby and Crennan JJ).

83 *Rowe* (n 2) 12 [2].

84 Ibid 18 [18]. Justices Gummow and Bell took a similar view: at 46 [115]–[116].

85 Ibid 33 [69].

cut-off period in terms of election integrity. His Honour thus concluded the measure failed proportionality analysis and was invalid.[86]

Justices Gummow and Bell noted there may be many reasons why would-be voters might not meet the deadline contained in the amended provision.[87] Their Honours were unconvinced of the necessity of the measure. No problem with processing applications to be placed on the roll in a timely manner had been identified in relation to the old seven-day rule. Nor was there any evidence of fraud or integrity issues with such a system. Their Honours did not expressly use proportionality language, but their judgment is consistent with it — if the amendment had any positive impact, it was outweighed by the damage it did, by excluding a large number of would-be voters from being able to exercise their right to vote.[88]

Justice Crennan noted the 'centrality of the franchise, to a citizen's participation in the life of the community and membership of the Australian body politic'.[89] Justice Crennan observed that the constitutional phrase 'directly chosen by the people' signified that individual citizens had a share in political power through a democratic franchise.[90] Her Honour agreed with the relevance of 'arbitrariness' in this context, as espoused by Gleeson CJ in *Roach*.[91] The point had been reached where arbitrary exclusions from the franchise (including gender or race) were not consistent with the constitutional requirements in ss 7 and 24. Justice Crennan agreed the challenged limits were not necessary or appropriate for the protection of the integrity of the electoral rolls. Claims that the new rules would help prevent electoral fraud had not been justified by evidence. Justice Crennan found the impugned measures failed to recognise the centrality of the franchise in a citizen's participation in the political life of their country.[92]

Roach and *Rowe v Electoral Commissioner* ('*Rowe*') suggest significant limits on the constitutional validity of parliamentary measures that seek to deny universal adult suffrage.[93] The words in ss 7 and 24 may be seen as a guarantee of suffrage,

86 Ibid 38–9 [78].

87 Ibid 51 [131].

88 Ibid 61 [166]–[167].

89 Ibid 112 [343].

90 Ibid 112 [347].

91 Ibid 115 [365].

92 Ibid 120 [382]–[384]. Cf Kiefel J (dissenting) at 129 [415]:

> Considerations of representative government do not point to a constitutionally derived requirement in the terms for which the plaintiffs contended. To the contrary, the power given to Parliament to legislate with respect to elections should not be seen as fixed by reference to a requirement that the greatest number of people as possible vote.

93 Pillai, 'The Rights and Responsibilities of Australian Citizenship' (n 32) 778 (emphasis added): 'While Parliament has a general power to determine, through electoral law, the qualifications of electors, *Roach* and … *Rowe* indicate that its capacity to exercise this power in a way that excludes Australian citizens from the franchise is *relatively limited*'. Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth' (n 32) 603: 'Case law [referring to *Roach* and *Rowe*] points to at least one substantive right that may flow from constitutional citizenship held

at least to Australian citizens (and subject to exceptions). As Reilly and Torresi sum it up, '[t]he concern of the Court is always to ensure that the franchise is as wide as possible'.[94] Arcioni suggests that the effect of the decisions is that there is a presumption that all capable adult citizens should have the right to vote.[95] The presumption is rebuttable, but the abrogation must be for a good reason, and not too broad to achieve its objective.

In this context, serious questions are raised regarding whether current Australian laws denying (some) expatriates the right to vote are for a good reason, what (if any) objective they seek to achieve, and whether they are proportionate to that achievement. They are arguably arbitrary. These arguments are considered in detail in Part IV.

III CANADIAN PERSPECTIVES ON THE RIGHT TO VOTE

A *Preliminaries: Similarities and Differences to Australia*

It is instructive to consider how the Supreme Court of Canada has determined disputes regarding the constitutional validity of laws restricting the right to vote. Canada is a comparable democracy to Australia, with a similar legal system and common law tradition. Not surprisingly, on numerous occasions, members of the Australian High Court have referred to Canadian decisions in the context of implications from representative government, including freedom of speech and voting rights.[96] That having been said, it must be acknowledged that there are significant differences in Canadian law to be taken into account. Firstly, s 3 of the *Canadian Charter* expressly confers the right to vote on citizens. This contrasts with Australia, where, as explained above, the express constitutional provision conferring voting rights is of historical interest only, and the practical, operative 'right to vote' is implied in nature. Secondly, Canada applies proportionality analysis to laws which are said to infringe the *Canadian Charter*. Once a measure is shown to burden a *Canadian Charter* right, the Court will consider three questions: (a) whether there is a rational connection between the government's asserted objectives in passing the measure, and the measure itself, as the measure must not be arbitrary, unfair or based on irrelevant considerations; (b) whether the measure goes no further than reasonably necessary to achieve its objectives (ie

by "the people of the Commonwealth" — a right to political participation that cannot be revoked by Parliament'.

94 Alexander Reilly and Tiziana Torresi, 'Voting Rights of Permanent Residents' (2016) 39(1) *University of New South Wales Law Journal* 401, 405.

95 Arcioni, 'The Core of the Australian Constitutional People' (n 47) 441.

96 *Australian Capital Television* (n 57) 140–1 (Mason CJ). *Nationwide News* (n 57) 49–50 (Brennan J), 74 (Deane and Toohey JJ); *McGinty* (n 1) 186–7 (Dawson J), 246–7 (McHugh J). '[A]s to the evolution of representative government in Australia … Australia has far more in common with Canada': at 268 (Gummow J). *Roach* (n 6) 179 [18] (Gleeson CJ), 203–4 [100]–[101] (Gummow, Kirby and Crennan JJ). Cf Hayne and Heydon JJ (both dissenting) rejecting the use of the Canadian material to questions of voting rights pursuant to constitutional representative government in Australia: at 221 [164] (Hayne J), 224–5 [181] (Heydon J).

whether the measure minimally impairs the constitutional right in pursuit of its objective); and (c) proportionality — whether the benefits of the measure outweigh its impact on the freedom.[97]

Obviously Australia does not currently have an equivalent national *Canadian Charter*. Further, the *Roach* decision above reflects use of the two-stage *Lange* test involving questions whether challenged measures were reasonably appropriate and adapted to a legitimate end consistent with representative government, though there are nascent signs in the case of proportionality analysis. The joint reasons assimilated the reasonably appropriate and adapted test to proportionality, and Gleeson CJ utilised questions of 'arbitrariness' and whether limits on voting rights were for a 'substantial reason'. These factors clearly relate to the first of the three questions asked by Canadian proportionality analysis. Arbitrariness was also considered by two of the majority justices in *Rowe*, and the other two applied a nascent kind of proportionality analysis, again weighing up the benefits of the challenged measure against its impact on rights.

It was shortly after *Roach* that the High Court of Australia adopted a more structured approach to proportionality. Notably, this was in a different context. The context there was the implied freedom of political communication, *not* the implied right to vote, though they share a common source: constitutional representative government. In a political communication case, a majority of the High Court adopted a proportionality test to complement the existing *Lange* two-stage test.[98] After determining whether a measure burdened the implied freedom, the Court would consider whether the objective of the measure and the means used to achieve it were consistent with the Australian system of representative government (now known as *compatibility testing*). Then, the High Court would consider *proportionality testing*. This involved three questions: (a) whether the measure was *suitable* in terms of meeting the legislative objective; (b) whether the measure was *necessary*, in that no measure that could equally achieve Parliament's objective with less impact on the constitutional freedom was reasonably available; and (c) whether it was *adequate in its balance* — here the Court took into account the impact of the measure on the constitutional freedom, and compared it with the importance of the legislative objective.[99] This is known as 'structured proportionality'.

The High Court has emphasised it is *not* to be presumed that proportionality is to be applied in the same way in Australia as elsewhere.[100] In general, our courts are more deferential to Parliament's choices, and it is very rare that a measure is struck out as being incompatible with the implied freedom. Briefly, this occurs because the High Court has insisted that any identified alternative measure must meet the exact same objectives as the impugned measure to the same extent (in relation to

97 *R v Oakes* [1986] 1 SCR 103, 139 (Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ), citing *R v Big M Drug Mart* [1985] 1 SCR 295, 352 (Dickson J).

98 *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*').

99 Ibid 195 [2]–[3] (French CJ, Kiefel, Bell and Keane JJ).

100 Ibid 195–6 [4].

(b)),[101] must meet an 'obvious and compelling' test,[102] and must burden the freedom *significantly* less.[103] That having been acknowledged, one can observe broad similarities between the Canadian and Australian use of proportionality. This includes the Canadian focus on whether a measure is rationally connected to its objective and the Australian focus on whether it is suitable, whether the measure is 'minimally invasive' in Canada and whether the measure is 'necessary' in Australia, and at the third stage in both jurisdictions, a balancing of impacts on the relevant human rights and the importance of the measure.

Thus, we must apply caution with the use of overseas decisions, including Canadian ones. Though we apply proportionality analysis as Canada and the European Court of Human Rights does, our version of proportionality is different, though with clear similarities.

One other preliminary point is that the High Court of Australia has not (yet) specifically applied its structured proportionality approach to the implied constitutional right to vote. As noted above, it was originally applied in the different context of the implied freedom of political communication. There is some overlap between these freedoms. Both are sourced in Australia's strong acceptance of democratic principles and representative government in our *Australian Constitution.* Both are implied from the text and structure of the *Australian Constitution*. Of the voting cases, three members of the Court in *Roach* noted their approach was similar to proportionality,[104] and members of the Court in *Rowe* applied proportionality analysis.[105] Since those cases were decided, a majority of the High Court has accepted and applied *structured* proportionality, in the sense described above.[106] Thus, although it has not been the subject of a decision as yet, it is likely that when the High Court next considers a voting rights case, it will apply *structured* proportionality. It has already extended structured proportionality to interpretation of an express right in the *Australian Constitution*, namely the s 92 freedom of trade, commerce and intercourse.[107] What connects these contexts is constitutional rights and freedoms and limitations on parliamentary power. Thus, it is a reasonable assumption it will apply structured proportionality to its next voting rights case. Since *Palmer v Western Australia*, the High Court seems happy to apply structured proportionality analysis to both pure implications and explicit guarantees, and universal suffrage has some express basis in the *Australian Constitution*, and is not simply an implication. This is an important reason why consideration of the Canadian case law on voting rights is also favoured, since that

101 *Farm Transparency International Ltd v New South Wales* (2022) 96 ALRJ 655, 669–70 [46] (Kiefel CJ and Keane J, Gleeson J agreeing at 707–8 [271]) ('*Farm Transparency International*').

102 *Monis v The Queen* (2013) 249 CLR 92, 214 [347] (Crennan, Kiefel and Bell JJ).

103 *Comcare v Banerji* (2019) 267 CLR 373, 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

104 *Roach* (n 6) 199 [85] (Gummow, Kirby and Crennan JJ).

105 *Rowe* (n 2) 39 [78] (French CJ), 145–7 [476]–[479] (Kiefel J).

106 *Farm Transparency International* (n 101) (Kiefel CJ, Keane, Edelman, Steward and Gleeson JJ).

107 *Palmer v Western Australia* (2021) 272 CLR 505.

jurisdiction has been a leader in applying proportionality analysis, influencing the European Court of Human Rights and the Australian High Court. That said, let us now consider two important Canadian voting rights decisions.

B *Canadian Case Law on Prisoners' Voting Rights*

In *Sauvé*,[108] the Supreme Court struck down by majority a provision prohibiting those serving a jail term of at least two years in duration from voting in a Canadian election.[109] The Court found this was a clear breach of s 3 of the *Canadian Charter*, providing Canadian citizens with a right to vote, and could not be justified under s 1 proportionality analysis.[110] The majority noted the fundamental nature of the right to vote. It rejected arguments that deference was owed to Parliament's choices.[111] It found this might be appropriate in areas involving complex social and political policy. However, it was not appropriate when a most fundamental democratic right was at stake.[112] The fact a parliament was elected by popular vote gave it legitimacy and authority to pass laws. The right to vote was strongly connected with the obligation to obey Parliament's laws.[113] The majority noted the evolution of the franchise, originally restricted by notions of class, property, and gender, before being progressively broadened to a stage where a universal franchise was an essential part of democracy.[114] A government that restricted universal suffrage weakened its own legitimacy and representative government.[115] It also undermined the dignity and worth of excluded individuals, telling those excluded their voices did not count, just as the former exclusion of individuals by gender, class, or property did.[116]

The majority found no rational connection between the government's objectives and the measure; thus it failed at the first stage of proportionality testing. The government's claimed objectives were to promote civic responsibility, respect for the law and to impose punishment. The Court disagreed the measure was rationally connected to these objectives.[117] Permitting prisoners to vote would connect them with the democratic process and maintain their links with society. It could provide

108 *Sauvé v A-G (Canada)* [2002] 3 SCR 519 ('*Sauvé*').

109 Ibid 557 (McLachlin CJ, Iacobucci, Binnie, Arbour and LeBel JJ), 627 (L'Heureux-Dubé, Gonthier, Major and Bastarache JJ dissenting). An earlier decision had invalidated an earlier measure that denied the right to vote to all those incarcerated, regardless of duration: *Sauvé v Canada (A-G)* [1993] 2 SCR 438.

110 Ibid 539, 542 (McLachlin CJ, Iacobucci, Binnie, Arbour and LeBel JJ).

111 Ibid 535.

112 *Sauvé* (n 108) 535–7 (McLachlin CJ, Iacobucci, Binnie, Arbour and LeBel JJ).

113 Ibid 544.

114 Ibid.

115 Ibid 545.

116 Ibid.

117 Ibid 521–2.

an important educative function.[118] Nor was it acceptable punishment, being arbitrary, not tailored to a particular offender's circumstances.[119] Even if it passed this stage, it failed the second — it was not minimally invasive. It was too broad, catching many whose crimes were relatively minor and who could not have been said to have broken ties to society. The government could not justify the two-year cut-off; it was arbitrary.[120] Nor was the measure proportionate — it significantly undermined the message that all were equal before the law and that all voices were important, for a tenuous benefit (if any).[121]

C *Canadian Case Law on Expatriates' Voting Rights*

The Supreme Court of Canada also considered the validity of a provision that a Canadian citizen who had lived in another country for at least five years could not vote in a Canadian federal election unless they resumed residence in that country.[122] A majority found the provision invalid, infringing the constitutional right of a citizen to vote under s 3, and again not justified under s 1 proportionality analysis.[123] The Canadian government proffered several objectives to which the provision was directed, including fairness to resident Canadians. The social contract was relied upon, on the argument that the social contract involved individuals in society promising to obey laws in return for protection of rights by government, including voting, and that because Canadian laws did not apply to non-residents, the social contract required they should lose their voting rights. The majority accepted fairness to resident Canadians could be a legitimate objective.[124] It rejected arguments based on the social contract — even if it were accepted a non-resident citizen had opted out of the social contract, this was not a legitimate basis for denying them the vote.[125] The majority noted citizenship, not residence, defined the Canadian political community and underpinned the right to vote.[126] It adopted a similar view to that taken in *Sauvé* regarding limitations on voting. These would need to be very carefully justified. It was not appropriate to accord special deference to Parliament's decisions in this regard. This did not mean that the Court was substituting its preferences for that of the legislature; rather it was the court upholding a fundamental Canadian constitutional value by ensuring restrictions on fundamental rights were logical and reflected common sense.[127]

118 Ibid 547.

119 Ibid 551 (McLachlin CJ, Iacobucci, Binnie, Arbour and LeBel JJ), citing *R v Smith* [1987] 1 SCR 1045, 1073 (Lamer J).

120 *Sauvé* (n 108) 553–4 (McLachlin CJ, Iacobucci, Binnie, Arbour and LeBel JJ).

121 Ibid 555 (McLachlin CJ, Iacobucci, Binnie, Arbour and LeBel JJ).

122 *Frank* (n 21).

123 Ibid 48–9 [83] (Wagner CJ for Wagner CJ, Moldaver, Karakatsanis and Gascon JJ), 61–2 [110] (Rowe J), 93–4 [171]–[172] (Cote and Brown JJ dissenting).

124 Ibid 36 [55] (Wagner CJ for Wagner CJ, Moldaver, Karakatsanis and Gascon JJ).

125 Ibid 33 [49].

126 Ibid 27 [35].

127 Ibid 31 [44].

Regarding s 1 analysis, the majority was not satisfied removing the right of a non-resident citizen to vote was rationally connected with the objective of fairness in Canada's elections. It concluded it had not been shown a limit of any duration was so connected.[128] There was no evidence of a 'problem' that these measures were intended to address. There had never been a complaint about non-resident citizens voting, which had been permitted for 20 years until this impugned provision was introduced.[129] The government had produced no evidence that voting by non-resident citizens had created unfairness in the Canadian electoral system.[130] The measure failed the first stage of proportionality analysis.

The majority also held it failed the second stage. The measure did not impact the right to vote minimally. It was not carefully tailored towards meeting a legitimate objective.[131] The Court acknowledged that a measure was not invalid simply because the Court could think of an alternative which would better tailor the measure to the objective.[132] However, here there was no evidence as to why the limit of 5 years was chosen.[133] The government claimed they sought to deny the vote to those with 'insufficient connection' to Canada. However, there was no necessary relation between length of time away from Canada and connection with the county. Many non-resident citizens remained deeply connected to Canada.[134] In the case of the current applicants, they had moved away from Canada for educational opportunities. They wished to return, but could not find appropriate work. The majority noted many resident Canadians might have much less of a commitment to Canada and much less versed in local issues than the applicants, despite their physical absence from the country.[135] Many non-resident Canadians could maintain links with the country, for example through family and friends, property, regular visits, and paying taxes. Although non-resident Canadians might be burdened less by Canadian legislation than residents, this was not an appropriate basis upon which to justify denial of voting rights to the former. And non-resident Canadians were, or could still be, subject to Canadian laws, when they returned home.[136] Some Canadian laws had extra-territorial effect.[137] Government policies could have effects well beyond the nation's borders.[138]

128 Ibid 38 [60].

129 Ibid 40 [63].

130 Ibid 41 [64].

131 Ibid 41 [66].

132 Ibid.

133 Ibid 41 [67].

134 Ibid 42 [68].

135 Ibid 36–7 [57], 42 [68].

136 Ibid 43 [70]–[72].

137 Ibid 43–4 [72].

138 Ibid 44 [72].

The majority also held it failed at the third stage. The legislation was not strongly beneficial. The government had not shown how extending the vote to non-resident Canadian citizens had created unfairness. On the other hand, its impacts were severe. It withdrew a fundamental right from a large number of Canadian citizens.[139] It attacked individuals' dignity and self-worth.[140] Interpreting these cases, commentators have suggested that the view of the Supreme Court of Canada is that unless there are very good reasons based on identification of a specific harm that needs to be remedied, blanket voter disenfranchisement of a section of voters is likely to breach the *Canadian Charter*.[141]

D *Relevance of Canadian Case Law for Australia*

These Canadian cases show that the Supreme Court of Canada views democracy and the right to vote as absolutely fundamental in nature. It will not lightly countenance laws by Parliament that detract from that right. The government will need to make out a clear case of what objective it seeks to achieve through the measure, and how it is rationally connected to it. It should be minimally invasive and specifically targeted. Any suggestion that the measure is arbitrary in nature is fatal to validity. The Court takes into account the lack of evidence of a 'problem' requiring legislative solution. It views fairness as potentially a legitimate objective, but did not think that denial of the vote to prisoners or expatriates was fair. It also scotched any notion that the fact a person may be away from Canada, even for a long time, means that they are not connected with Canada, as well as the validity of any assumption to this effect. It acknowledges expatriates can be subject to Canadian law and government policy. These are important lessons for Australia. Canadian case law informed a majority of the High Court justices' reasoning in the prisoner voting case *Roach*;[142] arguably it should also inform reasoning when Australia considers the voting rights of expatriates, given the similarity of our democracies, as noted by the High Court.

139 Ibid 46 [77]–[79].

140 Ibid 48 [82].

141 Sarah Burton, 'Locating the People: An Exploration of Non-Resident Enfranchisement and Political Belonging in *Frank v Canada* (*Attorney General*)' (2021) 66(4) *McGill Law Journal* 637, 650:

> The majority judges in each case harboured a scepticism that bordered on hostility to the very concept of group disenfranchisement … philosophical objectives are inadequate justifications for blanket disenfranchisement … it appears unlikely that the federal government can disenfranchise groups of citizens based on their behaviour. Short of abdicating citizenship, it is unlikely that people can act in a certain way that negates their right to vote federally.

142 *Roach* (n 6) 177–8 [13]–[15] (Gleeson CJ), 203–4 [100]–[101] (Gummow, Kirby and Crennan JJ). Use of United States constitutional law material in Australian High Court cases is sometimes more variable: see Anthony Davidson Gray, 'The *First Amendment* to the United States *Constitution* and the Implied Freedom of Political Communication in the Australian *Constitution*' (2019) 48(3) *Common Law World Review* 142, 151–62.

IV ARGUMENTS IN FAVOUR OF RECOGNISING THAT EXPATRIATES HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO VOTE

A *No 'Substantial Reason' to Deny Them and Measure Is Disproportionate to Objective/s*

As demonstrated above, Australia now accepts a general principle of universal adult suffrage. It is recognised this is a bedrock, fundamental principle of Australian democracy and the system of representative government enshrined in our *Australian Constitution*.[143] In the language of Gleeson CJ in *Roach*, adopted and applied by the other justices in the majority in that case, denial of the franchise to an Australian adult citizen would have to be for a 'substantial reason' in order to be constitutionally valid.[144] Or, on the assumption that proportionality analysis will be applied (which as the joint reasons suggested in *Roach*, was very similar to the reasonably appropriate and adapted approach to the implied freedom of political communication), the measure would have to have been passed for reasons compatible with representative government, and be suitable, necessary and adequate in its balance.

The history of the approach of Australian law to expatriates voting is documented by Mercurio and Williams.[145] They note that initially, there was no provision for expatriates to vote, because there was no postal voting option. In the 1950s, the law was amended to permit members of the Defence Force serving overseas to vote. In 1983, an expatriate living overseas for no more than three years could vote if they applied to do so prior to leaving Australia. Once the three-year period lapsed and the expatriate was still living overseas, they would lose their right to vote in an Australian election (subject to an extension of one year). In 1998, the three-year period was extended to six years, and the possible one-year extension was maintained. This was after a Joint Standing Committee on Electoral Matters report recommended the change.

Mercurio and Williams note there is nothing in Hansard to suggest the reason why a period of three years as chosen in respect of the amendment in 1983, and nothing on the public record as to why the decision was taken to extend the three year period to six years, apart from an acknowledgement that Australian ambassadors living overseas for more than three years were losing their right to vote.[146] The

143 Orr, 'Ballotless and Behind Bars' (n 18) 56 (emphasis in original): 'If one could find a concrete core to democracy, it would be in the ability of *all the people to have a say that counts*'.

144 See above n 65.

145 Mercurio and Williams (n 22).

146 Ibid 10–11. See also Gilbert and Tobin Centre of Public Law, Submission No 286 to Legal and Constitutional References Committee, *They Still Call Australia Home: Inquiry into Australian Expatriates* (March 2005) 2:

> [I]n the absence of historical record or a clear justification for the measure, it might be assumed that Australians living overseas were originally given limited voting rights because it was felt they might lose

lack of this kind of information makes it difficult to argue disenfranchisement of long-term expatriates was for a 'substantial reason', because (frankly) we do not know what that reason was.

In the alternative, the court might consider compatibility and proportionality testing. Again, it would be difficult to determine that the objectives sought by the measure were compatible with representative government, because we do not know what the objective were. Similarly, it would be difficult then to determine whether or not the law was *suitable* to achieving its purpose, *necessary* to achieve that purpose, and *adequate in its balance*, having regard to its effects on the fundamental right to vote. It will thus be necessary to speculate in terms of the purpose/s sought to be attained by excluding long-term expatriates from voting, taking a lead from justification arguments advanced in the Canadian cases.

One possible purpose might be fairness — it could be argued it is fair those who are living in Australia should be the ones making judgments about the country's governance. This might be because they will feel the greatest impact (benefit or burden) from government activity. It was accepted for the purposes of argument regarding proportionality analysis by the Supreme Court of Canada that fairness could be a legitimate objective said to justify restrictions on expatriates voting.[147] On the other hand, long-term expatriates (so the argument goes) will not be affected. Alternatively, the argument might be they are not as 'connected' with Australia and/or interested in Australian politics and governance, so it is 'fair' to disenfranchise them.

The first argument was answered well by the majority of theSupreme Court of Canada in *Frank v Attorney-General (Canada)* ('*Frank*'). It noted the impact of Canadian government laws and policies on expatriates. It must be accepted actions of the Australian government will sometimes have impact well beyond our shores. The Australian Parliament clearly has power to legislate extra-territorially.[148] For example, its laws regarding taxation clearly apply to those not living in Australia but whom, for example, derive income in Australia. Its policies can clearly have significant effect internationally — examples include immigration and asylum seeker policy, climate change policy, and trade policy. It thus becomes more difficult to see the fairness in disenfranchising Australian citizen (long-term) expatriates. They may be the subject of Australian Parliament's legislation and government policy.

The second argument reflects an assumption that those who are long-term expatriates no longer have an interest in or knowledge of current Australian politics

> tough with Australian society and not be knowledgeable enough to make an informed decision. Such a justification [is no longer] persuasive.

147 *Frank* (n 21) 36–8 [55]–[61] (Wagner CJ for Wagner CJ, Moldaver, Karakatsanis and Gascon JJ).

148 *New South Wales v Commonwealth* (1975) 135 CLR 337 ('*Seas and Submerged Lands Case*'); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 ('*Polyukhovich*'); *Australian Constitution* s 51(xxix).

and political issues.[149] There are several answers to this. Firstly, Australia has a system of compulsory voting. Eligible adult citizens are expected to become enrolled on the electoral roll, and expected to vote once they are on the roll. This compulsion applies to all adult citizens *regardless* of their level of knowledge or interest in current Australian politics and political issues. Many Australians have absolutely no interest in politics. Yet as citizens (adult and of sound mind) they are legally required to cast a ballot. Thus, if eligibility for voting generally does not require any expertise or interest, it is hard to see why that requirement should be imposed only on expatriates as a condition of their entitlement to vote. Further, mandatory voting does not apply to long-term expatriates. For them, voting is entirely voluntary. It is considered reasonable to assume that those with no interest in and/or knowledge of Australian politics will be less likely to vote in this context. Thus, we do not seem to have a difficulty that long-term expatriates with no interest in Australian politics are voting. Rationally, if they are not interested, and are not legally required to do so, they are unlikely to cast a vote. The lack of evidence of a 'problem' that laws disenfranchising citizens were designed to solve was a factor in leading to the invalidity of the comparable Canadian law.

There may be an assumption that the longer that a person is away from a country, the less connection the person has with it. However, the Supreme Court of Canada found in *Frank* that, even though the applicants had been away from Canada for some years, their connections with the country remained strong. This was common. It is a mistake to correlate length of absence from a country with lack of connection to it.[150] A simple time requirement takes no account of reasons for absence.[151] The Legal and Constitutional References Committee found that, although many Australians lived beyond its borders, they often felt strong cultural links with their country of origin.[152] The United Kingdom Government's Policy Paper on expatriate voting noted many expatriates maintained deep ties to the United Kingdom.[153]

In a somewhat different context, Edelman J reflected on the different ways in which a person might demonstrate close ties with a community, other than through residence:

149 Mercurio and Williams (n 22) 23: 'While the historical record is not clear, it would seem likely that Australians living overseas were denied voting rights because, among other things, it was felt that they would lose touch with Australian society and not be knowledgeable enough to make an informed decision'.

150 Richard Lappin, 'The Right to Vote for Non-Residents in Europe' (2016) 65(4) *International and Comparative Law Quarterly* 859, 883–4.

151 Ibid 883. Lappin argues the United Kingdom provision denying the right to vote to expatriates who have been away for 15 years is disproportionate because it takes no account of the reasons for the absence: at 883–4. Cf *Shindler v United Kingdom* (2014) 58 EHRR 5 ('*Shindler*') where the European Court of Human Rights held to the contrary.

152 Senate Legal and Constitutional References Committee, Parliament of Australia (n 9) v.

153 Department of Levelling Up, Housing and Communities, Parliament of the United Kingdom *Overseas Electors: Delivering 'Votes for Life' for British Expatriates* (Policy Paper, 3 February 2022) [3]: 'Most British citizens overseas retain deep ties to the United Kingdom. Many still have family here, some will return here. Many will have a lifetime of hard work in the UK behind them, and some will have fought for our country'.

> [A] person can become a member of the political community at birth by powerful ties to the community beyond mere physical presence. Those ties can include being born in the territory of the Australian community to a parent or parents who are permanent members of the community, or having a deep and historical connection with that territory.[154]

Thus, the harshness of a rule that presumes long-term absence means lack of connection with Australia is apparent. It appears to have the character of arbitrariness that the Supreme Court of Canada found fatal to equivalent laws challenged there — *not* specifically tailored to a particular objective, *not* sensitive to individual circumstances, but broad brush and thus significant in its impact on the human rights of many.

Further, the provision can seem somewhat anachronistic, in assuming that the only way for an individual to maintain knowledge of and interest in Australian political issues is to live in the country. Rapid technological advance has made it easy for most around the world to access information about Australian political issues. We gather most of our information online these days. It is accessible to anyone with an electronic device and internet access. A person's precise physical location is no longer, if it ever was, a proxy for knowledge about or interest in political issues in that location. It has been argued restrictions on expatriate voting dependent on time away were 'designed for another era'.[155]

Further, we have seen that Australian law has for many years connected the right to vote with citizenship.[156] It is citizenship that confers the right to vote.[157] This idea has ancient vintage, being reflected in the original democracy of Greece.[158] It is reflected in the writing of Rawls.[159] The citizenship legislation does *not* provide that, once Australian citizens have been living permanently overseas for a certain

154 *Alexander* (n 31) 606 [210].

155 Susan Collard, 'The UK Politics of Overseas Voting' (2019) 90(4) *Political Quarterly* 672, 679.

156 Orr, 'Ballotless and Behind Bars' (n 18) 56: '[T]he franchise is bound up at the heart of our notions of citizenship: whoever we include in our political community is prima facie entitled to the say accorded by the ballot' (subject to exceptions around youth and mental illness). Rubenstein, *Australian Citizenship Law* (n 20) 367: '[T]he right to participate in government, and to be consulted about and in its deliberations, is central to citizenship'.

157 Heather Lardy, 'Citizenship and the Right to Vote' (1997) 17(1) *Oxford Journal of Legal Studies* 75, 80: 'The connection between legal citizenship and the right to vote is deeply embedded in the electoral law of the United Kingdom'. Australia has adopted this approach.

158 Derek Heater, *Citizenship: The Civic Ideal in World History, Politics and Education* (Longman, 1990) 4: 'The practice of citizenship was the very core of life. Citizens really were involved in the judicial processes and really did participate in public debate as an essential preliminary to the formulation of policy and the making of political decisions'. As representative government eventually replaced direct participation, the role of citizens evolved to one voting for representatives to participate in decision making processes.

159 John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 221:

> The principle of equal liberty, when applied to the political procedure defined by the constitution, I shall refer to as the principle of (equal) participation. It requires that all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply.

time (say, for example, six years or more), that they somehow lose their citizenship. There are very limited specified ways in which an Australian citizen loses their citizenship. One thing that characterises non-voluntary ways in which this occurs is criminal behaviour and/or conduct 'incompatible with the shared values of the Australian community', severing the person's bond with and allegiance to Australia.[160] Simply being away from the country for six years or more is *not* one of them. So our citizenship legislation recognises that a citizen may be abroad for many years, well beyond six years, and still be recognised as a citizen. It does *not* reflect some idea that the fact a person has been away from Australia for some years means they do not share the same values as the Australian community, or does not have a bond with or allegiance to Australia. According to Parliament, citizenship represents formal membership of the community of the Commonwealth of Australia.[161] Yet, our electoral legislation, which recognises the close connection between citizenship and voting, provides that a long-term expatriate can lose their entitlement to vote after being away for at least six years. Still, the person disenfranchised remains part of the 'formal membership of the community of … Australia'.[162] The differential treatment of citizenship and one of its chief features is bizarre, and not justifiable. Legislative regimes should be consistent where possible.

Rubenstein states it is 'unclear' whether the current restrictions on the right of expatriates to vote in Australian elections could be challenged as unconstitutional. She points out that the current restrictions have 'disenfranchised a significant number of Australian citizens … [t]hese groups are excluded from political membership, even though they are Australian citizens and formal members of society'.[163]

In conclusion, the current Australian provision denying long-term expatriates the right to vote has not been passed for a 'substantial reason'. Acknowledging the necessary conjectural nature of this discussion, such denial is unlikely to be fair, given the application of Australian laws and policies to those living overseas. It is a mistake to presume from long-term absence from Australia a lack of connection and/or interest in its affairs, or that the connection disappears or diminishes sufficiently after six years. Without evidence as to why these time limits were chosen, they can appear arbitrary. These does not seem to be an identified problem that these laws aim to 'fix'. And the provision is contrary to citizenship legislation.

160 *Australian Citizenship Act 2007* (n 33) s 36A. See also at ss 34, 36B–36D. Section 36B was held invalid by a majority of the High Court in *Alexander* (n 31) on the basis it infringed ch III principles, conferring power to impose punishment upon a Minister: at 583 [96]–[97] (Kiefel CJ, Keane and Gleeson JJ), 588 [126] (Gageler J), 598 [173] (Gordon J), 614 [253] (Edelman J), 633 [344] (Steward J dissenting). This infringed separation of powers principles because the imposition of punishment was an exclusively judicial function. The case does not disturb the point that in extreme cases, behaviour by an individual that reflects conduct incompatible with allegiance to the Australian community can justify their being treated as an alien and liable to expulsion from Australia.

161 *Australian Citizenship Act 2007* (n 33) Preamble.

162 Ibid.

163 Rubenstein, *Australian Citizenship Law* (n 20) 375.

Citizenship does not automatically 'cut out' after six years' absence from Australia. It is thus not clear why one of its leading associated rights, the right to vote, should. The law speaks with forked tongue by permitting a long-term expatriate to continue to be a citizen of Australia indefinitely after their departure, but denies them a (traditionally) fundamental part of citizenship. Consistency in approach is important.

In the language of proportionality analysis, the measure clearly impacts representative government. It is not clear its purpose is compatible with representative government, because it has not been clearly stated. One argument is that the purpose of the provision is to provide 'fair' elections, that only those affected by government decisions or with a sufficient connection to Australia should have a say in government. It is not clear this measure is *suitable* — the fairness argument regarding expatriates was not accepted in Canada. Further, a simple assumption that those who have been away from Australia for six years do not have a strong connection with Australia may not be suitable. Arguably, the law is not suitable to achieving its objective because it affects many who would insist they maintain strong links to Australia. There is no evidence that the existing system leads to breaches of electoral integrity, so that cannot form the basis of a suggested legitimate purpose or argument about its suitability for that purpose. It is not *necessary* to achieve its presumed objective of fairness. It is easy to imagine alternative models — for example, a longer absence from Australia, or no fixed exclusionary period at all, but a requirement of registration and re-registration. The fact an expatriate is prepared to register, and re-register, to vote at an Australian election might be taken to be a proxy for sufficient connection with Australia. Such a rule would meet the same objectives as the current provision, but with significantly less impact on the constitutional right. And given that the rule disenfranchises hundreds of thousands of Australian citizens, and creates a grievous disjunct between citizenship and voting rights, its impact on human rights and consistency in the law is deep and harsh, with little to no benefit evident. In sum, the provision fails all three stages of Australian proportionality analysis, just as the Canadian measure failed each stage of proportionality analysis there, and it is not clear it would even pass compatibility testing.

This conclusion is consistent with the High Court decision in *Roach*. In that case, a majority of the High Court found that arbitrary denial of prisoners' right to vote while incarcerated was contrary to a s 24 choice by the people, and was not for a substantial reason.[164] In the language of 'shield' and 'sword', the High Court held that s 24 shielded an individual from having their voting right arbitrarily abrogated. Similarly here, s 24 is being used as a shield — protecting the voting rights of an expatriate Australian from arbitrary interference. In both cases, constitutional voting rights operate to shield an individual's rights from parliamentary interference. In no sense are rights being used as a 'sword' (on the supposition that this would or might be inappropriate legal reasoning, given that the High Court has

164 See above n 65.

found that the implied freedom of political communication operates as a shield not a sword).[165]

B *'All Affected Interests' Principle*

According to this theory, all whose interests are affected by the actions of a government are, or should be, entitled to vote regarding that government.[166] It would follow that, because expatriates' interests could (or are likely to be) affected by the actions of the Australian government, they should thus have the right to have a say on the identity of the Australian Parliament.[167] This theory is too broad, since by this logic Australians would be entitled to vote in United States elections, since the actions of the United States government clearly do affect Australian interests. As globalisation continues, our interests are increasingly affected by what governments around the world do. At present, Australian interests are being affected by the actions of the Russian government. Yet no-one could seriously assert a right (valueless though it might be) to vote in Russian elections. However, it does speak to a social contract theory of government, wherein individuals agree to unite into a society, ceding direct control over decision-making, and in return the government thereby created agrees to protect the rights of the individual. This is an instrumental view of citizenship. This theory would support expatriates having the right to vote in Australian elections.

A related but separate test refers to those who are subject to a nation's laws being eligible to vote in that nation's elections, regardless of where they live. This is considered below.

C *Bauböck's Narrower Test*

Responding to criticisms that the 'all affected interests' test is not sufficiently discriminatory in terms of voting entitlements, Bauböck developed a more refined model. He suggested that citizens of a nation would have the right to vote in that nation's elections although they live outside that nation if they satisfy at least one of the following two criteria:

(a) They depend on that community for long-term protection of their basic rights; or

165 *Lange* (n 61) 560 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

166 Ian Shapiro, *Democratic Justice* (Yale University Press, 1999) 37: '[E]veryone affected by the operation of a particular domain of civil society should be presumed to have a say in its governance. This follows from the root economic idea that the people appropriately rule over themselves'; Robert A Dahl, *After the Revolution? Authority in a Good Society* (Yale University Press, rev ed, 1990) 64–5; Robert E Goodin, 'Enfranchising All Affected Interests, and Its Alternatives' (2007) 35(1) *Philosophy and Public Affairs* 40; Rainer Bauböck, 'Morphing the Demos into the Right Shape: Normative Principles for Enfranchising Resident Aliens and Expatriate Citizens' (2015) 22(5) *Democratization* 820 ('Morphing the Demos into the Right Shape').

167 It is reflected in the United Kingdom Policy Paper, Department of Levelling Up, Housing and Communities, Parliament of the United Kingdom (n 153): 'British expatriates are also directly affected by decisions made in the UK Parliament — for example, on foreign policy, defence, immigration or pensions. It is therefore right that they have a voice in elections to that body'.

(b) They are or have been subjected to that community's political authorities for a significant period of their lives.[168]

Bauböck argues that satisfaction of either test signifies an individual as a legitimate stakeholder in a nation's future, justifying their right to have a say in that nation's governance. This arguably disconnects voting entitlement from citizenship entirely, but for current purposes, it might be seen as an additional requirement for a citizen to be able to vote in a nation's elections, though that citizen is living outside of the nation. If accepted, Bauböck's theory would certainly require a more nuanced decision regarding the voting rights of Australian expatriates than contemplated by the current law.

D *Nature of a Community Has Changed*

Traditionally communities were seen as territory-based, residing within a particular physical area. As Caramani and Strijbis note, there was a strong correlation between territorial boundaries (residence) and membership boundaries (nationality).[169] However, the nature of our society has irrevocably changed.[170] As a majority of the Supreme Court of Canada noted in *Frank*, globalisation has meant that individuals are much more mobile than they were in past times.[171] Technology has made it extremely easy to communicate with others around the world. While these changes have occurred very rapidly, perhaps our conception of the nature of a community had not kept pace with these changes.[172] Perhaps we need to accept that the Australian 'community' is not limited to those who physically reside in

168 Rainer Bauböck, 'The Rights and Duties of External Citizenship' (2009) 13(5) *Citizenship Studies* 475, 479 ('Rights and Duties of External Citizenship').

169 Daniele Caramani and Oliver Strijbis, 'Discrepant Electorates: The Inclusiveness of Electorates and Its Impact on the Representation of Citizens' (2013) 66(2) *Parliamentary Affairs* 384, 387.

170 Bauböck, 'Rights and Duties of External Citizenship' (n 168) 492: '[T]he political community within which norms of freedom, equality and self-government apply can no longer be regarded as a single and self-contained territorial society … we need to develop new conceptions of political community'.

171 *Frank* (n 21) 27 [34] (Wagner CJ for Wagner CJ, Moldaver, Karakatsanis and Gascon JJ): 'Today … we live in a globalized society. The ability of citizens not only to move, but to remain connected and maintain communications in so doing, is unprecedented'.

172 Daniele Caramani and Florian Grotz, 'Beyond Citizenship and Residence? Exploring the Extension of Voting Rights in the Age of Globalization' (2015) 22(5) *Democratization* 799, 804; Peter J Spiro, 'Perfecting Political Diaspora' (2006) 81(1) *New York University Law Review* 207; Kim Rubenstein and Daniel Adler, 'International Citizenship: The Future of Nationality in a Globalized World' (2000) 7(2) *Indiana Journal of Global Legal Studies* 519, 526 notes the 'rapidity of the assault upon the nation-state by the quickening turns of globalization'.

Australia,[173] as the Supreme Court of Canada has accepted.[174] The United Kingdom government's Policy Paper associated with its recent reforms to permit expatriates to vote notes that '[a]dvances in technology have enabled high-speed global communications, allowing British citizens to follow domestic affairs in real-time'.[175] The European Court of Human Rights has also noted this.[176]

By excluding expatriates from the right to vote, the law is effectively excluding them from the Australian community:

> The community confirms an individual person's membership, as a free and equal citizen, by according him or her a role in collective decision. In contrast, it identifies an individual who is excluded from the political process as someone not fully respected or not fully a member.[177]

This point has particular poignancy in the Australian context, where Indigenous Australians were denied the vote at federal elections for approximately 60 years after Federation.[178] The (belated) recognition of this right reflected acceptance of Indigenous Australians as fully-fledged members of the community, righting an egregious historical error.

This seems to reflect what Bauböck refers to as an 'intrinsic' view of citizenship, reflecting membership of a society, thus contributing to the individual's self-

173 Rainer Bauböck, 'Expansive Citizenship: Voting Beyond Territory and Membership' (2005) 38(4) *Political Studies: Political Science and Politics* 683, 684: 'The electoral inclusion of citizens living abroad is supported by ethnic conceptions of nationhood that conceive of the polity not as a territorial state and its inhabitants, but as a community that may be dispersed over several states'; Graeme Orr, 'Citizenship, Interests, Community and Expression: Expatriate Voting Rights in Australian Elections' in Simon Bronitt and Kim Rubenstein (eds), *Citizenship in a Post-National World: Australia and Europe Compared* (Federation Press, 2008) 24, 32 ('Citizenship, Interests, Community and Expression'): '[I]t is possible that in time, the typical expatriate will be truly a member of multiple national communities'. Cf Claudio López-Guerra, 'Should Expatriates Vote?' (2005) 13(2) *Journal of Political Philosophy* 216, 228: '[P]eople living permanently in one state are not members, in a political sense, of any other state, including their country of origin'.

174 *Frank* (n 21) 27 [34]–[35] (Wagner CJ, for Wagner CJ, Moldaver, Karakatsanis and Gascon JJ):

> [N]on-resident Canadian citizens maintain strong connections, both family- and employment-related, to Canada, as well as a strong sense of belonging … the world has changed. Canadians are both able and encouraged to live abroad, but they maintain close connections with Canada in doing so.

175 Department of Levelling Up, Housing and Communities, Parliament of the United Kingdom (n 153).

176 '[T]he emergence of new technologies and cheaper transport has enabled migrants to maintain a higher degree of contact with their state of nationality than would have been possible for most migrants forty, even thirty, years ago': *Shindler* (n 151) 176 [110].

177 Ronald Dworkin, 'What is Equality? Part Four: Political Equality' (1987) 22(1) *University of San Francisco Law Review* 1, 4. See also Lardy (n 157) 100: 'Electoral law is not merely a technical set of rules for administering elections, but a collection of coded pronouncements about who counts as a full member of the political community and why'. See Rubenstein, 'Unscrambling Its Meaning' (n 31) 517: '[C]itizenship is discussed as membership of the community … history is strewn with instances where citizenship and membership of the community are integrally linked'.

178 *Electoral Act 1962* (n 43). Cf *Franchise Act* (n 40).

respect, dignity and equality of treatment.[179] Discussing the contrast between an alien and a citizen, Gaudron J identified an alien as a person who was not a member of the body politic of the nation state.[180] An obvious corollary is that a citizen is (subject to possible narrow exceptions) a member of the body politic.[181] Yet the provisions of the *Electoral Act* which disenfranchise some expatriates suggests differently.

On this view, denial of the vote to expatriates seems contrary to statements in an early High Court decision, *Potter v Minahan*.[182] There, Griffith CJ stated that a person was entitled to remain in the place they were born and, at least until their right to return there was lost, the person was 'entitled to regard [themselves] as a member of the community which occupies that place'.[183] In that case it was found (by majority) that a person who had left Australia at the age of five and returned at the age of 32 remained a member of the Australian community, and not subject to deportation under the immigration power.[184]

Helen Irving argues that the quid pro quo of citizenship is the right of abode.[185] She describes this as the 'right not to be excluded or expelled'.[186] While she means this in the sense that an Australian citizen has the right to return to Australia, one could extend this reasoning to a right not to be 'excluded' from the franchise. An expatriate denied the right to vote in an Australian election may well feel they have been 'expelled'. By parity of reasoning, this should not be permitted.

A practical issue is whether expatriates would be included within the electorate in which they resided when they lived in Australia, or whether 'virtual electorates' would be created, to which expatriates would belong. This seems to have been the tenor of the South Australian proposal to enfranchise that state's expatriates.[187] It

179 Bauböck, 'Morphing the Demos into the Right Shape' (n 166) 825.

180 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 ('*Nolan*'); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 407 [33] (Gaudron J) ('*Re Patterson*').

181 *Shaw* (n 66) 61 [95] (Kirby J): An alien

> refers to someone who is outside the Australian community and its fundamental loyalties … [a]pplied today and for future application … such community and such loyalties are marked off by citizenship of birth and descent, and citizenship by naturalisation. Indeed, so much is accepted by all members of the Court.

182 (1908) 7 CLR 277.

183 Ibid 289. Similarly, O'Connor J referred to '[a] person born in Australia … becom[ing] by reason of the same fact a member of the Australian community under obligation to obey its laws, and correlatively entitled to all the rights and benefits which membership of the community involves': at 305.

184 Ibid 290–1 (Griffith CJ), 298–9 (Barton J), 306 (O'Connor J), 317 (Isaacs J dissenting), 324 (Higgins J dissenting). For a fuller discussion see Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011); Rubenstein, *Australian Citizenship Law* (n 20) 92–111.

185 Irving (n 31) 148.

186 Ibid 148.

187 Rubenstein, *Australian Citizenship Law* (n 20) 417.

is not necessary for current purposes to tender a preferred view on this. It suffices to say that ch 1 of the *Australian Constitution* makes very sparse provision regarding the formation of electorates, leaving very significant detail to Parliament's discretion. Parliament can pass laws regarding electorates (as we typically refer to them, though the *Australian Constitution* refers to them as divisions).[188] Parliament can alter the number of electorates.[189] A quota system, designed to ensure broad proportionality between the number of electorates in a state and its population, is required by s 24. However, there is nothing express to preclude this from being applied to those living overseas.[190] In my view, nothing in the *Australian Constitution* expressly prohibits the creation of virtual electorates, particularly if a 'living tree', rather than an originalist, approach is applied to constitutional interpretation.[191]

V ARGUMENTS AGAINST RECOGNISING THAT EXPATRIATES HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO VOTE

'There is little case in democratic theory for an expansive expatriate franchise'.[192]

A *They Are No Longer Subject to Australian Law*

Some who argue against granting expatriates the right to vote do so on the basis of social contract theory — the idea that each member of society agrees to abide by community rules (laws), and in return the government of that community protects the rights of individuals within that society. It is thus argued that because expatriates are no longer subject to the laws of the country from which they

188 *Australian Constitution* s 29.

189 Ibid s 27.

190 Section 24 of the *Australian Constitution* requires that the number of electorates in a given state should be calculated by dividing the number of people in the state by the 'quota' (based on the number of people of the Commonwealth). It reflects evident concern that the number of electorates in a given state be in proportion to its population, particularly having regard to other states. The *Australian Constitution* is thus clearly concerned about proportionality among states. On one view this would not apply to virtual electorates. Even if it did, the suggestion would be to create 'virtual electorates' that met proportionality requirements ie that the number of such electorates would be based on the number of Australians living overseas long-term who had registered with the authorities. Such a model would not conflict with any express provisions of the *Australian Constitution*, as I read it.

191 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81 (Dixon J): '[I]t is a *Constitution* we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances'; *New South Wales v Commonwealth* (2006) 229 CLR 1, 97 [120] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Work Choices Case*'): 'To pursue the identification of what is said to be the framers' intention, much more often than not, is to pursue a mirage'.

192 Orr, 'Citizenship, Interests, Community and Expression' (n 173) 34.

emigrated, they should no longer be recognised as having the right to vote.[193] As Rubio-Marin puts it:

> Democratic legitimacy and popular sovereignty require that the people subject to the law and state authority should be included, as a matter of right, in the process of shaping how that authority will be formed and exercised. The exercise of public authority affects mostly those who live subject to the jurisdiction of such authority. Since states are geographically bounded communities and their borders express the limits of their jurisdictions, democratic states generally have good reasons to restrict participation in the political process to those who reside within their territorial borders. This would then justify the exclusion of expatriates from the political process as they are not directly and comprehensively affected by the decisions and policies that their participation would help to bring about even if they are likely to be affected by some of those decisions … [including] remittances, nationality and military service laws.[194]

It is not true that expatriates are no longer the subject of Australian law. Australian Parliaments, both at Commonwealth[195] and state level,[196] can legally legislate with extra-territorial effect. Laws passed in Australia can and do affect Australians living overseas. The leading Australian text on citizenship includes a 60-page chapter entitled 'Legislative Consequences of Citizenship'.[197] That chapter documents hundreds of pieces of legislation that apply to a person who is a 'citizen' of Australia. Obviously, since citizens of Australia can be living overseas, all of this legislation potentially has significant application to expatriates. For example, taxation laws affect those living overseas. An expatriate may be subject to Australian taxation, particularly on income derived in Australia. They may hold a superannuation account which might be the subject of Australian law. Any property they hold in Australia will be subject to the laws of Australia. This should mean, according to López-Guerra, that expatriates should have voting rights. He stated

193 López-Guerra (n 173) 216: '[G]iven that permanent expatriates are no longer subject to the laws and binding decisions of their homeland, why should they have the right to decide who will govern those who do live within the country?'.

194 Ruth Rubio-Marin, 'Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants' (2006) 81(1) *New York University Law Review* 117, 129.

195 *Seas and Submerged Lands Case* (n 148); *Australian Constitution* s 51(xxix). In *Polyukhovich* (n 148), six members of the Court expressed a broad view of s 51(xxix). The section permits the Commonwealth to pass laws with respect to things, matters, events and individuals outside Australia: at 528 (Mason CJ), 599 (Deane J), 632 (Dawson J), 696 (Gaudron J), 714 (McHugh J). Section 51(xix) permits the Commonwealth power to pass laws with respect to aliens, and s 51(xxvii) permits the Commonwealth to pass laws with respect to immigration and emigration. The High Court has determined that an 'alien' could not include someone who is an Australian citizen: *Shaw* (n 66) 35 [2]–[3] (Gleeson CJ, Gummow and Hayne JJ, Heydon J agreeing at 87 [190]). Thus, an expatriate citizen could not be the subject of laws passed pursuant to s 51(xix). The question as to who is within the power with respect to 'emigration' is largely unknown. A suggestion that Australian citizens who had lived overseas for more than three years could be within its scope was doubted: Transcript of Proceedings, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* [2005] HCATrans 66.

196 *Pearce v Florenca* (1976) 135 CLR 507.

197 Rubenstein, *Australian Citizenship Law* (n 20) ch 5. It is acknowledged that, in many cases, the legislation listed distinguishes on the basis of 'residence', however at least a sizeable proportion of the legislation listed distinguishes on the basis of 'citizenship'.

that 'no person subject to the binding decisions of a democratic regime should be denied political rights'.[198] Habermas too connected entitlement to vote with subjection to the law.[199] Now this reasoning has implications for the denial of the vote to permanent residents who are non-residents. That can be left to one side for present purposes. What is relevant here is that by this reasoning, because Australian expatriates clearly *are* subject to laws and binding decisions of the Australian government, they should have an entitlement to vote at federal elections.

B *Measure Is Proportionate to a Legitimate Objective*

The English Court of Appeal rejected a challenge to the validity of the previous United Kingdom law limiting expatriates' voting rights to those who had resided overseas for less than 15 years. The applicant had argued this infringed the right to participate in free elections and that elections would reflect the free expression of the people under convention law.[200] The Court of Appeal held that the measure passed proportionality analysis.[201] It found that the 15-year rule had a legitimate aim — testing the strength of a British citizen's links with the United Kingdom, to determine whether they were sufficiently connected with the United Kingdom.[202] It bore in mind that legislation most directly affected those who were resident in the United Kingdom.[203] It found that residence was not an arbitrary measure of connection with a country.[204] It found that the 15-year rule was proportionate to the aim of the legislation. It continued to provide substantial opportunity for expatriates to vote.[205] It found alternatives impractical — it was not feasible to make an individual assessment of a person's connections with the United Kingdom.

198 López-Guerra (n 173) 221.

199 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, tr William Rehg (Polity Press, 1997) 112 states that democracy 'requires that those subject to law as its addressees can at the same time understand themselves as authors of law'.

200 *European Convention on Human Rights* (n 11) art 3.

201 *Preston* (n 11). There are broad similarities, and some differences, in how proportionality is applied in the United Kingdom, compared with Australia and Canada: *McCloy* (n 98) 195 [3] (French CJ, Kiefel, Bell and Keane JJ). The concept (broadly) tends to involve consideration whether the challenged measure relates to a legitimate objective, whether the measure is appropriately tailored to that objective, and proportional to that objective, given its impacts on rights.

202 *Preston* (n 11) 720 [89] (Mummery LJ, Sullivan LJ agreeing at 721 [98], Keene agreeing at 721 [99]).

203 Ibid.

204 Ibid 720 [90].

205 Ibid 721 [98]–[99].

The European Court of Human Rights took a similar position in *Shindler v United Kingdom*[206] for similar reasons.[207] It did note a clear trend among member states to permit voting by non-residents, with 44 member states granting such right, including 35 which did not remove the right once the person had lived outside the relevant jurisdiction for a certain length of time. The Court noted that decisions since 1961 had confirmed the validity of measures restricting the right to vote to expatriates, and the approach remained correct, though the matter may need to be 'kept under review in so far as attitudes in European democratic society evolve'.[208] Obviously, these decisions favour the constitutionality of the Australian provisions the subject of this article, to the extent they are applicable in this jurisdiction.

In response, we do not accept that living in a country is a legitimate test of a person's connection with that jurisdiction. In respectful disagreement with the Court of Appeal in *R (Preston) v Wandsworth London Borough Council*, a firm time limit is considered arbitrary. It takes no account of an individual's personal circumstances, and the extent of their actual connections with or interests in their country of origin. Contrary to the view expressed there, it is considered feasible for a decision maker to assess an individual's connections with a particular jurisdiction. This already occurs now, for example, in determining whether or not a person is a 'resident' for the purposes of taxation law. The decision maker considers a range of factors in making this determination.[209] The legislation of one jurisdiction can significantly impact its citizens around the world. The forces of globalisation have rendered territorial boundaries less meaningful and significant than they once were. As noted earlier, these realities have recently led to the United Kingdom moving to abandon the 15-year time limit.

Further, as indicated above, the founding fathers generally intended to leave many aspects of Australia's electoral system to the discretion of Parliament. This general point could be utilised to argue in favour of the constitutionality of the provisions considered in this article.

Assuming now that legislation denying expatriates the right to vote is vulnerable to constitutional challenge on the basis it was not passed for a substantial reason and disproportionally attack a fundamental democratic right for little or obscure benefit, the article will consider an alternative. Rather than Parliament denying expatriates the right to vote (which would break the strong link between citizenship and voting), what if it simply removed citizenship from (long-term) expatriates? In this way, it would not sever the link between citizenship and voting; rather it

206 *Shindler* (n 151).

207 The Court referred to the presumption that non-resident citizens were less directly, or less continually, concerned with the country's day-to-day problems and had less knowledge of them, that non-residents had less influence on candidate selection or formulation of policy, that expatriates were less affected by the country's laws, and the legitimate interest of the legislature in limiting the franchise to those likely to be most closely affected by laws: ibid 174–5 [105].

208 Ibid 178 [115].

209 *Harding v Federal Commissioner of Taxation* (2019) 269 FCR 311, 335–9 [59]–[64] (Davies and Steward JJ, Logan J agreeing at 313 [2]).

would alter the parameters of citizenship. It is to this possibility that the article now turns.

VI COULD PARLIAMENT SIMPLY STRIP LONG-TERM EXPATRIATES OF CITIZENSHIP AND THUS DENY THEM THE FRANCHISE?

We have seen that citizenship is (generally) the key to voting rights. The above discussion has suggested that the present situation, denying the right to vote to some expatriates who remain citizens, is vulnerable to constitutional challenge. Assuming that such a challenge was successful, could Parliament simply amend the citizenship legislation to strip citizenship from long-term expatriates, thus denying them the vote? Such a move would have a range of serious consequences for the individual.[210] Citizenship is typically regarded as a fundamental human right.[211] However there has been an expansion in the use of citizenship-stripping laws in Western nations in the context of national security, in particular.[212] This hypothetical example raises (at least) two questions — whether Parliament would have the constitutional power to pass such a law, and whether it might fall foul of other constitutional requirements. We now consider these questions.

A *Whether a Head of Power Exists to Strip Citizenship from an Expatriate Australian Citizen*

The Commonwealth lacks direct constitutional power with respect to citizenship. As explained above, Australian citizenship was not recognised at the time of Federation, so that is not surprising. The Commonwealth *does* have direct constitutional power with respect to aliens.[213] A significant aspect of the Commonwealth's ability to legislate regarding citizenship derives, somewhat perversely, from the power with respect to aliens,[214] or 'outsiders' to Australia.[215] This has led the High Court in the case law to consider the relationship between citizenship and alien status. Until recently, the Court viewed them as antonyms ie

210 This would also deny them other rights associated with citizenship, including the right to be protected while abroad (eg through consular assistance): *Love v Commonwealth* (2020) 270 CLR 152, 173 [12]–[13] (Kiefel CJ), and the right to abode here: at 198 [95] (Gageler J) ('*Love*').

211 Sangeetha Pillai and George Williams, 'The Utility of Citizen Stripping Laws in the United Kingdom, Canada and Australia' (2017) 41(2) *Melbourne University Law Review* 845, 888.

212 Ibid 845.

213 *Australian Constitution* s 51(xix).

214 *Koroitamana v Commonwealth* (2006) 227 CLR 31, 46 [50] (Gummow, Hayne and Crennan JJ) ('*Koroitamana*'): '[I]t is for the Parliament, relying upon para (xix) of s 51 of the *Constitution* to create and define the concept of Australian citizenship'; *Shaw* (n 66) 40 [21]–[22] (Gleeson CJ, Gummow and Hayne JJ); *Hwang* (n 34) 130 [17]–[18] (McHugh J); Joe McIntyre and Sue Milne, 'The Alien and the Constitution: The Legal History of the "Alien" Power of the Commonwealth' (Research Paper, 29 July 2020).

215 *Alexander* (n 31) 604 [199] (Edelman J); *Love* (n 210) 262 [296] (Gordon J).

a person who was a citizen could not be an alien, and vice versa.[216] This is complicated by the fact that citizenship is, as has been noted above, a purely statutory concept. Thus, we have the perplexing suggestion that an act of Parliament could alter the meaning of a constitutional term.[217] This is not acceptable.[218] The question then becomes what is meant by an 'alien' for constitutional purposes, and the extent to which Parliament can (if at all) impact on its meaning through legislation.

A definition was attempted by Gibbs CJ (with whom Mason and Wilson JJ agreed) in *Pochi v Macphee* ('*Pochi*'): 'Parliament can in my opinion treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian'.[219]

This definition was accepted by six members of the High Court in *Nolan v Minister for Immigration and Ethnic Affairs*.[220] It enjoys historical support. Blackstone distinguished '[n]atural-born subjects' (at a time when citizenship did not exist per se) born within the 'dominion' and aliens 'born out of it'.[221] In *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*,[222] Gleeson CJ applied as part of the definition of alien that the person was born outside Australia,[223] and Gaudron J noted that 'the notion of "alien" is and always has been linked with a person's place of birth'.[224]

If this line of authority were applied, Parliament could *not* simply legislate under s 51(xix) to strip a person born in Australia of citizenship status. They would be beyond the reach of the aliens power, given their circumstances.

216 *Re Patterson* (n 180) 471 [242] (Gummow and Hayne JJ); *Shaw* (n 66) 35 [2]–[3] (Gleeson CJ, Gummow and Hayne JJ): '[C]itizenship may be seen as the obverse of the status of alienage'; *Singh* (n 66) 329 [4] (Gleeson CJ); *Love* (n 210) 171–2 [7]–[8] (Kiefel CJ), 183 [52] (Bell J), 197 [92] (Gageler J), 216–17 [162]–[166] (Keane J). Cf at 262 [298] (Gordon J), 288 [394] (Edelman J) who denied they were antonyms.

217 See, eg, *Love* (n 210) 219 [172] (Keane J): 'The legal status of an alien in Australian law is now derived from the statutory definition of citizenship'.

218 Michelle Foster, 'Membership in the Australian Community: *Singh v Commonwealth* and Its Consequences for Australian Citizenship Law' (2006) 34(1) *Federal Law Review* 161, 161. I concede however, as per my earlier discussion, that members of the High Court indicated in *Roach* (n 6) that statutory developments since Federation had come to give Australians a (constitutionally protected) right to vote. This is highly unorthodox and questionable reasoning, but the result of the case (at least) enjoys near universal support in the literature, and it remains good law today.

219 (1982) 151 CLR 101, 109–10 ('*Pochi*').

220 *Nolan* (n 180) 186 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

221 Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) vol 1, 354.

222 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 ('*Ex parte Te*').

223 Ibid 169 [15].

224 Ibid 179 [54].

The complication is that subsequent cases refined the position, so that the definition of alien given in *Pochi* no longer (entirely) represents the law in Australia. In cases such as *Singh v Commonwealth* ('*Singh*'),[225] *Koroitamana v Commonwealth*,[226] and again recently in *Alexander v Minister for Home Affairs* ('*Alexander*'),[227] the High Court accepted a person born in Australia (each of the individuals concerned in these cases was Australian born) *could* (and did) fall within the scope of the aliens power. In the first two cases, the person was deemed to be an alien because of their parents' foreign citizenship (applying the statutory definition of citizen),[228] and in the latter case the person was considered to have renounced their Australian citizenship by their actions (applying a statutory provision outlining circumstances in which a person might lose Australian citizenship). These cases thus directly raise the question of the extent to which, under the aliens power s 51(xix), Parliament has the right to determine who is to have alien status.

In *Alexander*, the Court confirmed Parliament's broad power to determine who had the status of citizen under the aliens power.[229] Previous cases had also taken this position. There has been some tension in the case law between the view that (a) Parliament has broad power to legislate with respect to aliens, including to determine who has the status of alien;[230] and (b) that because 'alien' is a word in the *Australian Constitution*, its scope must be determined by the High Court, and not Parliament.[231] To use the well-worn phrase, that Parliament cannot '"recite itself" into power' or,[232] in this case, define itself into power by creating an expanded concept of who an alien is. This would leave it to the Court to determine itself who was within the meaning of 'alien'. Justices Gordon and Edelman of the current High Court accept (b), but the current majority view reflects (a).

On the assumption that (a) will continue to reflect the law, the next question is the extent of limits, if any, on Parliament's ability to do so. Again, in *Pochi*, Gibbs CJ said 'Parliament cannot, simply by giving its own definition of "alien", expand the

225 *Singh* (n 66).

226 *Koroitamana* (n 214).

227 *Alexander* (n 31).

228 *Singh* (n 66) 342 [31] (Gleeson CJ), 400 [203] (Gummow, Hayne and Heydon JJ), 419 [272] (Kirby J); *Koroitamana* (n 214) 38–9 [11]–[14] (Gleeson CJ and Heydon J), 46 [50] (Gummow, Hayne and Crennan JJ), 54–5 [81]–[82] (Kirby J), 55 [85] (Callinan J).

229 *Alexander* (n 31) 573 [35]–[36] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 583 [98]).

230 *Shaw* (n 66) 35 [2] (Gleeson CJ, Gummow and Hayne JJ): the aliens power 'supports legislation determining those to whom is attributed the status of alien'; *Alexander* (n 31) 573 [35]–[36] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 583 [98]); *Chetcuti v Commonwealth* (2021) 272 CLR 609, 621–2 [11] (Kiefel CJ, Gageler, Keane and Gleeson JJ) ('*Chetcuti*'); *Love* (n 210) 170 [4] (Kiefel CJ), 217–18 [167] (Keane J), 236 [236] (Nettle J).

231 *Re Patterson* (n 180) 485 [283] (Kirby J); *Shaw* (n 66) 61 [94] (Kirby J); *Singh* (n 66) 347 [49] (McHugh J dissenting); *Love* (n 210) 270 [327] (Gordon J), 288 [394] (Edelman J); *Alexander* (n 31) 602–3 [193] (Edelman J); *Chetcuti* (n 230) 630 [37] (Gordon J), 642–3 [69] (Edelman J).

232 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 206 (McTiernan J).

power under s 51(xix) to include persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word'.[233] This sentiment has been accepted by others.[234] Justice Kirby noted it would not be valid for Parliament to pass a law declaring that Indigenous Australians were aliens, or all those of Chinese descent were aliens.[235] As Gummow, Hayne and Heydon JJ said, s 51(xix) does not permit Parliament to make a law with respect to those whom Parliament simply considers to be aliens.[236] Justice Gaudron stated Parliament could not define a person born in Australia to an Australian citizen to be an alien.[237]

In *Alexander*, two justices adopted the wording of Gibbs CJ in *Pochi*,[238] and one justice adopted the virtually identical wording that Gleeson CJ had articulated in *Singh*,[239] itself an adoption of what Gibbs CJ had said in *Pochi*.[240] In effect, three justices accepted this view of Gibbs CJ in *Pochi*. The remaining justices expressed themselves in slightly different wording, that Parliament could not adopt an 'eccentric understanding' of alienage or the people in ss 7 and 24,[241] also expressly referring to Gibbs CJ in *Pochi*. The phrase 'eccentric understanding' is likely to convey the same sentiment as one who could not possibly be within the definition, though results may vary in relation to specific applications.

Alexander involved questions regarding the constitutional validity of laws stripping citizens of citizenship, but in a different context — the case concerned the power of a Minister to strip Australian citizenship from an individual whose conduct demonstrated they had repudiated their allegiance to Australia, and it would be contrary to the public interest to permit them to retain their Australian citizenship. The *Citizenship Act 2007* (Cth) provide examples of conduct that might meet the description of repudiating allegiance to Australia; s 36C(3)(g) includes engaging in foreign incursions and recruitment.

233 *Pochi* (n 219) 109 (Mason J agreeing at 112, Wilson J agreeing at 116).

234 *Singh* (n 66) 329 [4] (Gleeson CJ).

235 *Re Patterson* (n 180) 492 [303]; *Singh* (n 66) 347 [49] (McHugh and Callinan JJ dissenting); *Chetcuti* (n 230) 722 [66] (Edelman J).

236 *Singh* (n 66) 383 [153]; *Chetcuti* (n 230) 722 [67] (Edelman J): '[A] person born in Australia, to two parents who are Australian citizens, who is not a citizen of another country, and who has not renounced their allegiance to Australia', could not be defined as an 'alien' for the purposes of constitutional law.

237 *Ex parte Te* (n 222) 179 [54]. Justice Edelman made a similar remark in *Love* (n 210) 319–20 [465]–[466]; as did Kirby J in *Singh* (n 66) 418 [269].

238 *Alexander* (n 31) 589 [133] (Gordon J), 607 [215] (Edelman J), quoting *Pochi* (n 219) 109–10 (Gibbs CJ).

239 *Singh* (n 66) 329 [4].

240 *Alexander* (n 31) 621 [286] (Steward J).

241 Ibid 575 [46] (Kiefel CJ, Keane and Gleeson JJ, Gageler J agreeing at 583 [98]).

Members of the Court stated that in basic terms, an alien was someone who owed allegiance to a foreign power, not Australia.[242] Such a person was a foreigner to the Australian political community.[243] The Court concluded that, in the case of an Australian resident citizen who had been convicted of serious crimes involving fighting for an enemy force against Australian forces, the person would have demonstrated such lack of allegiance to Australia so as to fall within the scope of the aliens power.[244] This was an extreme case.[245] Justice Gordon indicated limits on the ability of Parliament to withdraw a person's membership of the Australian community.[246] Her Honour agreed with concerns raised previously by Gaudron J of Parliament attempting to retrospectively change the conditions of the Australian community to exclude individuals.[247]

Justice Edelman suggested it might not be possible for Parliament to use its alien power against a person born in Australia to a member or members of the Australian community.[248] Justice Steward said the power was limited to cases involving actions or steps 'indelibly inconsistent with … allegiance [to Australia] and with membership of [the Australian] community'.[249] Earlier cases had also contemplated limits on Parliament's ability to change an individual's status, for example by denying them membership of the Australian body politic. It was claimed this power was limited to circumstances where there had been a change to

242 Ibid 615 [257] (Steward J, Edelman J agreeing at 610 [232]–[233]); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, 458 [35] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ) ('*Ex parte Ame*').

243 *Alexander* (n 31) 604 [199] (Edelman J); *Chetcuti* (n 230) 727 [89] (Edelman J).

244 *Alexander* (n 31) 575 [46] (Kiefel CJ, Keane and Gleeson JJ): '[T]here is nothing fanciful in classifying as an alien — separate from 'the people' — an individual who, though previously a citizen, has acted so inimically to Australia's interests as to repudiate the obligations of citizenship on which membership of the people of the Commonwealth depends'. Their Honours' joint reasons referred to Alexander's conduct as having been so 'reprehensible as to be incompatible with the common bonds of allegiance to the Australian community': at 576 [51]. Justice Gageler agreed with the joint reasons: at 583 [98]. Similar judgments are found at 590 [137] (Gordon J), 601 [185] (Edelman J), 617 [266] (Steward J).

245 '[T]he validity of s 36B [in terms of being supported by a head of power] hinges upon the extreme wrongdoing that is required by, and inherent in, the notion of repudiation of allegiance to Australia': ibid 611 [234] (Edelman J).

246 Ibid 591 [143]. For example, it might be limited to circumstances where there was a change in sovereign identity or territory, where the person had renounced their allegiance to Australia expressly or through conduct, breached a condition on the grant of membership to the Australian community, or change in the nature of the relationship between the person and the community constituting the body politic: at 590 [139], 591 [142]–[143] (Gordon J).

247 Ibid 591 [143], quoting *Re Patterson* (n 180) 411 [47] (Gaudron J). See also *Nolan* (n 180) 193 (Gaudron J).

248 *Alexander* (n 31) 608 [220]. His Honour recognised exceptions, including where a person's conduct was so wrongful and extreme so as to be inconsistent with continuing membership of the Australian community: at 601 [185]; or where a person had voluntarily abandoned membership of the community or had breached a reasonable condition of membership: at 609–10 [229]. Similarly, in *Singh* (n 66) it was stated that someone's *birth* in Australia made them a part of the Australian community: at 342–3 [32] (McHugh J).

249 *Alexander* (n 31) 621 [286].

the relationship between the individual and the community,[250] or where there were 'substantial reasons' for doing so.[251]

It must also be conceded there is some sentiment in the High Court (expressed in a different context and in obiter dicta) that the mere fact a person experiences or senses closeness or connection with the Australian community or polity does not necessarily mean they are beyond the aliens power.[252] There is also sentiment, arguably to the contrary of some of the judgments in *Alexander*, that a change in the status of an individual (for example, from a non-alien to an alien) does *not* require an act on the part of the person.[253]

On balance, it would seem difficult to constitutionally defend Commonwealth amendment of the citizenship legislation to exclude long-term expatriates from citizenship. This is not because the law may be seen as unfair or harsh; these are not constitutional tests of validity. It is for want of a head of power — these individuals are unlikely to be within the scope of the aliens power. The High Court *did* countenance the possibility that an Australian citizen might become an alien, and this was in fact what occurred on the facts in *Alexander*, but this occurred through voluntary behaviour on their part which indicated lack of allegiance to Australia and involved actions inimical to Australian interests and Australian values. It is difficult to see mere long-term absence from Australia in the same or relevantly similar way. As the Senate Committee found in its 2005 Report, expatriates often retain significant connection with and affection for Australia.[254] Thus, it is concluded the Commonwealth could not utilise s 51(xix) to disenfranchise long-term expatriates by excluding them from citizenship.[255]

There are other possibilities — the s 51(xxvii) emigration power, however this has been little litigated and so not much is known of its scope. Section 51(xxix) is also a possibility, with respect to things physically external to Australia. Again, it has been little utilised outside of treaty implementation, so it cannot be categorically

250 *Re Patterson* (n 180) 411 [47] (Gaudron J).

251 *Love* (n 210) 200 [101] (Gageler J).

252 Ibid 246 [257] (Nettle J). Cf '[a]n approach which focused instead on the degree of membership or connection with the Australian community might [embody] a more modern conception of citizenship (or, to be more accurate, non-alienage)': Foster (n 218) 175.

253 *Ex parte Ame* (n 242) 459 [36]–[39] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); Kim Rubenstein and Jacqueline Field, 'What is a "Real" Australian Citizen? Insights from Papua New Guinea and Mr Amos Ame' in Benjamin N Lawrance and Jacqueline Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press, 2017) 100, 107.

254 Senate Legal and Constitutional References Committee, Parliament of Australia (n 9) 60 [5.94], 118 [9.47].

255 It is *arguable* an exception might need to be made with respect to an Australian citizen born to non-Australian citizens, given the majority view in *Singh* (n 66). However, that precedent involved a person under the age of 10. It is *possible* that the Court might view an adult who had lived in Australia all their lives before moving overseas differently than a child born to non-Australian citizens.

determined whether or not it might be utilised in this way.[256] Dicta of two justices in *Re Patterson; Ex parte Taylor* suggests possible use by the Commonwealth of s 51(xxix) in this broad area;[257] other justices have discounted this possibility.[258] Justice Kirby has also rejected possible use of the implied nationhood power here,[259] relying on past case law on that power to suggest it should not be used to effectively circumvent express limits in the *Australian Constitution*, and must be read together with other parts of the *Australian Constitution*, including other heads of power.[260] Justice Callinan rejected use of both s 51(xxix) and the implied nationhood power in this context on similar reasoning.[261] Respectfully, it must be noted that while there is earlier authority to support limiting the scope of the implied nationhood power on this basis, there is less support for limiting the scope of express heads of power on this basis. Specifically, not long after *Shaw v Minister for Immigration and Multicultural Affairs*, a majority of the High Court expressly *rejected* the suggestion that an express head of Commonwealth legislative power should be read down having regard to other express provisions of the *Constitution*.[262] Thus, s 51(xxix) is a possibility in this regard, but it is uncharted constitutional territory.

B *Is Such a Measure 'Punitive' in Nature, Raising Ch III Constitutional Concerns if Exercised by a Member of the Executive?*

The other constitutional difficulty with stripping citizenship from expatriates is its (possibly) punitive nature.[263] Six members of the High Court found in *Alexander* and *Benbrika v Minister for Home Affairs* ('*Benbrika*') that stripping an Australian

256 *Alexander* (n 31) 589–90 [136] (Gordon J). Her Honour briefly notes the possible use of s 51(xxix) to regulate citizenship. Her Honour also alluded to the implied nationhood power in this regard.

257 *Re Patterson* (n 180) 474–5 [253] (Gummow and Hayne JJ). It was also briefly acknowledged in *Singh* (n 66) 378 [134] (McHugh J).

258 *Shaw* (n 66) 71 [124] (Kirby J): His Honour rejected an argument that Parliament could utilise s 51(xxix) to effectively make a person 'external' to Australia by changing their citizenship status.

259 Ibid 71–2 [125].

260 *Victoria v Commonwealth* (1975) 134 CLR 338, 378 (Gibbs J), 398 (Mason J).

261 *Shaw* (n 66) 85 [179]–[182]. See also Callinan J at 433–4 [318]–[319].

262 *Work Choices Case* (n 191) 123–31 [203]–[229] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 205–6 [481]–[483] (Kirby J), 335 [802]–[803] (Callinan J dissenting).

263 Whether or not a measure is punitive is open to conjecture — relevant factors include whether it (a) includes measures or sanctions normally considered unpleasant; (b) is for an offence against legal rules; (c) it must be imposed on an actual or supposed offender for an offence; (d) is intentionally administered by a body other than the transgressor; and (e) is administered by an authority constituted by the legal system against which the offence is committed: HLA Hart, *Punishment and Responsibility*: *Essays in the Philosophy of Law* (Oxford University Press, 1968) 4–5; *Alexander* (n 31) 611 [238] (Edelman J). These factors are not conclusive and not all of them must be met in order that a measure be considered punitive.

citizen of their citizenship was effectively an exercise of judicial power,[264] because of its punitive nature. Historically, exile was a form of punishment.[265] The power could not be reposed in a Minister. This was an unacceptable attempt by the executive to exercise judicial power. By parity of reasoning, it could be that legislation that stripped citizenship from expatriates could also be seen effectively as an exercise of the exclusively judicial power of imposing punishment. The punishment aspect is less obvious here, because the conduct concerned (absence from Australia) is obviously not criminal in nature, unlike that involved in *Alexander* and *Benbrika*. The relationship between the citizenship stripping and criminal behaviour was direct in *Alexander* and *Benbrika*. Clearly, citizenship stripping in the case of expatriates is not retribution for criminal activity. However, it is acknowledged that historically withdrawal of a person's right to remain in society, through banishment, exile and the like, does (or may) constitute punishment. Justice Gordon noted the comments of Warren CJ in *Trop v Dulles*:

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.[266]

Justice Gordon concluded that 'a citizenship cessation determination may constitute punishment', and that this was 'consistent with history'.[267] Justice Edelman added that stripping of a person's citizenship had been described as a 'fate universally decried by civilized people'[268] and a 'form of civil death'.[269] Likewise, it might founder on ch III grounds. There may also be an argument that such a measure breaches international law, including art 12(4) of the *International Covenant on Civil and Political Rights*.[270] I do not pursue that argument here, since

264 (2023) 97 ALJR 899, 912 [49] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), 917 [75] (Gordon J), 925 [114]–[115] (Edelman J), 935 [165] (Steward J dissenting).

265 Ibid 911 [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), 916 [70] (Gordon J), 923 [101] (Edelman J); *Alexander* (n 31) 578 [72] (Kiefel CJ, Keane and Gleeson JJ), 587 [120] (Gageler J).

266 *Alexander* (n 31) 598 [172], quoting *Trop v Dulles* 356 US 86, 101 (Warren CJ for Warren CJ, Black, Douglas and Whittaker JJ) (1958) ('*Trop*'). Justice Edelman also cited this passage with evident approval: ibid 613 [248].

267 *Alexander* (n 31) 597 [167].

268 Ibid 613 [248], citing *Trop* (n 266) 102 (Warren CJ for Warren CJ, Black, Douglas and Whittaker JJ).

269 *Alexander* (n 31) 613 [248].

270 This article states 'no one shall be arbitrarily deprived of the right to enter his own country': *International Covenant on Civil and Political Rights* (n 15). Obviously, if someone's citizenship were stripped away, this may indirectly deprive the person of the right to enter their (now former) country. The key word is *arbitrarily*. There would be lively argument regarding whether depriving a person of their citizenship because of the length of time they have spent outside Australia amounts to arbitrary deprivation. The English Court of Appeal did not think that denial of the vote to a United Kingdom citizen who had lived overseas for at least 15 years was 'arbitrary': *Preston* (n 11) 720 [90] (Mummery LJ, Sullivan LJ agreeing at 721 [98], Keene agreeing at 721 [99]); Regina Jefferies, Jane McAdam and Sangeetha Pillai, 'Can We Still Call Australia Home? The Right to Return and the Legality of Australia's COVID-19 Travel

Australia has not adopted the content of this multilateral treaty (yet) into Australian law.[271] Its utility in practically defending rights in Australia is thus questionable, given the High Court's typical view on the relevance of international law to domestic legal issues.[272]

VII CONCLUSION

This article has discussed questions regarding the constitutionality of existing provisions forbidding some expatriates from voting in Australian elections. It has concluded such provisions are potentially vulnerable to constitutional challenge, given they undermine the universality of adult suffrage, and deny a substantial number of Australian citizens a key right closely linked with citizenship. This is not for a substantial reason, as past cases have required. It cannot be justified on the basis of fairness, or that it addresses an issue of electoral fraud or integrity. A claim that long-term expatriates have lost connection with Australia is unsubstantiated and anachronistic. Such assumption appears to be arbitrary, which has been fatal to the validity of other laws that have restricted the franchise. Canada has thrown out laws which removed the right of long-term expatriates to vote in Canadian elections. Australian and Canadian democratic models are materially similar.

The article has then considered an alternative option, where the Commonwealth Parliament simply stripped citizenship from long-term expatriates. It is doubtful whether Parliament has a head of power to do so. While it has power with respect to 'aliens', it cannot simply define anyone it wishes to be an alien. The High Court has accepted Parliament has broad power to define a person to be an alien, including an Australian born person, but the power is limited. In *Singh*, it was because the person had non-Australian citizen parents; in *Alexander*, it was because the person had acted in such a way as to demonstrate non-allegiance with Australia or through actions inimical to Australia and Australian values. It is hard to equate long-term absence with either of these. Parliament may not be able to rely on s 51(xix) to strip citizenship from a long-term absentee. It potentially could utilise other heads of power such as s 51(xxix) or the inherent nationhood power, but this is untested. If such a power is exercised by a Minister, the recent decision in *Alexander* suggests real difficulties regarding ch III of the *Australian Constitution* given the punitive nature of the power.

Restrictions' (2022) 27(2) *Australian Journal of Human Rights* 211, 223; Michelle Foster and Jade Roberts, 'Manufacturing Foreigners: The Law and Politics of Transforming Citizens into Migrants' in Catherine Dauvergne (ed), *Research Handbook on the Law and Politics of Migration* (Edward Elgar, 2021) 218, 225.

271 *Tajjour v New South Wales* (2014) 254 CLR 508, 567 [96]–[98] (Hayne J), 606 [248]–[249] (Keane J).

272 Ibid 567 [96]–[98] (Hayne J), 606 [248]–[249] (Keane J); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 32–4 [98]–[102] (McHugh and Gummow JJ).