SUPPLEMENT TO CHAPTER 9, §3

# *Rowe v Electoral Commissioner*
[2010] HCA 46

In order to vote at a federal election a qualified person must appear as an elector on the Electoral Roll for a Division in which (exceptions aside) he or she is resident. Enrolment has been compulsory since 1911. At most elections called since the 1930s, eligible adults who have not previously regularised their enrolment (either after reaching the voting age, or by re-enrolling after removal from the rolls or transferring their enrolment following a change of address) have had a window of time to do so, between the announcement of the election and the closing of the rolls.

Between 1934 and 1983 this was never less than five days and depended on an executive practice of delaying the issue of writs following the election announcement. The closing of the rolls the day after Prime Minister Malcolm Fraser called the March 1983 election prompted the plaintiffs in *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 to challenge their exclusion from the vote. They had lodged applications after the rolls closed but prior to the election and were included on the State electoral roll but excluded by Commonwealth law from the federal roll until after the election had taken place. The plaintiffs based their challenge, which was unsuccessful, on section 41 of the Constitution, pointing to their inclusion on the State roll (see Chapter 9, §3(b)).

The circumstances of the March 1983 election also led to the grace period being put on a statutory basis, as a result of amendments passed later in the same year. The cut-off for the Australian Electoral Commission considering enrolment and transfer claims was uncoupled from the date of issue of the writs and fixed at the date of closure of the rolls. A seven day gap was inserted between these two steps in the electoral process.

Australian voters made liberal use of the statutory grace period to regularise their enrolment. At each of the eight subsequent federal elections held before 2007, the Electoral Commission processed enrolment and transfer claims for hundreds of thousands of voters after the election announcement.

In 2006 the Howard government introduced significant amendments to Commonwealth electoral law with the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth). As well as introducing the blanket ban on prisoner voting successfully challenged in *Roach v Electoral Commissioner* (2007) 233 CLR 162 (see Chapter 9, §3(c)), the Act removed the grace period for new enrolments and abbreviated it for transfers. A new s 102(4) of the *Commonwealth Electoral Act 1918* (Cth) precluded the processing of enrolment claims between the issue of the writs and the close of polling, while a new s 102(4AA) stopped transfers being processed between the close of the rolls and the close of polling. The date for the close of the rolls was fixed at the third working day after the issue of the writs by a new s 155.

Shannen Rowe reached her 18th birthday 33 days before the writs were issued for the August 2010 election and did not submit a claim for enrolment until four days after their issue. Her fellow plaintiff, Douglas Thompson, moved address from the Division of Wentworth to the Division of Sydney in March 2010 and lodged a transfer claim three days after the issue of the writs. On 26 July 2010 they sought a declaration from the High Court that the 2006 amendments were invalid, with the result that the law reverted to the pre-2006 statutory grace period of seven days. The Electoral Commission indicated to the High Court that it could process claims from the plaintiffs and people in a like position in time for the 2010 election, should the Court find in favour of the plaintiffs, if the Court's decision was

available by 6 August. The Electoral Commission estimated this might affect approximately 100,000 people who lodged claims in the seven day period after the writs were issued. The matter was heard on 4 and 5 August and the orders of the Court were published the following day. The Court's reasons were published later, on 15 December 2010.

The plaintiffs' challenge was successful (French CJ, Gummow, Crennan and Bell JJ, with Hayne, Heydon and Kiefel JJ dissenting). The amendments to enrolment procedure were held to exceed the limits imposed by ss 7 and 24 of the Constitution on Parliament's powers under some combination of ss 8, 9, 10, 30, 31 and 51(xxxvi) to make laws about the qualifications of electors and the conduct of federal elections.

The High Court has repeatedly observed that the Constitution is silent as to many aspects of the system of representative government, leaving the details to be filled in by Parliament from time to time. *Rowe* was another case testing the irreducible minimum content of the words "directly chosen by the people". The reasoning in *Lange*, *Mulholland* and *Roach* showed that those words require more than merely an electoral system that affords direct popular choice. Also implicit, according to *Mulholland* and *Roach*, is that the electoral process must satisfy the requirements of the system of representative government prescribed by the Constitution. The content of that more broadly worded criterion of validity is a question of degree over which the majority and minority divided in *Rowe*. That division of opinion was reflected in the latitude individual judges were prepared to grant the Parliament when legislating about the entitlement to vote at federal elections.

French CJ began by discussing what he called the "constitutional mandate" in ss 7 and 24. He indicated that it had an evolving content, which was influenced by legislative developments and which, in its democratic character, was to some extent irreversible.

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**French CJ**: The Constitution requires that members of Parliament be "directly chosen by the people". That requirement is "constitutional bedrock" [*Roach v Electoral Commissioner* (2007) 233 CLR 162 at 198 per Gummow, Kirby and Crennan JJ]. It confers rights on "the people of the Commonwealth" as a whole [*Langer v The Commonwealth* (1996) 186 CLR 302 at 343 per McHugh J]. It follows, as Isaacs J said in 1912, that: "The vote of every elector is a matter of concern to the whole Commonwealth" [*Smith v Oldham* (1912) 15 CLR 355 at 362].

Individual voting rights and the duties to enrol and vote are created by laws made under the Constitution in aid of the requirement of direct choice by the people.

An electoral law which denies enrolment and therefore the right to vote to any of the people who are qualified to be enrolled can only be justified if it serves the purpose of the constitutional mandate. If the law's adverse legal or practical effect upon the exercise of the entitlement to vote is disproportionate to its advancement of the constitutional mandate, then it may be antagonistic to that mandate. If that be so, it will be invalid. Laws regulating the conduct of elections, "being a means of protecting the franchise, must not be made an instrument to defeat it" [*Kean v Kerby* (1920) 27 CLR 449 at 459 per Isaacs J]. As the Court said in *Snowdon v Dondas* [(1996) 188 CLR 48 at 71]: "The importance of maintaining unimpaired the exercise of the franchise hardly need be stated" ...

The content of the constitutional concept of "chosen by the people" has evolved since 1901 and is now informed by the universal adult-citizen franchise which is prescribed by Commonwealth law. The development of the franchise was authorised by ss 8 and 30 of the Constitution, read with s 51(xxxvi). Implicit in that authority was the possibility that the constitutional concept would acquire, as it did, a more democratic content than existed at Federation. That content, being constitutional in character, although it may be subject to adjustment from time to time, cannot now be diminished. In *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* [(1975) 135 CLR 1] its evolution was linked in

the judgment of McTiernan and Jacobs JJ to "the common understanding of the time on those who must be eligible to vote before a member can be described as chosen by the people of the Commonwealth" [135 CLR at 36]. Their Honours said [135 CLR at 36]: "For instance, the long established universal adult suffrage may now be recognized as a fact and as a result it is doubtful whether, subject to the particular provision in s 30, anything less than this could now be described as a choice by the people."

The term "common understanding", as an indication of constitutional meaning in this context, is not to be equated to judicial understanding. Durable legislative development of the franchise is a more reliable touchstone. It reflects a persistent view by the elected representatives of the people of what the term "chosen by the people" requires.

Gleeson CJ adverted to the irreversible evolution of "chosen by the people" in *Roach v Electoral Commissioner* when he answered in the negative the question: "Could Parliament now legislate to remove universal adult suffrage?" [233 CLR at 173]. The reason for that negative answer was to be found in ss 7 and 24 of the Constitution. Although those sections did not require universal adult suffrage in 1901, it had become, as McTiernan and Jacobs JJ had said in *McKinlay*, a "long established" fact [135 CLR at 36]. The Chief Justice concluded that "in this respect, and to this extent, the words of ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote" [233 CLR at 174] ...

While the term "directly chosen by the people" is to be viewed as a whole, the irreversibility of universal adult-citizen franchise directs attention to the concept of "the people". Analogous considerations may apply to the term "chosen" and to the means by which the people choose their members of Parliament. Where a method of choice which is long established by law affords a range of opportunities for qualified persons to enrol and vote, a narrowing of that range of opportunities, purportedly in the interests of better effecting choice by the people, will be tested against that objective. This is not to suggest that particular legislative procedures for the acquisition and exercise of the entitlement to vote can become constitutionally entrenched with the passage of time. Rather, it requires legislators to attend to the mandate of "choice by the people" to which all electoral laws must respond. In particular it requires attention to that mandate where electoral laws effect change adverse to the exercise of the entitlement to vote. In this case it is the alteration of a long-standing mechanism, providing last-minute opportunities for enrolment before an election, that is in issue.

French CJ said that while *Roach* concerned a distinct issue of prisoner disqualification the approach taken by the majority was "instructive" for the present case. In doing so he (like Gummow and Bell JJ) assimilated Gleeson CJ's requirement for a "rational connection" and a "substantial reason" with the proportionality approach adopted by the plurality in that case.

**French CJ:** Gummow, Kirby and Crennan JJ also spoke of the need for a "substantial reason" to justify an exception to universal adult-citizen franchise. That requirement would be satisfied by an exception "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government" [233 CLR at 199]. That formulation, their Honours said, approached the notion of "proportionality", for [233 CLR at 199]: "What upon close scrutiny is disproportionate or arbitrary may not answer to the description reasonably appropriate and adapted for an end consistent or compatible with observance of the relevant constitutional restraint upon legislative power."

The present case concerns an electoral law of a procedural or machinery character. It does not in terms carve out an exception to the franchise. It does, however, have a substantive effect upon entitlements to vote and so affects the exercise of the franchise.

... Where, as in the present case, the law removes a legally sanctioned opportunity for enrolment, it is the change effected by the law that must be considered. It is not necessary first to determine some baseline of validity. Within the normative framework of a representative democracy based on direct choice by the people, a law effecting such a change causes a detriment. Its justification must be that it is nevertheless, on balance, beneficial because it contributes to the fulfilment of the mandate. If the detriment, in legal effect or practical operation, is disproportionate to that benefit, then the law will be

invalid as inconsistent with that mandate, for its net effect will be antagonistic to it. Applying the terminology adopted in *Roach*, such a law would lack a substantial reason for the detriment it inflicts upon the exercise of the franchise. It is therefore not sufficient for the validity of such a law that an election conducted under its provisions nevertheless results in members of Parliament being "directly chosen by the people".

The system for registering as a voter by enrolment is entirely created by statute. In rejecting the need for "some baseline of validity", French CJ's approach of focussing on "the alterations effected by the law to existing opportunities to enrol and update enrolment" seemed to accord with the approach of Kirby J in *Mulholland*. In that case Kirby J assessed the validity of aspects of the party registration legislation against constitutional requirements and did not insist on the identification of a "pre-existing right" in order to activate the constitutional guarantee. In *Rowe* the validity of the 2006 amendments to "late" enrolment procedures was assessed regardless of the fact that previous procedures had a statutory basis.

French CJ noted that the two main government rationales for the 2006 amendments, contained in a majority report of the Parliament's Joint Standing Committee on Electoral Matters (JSCEM), were averting the future possibility of fraud so as to ensure "the Electoral Roll retained a high degree of accuracy and integrity, while reminding electors that the responsibility for ensuring that the Electoral Roll is updated in a timely manner rests with them". He accepted that these ends were "legitimate in terms of the constitutional mandate". But the provisions in question were not proportionate to the achievement of these ends.

**French CJ:** Importantly, there was nothing to support a proposition, and the Commonwealth did not submit otherwise, that the impugned provisions would avert an existing difficulty of electoral fraud. Nor was there anything to suggest that the AEC had been unable to deal with late enrolments. Indeed, it had used the announcement of an election, coupled with the existence of the statutory grace period, to encourage electors to enrol or apply for transfer of enrolment in a context in which its exhortations were more likely to be attended to and taken seriously than at a time well out from an election.

The plaintiffs, in their submissions, pointed to existing mechanisms to ensure the integrity and accuracy of the Rolls. These included the CRU process, the RMANS Address Register and more stringent proof-of-identity requirements introduced in connection with the 2006 amendments and reflected in s 98AA of the CEA and regs 11A and 12 of the Electoral and Referendum Regulations 1940.

The constitutional legitimacy of measures calculated to ensure that people who are not entitled to vote do not vote was, of course, accepted by the plaintiffs. They pointed, however, to the absence of any evidence of the existence prior to the Amendment Act of a significant number of persons voting who were not entitled to vote. They contrasted that absence with the evidence of the effect of the impugned provisions in preventing an estimated 100,000 citizens from being enrolled or transferring their enrolment.

The legal effect of the impugned provisions is clear. They diminish the opportunities for enrolment and transfer of enrolment that existed prior to their enactment. These were opportunities that had been in place as a matter of law for eight federal elections since 1983. They were consistent with an established executive practice which provided an effective period of grace for nearly 50 years before 1983. The practical effect of the Amendment Act was that a significant number of persons claiming enrolment or transfer of enrolment after the calling of an election could not have their claims considered until after the election. That practical effect cannot be put to one side with the observation, which is undoubtedly correct, that those persons were so affected because of their own failures to claim enrolment or transfer of enrolment in accordance with their statutory obligations. The reality remains that the barring of consideration of the claims of those persons to enrolment or transfer of enrolment in time to enable them to vote at the election is a significant detriment in terms of the constitutional mandate. That detriment must be considered against the legitimate purposes of the

Parliament reflected in the JSCEM Report. Those purposes addressed no compelling practical problem or difficulty in the operation of the electoral system. Rather they were directed to its enhancement and improvement. In my opinion, the heavy price imposed by the Amendment Act in terms of its immediate practical impact upon the fulfilment of the constitutional mandate was disproportionate to the benefits of a smoother and more efficient electoral system to which the amendments were directed.

In their joint judgment, Gummow and Bell JJ said that ss 7, 24 and related provisions were drawn with an appreciation of pre-1901 history and reflected a constitutional commitment to the people sharing in governmental power through the franchise.

**Gummow and Bell JJ:** In the immediate past lay the development of representative government in the Australian colonies. This had two presently relevant aspects. The first was a rapid growth in the development of universal and uniform adult male suffrage divorced from property qualifications, and direct election for the lower houses of the legislatures. In the United Kingdom, on the other hand, at the beginning of the 20th century, it was possible to distinguish seven species of franchise, those identified as the property, freemen, university, occupation, household, lodger and service franchises.

... Quick and Garran wrote, with respect to the Senate [*The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901), 418]:

> The principle of popular election, on which the Senate of the Commonwealth is founded, is more in harmony with the progressive instincts and tendencies of the times than those according to which the Senate of the United States and the Senate of Canada are called into existence. In the Convention which drafted the Constitution of the Commonwealth not a single member was found in favour of a nominated Senate. It was generally conceded, not only that a chamber so constituted would be of an obsolete type and repugnant to the drift of modern political thought, but that, as a Council of States, it would be an infirm and comparatively ineffective legislative body.

This emphasis by Quick and Garran (who dedicated their work to "the people of Australia") upon the progressive instincts and tendencies of modern political thought retains deep significance for an understanding of the text and structure of the Constitution.

It has been well said that one of the assumptions as to "traditional conceptions" upon which the Constitution was framed was the rule of law [*Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193]. The law included not only the English common law which the colonies had received, and which, of its nature, can never be wholly static, but also the enacted law. What is of enduring and immediate significance is that, whatever else it involves, "the rule of law" posits legality as an essential presupposition for political liberty and the involvement of electors in the enactment of law ...

The significance of developments in the period before the adoption of the Constitution is further considered in the reasons of Crennan J ... We agree that the term "chosen by the people" had come to signify the share of individual citizens in political power by the means of a democratic franchise.

This history influenced Gummow and Bell JJ to regard the end or purpose of electoral laws as "making elections as expressive of the will of the majority of the community as proper practical considerations permit". Applying a proportionality test and taking account of the practical effects of the 2006 amendments on the capacity for qualified persons to participate in an election, they found the provisions invalid.

**Gummow and Bell JJ:** The agreed facts show that with respect to the general elections conducted in 1993, 1996, 1998 and 2001, the numbers of enrolments (and re-enrolments) and transfers of enrolment in the period between the issue of the writs and the closing dates for claims to enrol or transfer were, respectively, 377,769; 376,904; 355,189 and 373,732; and that the total enrolments were, respectively, 11,348,967; 11,655,190; 12,056,625 and 12,636,631. For the 2004 general election there were 423,993 enrolment transactions before the Rolls closed and 168,394 claims were lodged after they closed. For

the 2007 election, when the changes made by the 2006 Act were in operation, there were 279,469 enrolment transactions before the Rolls closed and 100,370 claims lodged after they closed.

Day by day data on enrolment transactions in the period from the issue of the writs for the 1998 and 2001 general elections showed that the number of new claims and re-enrolments increased daily during the then applicable seven day period (except on Saturday and Sunday) and 50 percent of claims were made on the last day.

With respect to the general election called for 21 August 2010, approximately 508,000 claims were received between the announcement of the election and the current deadlines of 8pm on the day of issue of the writs (for new enrolments) and 8pm on the day of the close of the Rolls (in the case of transfers and other applications). As already noted, a large number of claims were received after these deadlines but within a seven day period from the date of the writs, the date for the close of the Rolls before the 2006 Act.

... The interrelation, already described, between the requirements for enrolment and those for voting entitlement is such that failure to comply with the former denies the exercise of the latter by persons otherwise enfranchised. In this way, the method of choice adopted by the legislation fails as a means to what should be the end of making elections as expressive of the popular choice as practical considerations properly permit. The requirements operate to achieve disqualification in the sense used in *Roach*.

... The position then is reached that the 2006 Act has the practical operation of effecting a legislative disqualification from what otherwise is the popular choice mandated by the Constitution. It is no sufficient answer, as Western Australia submits, that *Roach* is not reached because the disqualification does not apply to those who have promptly enrolled or claimed transfer of enrolment and only applies to those who have failed to do so, and this state of affairs is the product of permissible legislative choice. Rather, the relevant starting point is to ask whether, *at the time when the choice is to be made by the people*, persons otherwise eligible and wishing to make their choice are effectively disqualified from doing so.

If so, the question then becomes whether, as Gleeson CJ put it in *Roach*, there has been broken the rational connection necessary to reconcile the disqualification with the constitutional imperative, and whether, as Gummow, Kirby and Crennan JJ put it in the same case [233 CLR at 199]:

> Is the disqualification for a 'substantial' reason? A reason will answer that description if it be reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government. When used here the phrase 'reasonably appropriate and adapted' does not mean 'essential' or 'unavoidable'. Rather, as remarked in *Lange*, in this context there is little difference between what is conveyed by that phrase and the notion of 'proportionality' ...

... A legislative purpose of preventing ... fraud "before it is able to occur", where there has not been previous systemic fraud associated with the operation of the seven day period before the changes made by the 2006 Act, does not supply a substantial reason for the practical operation of the 2006 Act in disqualifying large numbers of electors. That practical operation goes beyond any advantage in preserving the integrity of the electoral process from a hazard which so far has not materialised to any significant degree.

Crennan J found the 2006 amendments invalid for essentially the same reasons as her colleagues in the majority.

In *Rowe* the respondents put forward a "personal responsibility" argument, to undermine reliance for constitutional purposes on the opportunity for "late" enrolment when an election has been called. Like French CJ and Crennan J, Gummow and Bell JJ were not inclined to adopt a punitive mindset and took a pragmatic approach to the existence of a criminal sanction.

**Gummow and Bell JJ:** Enrolment of qualified persons is encouraged by s 101, which deals with compulsory enrolment and compulsory transfer of enrolment. The section imposes a criminal sanction

> for failure to comply within 21 days of entitlement to placement upon the Roll for any Subdivision of an Electoral Division, whether by way of initial enrolment (as in the case of the first plaintiff) or by way of transfer of enrolment (as in the case of the second plaintiff).
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> However, common experience suggests a range of causes of human conduct, beyond careless disregard of civic responsibility, which may lead to untimely enrolment or transfer of enrolment. Hence, s 101(7) is an important provision in this compulsory system ... Section 101(7) provides: "Where a person sends or delivers a claim for enrolment, or for transfer of enrolment, to the Electoral Commissioner, proceedings shall not be instituted against that person for any offence against subsection (1) or (4) committed before the claim was so sent or delivered."
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> The plaintiffs are in that position, having made late claims, and proceedings may not be instituted against them for any offence under s 101.

By contrast, all three dissenting judges placed emphasis on the failure of the plaintiffs and others in their position to fulfil the legal obligation of timely enrolment, attributing primary responsibility for their exclusion from voting to their inaction rather than the changes made by Parliament in 2006. Hayne J, quoting extensively from past judgments of Gummow J, cautioned against over-specifying the form of representative government mandated by the Constitution. He said "there is no foundation for identifying maximum participation as an element of the constitutionally prescribed system of government", a proposition echoed by Kiefel J in her dissent. The changes to the cut-off dates were in any case, according to Hayne J, reasonably appropriate and adapted to averting potential enrolment fraud and to encouraging timely observance of obligations to enrol, ends which were compatible with the constitutionally prescribed system of representative government. Hayne J said that the "absence of proven instances of fraud does not demonstrate that no new or different step can or should be taken to prevent it" and whether to do so was "a matter of judgment". He also found that the plaintiff had not demonstrated "that shortening the time for last minute enrolment could have no effect on the general level of compliance with the obligation to enrol, or transfer enrolment, forthwith upon becoming entitled to enrol, or required to transfer enrolment". Heydon J dismissed the challenge for similar reasons.

In her dissent Kiefel J took the opportunity to make significant and extensive remarks about the use of proportionality in Australian constitutional law. By contrast with the customary High Court caution and caveats about proportionality evident in the majority judgments, Kiefel J made clear her interest in this juridical concept which originated in Germany and is used so extensively in human rights and constitutional contexts around the world.

After finding "a range of discernible tests and the identification of various factors" in the Australian case law on proportionality, Kiefel J turned to the position in German and European Community law where, she said, "tests are more clearly defined and openly stated". Her judgment was effectively a rallying call to colleagues to let go of some of their caution about proportionality and engage in a more rigorous and transparent use of this tool in constitutional decision-making. This included greater attention to specifying the aspect of a right or freedom that is at stake in a given constitutional case.

> **Kiefel J:** In *Roach* Gleeson CJ expressed concern about the importation of the concept of proportionality into the Australian constitutional context. This was not the first occasion upon which concerns of this kind had been expressed. In *Mulholland* Gleeson CJ had observed that the use of the term "proportionality" has the advantage that it is commonly used in other jurisdictions, in similar fields of discourse, and the disadvantage that it has there taken on different elaborations which may be imported into a different legal context without explanation. However, despite his misgivings, his Honour said in *Roach* that he found aspects of the reasoning of the courts of other jurisdictions

"instructive" [233 CLR at 179]. Gleeson CJ's qualification in *Mulholland* is important. It requires that any derivation from the principle be critically analysed.

There is no doubt that the principle has a different status in other legal systems. In Germany and the European Community, to which I shall shortly refer, it has, respectively, the status of a constitutional principle and a general principle of wide application. The context in which it is applied, the extent to which account is taken of legislative discretion, and the extent to which legislation is required to conform to higher principles, may differ. Nevertheless, the question to which it is directed is common to these systems and our own. It is how to determine the limit of legislative power, where its exercise has the effect of restricting protected interests or freedoms. The methods used to test the principle of proportionality are rational and adaptable. Some bear resemblance to tests which have already been utilised in this Court. Further, proportionality is a principle having its roots in the rule of law. That rule is reflected in the judgments of the majority in *Roach*, which rejected the legislative disqualification as arbitrary and therefore disproportionate.

It should not be assumed that the application of identifiable tests of proportionality will lead to widening, impermissibly, the scope of review of legislation. The statement and explication of the tests employed in the assessment of proportionality should result in a more rigorous and disciplined analysis and render the process undertaken more clear. Once it is acknowledged that constitutional protections are not absolute, some test must be utilised in an assessment of proportionality, as has earlier been observed. It is preferable to identify how that assessment is undertaken in order to avoid the invocation of proportionality as a mere statement of conclusion.

The principle of proportionality has its clearest expression in Germany. In its earlier form, as a principle of necessity, it appeared at the end of the 19th century, as a response to excessive police powers in Prussia, although its origins are said to be more ancient. Its main purpose is the protection of fundamental freedoms. Professor Jürgen Schwarze explains that [*European Administrative Law* (Sweet & Maxwell, rev ed 2006), 679]: "where intervention by the public authorities is justified by reference to social objectives, such intervention must be limited by its effectiveness and consequently also by its proportionality in relation to the interest it seeks to defend."

There is general agreement that proportionality is tested by reference to three factors, or sub-principles, in Germany [Schwarze, *European Administrative Law* (Sweet & Maxwell, rev ed 2006), 687]:

(1) First, the state measures concerned must be *suitable* for the purpose of facilitating or achieving the pursued objective.
(2) Second, the suitable measure must also be *necessary*, in the sense that the authority concerned has no other mechanism at its disposal which is less restrictive of freedom …
(3) [Third], the measure concerned may not be *disproportionate* to the restrictions which it involves. (emphasis in original)

The Federal Constitutional Court of Germany has defined the principle in similar terms. The three sub-principles, or tests, of the principle of proportionality are: (1) suitability, (2) necessity and (3) proportionality in the strict sense.

A notable feature of Kiefel J's approach to proportionality, which is likely to make it less protective of rights and freedoms than some others, is what she called the "essential" requirement that any alternative and less restrictive measure put forward in argument for achieving the same identified end or purpose be "as practicable as the law in question". This was a major factor in Kiefel J's decision to dismiss the plaintiffs' challenge.

**Kiefel J:** It was put that, accepting that there may be some concerns of the kind mentioned, less restrictive means could have been adopted to address them. Thus, the test of reasonable necessity, as assessed by alternative practicable means, is raised, as it was in *Lange*. Such a test assumes that the measures are sufficiently restrictive to warrant a search for alternative means. This is a matter which will require separate consideration.

It was not suggested by the plaintiffs that the Electoral Act should make provision for persons to enrol or transfer enrolment at all times up to polling. Nor was it suggested that the legislation should provide that the AEC should undertake enrolments itself, which has been mooted elsewhere. The plaintiffs' case was that they should have been allowed to have their claims considered at any time during the seven days prior to closure of the Rolls, as the Act had permitted prior to the 2006 amendments.

It is not sufficient, for this test of proportionality, that an alternative legislative measure be identified. The Court must be able to conclude that that alternative measure is just as effective for the legislative purpose as the measures employed. Such a conclusion is not possible here. There is nothing to suggest that allowing the longer period before the close of Rolls would be just as effective for the purpose of encouraging compliance with enrolment obligations and, therefore, nothing upon which to conclude that the opinion of the JSCEM was wrong.