CASE NOTES

RE PEARSON; EX PARTE SIPKA[1]

Constitutional Law — Interpretation of Constitution s. 41 — Meaning of 'acquires right to vote' — Distinction between right to vote and right to be placed on electoral roll — Lack of constitutional protection of right to vote.

One of the several prices Australia has to pay for doing without a constitutional bill of rights is litigation designed to supply the deficiency by persuading the High Court to adopt strained and improbable interpretations of any section which can conceivably be transmuted by such means into a right of one kind or another.[2] This has happened twice in the last decade[3] over the meaning of section 41 of the Constitution, which runs as follows.

> No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

Quick and Garran, writing in 1900, observed with justice that the interpretation of section 41 was 'a matter of considerable difficulty'.[4] The source of the difficulty, as so often, is that the section does not express with honesty what it was intended to do. At the time of the debates leading up to the 1898 referendum on federation, South Australia was the only colony which had had the electoral enlightenment to extend the franchise to women. Whilst there was general agreement that, if federation came about, the federal franchise should be a matter for the Commonwealth Parliament, it was suspected with reason that a uniform Commonwealth franchise would not extend to women. If this possibility were left open, the women of South Australia might vote against federation in the forthcoming referendum. Hence the federalists sought a formula which would reassure the women of South Australia without upsetting everyone else. Section 41 was the ingenious result.

The effort to cover a particular situation in ostensibly general terms however inevitably produced obscurity. The main problem lies in the word 'acquires'. The nature of the difficulty is that it is not clear from section 41 alone what is the time reference within which this word is intended to operate. It is a reasonable reading of the section that the word 'has' refers to people who had a relevant right to vote on the date upon which the constitution came into effect, which was 1 January 1901. The word 'acquires' then refers to the possibility of acquiring a relevant right after federation. The question is whether this possibility of subsequent acquisition lasts as long as section 41 itself remains in the Constitution or expires at some earlier time. If the latter, when and why?

Quick and Garran[5] distinguished three possible interpretations of the section: (1) the right might be acquired at any time, under a State law passed at any time; (2) the right might be acquired at any time, but only under a State law passed before a federal franchise was fixed by the Commonwealth Parliament; (3) the right must be acquired by the person concerned before the federal franchise was fixed.

[1] (1983) 45 A.L.R. 1.

[2] In addition to next note *cf. Attorney-General of the Commonwealth (ex rel. McKinlay) v. Commonwealth* (1975) 135 C.L.R. 1.

[3] In addition to *Re Pearson* see *King v. Jones* (1972) 128 C.L.R. 221.

[4] Quick J. and Garran R. R., *The Annotated Constitution of the Australian Commonwealth* (1901) 484.

[5] *Ibid.* 486.

Possibility (1) is the most sweeping and literal interpretation of section 41. It leaves it open to any State at any time to change the effect of a federal franchise law, at all events by way of extending the franchise, in that State.[6] Questionable though this result might be in practice, a curiosity of the Australian Constitution (and one which would be eliminated by a properly drafted bill of rights) is that it nowhere prescribes that the federal franchise shall be uniform throughout the Commonwealth. The only indication of this expectation is to be found in the amendment section, section 128, which in the fourth paragraph uses the expression 'until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth'. Unless and until the High Court decided otherwise therefore, interpretation (1) was certainly a possibility.

Interpretation (2) takes into account section 30 of the Constitution, which runs as follows.

> Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once.

Interpretation (2) reads section 41 as necessarily qualified by section 30 and reads section 30 as empowering the States to make their own laws on the subject at any time up to the enactment of a Commonwealth franchise law. After that time the State law could go on operating indefinitely with effects on the federal franchise, and persons could continue to acquire rights to vote under it, but no State could enact any further law on the subject, except perhaps to repeal the existing law. This interpretation is less drastic than interpretation (1) but invites the same basic objection from a policy point of view, that it preserves a state power of variation of a federal franchise, even if to a less sweeping extent than (1).

Interpretation (3) also reads section 41 as a supplementation of section 30 but treats it more rigorously as a transitional provision only. It sees section 41 as applying only to persons who have acquired their relevant state right to vote before the enactment of a federal franchise, having therefore no application to any State rights to vote acquired after that date. In 1900 Quick and Garran came firmly to the conclusion that interpretation (3) was the correct one, although it had the potential for giving South Australian women a federal vote which their daughters might not enjoy. Fourteen years later, as Secretary of the Attorney-General's Department Garran adhered to this opinion.[7]

From the vantage point of 1983 it seems surprising that such important questions should have been left unlitigated until now. In 1972 in *King v. Jones*[8] the High Court held that the expression 'adult person' in section 41 meant a person not less than 21 years of age, as opposed to a person who had recently acquired a right to vote in state elections at the age of 18. Since the case was based primarily on the adult person argument, the question whether the right acquired was a relevant one under section 41 was not reached.

Which of Quick and Garran's possible interpretations, or any other, was the correct one was not litigated until *Re Pearson*[9] in 1983. The majority of six delivered two joint judgments, each being subscribed to by three members of the court.[10] There appears to be no material difference between the two. Each arrives without difficulty at Quick and Garran's interpretation (3) and each is clearly influenced by the questionable consequences which would follow under any other interpretation. Each proceeds to the conclusion that section 41 is now a dead letter, all the persons to whom it could have applied having passed from the scene.[11] (Even if someone in that category still survives, they are more than covered by the Commonwealth Electoral Act 1918.) From this point of view therefore *Re Pearson* is no more than a belated statement of what ought to have been settled a long time ago.

There are however a number of points of incidental interest. Some of them emerge from the dissenting judgment of Murphy J. As an interpretation of the Constitution Murphy J.'s judgment is not

[6] Such a statute would also affect the number of people voting in that State in a referendum under s.128, fifth paragraph, of the Constitution.

[7] *Opinions of Attorneys-General of the Commonwealth* i, opinion 542, 27 July 1914.

[8] (1972) 128 C.L.R.221.

[9] (1983) 45 A.L.R.1. A further (unsuccessful) argument based on the Commonwealth Electoral Act 1918 s.39B is not noted here.

[10] Gibbs C.J., Mason and Wilson JJ. to the one; Brennan, Deane and Dawson JJ. to the other.

[11] The first uniform federal franchise was enacted by the Commonwealth Franchise Act 1902.

persuasive. Nevertheless it affords him a vehicle for drawing attention to a number of unsatisfactory features of the present situation, some of which would be appropriately remedied by constitutional amendment. It also illustrates, unintentionally no doubt, the point made at the outset of this note, that where a matter properly the subject of a constitutional bill of rights is not protected in that form, it is inevitable that strained reasoning is going to be provoked, designed to distort some part of the Constitution into much the same thing. The money, time and effort expended on exercises of this kind would be better spent on the interpretation of a genuine bill of rights than on improbable exercises in legal ingenuity.

If one accepts the desirability of a constitutional protection of fundamental rights at all, surely some clear definition of the right to vote is basic to a western democracy. The right to vote however is not something which operates in a vacuum. It can be exercised effectively only if the State facilitates its exercise with an enormous logistical support mechanism. Every federal election is something of an organizational miracle. To those who know anything of the realities it is a source of constant astonishment that the Electoral Office manages, in the very short time usually left available to it, to get everything in place by the due date and to see the whole complex operation through as smoothly as it invariably does.

No doubt because of an awareness of the practicalities of organizing democratic elections on any scale, the majority judgments in *Re Pearson* distinguish clearly between the right to vote and the right to be placed on an electoral roll. The effective right is to be placed on an electoral roll, a point also made by Quick in a departmental opinion as long ago as 1912.[12] If up-to-date rolls are to be available across the country in time for polling day, it is simply impossible to keep them open until the last minute. For this reason the Commonwealth Electoral Act 1918 provides in section 45(a) that no-one who has not applied to be placed on the roll by 6 p.m. of the day on which the writs for the election are issued can vote at that election.

As Murphy J. points out,[13] the Prime Ministerial announcement that a federal election would take place in March 1983 was made late on the afternoon of Thursday 3 February and writs were issued on Friday 4 February 1983. This effectively meant that anyone who was entitled to be enrolled but had neglected to enrol had 24 hours at best to do so. He observes that section 32 of the Constitution contemplates a period of ten days after dissolution of the House of Representatives being allowed for issue of the writs, so that there is certainly no legal necessity for them to be issued with such speed. Murphy J. points out also that such a short time interval between dissolution and issue of the electoral writs is not usual. The timetable recommended to the Governor-General seems in fact to have been shaped more by political considerations than anything else.

Without being unduly sympathetic towards qualified voters who simply neglect to enrol, there is surely something to be said for giving them a last opportunity, and also for including as many voters as possible, by allowing a few further days after the public announcement of an impending dissolution before the writs are actually issued. This is not a matter of party politics. If the former Prime Minister at any stage thought he might derive political advantage from preventing voters getting on the roll, he miscalculated, for he was soundly defeated in the election. The point is that the very possibility ought to be placed beyond contemplation.

One last thing on *Re Pearson*. The quite common expression in the Constitution 'until the Parliament otherwise provides' is capable as a matter of construction of having more than one effect. It is to be noted that in the present case its appearance in section 30 of the Constitution was given the effect of terminating the operation of section 41. Presumably it has a similar effect on section 30 itself, so that if the Commonwealth Parliament were ever, whether intentionally or inadvertently, to abolish the federal franchise, State electoral laws would not fill the gap. This may be of only theoretical interest in the electoral context but one never knows what may happen in other parts of the Constitution. It is always possible to interpret 'until the Parliament otherwise provides' as meaning 'until and as long as etc.,' so that upon repeal of the federal law the transitional provision revives.

COLIN HOWARD*

[12] *Opinions of Attorneys-General of the Commonwealth* i, opinion 480, November 1912 (date incomplete).

[13] (1983) 45 A.L.R.1, 10.

* Hearn Professor of Law and Dean of the Faculty of Law in the University of Melbourne.