

# Not all Australian citizens are equal

Kim Rubenstein

The Age - August 30, 2007

Even as the High Court yesterday struck down the Federal Government's latest attempt to disenfranchise part of its citizenry, the right to vote is far from an axiomatic feature of Australian democracy.

The High Court's order in *Vickie Lee Roach v Electoral Commissioner and Commonwealth of Australia* prevents the Commonwealth from universally disenfranchising all prisoners on election day. But all that does is return matters to where they were, with categories of prisoners still unable to vote and no firm guarantees that voting rights on the part of all citizens cannot be abridged.

This is because there is no clear statement in the constitution about Australian citizens' right to vote. Indeed, there is nothing in the Australian Constitution about Australian citizenship, let alone rights that flow from citizenship.

No doubt the High Court's reasons will shed important light on the jurisprudence of voting (we only have the order at this stage, not the reasoning) but there is next to nothing in the Constitution the Court can fix upon to make citizens rest easier in their bed of Australian democracy.

Citizenship, the right to vote, the right to return and live in one's country, all, one who have thought, the very rudiments of democratic governance stand on very thin constitutional ground in Australia.

This is partly because Australians were British subjects at the time of Federation. But, more significantly, the drafters were conscious of what Sir Isaac Isaacs stated would be the "innumerable difficulties" that would flow from including the term citizen in our foundation document. Those difficulties revolved around the racist foundations of our Federation - a desire to exclude people who were not white. It was easier if it were left to administrative practice than law.

Indeed the Roach case highlights one of the many problems with the draft booklet *Becoming an Australian Citizen* (issued on Sunday by the government in anticipation of introducing a citizenship test to applicants for Australian citizenship). Its statements about what being an Australian means are just not accurate. It says that becoming an Australian citizen means that you have a right and duty to vote. In fact it proclaims "the right to vote is one of the most important liberties held by Australian citizens".

But it doesn't mention that it is not all Australian citizens. The result of yesterday's High Court decision is that the former provisions of the Commonwealth Electoral Act in force prior to the amendments are valid. So, an Australian citizen who is serving a sentence of three years or longer for an offence against the law of the Commonwealth or of a State or Territory; or has been convicted of treason or treachery and has not been pardoned is not entitled to have his or her name placed on or retained on any Roll or to vote at any Senate election or House of Representatives election.

Statements about voting rights are not the only area unclear in the booklet. It also says that "becoming an Australian citizen will mean that you will have the right to live in Australia". Earlier in the year before David Hicks was returned to Australia, the Prime Minister asserted that just because David Hicks is an Australian does not mean that he has a right to come to Australia.

Most Australians would presume Australian citizens have a right to live in this country and are rightly outraged at the idea that an Australian citizen may not have a right to enter Australia. Yet, in constitutional law terms, it is not clear whether Australians have a right to enter and live in Australia. Doesn't that sound preposterous? But it reflects on the failings of our current Constitution and the lack of clarity in this area in the law.

It is not only the Constitution that sends out mixed messages about Australian citizenship. In 2002 the government strongly supported the recommendations of the Australian Citizenship Council report of 2000 repealing the former section 17 of the Australian Citizenship Act 1948. It allowed Australians to take up a new citizenship without losing their Australian citizenship.

This was a statement of confidence in Australians - that a connection to Australia can be affirmed while one is outside Australia - it is a statement of inclusion rather than exclusion. In contrast, the desire to set up citizenship testing speaks more of exclusion. While there are clear benefits in encouraging permanent residents to have a basic knowledge of English and know about Australia and its values, setting up a citizenship test with questions that actually emphasise citizenship's uncertainty in Australian law should be avoided.

Policy makers should seriously look at Australia's foundation document to guarantee those rights mentioned in the booklet - all Australians should have a right to vote and reside in their country of citizenship.

*Kim Rubenstein is professor and director of the Centre for International and Public Law, ANU College of Law, Australian National University.*