



RESEARCH NOTE

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One Vote One Value — An Implied Right Too Far? (The High Court Decision in *McGinty & Ors v State of Western Australia* (1996))

The Australian Constitution does not express all that is intended by it: much of the greatest importance is implied¹

There has been much discussion in recent years about the role of the High Court in finding implied rights in the Australian Constitution that are not apparent from the actual text. In the recent case of *McGinty* the High Court reversed the trend of finding implied rights and held by a majority of 4:2 that the Constitution did not imply that one vote must mean one value. In that case Deane J did not sit and the newly appointed judge Kirby J had not yet taken up his position on the bench

Facts:

The plaintiffs were ALP members of the Legislative Assembly of Western Australia and the Legislative Council of Western Australia. They challenged the validity of the Western Australian laws governing the distribution of electorates for both the Assembly and the Council. The basic premise of the challenge was that there was a considerable disparity between the number of enrolled voters in the metropolitan districts and the number of enrolled voters in the non-metropolitan districts. The disparities, argued the plaintiffs,

¹ Murphy, J. p668 of *McGraw-Hinds (Aust) Pty Ltd v Smith* (1978) 24 ALR 175 .

were caused by the *Acts Amendment (Electoral Reform) Act 1987* (WA) which did not evenly divide electorates and, given the shifts in population in the intervening years, culminated in a system whereby one electorate had 376% of the number of voters of another.² The plaintiffs argued that the disparities were so great as to undermine the principle of representative democracy.

The Commonwealth, New South Wales, Victoria, Queensland, South Australia and Tasmania all have legislation that requires electorates to be equal and vary only by a specified percentage tolerance. In the case of the Commonwealth, the maximum tolerance for the House of Representatives is 10%³.

Earlier precedents

In *Attorney-General (Cth)(Ex rel McKinlay) v The Commonwealth* (1975) 135 CLR 1, the High Court held that although 'something approaching numerical equality' of voters in each elector was important, it was not something that was necessarily found in the Constitution as a guarantee of representative democracy. However, since 1975 the High Court has been more inclined to

² Brennan CJ at p3. The North Metropolitan electorate had 34,161 voters at the 1993 election and the Mining and Pastoral electorate had 9,097 voters.

find implied rights in the Constitution⁴ and this perhaps encouraged⁵ the litigants in *McGinty* to run a similar argument to the one defeated in 1975. Had the argument in *McGinty* been accepted, *McKinlay* would have been either distinguished or overruled.

In the case *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 232, Mason CJ, Toohey and Gaudron JJ (who were all in the majority of the full court) held that the concept of representative democracy was embodied in the Constitution and as a result of this embodiment there was an implied freedom of communication about political matters. The minority in *Stephens* did not agree. For example, McHugh J found:

³ s66(3) of the *Commonwealth Electoral Act 1918*.

⁴ See for example, Bailey, P. *Righting the Constitution Without a Bill of Rights* (1995)FLR v23, 1–36.

⁵ Dawson J at p20 stated that the plaintiffs were encouraged by recent decisions of the High Court such as *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Cunliffe v The Commonwealth* (1994) 182 CLR 272.

...no support in the Constitution for an implication that the institution of representative government or representative democracy is part of the Constitution independently of the terms of sections 1,7,24,30 and 41...

The plaintiffs argued in *McGinty* that because representative democracy was implied in the Constitution, the concept of equality of voting power (one vote, one value) must also be implied.

What the Judges in *McGinty* Held

The Majority View

Chief Justice Brennan found that the Commonwealth Constitution did not contain any implication 'affecting disparities of voting power among the holders of the franchise for the election of members of a State Parliament'.

Dawson J noted that there were many different types of electoral systems and that the Constitution did not imply any particular system other than that it must include 'direct choice by the people through those eligible to vote at elections' His Honour also noted that there were no express requirements in the Constitution for equal electorates and in fact section 7 and section 24 (dealing respectively with the election of Senators and Members), when read together, contradicted the notion of equality. Those two sections required that Original States have no less than 6 Senators and no less than 5 Members — irrespective of the number of people residing in the State. His Honour commented that it was open to parliament to exercise its power to provide for electoral divisions that resulted in 'one vote, one value'.

McHugh J found that the principle of representative democracy was not contained in

the Constitution and even if it were, whatever representative democracy required at the turn of the century it did not now include a requirement for equal numbers of electors in electoral divisions.

Gummow J noted that the Constitution 'did not entrench the secret ballot, compulsory voting, preferential or proportional voting, nor any universal adult franchise'. His Honour also observed that the Constitution did not prescribe any authority or body to establish or monitor electoral divisions within States or Territories. His Honour accepted that there could be situations where the disparity in the numbers of electors could be so 'grossly disproportionate as to deny ultimate control by popular election' but found that in the present case this had not occurred. This latter point was made in some of the judgments in *McKinlay*.

The Minority View

Toohey J was able to distinguish the case of *McKinlay* on the grounds that the majority in that case did not address the issue of whether the requirements of a representative democracy included equality of voting power. Therefore, His Honour found it unnecessary to overrule *McKinlay*. He went on to conclude that provisions in the Western Australian legislation were at odds with the principle of representative democracy. His Honour found the principle of representative democracy to be implied in both the Commonwealth Constitution and the Constitution of Western Australia.

Gaudron J was of the opinion that section 24 did not require complete or even practical equality of electorate size. However, Her Honour felt that the malapportionment of voters in metropolitan and non-

metropolitan areas was so great as 'to be distinctly at odds with democratic standards revealed in the electoral laws of the Commonwealth and the other Australian States...

Conclusion

Whilst the judgment in *McGinty* makes it clear that there is no constitutional requirement for equal electorate size, this is not an absolute term. Whilst the expectation might be that one vote means one value, the High Court's majority judgment makes it clear that this is not constitutionally guaranteed. Clearly the High Court would find in some cases that a disparity in the number of electors between electorates could be so great as to offend the principle in the Constitution that representatives are elected directly by the people.

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