SUPREME COURT OF QUEENSLAND

CITATION:	*Mowen v Australian Electoral Commission* [2016] QCA 152
PARTIES:	**MOWEN, Bevan Alan** (applicant) **v** **AUSTRALIAN ELECTORAL COMMISSION** (respondent)
FILE NO/S:	CA No 13 of 2016 DC No 32 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Rockhampton – Unreported, 8 December 2015
DELIVERED ON:	10 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2016
JUDGES:	Fraser JA and Atkinson and Dalton JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal is refused.**
CATCHWORDS:	CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – GENERAL MATTERS – VALIDITY OF LAWS OF THE COMMONWEALTH – GENERALLY – where the applicant was convicted and fined in the Magistrates Court for failing to vote at a Federal election in contravention of s 245(15) of the *Commonwealth Electoral Act* 1918 (Cth) – where the applicant's appeal to the District Court was dismissed – where the applicant's core argument, in seeking leave to appeal to this court, seems to be that the *Commonwealth Electoral Act* 1918 (Cth) is invalid for inconsistency with the *Commonwealth Constitution* – whether there is any such inconsistency – whether the applicant has suffered any injustice – whether there is any reasonable argument that there is an error to be corrected in the findings of the proceedings below *Australia Act* 1986 (Cth), s 11 *Commonwealth Constitution*, s 30, s 34, s 80 *Commonwealth Electoral Act* 1918 (Cth), s 93, s 163, s 245 *Crimes Act* 1914 (Cth), s 4G, s 4H *District Court of Queensland Act* 1967 (Qld), s 118

Glennan v Commissioner of Taxation (2003) 77 ALJR 1195; (2003) 198 ALR 250; [2003] HCA 31, cited
Pearson v Thuringowa City Council [2006] 1 Qd R 416; [2005] QCA 310, cited
Re Finlayson; ex parte Finlayson (1997) 72 ALJR 73, cited
Rodgers v Smith [2006] QCA 353, applied
Till v Johns [2004] QCA 451, applied

COUNSEL: The applicant appeared on his own behalf
B Mumford for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Atkinson J and the order proposed by her Honour.

[2] **ATKINSON J:** The applicant, Bevan Mowen, brought an application pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) for leave to appeal against the judgment of the District Court. The judgment in the District Court was itself a decision on an appeal from a decision of the Magistrates Court.

[3] Leave to appeal should be granted where it is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected. As Keane JA held in *Rodgers v Smith*[1] quoting *Pearson v Thuringowa City Council*[2] the statutory restriction on appeals to this court:

> "serves the purpose of ensuring that this Court's time is not taken up with appeals where no identifiable error or injustice can be articulated by those litigants whose arguments have already been fully considered at two judicial hearings."

[4] Mr Mowen was convicted in the Magistrates Court in Rockhampton for failing to vote at a Federal election in contravention of s 245(15) of the *Commonwealth Electoral Act* 1918 (Cth). He was convicted and fined $170 and ordered to pay $93.40 for court costs and $150 for witness expenses. He was allowed one month to pay the fine.

[5] The applicant's appeal to the District Court was dismissed.

[6] The ground of the application for leave to appeal is said to be:

> "The *Commonwealth Electoral Act* 1981 age qualification requirements are contrary to the age qualifications expressly stated in the constitution and are therefore unconstitutional."

[7] The application for leave to appeal said that the orders he sought on the appeal are:

> "(a) the appeal be allowed
>
> (b) the void judgment be set aside

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1 [2006] QCA 353 at [4].
2 [2005] QCA 310 at [14].

(c) this matter be heard by a jury as my constitutional right under section 80

(d) Or this matter be moved to the Privy Council a court of appropriate jurisdiction as no person acting in the position of judge in this country can say they are constitutional and therefore qualified to hear this matter as is evidence by all judicial activism in previous decisions in the courts with regard this matter and all matters brought before the court by Bevan Mowen."

[8] In paragraph 4 of the application the applicant set out the reasons why the court should grant leave for him to appeal. They were:

> "Criminals cannot pass legislation, judges have a statutory duty to the law, all judges have either failed, refused or performed their duty poorly so as not to have done it at all.
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> It is hypocritical of the court to expect a decision to be appealed that is void ab initio, fails all rules of construction and interpretation and is unconstitutional.
>
> If any criminal conviction is put on my name I will be seeking defamation damages from [the District Court judge] and anyone else complicit in this criminal act.
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> Section 5 of the Constitution Act states the only laws that must be obeyed are the laws made under the constitution – Acts Interpretation Act 1901 Section 15A Construction of Acts to be subject to the constitution, every act shall be read and construed subject to the constitution and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power – Section 34 of the constitution which expressly states the full age of 21 years – Section 128 mode of altering the constitution, is only by referendum – neither the judicature nor the parliament can alter one word of the constitution without the approval of the people – no court or false parliament can order or force me to vote under an act that is unconstitutional in its terms."

[9] The applicant's outline of argument after referring to the material to be read sets out the following:

> "2. There is no enumerated power in the Constitution that allows either the judiciary or the parliament to alter the state compact without the change being put to the electors in a referendum this is the only way the constitution of the Commonwealth of Australia shall be altered.
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> 5. [*sic*] Public Officers refusing to do their statutory duty (persons purporting to be justices).
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> 6. Literal Rule for interpretation of a statute.
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> 7. Acts Interpretation Act 1901.
>
> 8. Breach of statutory duty."

[10] There appears to be no contest that the applicant did not vote in the Federal election on 7 September 2013. The learned Magistrate did not accept that he had a valid and sufficient reason for that failure and so convicted him. The applicant's argument before the learned Magistrate and on appeal to the District Court and on his application for leave to appeal to this court appear to concern the constitutionality of various matters. I shall endeavour to deal with each of those matters.

[11] One of the arguments appears to be an argument that the *Commonwealth Electoral Act* 1918 (Cth) is unconstitutional. This argument is based on the applicant's interpretation of s 34 of the *Commonwealth Constitution* (the Constitution) which relevantly states:

> "Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:
>
> (i) he must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector…"

[12] The respondent has identified that the applicant's core argument seems to be that s 93 of the *Commonwealth Electoral Act*, which relevantly provides that a person who is 18 years of age and an Australian citizen shall be entitled to enrolment to vote, is inconsistent with s 34 of the Constitution and therefore the *Commonwealth Electoral Act* is invalid in its entirety. There are two problems with this contention. Firstly, if one section of an Act is constitutionally invalid then the normal procedure would be to declare that section unconstitutional rather to invalidate the entire Act. Secondly, and more importantly, s 34 of the Constitution itself expressly says "until the Parliament otherwise provides". This section of the Constitution clearly provides that the Commonwealth Parliament can make laws with regard to the qualification to be a member of Parliament and can therefore validly change the age at which a person is eligible to be a member of Parliament. It has done so in s 163 of the *Commonwealth Electoral Act* and there is no merit in the argument that in doing so the Parliament has behaved in a way that is contrary to the Constitution. Section 30, which deals with suffrage, also contains the expression "until the Parliament otherwise provides" giving the Commonwealth Parliament power to legislate in this area.

[13] The next constitutional argument which the applicant seeks to make is that he was entitled to trial by jury under s 80 of the Constitution. Section 80 of the Constitution relevantly provides that the trial on indictment of any offence against a law of the Commonwealth shall be by jury. This was not a trial on indictment as the applicant was charged with a summary offence pursuant to s 4H of the *Crimes Act* 1914 (Cth) rather than an indictable offence under s 4G of the *Crimes Act*. Accordingly, there was no requirement under s 80 of the Constitution for the trial to be by jury.

[14] Another matter which the applicant appears to wish to raise is that the matter should be removed to the Privy Council. The Privy Council has no jurisdiction over matters in Australia and has not had any such jurisdiction since the *Australia Act* 1986 (Cth) was passed by the Commonwealth Parliament. Section 11 of the *Australia Act* abolished appeals to the Privy Council.

[15] On the hearing of this appeal, the applicant submitted that the matter fell within the original jurisdiction of the High Court under s 75 and s 76 of the Constitution. Section 77

explicitly gives the Commonwealth Parliament power to make laws, as it has done, investing State courts with federal jurisdiction.

[16] The learned Magistrate was satisfied that none of the matters raised in that court provided a valid and sufficient reason for failing to vote. The appeal against that decision was dismissed. There is no reason to conclude that the decision of the learned District Court judge dismissing the appeal was in error. The additional argument raised in this court is also completely lacking in merit.

[17] As the President held in *Till v Johns*[3] of clearly unmeritous arguments which seek to raise a constitutional issue:

> "This argument is so plainly without merit that it does not 'involve' a matter arising under the Constitution or involving its interpretation under s 78B *Judiciary Act* 1903 (Cth) requiring notices to be given to the Attorneys-General of the Commonwealth and the States: see the observations of Toohey J in *Re Finlayson; ex parte Finlayson*.[4]"

[18] As there has been no injustice to the applicant and nor is there any reasonable argument that there is an error to be corrected, the application for leave to appeal should be refused.

[19] **DALTON J:** I agree with the reasons of Atkinson J and with the proposed order.

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3 [2004] QCA 451 at [6].

4 (1997) 72 ALJR 73, 74, approved by the High Court in *Glennan v Commissioner of Taxation* (2003) 198 ALR 250, 253.