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# Bailing out Hanson and Ettridge

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## Introduction

One of the side issues that kept the Pauline Hanson and David Ettridge saga in the media was their unsuccessful attempts to obtain bail after being convicted in the District Court on fraud and electoral charges. David Field's article *The Perils of Pauline* in this edition discusses the reasons why Pauline Hanson and David Ettridge were ultimately released after their convictions were quashed. Their attempts to obtain bail were all unsuccessful. In the light of their eventual acquittal it is interesting to ask what is the nature of bail; when is it granted and why was it not granted in this case.

## The nature of bail

Most commonly bail involves releasing a person from detention who has been charged with an offence pending a hearing where that person cannot be brought before an appropriate court for a hearing promptly. Drawing on the presumption of innocence it is considered inappropriate to place a person behind bars until a hearing (which may take weeks) when they may in fact be innocent of the charge. In this way bail attempts to strike a balance between a person's entitlement to freedom prior to being put on trial for a crime and the need both to ensure the accused returns to answer the charges and to protect the public.

For more minor offences, such as driving under the influence of alcohol, bail may be determined by the police while on many occasions it is determined by a magistrate. For serious offences like murder bail is considered by the Supreme Court.

Bail may simply consist of an undertaking made by the person to return for a hearing or the deposit of money or other security by the accused or someone on behalf of the accused. Of course, if the person does not return for the hearing this deposit or security may be seized by the court. While on bail a person is obliged to ensure they do not commit any further offences; that they do not endanger the public; interfere with witnesses or otherwise obstruct the course of justice. Sometimes a person may be asked to report to police on a regular basis or surrender their passport (to make it difficult to leave the country to avoid capture) or to submit to a medical examination.

## When is Bail granted?

A court considers a number of factors when determining whether to grant bail. These factors include whether there is an unacceptable risk that the accused will not appear again; they are likely to commit further offences; they may endanger others or interfere with witnesses. A person may be refused bail for their own protection ie they have been charged with child molestation and live in a small commu-

nity. Other issues a court will consider include:

- The nature of and seriousness of the offence – for example a court will not commonly grant bail in the case of a murder charge.
- The accused's character.
- The associations of the accused – do they commonly frequent with felons?
- Home background – do they have a supportive home environment?
- Employment
- Criminal history
- Permanence of residence
- Previous bail history – evidence of offences while previously on bail will be prejudicial to a bail application by an accused.
- The strength of the case against the accused.

Bail may also be relevant (though rarely) after conviction when a custodial sentence (prison) is given and an appeal against the conviction is pending. It was this type of situation that the court considered in the Hanson/ Ettridge case. The courts have long recognized the fundamental difference between the considerations at issue when considering bail for a person who is presumed to be innocent and those where the person has been convicted beyond reasonable doubt.

## Why was bail not granted in this case?

One extraordinary aspect of this case is the number of appeals made in relation to bail. When Justice Chesterman refused the application for bail Hanson appealed to the Court of Appeal unsuccessfully. Hanson then made an appeal to the High Court of Australia before Justice Callinan who also rejected the appeal. A plaintiff will rarely be capable of funding this number of appeals pertaining to bail. What is most interesting about these applications is not only the discussion they contained about the principles of law that should be applied when considering bail in these circumstances but the indications given especially in the Court of Appeal decision suggesting that the appeal against the conviction had good prospects of success. Unfortunately for Hanson, based upon the principles of law relevant to bail her freedom would have to wait for the successful appeal against the convictions.



## Supreme Court

Chesterman J on the first of September 2003 heard the application for bail for Ettridge and Hanson while the appeals against the conviction were underway. Chesterman J acknowledged that the grant of bail pending an appeal was most unusual and required exceptional circumstances to succeed and was rarely granted. The reason for this reluctance was that a grant of bail after a conviction and before an appeal could have the effect of undermining the finality of a jury verdict 'so that the trial and conviction take on a provisional aspect and appear to be only a step in the process of conviction which would not conclude until judgement was given on an appeal. The law, on the contrary, has always regarded jury verdicts as final and only open to limited challenge.' A circumstance where there is some prospect of a successful application for bail at this stage is where there is an obvious error in the trial process that indicates the appeal will result in an acquittal or an order for a retrial. Chesterman J acknowledged this type of error is not often demonstrated on the materials provided to this type of application. The other situation where bail may be granted after a conviction is where the period of imprisonment is short and before the appeal is heard all or most of the imprisonment will have been served. As Hanson had been sentenced to three years jail the previous month this consideration would become relevant if it was likely the sentence would be substantially reduced.

Chesterman J considered the submissions on the chances of success on the appeal against the sentence and conviction. He concluded he could not form a concluded view about the chances of success of the appeals against conviction. He was also not prepared to conclude that the appeal against the sentence was highly likely to result in a reduction in the sentence such that it was appropriate that bail be granted.

## Court of Appeal

On the 9 September Pauline Hanson appealed against the decision of Chesterman J to refuse bail to the Court of Appeal constituted by justices Jerrard, Dutney and Philipides. The Court of Appeal discussed the relevant principles of law that they were obliged to apply. These reflected the principles discussed by Chesterman J.

In discussing the strength of the appeal against conviction that was underway the Court of Appeal made statements that suggested there were substantial grounds for optimism on that appeal. They suggested that the submissions by Pauline Hanson's counsel Mr Hampson QC 'represented a strong submission' about the nature of the membership of the political party Pauline Hanson's One Nation and that these arguments 'gained force' from the documents to which he referred the court. The court noted 'It is of concern that the Crown case, as expressed when resisting the application for bail, appears to be at odds with the documents in existence at the relevant time.' They commented that assuming the correctness of an aspect of the submission of Hampson QC 'The Crown case appears to ignore the contractual obligations and relationship objectively existing between the appellant and those other persons who paid the relevant fee and received the relevant membership card describing them as a member of One Nation. On the given assumption, Mr Hampson's submission that they were members (with admittedly limited) rights appears sound, appears in parts actually conceded in argument by the Crown, and would appear to

destroy the basis for Ms Hanson's conviction on any count.'

The Court of Appeal noted that they had not heard full argument from the Crown on some important aspects of the case. The Court concluded that if full arguments had been addressed to the Court 'we may have concluded that there were strong grounds for holding that the appeal would be allowed.' Without that full argument the Court concluded Pauline Hanson had not satisfied the required level of likelihood of success to justify bail.

## High Court

Justice Callinan sitting as a single judge refused the appeal against the Court of Appeal decision on the basis that he could not form a confident view about the prospects of a successful appeal against the conviction without a full understanding of the facts and arguments in the case. These details were not available to him. He also took the view that the High Court (especially a single judge) should not interfere with a matter within the discretion of a state court unless there were exceptional circumstances.

## Conclusion

The ability to obtain bail is important to avoid the circumstance that a person who is charged with an offence (and who is presumed to be innocent) must wait a substantial period of time in custody when they may be innocent. In the case of a non-serious offence bail may be readily obtained when the accused is not likely to re-offend or be a risk of flight. When a person has been convicted it is a difficult task to obtain bail. As discussed above although the Court of Appeal was clearly concerned (without the benefit of full arguments and details) that the conviction of Pauline Hanson was unsafe legal principle suggested this was not sufficient to justify granting bail. The public policy concerns about casting doubt about the finality of a conviction in this case overrode the concerns about the correctness of the decision.

Supreme Court – *Hanson v Director of Public Prosecutions; Ettridge v Director of Public Prosecutions* BC 200304970

Court of Appeal – *Pauline Lee Hanson v DPP (Qld)* BC 200305311

High Court – *Hanson v DPP (Qld)* BC 200306779

### Discussion Question

*Do you think courts should be more open to allowing bail for a person when a conviction for a crime is under appeal? If so, what limits would you apply to that approach?*