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Safeguarding the franchise

Background

5.1 Australia has enjoyed electoral legislation that has become increasingly inclusive. There have been a number of changes to make it more so occurring in the past 50 years, including extending the franchise to Aboriginal Australians (1962), allowing British Subjects to retain the franchise when Australian citizenship became the new qualification (1984), and extending the franchise to include certain Norfolk Islanders (1992).[1]

5.2 Similarly, other amendments allow itinerant electors to remain enrolled even thought they do not meet the one month residency qualification for enrolment. Australian citizens who depart for overseas, who have a fixed intention to return to Australia within a defined period (currently six years) may remain enrolled, or enrol from outside Australia under certain conditions, and provisional enrolment is now available to Australian citizens over 16 years of age and those who have applied for Australian citizenship.

5.3 However, it has been argued that certain amendments made to the *Commonwealth Electoral Act 1918* in 2006 by the then Government had the effect of disenfranchising some electors and potential electors.

5.4 In relation to enrolment entitlement, the High Court cases of *Rowe v Electoral Commissioner (Rowe)* and *Roach v Electoral Commissioner (Roach)* upheld challenges to certain amendments to the Commonwealth Electoral Act made in 2006. The matters considered by the High Court were the close of rolls period and prisoner entitlement, respectively.

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1 Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2007 federal election and matters related thereto* (2009), Commonwealth Parliament of Australia, pp. 40-41.

5.5 The Committee has found it necessary to consider these changes and subsequent cases as they impacted on the franchise of electors and potential electors. In the case of *Rowe* the High Court's findings directly impacted on the conduct of the 2010 federal election.

Rowe v Electoral Commissioner

5.6 The High Court case of *Rowe* was a challenge to the 2006 amendment of the Commonwealth Electoral Act that reduced the close of rolls period. Prior to this change, new electors could enrol, previous enrolled electors could re-enrol, and enrolled electors could update their details in the seven days following the issue of the writs. The close of rolls period for new enrolments, re-enrolments and detail updates had been seven days since the 1984 federal election.

5.7 However, as a result of the changes, for the 2007 and 2010 federal elections new enrolments and re-enrolments had to be received by the Australian Electoral Commission (AEC) by 8 pm on the day of the issue of the writs, and changes to enrolment details had to be received within three days of the issue of the writs.

5.8 The plaintiffs in *Rowe* were Shannen Rowe and Douglas Thompson. Ms Rowe turned 18 on 16 June 2010 and was not enrolled at the time the election was announced. She did not lodge her completed application with the AEC until Friday 23 July 2010, which under section 102(4) of the Commonwealth Electoral Act, at the time, was required to be lodged by 8 pm on Monday 19 July 2010.

5.9 Mr Thompson was enrolled in the electoral Division of Wentworth, but had moved to a new address in the Division of Sydney in March 2010. He had made unsuccessful attempts to lodge a claim of transfer form under section 101. He subsequently completed a form which was signed on 22 July and it was lodged by facsimile by his solicitor. However, the requirement under section 102(4AA) was that it be lodged by 8 pm on 21 July 2010.

5.10 Ms Rowe and Mr Thompson subsequently commenced court proceedings on 26 July 2010, challenging the constitutional validity of the legislative changes that shortened the close of rolls period.

5.11 On 6 August 2010, the High Court, in a 4-3 decision, ruled the shortening of the close of rolls period to be invalid, as it contravened sections 7 and 24 of the Australian Constitution. The summary of judgment stated:

> Chief Justice French, Justices Gummow and Bell, and Justice Crennan held that these provisions contravened the requirement, contained in ss 7 and 24 of the Constitution, that members of both Houses of the Commonwealth Parliament be "directly chosen by the people". The Chief Justice considered that the adverse legal and practical effect of the challenged provisions upon the exercise of the entitlement to vote was disproportionate to their advancement of the requirement of direct choice by the people. Justices Gummow and Bell, with whom Justice Crennan broadly agreed, held that the provisions operated to achieve a disqualification from the entitlement to vote and that the disqualification was not reasonably appropriate and adapted to serve an end compatible with the maintenance of the system of government prescribed by the Constitution. Justice Crennan held that the democratic right to vote is supported and protected by the Constitution.[2]

5.12 In contrast, Justice Heyden stated:

> The denial of enrolment and voting for an election, for a legitimate reason, does not intrude too far upon the system of voting. It is, and has always been, a part of that system. It reinforces the requirement that persons qualified to vote enrol in a timely way, which is conducive to the effective working of the system. No denial of the franchise is involved. It is not possible, logically, for the plaintiffs to suggest that these provisions are incompatible, but those allowing for a few more days for enrolment are not.[3]

5.13 As discussed earlier in the report, this resulted in new enrolments, re-enrolments and changes to elector details that had been received by the AEC by 26 July 2010 being processed. The AEC advised the Committee that this resulted in an additional 57 732[4] new electors on the electoral roll, and some 40 408[5] changes to enrolment details being made.

5.14 The Government subsequently gave effect to this decision in the *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act 2011*, which restored the close of rolls period to seven days following the issue of writs. This Act also made amendments to prisoner voting entitlements.

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2 High Court of Australia website, http://www.hcourt.gov.au/publications/judgment-summaries/2010-judgment-summaries, viewed 20 October 2010.

3 *Rowe v Electoral Commissioner* [2010] HCA 46, paragraph 489.

4 Australian Electoral Commission, Submission 87, p. 32.

5 Australian Electoral Commission, Submission 87, p. 32, Table 3.5.

Roach v Electoral Commissioner

5.15 The entitlement of prisoners to enrol, remain on the roll and vote was another issue considered by the High Court. In *Roach v Electoral Commissioner* [2007] HCA 43, Ms Vicki Roach challenged the constitutional validity of the 2006 amendments to the Commonwealth Electoral Act that changed the voting entitlement for prisoners. The effect of the amendments removed the entitlement for people serving less than a three year term of imprisonment to vote at federal elections. All prisoners were thus excluded from voting.

5.16 In 2004, Ms Roach was sentenced to six years imprisonment for burglary, including negligent injury and endangerment. She argued that she should have the right to vote.

5.17 In *Roach*, in a 4-2 judgement, the High Court ruled on 26 September 2007, that:

> ...the 2006 amendments were inconsistent with the system of representative democracy established by the Constitution. The Court held that voting in elections lies at the heart of that system of representative government and disenfranchisement of a group of adult citizens without a substantial reason would not be consistent with it.[6]

5.18 It was in 2011, three years after the *Roach* judgement, that the *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act 2011* gave effect to this principle, restoring the right to vote to some prisoners serving less than three-year terms. However, this means that persons in similar situations to Ms Roach would still be excluded if serving more than three years in prison.

5.19 Prisoners serving a term of imprisonment of less than three years[7] now have the option to remain enrolled for the Subdivision for which they were enrolled when they began their sentence. If not already enrolled, a prisoner serving less than three years is entitled to enrol for:

(a) the Subdivision for which the person was entitled to be enrolled at that time;

(b) if the person was not so entitled, a Subdivision for which any of the person's next of kin is enrolled;

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6 High Court of Australia website, http://www.hcourt.gov.au/assets/publications/judgment-summaries/2007/hca43-2007-09-26.pdf, viewed 3 June 2011.

7 *Commonwealth Electoral Act 1918*, s. 93(8AA).

(c) if neither of paragraphs (a) and (b) is applicable, the Subdivision in which the person was born; and

(d) if none of the preceding paragraphs is applicable, the Subdivision with which the person has the closest connection.[8]

Committee conclusion

5.20 The Committee took the view that the *Rowe* and *Roach* cases are important, as they demonstrated that there are processes in place to help safeguard the enrolment and voting franchises.

5.21 The Committee believes that they also signal to governments that protecting the enrolment and voting franchises must be at the core of any reforms to Australia's electoral system.

8 *Commonwealth Electoral Act 1918*, s. 96A