

Reinstatement to the roll

- 6.1 The High Court decisions in *Rowe* and *Roach* drew certain constitutional limits on the ability of the Commonwealth Parliament to legislate with respect to the franchise. The Opposition members of the Committee note that *Rowe* established that a sentence of three years or more acts to disenfranchise a prisoner, but believes that one year is more appropriate.
- 6.2 As discussed in Chapter 5, the Government has since given effect to these High Court decisions with the *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act 2011*. However, there are other significant changes made in 2006 by the then Government that have now been in place for two elections (2007 and 2010). Opposition members believe these changes improved the integrity of the electoral roll by ensuring electors who no longer lived at a particular address were removed from the electoral roll.
- 6.3 One such matter is the requirements for the reinstatement of electors to the electoral roll. The Committee previously examined this issue during its review of the 2007 federal election.
- 6.4 The Commonwealth Electoral Act previously provided less restrictive provisions for the reinstatement of voters to the electoral roll – and consequently the admission of their declaration vote to the count – in certain prescribed circumstances. However, the effects of the 2006 legislative changes which tightened restrictions on reinstatements are again evident in the 2010 federal election. In this chapter, the Committee seeks to examine both the supporting and alternate views presented in submissions and evidence to the current inquiry, along with updated data that shows the effects of the changes being discussed.

Background

- 6.5 Electors who attend polling places in order to cast a vote in an election or referendum generally do so because they are required by law to participate because of Australia's compulsory enrolment and voting system and because they believe that they are correctly enrolled and want to cast their votes.
- 6.6 In most cases they are correctly enrolled, and their names are marked against the certified list at the polling place. They are questioned as to whether they have previously voted and if they answer 'no' are handed ballot papers. Most cast their vote with the expectation that it will be counted and have some effect on the election result. Others deliberately vote informally, whilst thousands, particularly in Queensland and New South Wales where optional preferential voting applies at the state level, simply put a '1', a cross or a tick against the name of the person they wish to vote for. Unfortunately for the elector, this vote is formal in both New South Wales and Queensland state elections but informal at a federal election for the House of Representatives.
- 6.7 Those electors who present at a polling place on polling day and whose names cannot be found on the certified list of voters for that electoral division may only cast a provisional vote for that division, being the one they claim to live in.
- 6.8 Electors who present at a polling place outside their electoral division but still in their home state, or those who present at a pre-poll voting centre, whose names do not appear on the certified list of voters for the division in which the pre-poll centre is located, or electors who cast postal votes, are permitted to cast a vote of the respective type. Votes cast in such circumstances are sealed within an appropriate envelope and sent to the Divisional Returning Officer (DRO) for the electoral division in which the elector claims to be enrolled.
- 6.9 Each of these types of votes are known as declaration votes because they require the elector to declare that they are entitled to vote, and all are subjected to a number of checks by the relevant DRO before they are either admitted to the count or rejected. These checks are known as the preliminary scrutiny of declaration votes.
- 6.10 The rules which govern how the preliminary scrutiny is conducted are contained in Schedule 3 of the Commonwealth Electoral Act. These detailed rules governing the checks must be strictly followed by DROs, who are provided with no discretionary powers to enable any departure

from the rules. All of the checks required by Schedule 3 may be observed by scrutineers acting on behalf of candidates contesting the election.

- 6.11 Opposition members noted that there were over 20 633 cases of multiple voting in 2007 and that the Australian Electoral Commission (AEC) gave evidence during this current inquiry that it does not have adequate powers to investigate or provide briefs for prosecutions.¹

Reinstatement – ensuring the voting franchise is not lost

- 6.12 The AEC submitted that over 200 000 pre-poll, absent and provisional votes were rejected² at the 2010 federal election due to the persons casting the vote being incorrectly enrolled or not enrolled and thus not complying with the law which requires each elector to enrol and update their details when they change their address. One of the main ways of dealing with this, and saving some of these votes, is through reinstatement provisions.
- 6.13 At all elections and referenda between 1984 and 2004, electors who cast declaration votes, but whose names were not on the certified list, were reinstated to the roll in situations where the DRO determined during the preliminary scrutiny that they had previously been enrolled for the relevant electoral division, and that there was no evidence of a later enrolment in any different electoral division.
- 6.14 In such situations it was deemed that the electors' names had been removed from the roll in error by the AEC. The electors were reinstated to the electoral roll, their House of Representatives and Senate ballot papers were included in the scrutiny and thus, the franchise was restored to them.
- 6.15 Likewise, electors who were found to be enrolled in a different electoral division, but still in the same state or territory as the division in which they claimed to be enrolled, had their Senate ballot papers included in the Senate scrutiny, but their House of Representatives ballot papers were set aside. Such declaration votes were commonly referred to as being 'partially admitted'. It is for this reason that often the number of Senate ballot papers counted in Senate elections exceeds the number of House of Representative ballot papers counted.

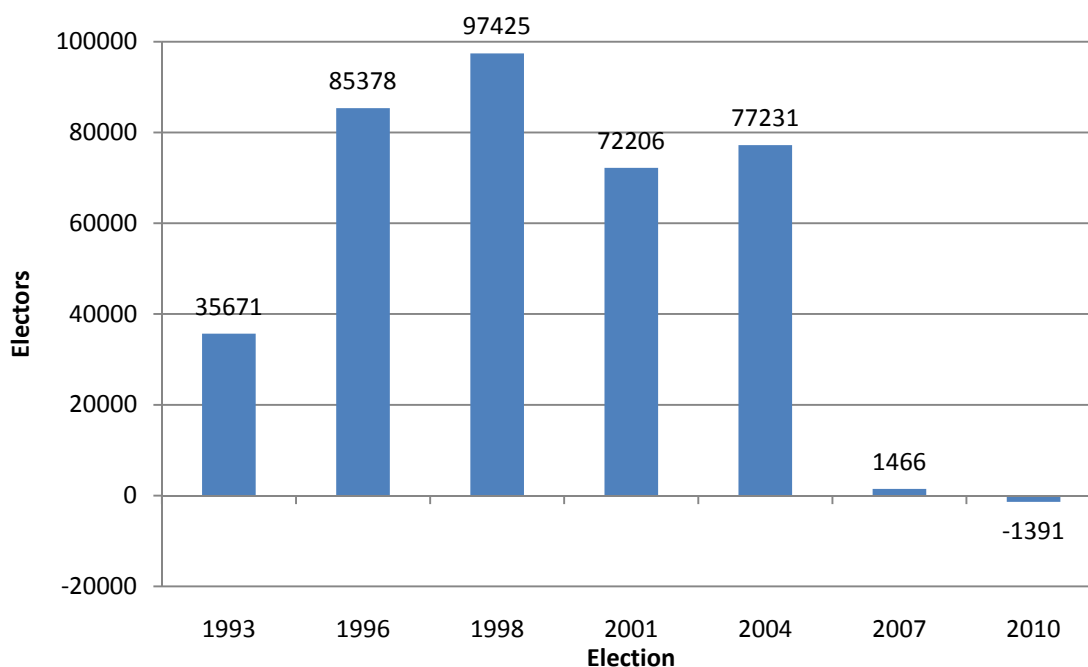
1 Discussion with Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, Transcript, 25 May 2011, pp. 7-9.

2 Australian Electoral Commission, Submission 87, p. 62.

- 6.16 The 2006 legislative changes put in place stricter requirements for dealing with this situation, by providing that:
- provisional voters were to provide evidence of identity either on polling day or in the week after polling day; and
 - provisional votes cast by persons who had been removed from the roll by objection on the basis of non-residence would be inadmissible to the election count.³
- 6.17 This put a greater onus on voters to follow up identity requirements if they initially were not able to provide them at the polling place, and it removed the AEC's ability to reinstate electors who may have been erroneously removed from the roll due to objection requirements.
- 6.18 The proof of identity provision has now been addressed by the *Electoral and Referendum Amendment (Provisional Voting) Act 2011*. The requirement for provisional voters to provide proof of identity on polling day or in the week following has been repealed. However, at the time of writing, the restriction on the reinstatement of electors contained in Schedule 3 is still in place.
- 6.19 The effectiveness of reinstating the franchise to electors who have been removed from the roll in error is readily apparent when the difference between the close of rolls enrolment at a particular election or referendum and the election enrolment for that election or referendum is calculated.

3 Australian Electoral Commission, Submission 87, p. 85.

Figure 6.1 Difference between election roll and close of rolls enrolment, 1993 to 2010 elections



Source *Joint Standing Committee on Electoral Matters, Report on the conduct of the 2007 federal election and matters related thereto, June 2009, Commonwealth Parliament of Australia, p. 384; and AEC website.*⁴

6.20 As can be seen in Figure 6.1 above, at Commonwealth elections held between 1993 and 2004, election enrolment is significantly higher than close of rolls enrolment. This is mainly due to the number of electors for whom reinstatement to the electoral roll was permitted by the rules which then governed the conduct of the preliminary scrutiny.

6.21 However, at the 2007 election, following the amendments made to Schedule 3 discussed above, the election roll increased by a mere 1 466 electors, and at the 2010 election, enrolment actually declined between close of rolls and the election with the result that election enrolment was 1 391 electors fewer than at the close of rolls.

4 AEC website, <http://results.aec.gov.au/15508/Website/GeneralEnrolmentByState-15508.htm>, viewed 16 March 2011.

6.22 The AEC explained the difference between close of rolls enrolment and election enrolment figures at the 2010 election:

The roll does not remain static after the close of rolls. Between the close of rolls and polling day, a number of changes may occur...

These include:

- a small number of additions to the roll (primarily as a result of processing enrolment forms that were received prior to close of rolls but not processed due to time constraints), there were 942 in this period in 2010 (compared to 1 562 in 2007); and
- a small number of deletions from the roll (primarily the removal of deceased electors), there were 6 031 in this period in 2010 (compared to 7 710 in 2007).

In addition, after polling day persons who were not enrolled but who are nevertheless eligible to have their votes counted are 'reinstated' to the electoral roll, having been originally removed in error by the AEC (for example, removed as a death deletion in error). Fewer reinstatements were required following the 2010 election (3 698) compared to the 2007 election (7 614). Note that such reinstatements did not apply to those who had been removed from the roll by objection action on the ground that they were no longer resident at their enrolled addresses...⁵

6.23 The Committee also notes evidence from the Community and Public Sector Union that there were a number of problems with the GENESIS system limiting the number of enrolment applications that could be processed:

We understand from the user tester groups that things are improving, but we are not in a position to say that the throughput of GENESIS is comparable to that which was achieved through RMANS in years gone by. And you do note earlier that there were previous elections with a greater number of enrolment transactions occurring. In 1990, when RMANS was introduced, they put through 594,612 at that time, and it is curious that 20 years later a new system is slower.⁶

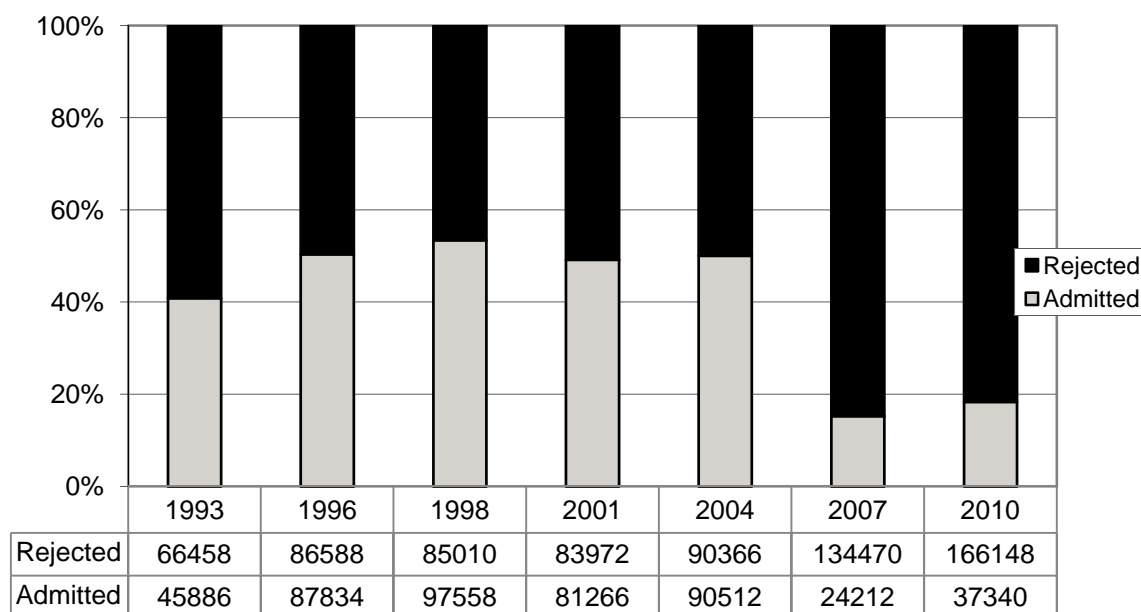
5 Australian Electoral Commission, Submission 87, pp. 22-23.

6 Mr Jonathan Ring, National Organiser, Community and Public Sector Union, Transcript, 15 June 2011, p. 3.

Provisional votes – reinstate or reject?

- 6.24 Another way to gauge the effect of the amendments to Schedule 3 is to examine the number of provisional votes that have been accepted into the count after the preliminary scrutiny of those votes.
- 6.25 Prior to and at the 2004 election, a relatively high percentage of provisional voters were reinstated to the roll during the preliminary scrutiny of provisional votes on the basis that the electors had, prior to their removal from the roll, previously been enrolled in the division in which they cast their vote. In the majority of cases, it was found that the elector had been removed from the roll in error by the AEC, on the basis that the AEC had a strong reason to believe that the elector no longer resided at their enrolled address or another address within that electoral division.
- 6.26 Figure 6.2 below shows the number and proportion of provisional votes rejected at elections from 1993 to 2010. It is evident that there has been a significant increase in the proportion of provisional votes rejected since the 2004 federal election.

Figure 6.2 Provisional votes rejected at federal elections, 1993 to 2010



Source *Joint Standing Committee on Electoral Matters, Report on the conduct of the 2007 federal election and matters related thereto, June 2009, Commonwealth Parliament of Australia, p. 380; and the AEC website.*⁷

6.27 The AEC addressed this issue in its first submission, noting that the 2006 amendments to Schedule 3 were responsible for the increased rejection of provisional votes. It observed that:

As a result of these amendments, at the past two federal elections, a far greater proportion of provisional votes have been rejected at preliminary scrutiny.⁸

6.28 The AEC advised that the requirement for provisional voters to provide proof of identity at the time of voting or by the Friday following polling day or their votes would not proceed into the preliminary scrutiny, resulted in some 27 529 provisional votes being rejected at the 2007 election and some 28 065 at the 2010 election.⁹ Further provisional votes were also rejected as the AEC was not able to reinstate electors who had been removed from the roll in error.

7 AEC website, <http://results.aec.gov.au/15508/Website/GeneralDecVotesReceivedByState-15508.htm>; and <http://results.aec.gov.au/15508/Website/HouseVotesCountedByState-15508.htm>, viewed 16 March 2011.

8 Australian Electoral Commission, Submission 87, p. 85.

9 Australian Electoral Commission, Submission 87, p. 87.

6.29 The Australian Labor Party also noted the increased rejection rate, observing that:

In the 2010 Federal Election, we have witnessed the continuation of a trend in which a large proportion of provisional votes are being rejected.

In the 2004 Federal Election, around half of provisional votes were accepted and counted. However, in the 2007 Federal Election over 80% of provisional votes were rejected. This trend continued in the 2010 Federal Election, with over 80% of provisional votes being rejected again.¹⁰

6.30 Similarly, the Greens NSW, arguing in support of automatic enrolment, noted the higher rejection rate, commenting that:

The 2010 election once again saw a very high rate of disallowance of provisional ballots. According [to] the AEC, 131,123 provisional vote applications were refused, 64% of the total issued. In 2007, the rejection rate was 75%, but in 2004, prior to the introduction of the Howard Government's "roll integrity" changes, the rate was 38% on a much lower total number issued.

These figures demonstrate that the enrolment rules, although improved in 2010, are still effectively disenfranchising large numbers of voters.¹¹

6.31 In contrast, The Nationals supported the retention of the 2006 amendments, arguing that the stricter requirements for provisional voting help to reduce the potential for electoral fraud. The Nationals stated that:

Up to and including the 2004 election, the rules surrounding provisional voting provided a loop-hole in the integrity of the electoral roll. Essentially, the system was vulnerable to potential abuse by people who enrol in marginal electorates and vote to influence a close result, despite not living in that electorate.

In 2006 legislative amendments were introduced that required (a) provisional voters to provide evidence of identity either on election day or in the following week, and (b) the removal from the count of provisional votes cast by people who had been removed from the roll by objection on the basis of non-residence.

10 Australian Labor Party, Submission 55, p. 3.

11 The Greens NSW, Submission 86, p. 3.

After a significant increase in the number of provisional votes submitted to and included in the count at the 2004 election, the amendments have resulted in a decrease in these numbers at both the 2007 and 2010 elections.¹²

6.32 It has been suggested in the past that many provisional voters believe that they are in fact enrolled, only to find out that they are not correctly enrolled when they attend a polling place to vote.

6.33 When the Committee reviewed the issue at a roundtable discussion on the Government's Electoral Reform Green Paper *Strengthening Australia's Democracy*, in November 2009, Mr Peter Brent of the Democratic Audit of Australia indicated that:

There is a large number who want to vote and cannot on election day – they turn up to vote and they are not on the roll so they try to vote provisionally or they just turn around and leave. This is all complicated of course by compulsion. If it is compulsory then everyone should do it, I suppose we could say. But if we were to imagine that we did not have compulsory voting, there are people who want to vote but suffer because the electoral roll is in bad shape. So it is not just the die-hard people who refuse to vote who do not vote on election day.¹³

6.34 Professor George Williams claimed the disenfranchisement of provisional voters could be avoided if government was to use data it already had to update enrolments. He stated that:

With those numbers that have been mentioned we are talking about hundreds of thousands of people; it is not a small number of people but in fact is literally hundreds of thousands of people who do want to vote but find that their details have not been updated, generally through their own inadvertence. I have seen the Australian Electoral Commission say in the past that with many of those people it seems to be that they assume their details are updated. They believe that the government collects this information and they cannot understand why it has not used the information that it already has about their moving address – it has been notified through a tax return or another authoritative source. Many of these people just cannot understand why they are not there. From my point of view I think that they have a good point about that. The system should ensure accuracy, integrity and the

12 The Nationals, Submission 93, pp. 6-7.

13 Mr Peter Brent, Democratic Audit of Australia, Transcript, 20 November 2009, p. 41.

like but it should also make it as easy as possible for people to cast their vote and should not put artificial barriers in their way.

Unfortunately, the data is very clear in that there are hundreds of thousands of people who are at the moment being disenfranchised through the weakness in the system.¹⁴

- 6.35 Opposition members of the Committee believe the integrity of the roll is critical. The burden to enrol and update enrolment details is not a significant one. Indeed many Australians fill out substantially more complex forms to access Government services or support. Opposition members do not support any measure to reduce or otherwise water-down the requirements to maintain one's electoral enrolment. Accordingly, any proposal to allow voters to vote despite knowledge of their details being incorrect should be opposed.

Committee conclusion

- 6.36 The Committee notes the decreased number of electors on the electoral roll used at the 2010 election when compared to the close of rolls figures (Figure 6.1). The Government members of the Committee are of the view that the roll had not decreased at any previous election. They believe that there are two reasons for the increased number of provisional votes rejected at the 2007 and 2010 elections: the proof of identity requirement for provisional voters, and the restriction on reinstating persons to the roll who had been removed by the AEC on the basis that it believed they no longer resided at their enrolled address. These changes were made as part of the then Government's 2006 amendments to the Commonwealth Electoral Act.
- 6.37 The net effect of the 2006 legislative changes on provisional votes is demonstrated in Figures 6.1 and 6.2. Government members of the Committee feel that the changes, which were based on an erroneous assumption that they would somehow increase electoral integrity, have had no such positive effect. Opposition members of the Committee believe the 2006 reforms enhanced the integrity of the roll.
- 6.38 Conversely, Government members believe these changes have disenfranchised genuine electors who had previously been protected by the safety net provided by the reinstatement provisions over the past two federal elections.

14 Professor George Williams, Transcript, 20 November 2009, p. 41.

- 6.39 Government members agree with the AEC's observation that:
- Provisional voting provides a safety-net in recognition that the absence of a person's name from the roll cannot provide a final and definitive answer to the question of whether that person should be permitted to vote.¹⁵
- 6.40 It is simply wrong to assume that an elector who does not respond, or on whose behalf others do not respond to letters from the AEC, does not live at a particular address, or does not live at another address in the same electoral division.
- 6.41 Further, it is against the principles of natural justice to then disqualify an elector from voting on the basis of an incorrect assumption made by an electoral authority, even when that decision is made in good faith on the available evidence, and not provide an avenue of appeal against the decision.
- 6.42 The Committee believes that the reinstatement provisions were designed to provide relief to those electors so affected, to ameliorate the objection processes mandated by the legislation, which are prone to error.
- 6.43 The Committee notes that an elector who presents at a polling place and who is found to be on the electoral roll at a different address to that which is shown on the certified list, but still in the same electoral division, is entitled to cast an ordinary vote, and that vote will be counted.
- 6.44 However, if that same elector had been taken off the roll on the basis of an erroneous belief that they did not reside at the enrolled address (even if they moved to another address in the same electoral division), and they presented at the polling place, they would be required to cast a provisional vote, which under the current provisions, would not be counted.
- 6.45 Clearly, the effect of the amendment is that the elector who is retained on the roll is treated significantly different to an elector who is removed from the roll, even when the removal from the roll occurred in error.
- 6.46 The Committee therefore concludes that the amendments made to Schedule 3 to prevent reinstatement should not have occurred, and recommends that the Commonwealth Electoral Act be amended to provide for reinstatements to the electoral roll to be made in the same circumstances as they were before the 2006 amendments took effect.
-

15 Australian Electoral Commission, Submission 87, p. 85.

Recommendation 24

6.47 The Committee recommends that the *Commonwealth Electoral Act 1918* be amended to provide that where an elector who had lodged a declaration vote at an election has been removed from the electoral roll by objection action on the ground of non residence; and

- the removal from the roll occurred after the election prior to the election to which the scrutiny relates, or
- where there has been a redistribution of the state or territory that includes the division since the last election but one before the election to which the scrutiny relates, the removal from the roll was made after the last such redistribution, then:
 - ⇒ if the address at which the elector claims to be enrolled at the time of voting is within the electoral division for which he or she was previously enrolled, his or her House of Representatives and Senate votes will be counted; but
 - ⇒ if the address at which the elector claims to be enrolled at the time of voting is in a different electoral division in the same state or territory, his or her Senate vote will be counted, but his or her House of Representatives vote will not be counted.