



RESEARCH NOTE

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Electoral Act Offences—failure to vote—section 245, *Commonwealth Electoral Act 1918*

The offence

It is the duty of every elector to vote at each election. An elector commits an offence against section 245 of the *Commonwealth Electoral Act 1918* and is liable, upon conviction, to a maximum fine of \$50 if;

- they were an elector, (that is, they were on the electoral roll) and
- they failed to vote without a valid and sufficient reason.

Section 245 does not apply to Antarctic electors (section 245 and Part XVII), eligible overseas electors (as defined by sections 245 and 94) and itinerant electors (sections 245 and 96).

The administrative procedure following an election

- Section 245 requires the Electoral Commission to send notices to all electors who appear to have failed to vote. The **first notice** states that the elector
- appears to have failed to vote, and
- it is an offence to fail to vote, and
- if they do not wish to be prosecuted for failure to vote, they can, if they did vote, give the District Returning Officer (DRO) particulars of the circumstances of their voting, or if they did not vote, they can give the DRO a valid and sufficient reason for the failure to vote or pay the DRO a penalty of \$20.00.

- Court proceedings for failure to vote are prohibited if the elector pays the penalty of \$20.00, or if the DRO is satisfied either that the elector did vote, or that the elector had a good and sufficient reason for failing to vote.
- If the elector does not reply to the first notice, the Electoral Commission is required to send the elector a **second notice** setting out the above matters.
- If the elector still does not reply, or if the DRO is not satisfied that the reason for not voting was sufficient, then the DRO is obliged to send a **third notice** to the elector advising that they can avoid court proceedings by paying a \$20.00 penalty to the DRO.
- If, after receiving the third notice, the elector does not pay the penalty, the Electoral Commission may **prosecute** the elector for failure to vote.

Defences

An elector has a defence to a charge under section 245 if he or she:

- believes it is part of his or her religious duty to abstain from voting (section 245 (14)); or
- was not on the electoral roll, (section 3); or
- was ineligible to vote (section 93 and Part VIII); or
- was not present in Australia on polling day (section 245); or

- did not receive the notices that the Electoral Commission is required to send after an election to electors who appear to have failed to vote (section 245); or.
- had a valid and sufficient reason for failure to vote (section 245).

Whether a reason is valid and sufficient is a question of fact and dependant on the circumstances of the case. A valid and sufficient reason for failing to vote must be established on the balance of probabilities (*Dougllass v Ninnes*, [1976] 14 SASR., 377).

Valid reasons for failing to vote

The following examples, of what would constitute a 'valid and sufficient' reason, were given by Isaacs J. in *Judd's case*. They include 'some reason which is not excluded by law and is, in the circumstances, a reasonable excuse for not voting...Physical obstruction, whether of sickness or outside prevention, or of natural events, or accident of any kind, would certainly be recognised by law.' If the intending voter was 'diverted to save life, or to prevent crime, or to assist at some great disaster, as a fire: in all of which cases, in my opinion, the law would recognise the competitive claims of public duty'. In *Dougllass v Ninnes*, [1976] 14 SASR, 377, it was implied that a belief that it was morally wrong to vote would have been a defence under section 245(14).

Invalid and insufficient reasons for failing to vote

The courts have held that the following reasons for not voting are not 'valid and sufficient'.

- A socialist and a member of the Socialist Labor Party was prohibited from voting by his party because all the candidates were capitalists, (*Judd v McKeon*, (1928) 38 CLR 380).
- An objection to the social order of the community (*Judd v McKeon*, (1928) 38 CLR 380).
- Conscientious objections to compulsory voting falling short of a belief that it is morally wrong to vote (*Douglass v Ninnes*, [1976] 14 SASR 377).
- Christian beliefs such as a belief in creation, free will, the resurrection, justice according to the teaching of Christ etc. (*Douglass v Ninnes*, [1976] 14 SASR, 377).
- A belief that compulsory voting is inconsistent with the United Nations Declaration of Human Rights (*Douglass v Ninnes*, [1976] 14 SASR, 377).
- No desire for the election of any of the candidates and thus no choice, when choice was required by section 9 of the Constitution which empowers Parliament to make laws on the method of choosing Senators (*Judd v McKeon*, (1928) 38 CLR 380).
- No preference for any of the candidates in a Senate election and thus no vote to register (*Lubcke v Little*, [1970] VR 807).

- No preference for any of the candidates with the consequence that to state a preference would be a lie (*Fader-son v Bridger*, (1971) CLR 271).
- Non recognition of the sovereignty of the Commonwealth and a belief that voting would contravene Aboriginal law (*Cranshaw's case*, unreported, *The Australian*, 20 September 1994).

Court procedure

In a prosecution for failure to vote, witnesses do not need to give evidence to prove that an elector failed to vote. Section 388 of the *Commonwealth Electoral Act 1918* allows the prosecution to rely on the facts stated in the information and complaint, and section 388 deems those facts to be proved in the absence of evidence to the contrary.

If an elector does not give sworn evidence to cast doubt on the facts alleged in the information, or by sworn evidence provide a valid and sufficient reason for failing to vote, the elector will be convicted.

If an elector fails to appear at the court proceedings, he or she can be convicted and fined in his or her absence. It should also be noted that in proceedings for an offence against section 245, process is taken to be served on a person if it is delivered by mail to the address of the person recorded on the electoral roll (section 387A).

By section 4H of the *Commonwealth Crimes Act 1914*, an offence against section 245 is a summary offence and an elector cannot elect for trial by jury.

A magistrate cannot sentence an elector who has been convicted

of the offence of failure to vote to imprisonment. However, if an elector is fined by the court, and refuses or neglects to pay the fine within the time allowed for payment, an arrest warrant may issue. An elector will usually be given several chances to pay the fine, but if he or she refuses to do so, imprisonment may result. The basis of the imprisonment is that the person has disobeyed an order of a court to pay a fine.

See Research Paper No 24 1994/95 *Compulsory Voting*, for an account of the history of compulsory voting in Australia, a description of compulsory voting in practice in Australia and overseas, and the arguments for and against. In relation to the last general election in 1993, of the 11,384,638 people on the electoral roll, 96.22 per cent, or 10,954,258 people voted. Following the election, 23,230 people paid a \$20 penalty to the Australian Electoral Commission and 4,412 non voters were summonsed to appear before the courts.

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