



Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Bill 2010

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Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Bill 2010

Date introduced: 24 November 2010

House: House of Representatives

Portfolio: Special Minister of State

Commencement: The day the Act receives Royal Assent

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the [Bill's home page](#), or through <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

Purpose

The main purpose of the Bill is to amend the *Commonwealth Electoral Act 1918* ('the Electoral Act') and the *Referendum (Machinery Provisions) Act 1984* (Cth) ('the Referendum Act') so as to:

- fix the seventh day after the issue of federal election writs as the date for the close of rolls
- reinstate the constitutionally mandated right to vote for prisoners serving less than a three year term of imprisonment while excluding those whose term of imprisonment is three years or longer, and
- provide that all prisoners otherwise eligible can remain on, or join, the electoral roll.

Background

2006 Howard Government amendments to the Electoral Act

In 2006 the Howard Government introduced a suite of significant changes to electoral and referendum administration with the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) (the 2006 Act). Changes included:

- the introduction of evidence of identity requirements for enrolments and provisional voting
- changing the date for the close of rolls from the seventh day after the issue of the federal election writs to the third working day after the issue of the writs for certain categories of enrolment (for updating details; for those turning 18 years of age between the issue of the writs and polling day; and for those gaining citizenship between the issue of the writs and polling day)
- changing the date for the close of rolls from the seventh day after the issue of the federal election writs to the date of the issue of the writs for other new enrolments and re-enrolments, and

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- disqualifying those serving a full-time sentence of imprisonment of any length, from voting in elections for the House of Representatives or Senate (previously the disqualification had been for those with terms of imprisonment of three years or more).¹

Measures in the 2006 Act were controversial and were opposed by the Australian Labor Party (ALP) (then in Opposition) and by the minor parties.² The main issues in contention in relation to roll closure have been electoral roll integrity and voting fraud and restriction of the vote/disenfranchisement.³

The *Roach* and *Rowe* High Court decisions

Roach v Electoral Commissioner

In August 2007 the High Court, in *Roach v Electoral Commission*,⁴ struck down the operative provisions excluding all prisoners serving a term of imprisonment from voting (provisions inserted by the 2006 Act). The decision, a 4:2 majority, was significant because ‘it provided a measure of protection for the right to vote in Australian federal elections.’⁵

Vicki Roach, an Aboriginal woman sentenced in 2004 to six years for burglary including negligent injury and endangerment, subsequently completed a masters degree and took the case claiming her right to vote. While she was successful in so far as the blanket ban on prisoners voting if they were serving any term of imprisonment introduced by the 2006 Act was ruled unconstitutional, the case was not decided entirely in her favour: the majority upheld earlier legislation which would continue to operate and prevented prisoners whose terms were more than three years from voting, including the plaintiff. The current Bill proposes to reinstate those earlier provisions recognised as constitutional into the Electoral Act.

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1. *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth). This Act is available online at: <http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/DB7BE4E22B6B49BFCA257497002DC413?OpenDocument>, viewed 6 January 2011.
 2. See ‘Second reading speech: Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006’, Senate, *Debates*, 16 June 2006, pp. 1–93, viewed 6 January 2011, http://parlinfo.parlInfo/download/chamber/hansards/2006-06-16/toc_pdf/4788-2.pdf;fileType=application%2Fpdf#search=%22electoral%20integrity%22
 3. See Joint Standing Committee on Electoral Matters (JSCEM), *Report on the conduct of the 2007 federal election and matters related thereto*, JSCEM, Canberra, 2009, pp. 43–51, viewed 11 January 2011, <http://www.aph.gov.au/house/committee/em/elect07/report2/Final.pdf>
 4. *Roach v Electoral Commissioner* (2007) 233 CLR 162, <http://www.austlii.edu.au/au/cases/cth/HCA/2007/43.html>
 5. G Orr and G Williams, ‘The people’s choice: the prisoner franchise and the constitutional protection of voting rights in Australia’, *Election Law Journal*, vol. 8, no. 2, 2009, p. 138.

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The High Court majority was constituted by a single judgment from Gleeson CJ and a joint judgment by Gummow, Kirby and Crennan JJ. The primary minority judgment was written by Hayne J, with whom Heydon J agreed, adding some reflections of his own.

The majority give a detailed account of the history of the franchise for prisoners including detailing that in NSW, before the Constitution's adoption, 'treason, felony or infamous offence' precluded a person from voting,⁶ and drawing attention to section 44(ii) of the Constitution, which precludes anyone from being chosen as a Senator or Member if that person:

[i]s attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer.⁷

While recognising that there is thus a constitutional basis for some limitation on the right to vote Gleeson CJ spent some time exploring the arbitrary nature of the 2006 Act's 'any term of imprisonment' category. In particular this broad exclusion would encompass more than simply 'infamous offences'. As Gummow, Kirby and Crennan JJ summarised the matter, Gleeson CJ established that:

First, a very substantial proportion of prisoners serve sentences of six months or less. Secondly, when decisions to impose short-term custodial sentences are made, the range of practical sentencing options (including fines, home or periodic detention and community service orders) may be limited by the facilities and resources available to support them and by the personal situation of those offenders who are indigent, homeless or mentally unstable.⁸

The Court effectively found that the unpredictable nature of the categories covered by 'any' sentence of imprisonment came too close to fulfilling the plaintiff's charge that the 2006 Act introduced provisions which operated in an 'arbitrary or capricious fashion.'⁹

The case contains many illuminating reflections on Australia's Constitution and the interplay of Parliamentary supremacy with individual rights. While it was, as noted above, hailed as a breakthrough for the 'right to vote' it was a limited triumph for Ms Roach, both because the legitimacy of the ban on voting for those with a three year or longer sentence remained and because the Court, for instance in Gleeson CJ's judgment, also supported conclusions regarding the freedom of the Parliament to legislate which flow from the premise that:

The Australian Constitution was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon legislative power for the purpose of protecting the rights of individuals.¹⁰

6. [Roach v Electoral Commissioner](http://www.austlii.edu.au/au/cases/cth/HCA/2007/43.html) (2007) 233 CLR 162 at 190, per Gummow, Kirby and Crennan JJ, quoting section 6 of the *Australian Constitutions Act 1842 (Imp)*, viewed 20 February 2011, <http://www.austlii.edu.au/au/cases/cth/HCA/2007/43.html>

7. *Ibid* at 188.

8. *Ibid* at 91.

For further background on the prisoners' franchise including the international context, see the Parliamentary Library paper by Jerome Davidson in 2004, 'Inside outcasts: prisoners and the right to vote in Australia',¹¹ which was prescient in its identification of a case such as *Roach* and its outcome.

Rowe v Electoral Commissioner

In July 2010 a challenge to the 2006 amendments relating to the close of rolls was mounted in the High Court of Australia. On 6 August 2010 a majority of the Court (French CJ, Gummow, Bell and Crennan JJ) declared that the amendments were invalid.¹² In his judgment French CJ noted that the effect of the 2006 amendments was to 'diminish the opportunities for enrolment and transfer of enrolment that existed prior to their enactment', and that 'a significant number of persons claiming enrolment or transfer of enrolment after the calling of an election could not have their claims considered until after the election'.¹³

Chief Justice French went on to hold that 'the barring of consideration of the claims of those persons to enrolment or transfer of enrolment in time to enable them to vote at the election is a significant detriment in terms of the constitutional mandate', and that:

That detriment must be considered against the legitimate purposes of the Parliament reflected in the JSCEM Report. Those purposes addressed no compelling practical problem or difficulty in the operation of the electoral system. Rather they were directed to its enhancement and improvement ... the heavy price imposed by the Amendment Act in terms of its immediate practical impact upon the fulfilment of the constitutional mandate was disproportionate to the benefits of a smoother and more efficient electoral system to which the amendments were directed.¹⁴

After the High Court's declaration the Australian Electoral Commission (AEC) moved to facilitate the enrolment of those otherwise excluded by virtue of the 2006 amendments.¹⁵ Shortly before the

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9. Ibid at 188.
 10. Ibid at [1], per Gleeson J
 11. J Davidson, Inside outcasts: prisoners and the right to vote in Australia, *Current Issues Brief* no. 12, 2003–04, viewed 20 January 2010, <http://www.aph.gov.au/library/pubs/CIB/2003-04/04cib12.htm>
See also J Davidson, *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005*, Bills Digest, no. 95, 2005–2006, Parliamentary Library, Canberra, 2006, viewed 20 January 2011, <http://www.aph.gov.au/library/pubs/bd/2005-06/06bd095.pdf>
 12. High Court of Australia, *Rowe & Anor v Electoral Commissioner & Anor*, media release, 6 August 2010, viewed 14 January 2011, <http://www.highcourt.gov.au/media/rowe.pdf>
 13. *Rowe v Electoral Commissioner* [2010] HCA 46, per French CJ at [78], viewed 14 January 2011, <http://www.austlii.edu.au/au/cases/cth/HCA/2010/46.html>
 14. Ibid.
 15. Australian Electoral Commission (AEC), *Election 2010: Statement from the Australian Electoral Commission on High Court decision*, media release, 6 August 2010, viewed 14 January 2011, http://www.aec.gov.au/About_AEC/Media_releases/e2010/06-08.htm

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2010 election the AEC indicated that an extra 57 732 voters had been enrolled and that a further 40 408 voters had had their enrolment details updated.¹⁶

Basis of policy commitment

The second reading speech states that the Bill is intended to address the *Roach* and *Rowe* decisions relating to the close of rolls and prisoner voting.¹⁷ The Bill is also intended to implement the Government's response to a recommendation concerning prisoner voting made by the Joint Standing Committee on Electoral Matters (JSCEM) in its June 2009 inquiry report on the conduct of the 2007 federal election.¹⁸

In 2010 the Government introduced two separate bills to reverse the 2006 amendments to the Electoral Act concerning the date for the close of rolls and restoring the closure date to the seventh day after the issue of federal election writs (see further below). The Government stated that the close of rolls measures in both of these bills were intended to implement election commitments; both bills were also related to the recommendations made by the JSCEM in its 2007 election inquiry report.¹⁹ In the report a majority of the JSCEM made a total of 53 recommendations relating to a range of electoral administration matters including fixing the date for the close of rolls to seven days after the date of federal election writs (recommendation 1).²⁰

In its 2007 election inquiry report also, a majority of the JSCEM recommended that the Government amend the Electoral Act so as to 'reinstate the previous three-year disqualification for prisoners' and implement the High Court's decision in the *Roach* case (recommendation 47).²¹

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16. AEC, *Election 2010: Updated figures on Australians enrolled to vote for 2010 election*, media release, 18 August 2010, viewed 14 January 2011, http://www.aec.gov.au/About_AEC/Media_releases/e2010/18-08b.htm
 17. G Gray (Special Minister of State), 'Second reading speech: Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Bill 2010', House of Representatives, *Debates*, 24 November 2010, pp. 3550–51, viewed 6 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2010-11-24%2F0019%22>
 18. *Ibid.*, p. 3551. The JSCEM inquiry report and associated information are available at the JSCEM website: <http://www.aph.gov.au/house/committee/em/elect07/tor.htm>, viewed 10 January 2011.
 19. A Byrne, 'Second reading speech: Electoral Referendum (Close of Rolls and Other Measures) Bill 2010', House of Representatives, *Debates*, 11 February 2010, p. 1136, viewed 11 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2010-02-11%2F0020%22>; G Gray, 'Second reading speech: Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill (No. 2) 2010', House of Representatives, *Debates*, 2 June 2010, p. 4908, viewed 11 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2010-06-02%2F0025%22>. In its 2007 National Platform the ALP indicated that it would reverse a number of the 2006 Howard Government changes to electoral administration including the changes to the date for the close of rolls: ALP, *National Platform and Constitution 2007*, ALP, Canberra, 2007, pp. 181, 189, viewed 6 January 2011, http://pandora.nla.gov.au/pan/22093/20071124-0102/www.alp.org.au/download/now/2007_national_platform.pdf
 20. JSCEM, *Report on the conduct of the 2007 federal election and matters related thereto*, op. cit., pp. xxiii–l.
 21. *Ibid.*, p. xlvi.

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The Government responded to the JSCEM recommendations in March 2010 and agreed in principle with recommendation 47. The Government stated that it would ‘introduce legislation to reflect the ruling of the High Court’ in *Roach* and that ‘[w]hile prisoners serving a sentence of imprisonment of three years or longer will not be permitted to vote, the legislation will provide that prisoners may enrol or continue to be enrolled’.²² The Government also stated in its response that it ‘is giving further consideration to the prisoner franchise’ as part of the green paper process (see further below).²³

Broader electoral reform agenda

The Bill is part of the Government’s broader electoral reform agenda. In December 2008 the Government issued a green paper examining electoral finance reform issues, and in September 2009 a second green paper was issued examining broader electoral reform issues.²⁴ Both green papers identified reform possibilities and invited comment.

In 2010 a raft of changes were made to electoral law including lowering the age of provisional enrolment from 17 to 16 years, increasing authorisation requirements for how-to-vote cards, and limiting the number of election candidates that can be endorsed by a political party in an electoral division.²⁵

In 2008, 2009 and 2010 the Government introduced bills making significant changes to the law relating to electoral funding, political donations, disclosure and reporting, and certain offences and penalties.²⁶ The 2008 Bill was defeated in the Senate in March 2009 and the 2009 Bill, which was a

22. Australian Government, *Government response to the Joint Standing Committee on Electoral Matters’ Report on the conduct of the 2007 federal election and matters related thereto*, Australian Government, March 2010, p. 16, viewed 11 January 2011,

<http://www.aph.gov.au/house/committee/em/Government%20Responses/Govt%20Resp%20Conduct%20of%202007%20federal%20election.pdf>

23. Ibid.

24. Australian Government, *Electoral reform green paper—donations, funding and expenditure*, Australian Government, Canberra, December 2008, viewed 11 January 2011, http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf; Australian Government, *Electoral reform green paper—strengthening Australia’s democracy*, Australian Government, Canberra, September 2009, viewed 11 January 2011,

http://www.dpmc.gov.au/consultation/elect_reform/strengthening_democracy/docs/strengthening_australias_democracy.pdf

25. *Electoral and Referendum Amendment (Modernisation and Other Measures) Act 2010; Electoral and Referendum Amendment (How-to-Vote Cards and Other Measures) Act 2010; Electoral and Referendum Amendment (Pre-poll Voting and Other Measures) Act 2010.*

26. Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008; Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009; Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010. These Bills and associated documentation, including Bills Digests, can be accessed at:

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs627%22> (2008 Bill), viewed 10 January 2011,

revised version of the 2008 Bill, lapsed in July 2010 with the conclusion of the 42nd Parliament. In October 2010 the Government introduced a third funding and donations reform Bill into the House of Representatives; this Bill contains essentially the same measures as the 2009 Bill and is currently before the Senate.

Previous bills containing close of rolls measures

The measures in the current Bill relating to the close of rolls are the third set of proposed changes in this area of electoral law to be introduced by the Rudd and Gillard Governments.

On 11 February 2010 the Government introduced the Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill 2010 in the House of Representatives. The Bill proposed to fix the seventh day after the issue of federal election writs as the date for the close of rolls along with a number of other measures including:

- repealing evidence of identity requirements for provisional electors and providing for a signature checking procedure
- making provision for the electronic updating of electors' details
- enabling the Australian Electoral Commission to process enrolment transactions outside the electoral division for which a person is enrolling, and
- enabling electronic voting for sight-impaired electors.²⁷

The Bill passed the House on 10 March 2010 and was introduced in the Senate on 15 March 2010, but lapsed in July 2010 with the conclusion of the 42nd Parliament.

On 2 June 2010, while the original Bill was still before the Parliament, the Government introduced a second bill, the Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill (No. 2) 2010, in the House of Representatives.²⁸ This second Bill reproduced the schedules of the original Bill relating to roll closure and evidence of identity requirements for provisional electors. Other elements of the original Bill were not contained in the second Bill but were re-introduced in

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4073%22> (2009 Bill), viewed 10 January 2011,

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4477%22> (2010 Bill), viewed 10 January 2011.

27. The Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill 2010 and its associated documentation, including the Bills Digest, can be accessed at:

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4306%22>, viewed 10 January 2011.

28. The Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill (No. 2) 2010 and its associated documentation, including the Bills Digest, can be accessed at:

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4378%22>, viewed 10 January 2011.

separate legislation.²⁹ The Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill (No. 2) 2010 passed the House on 16 June 2010 and was introduced in the Senate on the same day, but was not debated in the Senate and lapsed in July 2010 with the conclusion of the 42nd Parliament.

Positions of the Opposition, non-government parties, and independents

Close of rolls Measures

It is likely that the Opposition will oppose the close of rolls measures in the Bill. The Opposition opposed the close of rolls measures in the original Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill 2010 and the subsequent Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill (No. 2) 2010.³⁰ In August 2010 the Opposition was reported to be of the view that the High Court's decision in *Rowe* would enable the making of 'false enrolments and false transfers of enrolments' after the issue of federal election writs.³¹ It was also reported that the Opposition intended to 'examine the need to legislate to ensure the integrity of the electoral roll' if elected at the 2010 federal election.³² In the JSCem 2007 election inquiry report Opposition members dissented from the majority recommendations concerning the close of rolls.³³

The Australian Greens endorsed the original Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill 2010 but also proposed amendments creating offences for inaccurate and misleading electoral advertising and for pre-election automated telephone calls to electors intended

29. The separate Bill was the Electoral and Referendum Amendment (Pre-poll Voting and Other Measures) Bill 2010, which was also introduced in the House of Representatives on 2 June 2010 and subsequently passed the Parliament. Two further electoral Bills were also introduced into the House of Representatives on 2 June 2010 and subsequently became law: the Electoral and Referendum Amendment (Modernisation and Other Measures) Bill 2010 and the Electoral and Referendum Amendment (How-to-Vote Cards and Other Measures) Bill 2010.

30. J Hockey, 'Second reading speech: Electoral and Referendum (Close of Rolls and Other Measures) Bill 2010', House of Representatives, *Debates*, 25 February 2010, p. 1850, viewed 11 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2010-02-25%2F0021%22>; A Robb, 'Second reading speech: Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill (No. 2) 2010; Electoral and Referendum Amendment (Pre-poll Voting and Other Measures) Bill 2010; Electoral and Referendum Amendment (Modernisation and Other Measures) Bill 2010; Electoral and Referendum Amendment (How-to-Vote Cards and Other Measures) Bill 2010', House of Representatives, *Debates*, 15 June 2010, p. 5348, viewed 11 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2010-06-15%2F0056%22>

31. T Arup, 'Historic' High Court ruling adds 100,000 latecomers to electoral roll', *Sydney Morning Herald*, 7 August 2010, viewed 11 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FIZIX6%22>

32. *Ibid.*

33. JSCem, *Report on the conduct of the 2007 federal election and matters related thereto*, op. cit., pp. 323–33.

to affect voting.³⁴ Given this endorsement it would seem likely that the Greens will support the current Bill, although they may again propose amendments.

House of Representatives independent members Tony Windsor and Robert Oakeshott voted in favour of passage of both the original Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill 2010 and the subsequent Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill (No. 2) 2010.³⁵ One relevant factor here is that the ALP minority government agreements with the Greens and with Tony Windsor and Robert Oakeshott commit the signatories to amending the Electoral Act so as to create a ‘truth in advertising’ offence.³⁶

Independent Bob Katter voted against passage of the original Bill, but did not vote on the passage of the second Bill; it is not clear whether he will support or oppose the current Bill.³⁷

The other cross-bench members in the House of Representatives, Andrew Wilkie and Tony Crook, have not yet indicated their positions on the current Bill. Family First Senator Steve Fielding and independent Senator Nick Xenophon also have yet to indicate their positions on the current Bill.

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34. S Hanson-Young, ‘Second reading speech: Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill 2010’, Senate, *Debates*, 17 March 2010, pp. 2149–50, viewed 12 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F2010-03-17%2F0194%22>. The *Electoral and Referendum Amendment (How-to-Vote Cards and Other Measures) Act 2010* amended the Electoral Act so as to bring material published by telephone or the internet within the existing provision in the Electoral Act (section 329) prohibiting the printing, publication or distribution of material likely to mislead or deceive an elector in relation to the casting of a vote in an election.
35. Australia, House of Representatives, *Votes and proceedings*, vol. 150, 2008-09-10, 10 March 2010, pp. 1672–73, viewed 13 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fvotes%2F2010-03-10%2F0008%22>; Australia, House of Representatives, *Votes and proceedings*, vol. 168, 2008-09-10, 16 June 2010, pp. 1853–54, viewed 13 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fvotes%2F2010-06-16%2F0012%22>
36. J Gillard, W Swan, B Brown, C Milne and A Bandt, *The Australian Greens & The Australian Labor Party (‘The Parties’)—Agreement*, 1 September 2010, p. 1, viewed 13 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F165017%22>; J Gillard, W Swan, T Windsor and R Oakeshott, *The Australian Labor Party & the Independent Members (Mr Tony Windsor and Mr Rob Oakeshott) (‘the Parties’)—Agreement*, 7 September 2010, p. 2, viewed 13 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2F218795%22>
37. Australia, House of Representatives, *Votes and proceedings*, vol. 150, 2008-09-10, 10 March 2010, pp. 1672–73, viewed 13 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fvotes%2F2010-03-10%2F0008%22>; Australia, House of Representatives, *Votes and proceedings*, vol. 168, 2008-10-9-10, 16 June 2010, pp. 1853–54, viewed 13 January 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fvotes%2F2010-06-16%2F0012%22>

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Prisoner Voting Amendments

From the history of the legislative provisions governing a prisoner's right to vote, it is apparent that the Bill's provisions will not find favour with the Opposition. The Bill overturns legislation which the Coalition had introduced while in Government. The unconstitutionality of those provisions may not make them any less politically desirable to their supporters. However that unconstitutionality may serve to generate support for this Bill's amendments, which do effectively implement the High Court's decision. The 2006 Act's amendments had been promoted for some time and followed on from the recommendations in the 2004 Report where the Coalition majority argued that:

The Committee believes that persons sentenced to a period of full-time imprisonment should not be allowed to a vote during that time and urges the Government to pursue this through legislative change as soon as possible.³⁸

Similarly independent, Tony Windsor, commented during the passage of the 2006 amendments that 'I do not believe that prisoners and people who have broken the law and are incarcerated deserve the vote'.³⁹ Mr Windsor, however, went on to point out that he *did* support the seven day rule which was being promoted at the time by independent Peter Andren.⁴⁰ In general Windsor's vote went with the then Opposition, although he moved, and, along with Andren and another independent, Bob Katter, supported amendments to the 2006 Bill which were not supported by either party.

The positions of others on the cross benches is mostly yet to be discovered, however the history of the Australian Greens clearly indicates that they will support the removal of the blanket ban on prisoner voting. It also may be that they seek amendments to remove the prohibition on prisoners serving sentences of three or more years. It is unlikely they would be happy with such a limitation. In a 1998 press release Senator Bob Brown argued that by restricting voter's rights to vote

'Australia is likely to be acting counter to our obligations under the United Nations International Covenant on Civil and Political Rights 1991 Article 25(b) and the United Nations Universal Declaration on Human Rights 1948. Article 21(1) which was just re-signed by the Howard Government," said Senator Brown.

The ALP have not gone far enough in their recommendations. The Greens propose ensuring all prisoners have the right to vote.⁴¹

38. The 2004 Federal Election Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto, Joint Standing Committee on Electoral Matters, September 2005, para 5.109, p. 129

<http://www.aph.gov.au/house/committee/em/elect04/report/fullreport.pdf>

39. Antony Windsor MP, House of Representatives, *Debates*, 11 May 2006, p. 14.

40. *Ibid.*

41. Senator Bob Brown, '*Prisoners voting rights*', media release, 16 June 1998, viewed 28 January 2011,

<http://greensmps.org.au/taxonomy/term/3/all?page=34>

See also for instance S Benson, 'Greens to give mass killer Martin Bryant vote', *Daily Telegraph*, 9 March 2010, viewed 20 January 2011, <http://www.dailytelegraph.com.au/news/greens-to-give-mass-killer-martin-bryant->

Financial implications

The Government has stated that the cost of implementing the measures in the Bill is 'not expected to have an impact on the Budget'.⁴²

Summary of key measures in the Bill

Schedule 1—close of rolls

Currently under the Electoral Act and the Referendum Act the electoral and referendum rolls close on the third working day after the issue of the federal election/referendum writs for those updating their details and for those turning 18 years of age or gaining citizenship between the issue of the writs and polling day. For other new enrolments and for re-enrolments the electoral rolls close on the date of the issue of the writs. The rolls close at 8 pm on the relevant day as this is the deadline by which claims or applications for enrolment must be made. The provisions in the Electoral Act stipulating these requirements, introduced in 2006, have now been declared invalid by the High Court of Australia in the *Rowe v Electoral Commissioner* (see above).

The Bill proposes to amend the Electoral Act and Referendum Act so as to fix the seventh day after the issue of the federal election/referendum writs as the date for the close of the rolls. This closure date would apply for all categories of enrolment including new enrolments, updating details, those applying for enrolment at 16 years of age, and applications for enrolment from eligible overseas electors, itinerant electors, and those set to gain citizenship between the issue of the writs and polling day. The rolls would close on the seventh day after the issue of the writs and the deadline for the making of claims or applications for enrolment would be 8 pm on the day the rolls closed. The Explanatory Memorandum states that the seven-day close of rolls period proposed in the Bill would give electors 'reasonable time to ensure that they are on the Roll', and that:⁴³

The Bill would aim to ensure that any limitation on the right to vote as a consequence of the 7 day close of Rolls period is objective, reasonable, proportionate and non-discriminatory, and hence falls within the ambit of restrictions allowable by the ICCPR [International Covenant on Civil and Political Rights] ...⁴⁴

The new date for the close of the rolls would also apply to the removal of electors from the rolls resulting from an objection to their enrolment, so that removal could not occur between 8 pm on the day of the close of rolls and the close of polling on polling day.

[vote/story-e6freuy9-1225838459421](http://www.examiner.com.au/news/local/news/politics/greens-back-down-on-prisoner-vote/2053612.aspx) although see also, for instance, Angus Livingston, 'Greens back down on prisoner vote', *The Examiner*, 21 January 2011, viewed 22 January 2011, <http://www.examiner.com.au/news/local/news/politics/greens-back-down-on-prisoner-vote/2053612.aspx>

42. Explanatory Memorandum, Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Bill 2010, p. 3.

43. *Ibid.*, p. 5.

44. *Ibid.*

Whereas currently the Electoral Act and Referendum Act both specify that the close of rolls is to take place on the third working day after the issue of the writs (defined as any day except a Saturday, Sunday or a public holiday in any state or territory), the proposed amendments fixing the seventh day after the issue of the writs as the date for the close of rolls do not specify that the seventh day must be a working day. The Bill proposes to repeal the current definition of ‘working day’ from both the Electoral Act and the Referendum Act. In relation to the Referendum Act the Explanatory Memorandum states that the definition of ‘working day’ is ‘now redundant’.⁴⁵

The Bill also proposes to resolve an apparent anomaly in the Electoral Act due to the definition of ‘division’ in the Act which refers only to electoral divisions for House of Representatives elections. The Explanatory Memorandum states that, due to this definition, the operation of related provisions throughout the Electoral Act is potentially restricted to House of Representatives elections,⁴⁶ and that:

... in the event of a half Senate election held independently from an election for the House of Representatives, these provisions of the Electoral Act may not operate as intended.⁴⁷

The Bill would rectify this anomaly by inserting a new provision in the Electoral Act which would specify that, except where the contrary intention appears, references in the Electoral Act to elections or polls in, for, or in relation to divisions or subdivisions would include references to Senate elections or polls for Senate elections for the relevant state or territory. The term ‘Senate election’ is separately defined in the Electoral Act as ‘an election of Senators for a State or Territory’. The last standalone half-Senate election (that is, without an accompanying election for the House of Representatives) was in 1970.

Key provisions

Schedule 1—close of rolls

Item 7 proposes a change to the date for the close of rolls from the third working day after the writ to the seventh day after the writ (in both cases the day ends at 8pm). **Item 11** goes on to remove the definition of working day from the Referendum Act, which is no longer needed since **item 7** makes no distinction on the basis of working or non-working days – it is simply 7 days later. The Explanatory Memorandum does not dwell on this legislative tidy up, simply commenting the definition of ‘working day’ is ‘now redundant’. This redundancy must be seen as a result of the particular legislative scheme being amended, rather than having a broader application.

45. Explanatory Memorandum, Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Bill 2010, p. 12.

46. *Ibid.*, p. 6.

47. *Ibid.*, p. 6.

Items 2, 3 and 4 rely on the new date for the close of the rolls by extending the time during which various categories of person⁴⁸ can apply to be added to the relevant electoral roll until the close of the roll, which, by **item 7**, would be 7 days from the date of the writ. These items would remove the current (invalid) provisions in subsections 94A(4), 95(4) and 96(4) which stipulate that the deadline for being added to the relevant roll is 8pm on the day that the writ is issued.

Item 5 seeks to insert a new section 102, which is the section governing consideration of claims for enrolment including the cut-off point and associated suspension period for consideration of claims. It would extend the time period for the consideration of these claims from the current cut-off of the date of the writ to 8pm on the date of the close of the rolls. Consideration of claims would then be suspended until the close of polling day (item 5 would also make a variety of related amendments).

Item 6 would modify subsection 118(5) to reflect the new timeline so that electors could not be removed from the roll between 8pm on the day of the close of rolls and the close of polling day. Section 118 deals with removing voters from the rolls when they have been challenged for a valid reason. The new subsection 118(5) would introduce a contraction of the current time period for removal, which is between 8pm on the day of the writ and the close of polling day.

Item 8 is consequential to the changes introduced to section 102 by **item 5** and would adjust the relevant numbering elsewhere in the Electoral Act relating to the conduct of a preliminary scrutiny of declaration votes. A similar adjustment to the Referendum Act is made by **item 12**. Other changes to the Referendum Act reflect the introduction of the seventh day after the issue of the writ as the date for the close of the rolls.

Finally, **item 1** seeks to introduce a drafting modification that would redefine current references to elections or polls in, for or in relation to divisions or subdivisions (which apply in the case of House of Representative elections) so as to include a reference to a Senate election or poll for a state or territory including the division or subdivision.

Schedule 2—prisoner voting

The central operative provision of Schedule 2 is **item 2**, which would amend subsection 93(8AA) so that it stipulates that prisoners serving a term of imprisonment for three or more years cannot vote in House of Representatives and Senate elections. The modified provision would replace the current unconstitutional provision, whereby the legislation seeks to prevent anyone serving any term of imprisonment from voting.

48. The Electoral Act provides different arrangements governing various categories of potential voters, including enrolments made by those who are outside Australia (section 94A), those who derive their eligibility from the eligibility of their spouse, de facto partner or parent (section 95), and those who are itinerant electors (section 96) and items 2, 3 and 4 apply to each of these respective sections.

Those who, because of unsound mind cannot understand the nature and significance of enrolling or voting, or who have been convicted, and not pardoned, of treason or treachery, are excluded from being on the Electoral Roll at all. Under section 93(1) *all* prisoners who do not fit these categories are entitled to be on the Roll, and only those serving sentences of imprisonment of three or more years are, at the time of the election, denied the right to vote by the proposed operation of 93(8AA). Thus those serving three years or more imprisonment remain on the Electoral Roll – or can join it, and are only prevented from voting by the prohibition in 93(8AA).

Under the changes proposed in **item 3** the Controller-General of Prisons in each State and Territory would have to send the Electoral Commissioner a list of people serving sentences of three or more years. At the moment the legislation specifies that the various Contollers-General would have to send details of everyone serving terms of imprisonment.

Minor and mechanical provisions

There are a number of minor changes made by the provisions in Schedule 2. In the case of one repeal and reinsertion there is no textual change made to the provision whatsoever – **item 4**'s repeal and reintroduction of an identical provision (subsection 208(2)) is unusual. It would seem from the Explanatory Memorandum that its repeal and reintroduction in identical form is regarded as necessary because the High Court had declared a paragraph therein, 208(2)(c), as invalid.⁴⁹ The oddity in the Bill's provisions and response to the High Court's findings is that the nature and meaning of that provision will necessarily change (and consequently, presumably, become constitutionally acceptable) when the provision it refers to (i.e. 93(8AA)) is itself changed by the Bill. The Bill's replacement but non-amendment of the provision may be technically necessary but unusual nonetheless.

There may be an overabundance of caution in the decision to repeal and re-enact identical provisions, provisions which will now have a different meaning because they refer to an amended section – nevertheless the Government is taking the opportunity to make a number of other minor amendments which would usually be undertaken in a Statute Revisions Bill. So, for instance, the only textual change introduced by **item 1** is to insert a 'the' into a subsection governing who is entitled to enrol and vote. The change is hardly remarkable although it is difficult to identify when comparing the original provision and its replacement.⁵⁰ The Explanatory Memorandum suggests that the section's repeal and reinsertion in the same form is necessitated because the section to which it refers (93(8AA)) is itself being changed. It is most common to leave pre-existing legislation intact even when the provisions to which they refer change.

49. Explanatory Memorandum, Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Bill 2010, p. 18.

50. The 'the' is inserted at the end of the final sentence '...and at elections of THE Members of House of Representatives for that Division.' (emphasis added).

A similar logic appears to apply to **item 5**, whereby a provision (subsection 221(3)) is repealed and the replacement substituted with only minor wording changes, such as are not essential and would, as has been said, usually be effected in statute revision legislation.

Finally section 22 of the other Act being amended, the Referendum Act, requires the Electoral Commissioner to prepare a certified list of voters when a referendum is to be held. The substantive amendment proposed in **item 6** would mean that prisoners serving terms of three years or longer are excluded from this list, thus allowing enrolled prisoners to vote at a referendum if their sentence is less than three years.

Part 2 of both Schedules makes provisions for the future application of the legislative provisions. In summary these provisions are to apply to future elections and referendums from the commencement of the legislation, with provisions governing the list of excluded prisoners to commence more immediately.

Concluding comments

Nearly all of these amendments could be said to have been necessitated by the High Court's various decisions which defined for the Parliament what is within its constitutional power. The changes that were introduced by the 2006 Act were hotly contested, and the merits of the various options have been extensively canvassed. At this point, however, further reconsiderations of the matter may need to be through constitutional amendment.

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