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HOUSE OF REPRESENTATIVES

**ELECTORAL AND REFERENDUM AMENDMENT  
(ENROLMENT AND PRISONER VOTING)  
BILL 2010**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the  
Special Minister of State, the Hon Gary Gray AO MP)

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# **ELECTORAL AND REFERENDUM AMENDMENT (ENROLMENT AND PRISONER VOTING) BILL 2010**

## **OUTLINE**

The primary purpose of the *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Bill 2010* (the Bill) is to amend the *Commonwealth Electoral Act 1918* (the Electoral Act) and the *Referendum (Machinery Provisions) Act 1984* (Referendum Act) to give effect to two decisions of the High Court of Australia:

- *Rowe v Electoral Commissioner* [2010] HCATrans 207 (*Rowe*), decided on 6 August 2010, which concerned the process following the calling of an election through the formal issue of a writ, and the period of time allowed for relevant voters to either ensure that they are on the electoral Roll, or to update their details (close of Rolls); and
- *Roach v Electoral Commissioner* (2007) 233 CLR 162 (*Roach*), decided on 30 August 2007, with reasons published on 26 September 2007, which concerned the franchise for relevant people who may be serving a sentence of imprisonment.

Schedule 1 to the Bill addresses the *Rowe* decision and contains amendments relating to the close of Rolls. Schedule 2 to the Bill addresses the *Roach* decision and contains amendments relating to prisoner voting.

In short, the Bill would, if enacted, update the text of the Electoral Act to reflect the current legal position, as declared by the High Court, to:

- restore the close of Rolls period to 7 days after the date of the writ for a federal election; and
- reinstate the previous disqualification, for prisoners serving a sentence of imprisonment of 3 years or longer, from voting at a federal election.

Consequential amendments to the Referendum Act would be made to ensure consistency between the two Acts. In this context, a referendum is the formal constitutional amendment process, set out in section 128 of the Australian Constitution.

Two other related matters are also addressed by the Bill.

First, on 22 June 2009, the Joint Standing Committee on Electoral Matters (JSCEM) delivered a report entitled *Report on the conduct of the 2007 federal election and matters related thereto* (JSCEM Report). The Bill would implement the Government's Response, of 18 March 2010, to Recommendation 47 of the JSCEM Report. The amendments would ensure that while prisoners serving a sentence of imprisonment of 3 years or longer will be disqualified from voting, they may remain on, or be added to, the electoral Roll.

Second, the Bill would include an interpretative provision to ensure that certain references in the Electoral Act to "an election for a Division", or similar expressions,

can operate in the event of a half Senate election held independently from an election of the House of Representatives. This addresses an anomaly in the Electoral Act.

**Financial Impact Statement**

Any costs associated with implementation of the measures contained in this Bill are not expected to have an impact on the Budget.

## NOTES ON CLAUSES

### Clause 1 – Short title

1. Clause 1 provides for the Act to be cited as the *Electoral and Referendum (Enrolment and Prisoner Voting) Act 2010*.

### Clause 2 – Commencement

2. Clause 2 provides for the Act to commence on the day it receives Royal Assent.

### Clause 3 – Schedule(s)

3. Clause 3 provides for each Act, specified in a Schedule to the Bill, to be amended or repealed as set out in the applicable items in each of the Schedules. It also provides that any other item in a Schedule has effect according to its terms: this relates to provisions such as application and transitional provisions.

## Schedule 1 – Amendments relating to close of Rolls

### Overview

4. On 6 August 2010, the High Court delivered Orders in *Rowe* declaring invalid items 20, 24, 28, 41, 42, 43, 44, 45 and 52 of Schedule 1 to the *Electoral and Referendum (Enrolment Integrity and Other Measures) Act 2006* (the 2006 Act).
5. These items of the 2006 Act had purported to reduce the close of Rolls period by providing that the electoral Roll closed at 8 pm on the third working day after the issue of the writ. Persons not on the Roll were generally not able to be added to the Roll in the period between 8 pm of the day of the issue of the writ and polling day. Exceptions to this general rule were made: for certain persons not on the Roll (being those who, between the issue of the writ and polling day, were expected to turn 18 or to be granted citizenship); and for persons updating their enrolment details. Persons in these categories could apply for enrolment until 8 pm of the day of the close of the Rolls (that is, 3 working days after the day on which the writ was issued).
6. Schedule 1 to the Bill would implement the *Rowe* decision, by repealing and substituting provisions of the Electoral Act, the whole or part of which, had been amended by items of the 2006 Act that had been declared invalid. The prior legislative scheme, under which the date fixed for the close of the Rolls was the seventh day after the date of the writ for an election, would be reinstated. This approach ensures that the legislation reflects the current law, as declared by the High Court.
7. Consequential amendments to the Referendum Act would also be made to ensure consistency between the close of Rolls provisions in the Referendum Act and the Electoral Act (given that the electoral Roll is also used to determine those eligible to vote in a referendum to amend the Constitution).
8. An interpretative provision has been added that would, if enacted, ensure that certain references in the Electoral Act to “an election for a Division”, or similar expressions, can operate in the event of a half Senate election, held independently

from a House of Representatives election. As many of the provisions in which this potential anomaly arises are proposed to be amended in the Bill, this interpretive provision has also been addressed in Schedule 1.

9. In repealing and substituting certain provisions within the Electoral Act, Schedule 1 to the Bill would make changes to the text of the Electoral Act, as in force prior to the passage of the invalid items of Schedule 1 to the 2006 Act, in the interests of consistency with current drafting practice and to achieve greater consistency within the Electoral Act.

### **Human Rights**

10. Australia is a party to the International Covenant on Civil and Political Rights (ICCPR). Article 25 of the ICCPR provides that:

*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

...

*(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; ...*

11. The Bill would amend the text of the Electoral Act to reflect that the close of Rolls period is not 3 working days after the date of the writ, but is the seventh day after the date of the writ. Consequently, all applications for enrolment or transfer of enrolment would be allowed up to 8 pm of the day of the close of the Rolls, reflecting the current constitutional position.

12. The Bill would aim to ensure that any limitation on the right to vote as a consequence of the 7 day close of the Rolls period is objective, reasonable, proportionate and non-discriminatory, and hence falls within the ambit of restrictions allowable by the ICCPR. The aim of providing a cut-off date for the close of the Rolls is to ensure that, for practical purposes, a certified list of eligible voters can be prepared in advance of the election. This is particularly important from a logistical perspective as voting is compulsory in federal elections. Also, in light of compulsory enrolment, 7 days following the issue of writs for an election provides individuals with reasonable time to ensure that they are on the Roll.

13. Accordingly, the Bill is also intended to give better effect to Article 25 of the ICCPR.

## Part 1 – Amendments

### *Commonwealth Electoral Act 1918*

#### Item 1 – After subsection 4(7)

14. Item 1 would insert a new subsection 4(7A) in the Electoral Act, clarifying that unless the contrary intention appears, all references in the Electoral Act to an election or poll in, for or in relation to, a Division or Subdivision<sup>1</sup>, include a reference to a Senate election, or a poll for a Senate election, for the State or Territory that includes the Division or Subdivision.

15. Under subsection 4(1) of the Electoral Act a *Division* is defined as “an Electoral Division for the election of a member of the House of Representatives”. Certain references in the Electoral Act to “an election for a Division”, or similar expressions, appear to inadvertently limit the application of those provisions to elections for the House of Representatives. It follows 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.

16. The new interpretative provision inserted by item 1 would apply throughout the Electoral Act. In particular, new subsection 4(7A) would apply to the following references in the Electoral Act, as amended by this Bill:

- references to “election to be held in a Division” in paragraph 94A(4)(a) and subsections 95(4) and 118(5);
- reference to “election to be held in the Division” in subsection 96(4);
- references to “election for the Division” in subsections 102(4) and 109(2), and section 106;
- references to “election for the Subdivision” in subparagraphs 99B(1)(a)(i) and 99B(1)(a)(ii);
- reference to “taking of a poll in that Division” in subsection 80(2);
- reference to “taking of a poll in a Division” in subsection 80(3);
- reference to the “close of the poll for a Division” in subsection 266(1);
- references to the “close of the poll in a Division” in paragraphs 17 and 23 of Schedule 3; and
- reference to a person having “voted in the election in relation to the Division” in paragraph 260(3)(b).

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<sup>1</sup> Under subsection 4(4) of the Electoral Act, where a Division is not divided into Subdivisions, a reference in the Electoral Act to a Subdivision shall, in relation to that Division, be read as a reference to that Division.

17. Examples of where a contrary intention appears in the Electoral Act, which would exclude the operation of the new interpretative provision in subsection 4(7A), include:

- reference to an “election to be held in a Division or Divisions” in subsection 154(4): this section relates to writs for the election of members of the House of Representatives only;
- reference to “polling in each Division” in section 160: this section relates to a general election for the House of Representatives only; and
- references throughout the Electoral Act to “election for a Division”, or similar expressions, which expressly refer to elections for the House of Representatives, including those in subsections 166(1AA), 166(1E) and 167(3), paragraph 169(3)(b), subparagraphs 169B(1)(b)(ii) and 176(4)(b)(ii) and subsections 177(2) and 177(3).

18. The examples of the operation or exclusion of new subsection 4(7A) listed above are not intended to be exhaustive, but rather are provided as an aid to interpretation.

**Item 2 – Subsection 94A(4), Item 3 – Subsection 95(4) and Item 4 – Subsection 96(4)**

19. Items 2, 3 and 4 would repeal and substitute subsections 94A(4), 95(4) and 96(4) of the Electoral Act. These subsections deal with applications for enrolment from three categories of persons:

- (a) eligible overseas electors who are located outside Australia (section 94A);
- (b) the spouse or child of an eligible overseas elector (section 95); and
- (c) itinerant electors (section 96).

20. Items 20, 24 and 28 of Schedule 1 to the 2006 Act had purported to amend paragraph 94A(4)(a), subsection 95(4) and subsection 96(4) of the Electoral Act, to prevent these categories of persons from being added to the electoral Roll after 8 pm on the date of a writ for an election, until after the close of the poll for that election.

21. Items 20, 24 and 28 of Schedule 1 to the 2006 Act were declared invalid by the High Court in *Rowe*.

22. The substituted subsections 94A(4), 95(4) and 96(4) would remove this restriction in the text of the Electoral Act and reflect the current constitutional position, as declared by the High Court, reverting to the arrangements prior to the invalid amendments introduced by the 2006 Act.

23. Under the substituted provisions:

- (a) if an application for enrolment for a Subdivision is received by the Electoral Commissioner from a person in one of these three categories, after 8 pm on the day of the close of the Rolls for an election to be held in a Division; and
- (b) the application relates to a Subdivision of that Division,

then the person's name would be prevented from being added to the electoral Roll until after the close of the poll for that election.

24. In relation to substituted subsections 95(4) and 96(4), this prohibition would also extend to the required annotation of the Roll under subsections 95(1) and 96(2B), to indicate that the person is an eligible overseas elector or an itinerant elector, respectively.

25. Substituted section 155 would respecify the date fixed for the close of the Rolls as the seventh day after the date of the writ (see item 7).

26. Under subsection 4(4) of the Electoral Act, where a Division is not divided into Subdivisions, a reference in the Electoral Act to a Subdivision shall, in relation to that Division, be read as a reference to that Division.

27. In relation to the proposed subsection 4(7A) of the Electoral Act, that would, if enacted, be introduced by item 1 of Schedule 1, references in substituted subsections 94A(4), 95(4) and 96(4) to "an election to be held in a Division" also extend to a Senate election that includes the Division.

28. In the interests of consistency within the Electoral Act, subsections 95(4) and 96(4) have been redrafted in a style consistent with subsection 94A(4), within their current legal meaning, as in force prior to the invalid amendments contained in the 2006 Act. Additionally, various wording changes in the substituted sections have been made for consistency with current drafting practice, for example, changing "where" to "if" in subsection 95(4).

#### **Item 5 – Section 102**

29. Item 5 would repeal and substitute section 102 of the Electoral Act, which deals with actions on the receipt of claims for enrolment and transfer of enrolment made pursuant to section 101.

30. Items 41 to 45 of Schedule 1 to the 2006 Act purported to amend subsection 102(4), paragraph 102(4A)(a), subparagraph 102(4A)(b)(ii), subsection 102(4B) and paragraphs 102(4B)(a) and 102(4B)(b) of the Electoral Act.

31. The 2006 Act had restricted the consideration of new claims for enrolment received under section 101 between:

- (a) 8 pm on the date of the writ for an election for the Division to which the claim related; and
- (b) the close of the poll for the election.

32. In effect, this had provided that for new enrollees wishing to vote at an upcoming election, the electoral Roll closed on 8 pm on the date of the writ.

33. The 2006 Act had also restricted the consideration of claims by persons currently enrolled who update their details, and by persons not enrolled who, between the day on which the writs were issued and polling day, would attain 18 years of age or acquire Australian citizenship. These claims could not be considered between:

- (a) 8 pm on the purported date of the close of the Rolls for an election for the Division to which the claim related; and
- (b) the close of the poll for the election.

34. In effect, this had provided that for such enrolments and transfers of enrolment, the electoral Roll closed on 8 pm of the third working day after the date of the writ.

35. Items 41 to 45 of Schedule 1 to the 2006 Act had been declared invalid by the High Court in *Rowe*.

36. The change to section 102 (Action on receipt of claim) of the Electoral Act made by item 39 of Schedule 1 to the 2006 Act (inserting a reference to subsection (4AA) in subsection 102(1)) would be included in the substituted section 102, despite not having been expressly found in *Rowe* to be invalid. This is because subsection 102(4AA) itself was inserted by item 41 of Schedule 1 to the 2006 Act, which had been expressly found to be invalid. As such, this consequential change to subsection 102(1) of the Electoral Act is necessary for the internal coherence of section 102.

37. The change made to the Electoral Act by item 40 of Schedule 1 to the 2006 Act (amending subsection 102(2A) to substitute the reference to “the day on which the Rolls for the election close” with “the date of the writ or writs for the election”) was not expressly found to be invalid in *Rowe*. It does not require inclusion in the substituted section 102 as the provision which it had been amending, subsection 102(2A), was repealed by item 85 of Schedule 2 to the *Electoral and Referendum Amendment (Pre-poll Voting and Other Measures) Act 2010*.

38. The substituted section 102 would, if enacted, remove the previous restrictions on the consideration of claims for enrolment and transfer of enrolment, and would reinstate the prior 7 day close of Rolls period, reflecting the current legal position, as declared by the High Court in *Rowe*.

39. Generally, under the substituted subsection 102(4), a claim received by the Electoral Commissioner under section 101, during the *suspension period*, which would be defined as:

- (a) starting at 8 pm on the day of the close of the Rolls for an election to be held in a Division; and
- (b) ending on the close of the poll for the election,

where the claim relates to a Subdivision of that Division, would not be considered until after the end of the suspension period.

40. The suspension period in new subsection 102(4) would also apply to claims for enrolment under subsection 100(2) and subsection 99B(2), that are taken to be made under section 101. Under subsection 101(1A), persons entitled to be enrolled for any Subdivision under section 95AA of the Electoral Act may fill in and sign a claim to enrol. As these claims are also made under section 101, the suspension period in new subsection 102(4) would also apply to these claims.

41. Substituted section 155 would respecify the date fixed for the close of the Rolls as the seventh day after the date of the writ (see item 7).

42. In the interests of consistency within the Electoral Act, the new subsection 102(4) has been drafted in a style more consistent with substituted subsections 94A(4), 95(4) and 96(4) (within its current legal meaning, as in force prior to the amendments contained in the 2006 Act).

43. Under the new subsection 4(7A) of the Electoral Act, introduced by item 1 of Schedule 1, the reference in new subsection 102(4) to “an election to be held in a Division” would also extend to a Senate election that includes the Division.

44. Under subsection 4(4) of the Electoral Act, where a Division is not divided into Subdivisions, a reference in the Electoral Act to a Subdivision shall, in relation to that Division, be read as a reference to that Division.

45. In the interests of readability, subsections 102(4A) and 102(4B) would be amalgamated into a single new subsection 102(5). Generally, the opportunity has been taken to renumber new section 102 into consecutive integers and letters, as many amendments throughout the years to section 102 had left the numbering ad hoc.

#### **Item 6 – Subsection 118(5)**

46. Item 6 would repeal and substitute subsection 118(5) of the Electoral Act, which deals with the determination of objections by the Electoral Commissioner that may result in a person being removed from the electoral Roll in accordance with the requirements contained in section 114 (Objection to enrolment).

47. Item 51 of Schedule 1 to the 2006 Act purported to amend the Electoral Act to prevent the removal of an elector’s name from the electoral Roll during the period between:

- (a) 8 pm on the date of the writ for an election in a Subdivision; and
- (b) the close of the poll.

48. Prior to the passage of item 51 of Schedule 1 to the 2006 Act, the commencement of the suspension period described in paragraph (a) above had been specified as the date of the close of the Rolls, that is, 7 days after the issue of a writ for an election. Although the High Court in *Rowe* had not expressly found this item to be invalid, subsection 118(5) would be amended to reinstate the prior legal regime. This would be done to achieve consistency in the close of Rolls provisions in the Electoral Act, as would be amended by Schedule 1 to this Bill, which would repeal the other close of Rolls amendments contained in the 2006 Act that were declared invalid.

49. Substituted subsection 118(5) would prevent the removal of an elector’s name from the electoral Roll during the period:

- (a) starting at 8 pm on the day of the close of the Rolls for an election to be held in a Division; and
- (b) ending on the close of the poll for the election.

50. Substituted section 155 would specify the date fixed for the close of the Rolls as the seventh day after the date of the writ (see item 7).

51. In the interests of consistency within the Electoral Act, the substituted subsection 118(5) has been redrafted, in a style more consistent with substituted subsections 94A(4), 95(4), 96(4) and 102(4), within its current legal meaning, as in force prior to the amendments contained in the 2006 Act.

52. Under the new subsection 4(7A) of the Electoral Act, introduced by item 1 of Schedule 1, the reference in new subsection 118(5) to “an election to be held in a Division” would also extend to a Senate election that includes the Division.

53. Under subsection 4(4) of the Electoral Act, where a Division is not divided into Subdivisions, a reference in the Electoral Act to a Subdivision shall, in relation to that Division, be read as a reference to that Division.

#### **Item 7 – Section 155**

54. Item 7 would repeal and substitute section 155 of the Electoral Act, which specifies the date for the close of the Rolls.

55. Item 52 of Schedule 1 to the 2006 Act had purportedly amended the Electoral Act to shorten the close of Rolls period from 7 days after the date of the writ, to the third working day after the date of the writ.

56. Item 52 of Schedule 1 to the 2006 Act had been declared invalid in *Rowe*.

57. The substituted section 155 reflects the current legal position, as declared by the High Court, and reverts to the legal position prior to the invalid amendments introduced by the 2006 Act.

58. The substituted section 155 would specify that the date fixed for the close of the Rolls is the seventh day after the date of the writ.

59. This amendment would also give effect to Recommendation 1 of the JSCEM Report.

#### **Item 8 – Subparagraphs 10(a) and 11(a) of Schedule 3**

60. Item 8 would substitute the reference to subsection 102(4A) in paragraphs 10 and 11 of Schedule 3 to the Electoral Act with a reference to subsection 102(5). This would reflect the new numbering of substituted section 102 (see item 5).

#### ***Referendum (Machinery Provisions) Act 1984***

#### **Item 9 – Subsections 4(2) and (3)**

61. Item 9 would repeal subsections 4(2) and 4(3) of the Referendum Act and substitute them with a new subsection 4(2).

62. Subsections 4(2) and 4(3) of the Referendum Act had been inserted by items 104 to 106 of Schedule 1 to the 2006 Act, to ensure that the suspension periods affecting the consideration of claims for enrolment or transfer of enrolment under the Electoral Act, as well as the suspension period affecting the removal of an elector’s

name by objection pursuant to subsection 118(5) of the Electoral Act, were consistent with the Referendum Act.

63. Although the *Rowe* decision did not expressly find items 104 to 106 of Schedule 1 to the 2006 Act to be invalid, as the corresponding provisions in the Electoral Act were declared invalid, item 9 would amend the relevant suspension periods in subsection 4(2) of the Referendum Act to ensure consistency with the close of Rolls provisions in the Electoral Act.

64. Substituted subsection 4(2) of the Referendum Act would specify that for the purposes of voting at a referendum, applications or claims for enrolment, or transfer of enrolment, under the Electoral Act that are received during the *suspension period*, defined as:

- (a) starting at 8 pm on the day of the close of the Rolls for a referendum; and
- (b) ending on the close of voting at a referendum,

would not be considered until after the suspension period.

65. Substituted subsection 4(2) of the Referendum Act would also specify that a name must not be removed from a roll under section 118 of the Electoral Act during the suspension period.

66. To the greatest extent possible, subsection 4(2) of the Referendum Act has been drafted in a style consistent with new subsection 102(4) of the Electoral Act.

#### **Item 10 – Subsection 9(1)**

67. Item 10 would repeal and substitute subsection 9(1) of the Referendum Act, which fixes the day for the close of the Rolls for a referendum.

68. Item 107 of Schedule 1 to the 2006 Act amended the Referendum Act purportedly to shorten the close of the Rolls period for referendums from 7 days after the issue of a writ to 3 working days after the issue of the writ.

69. Although the High Court in *Rowe* had not declared item 107 of Schedule 1 to the 2006 Act to be invalid, item 10 would substitute subsection 9(1) of the Referendum Act to specify that the day fixed for the close of the Rolls is the seventh day after the issue of the writ for a referendum. This would ensure consistency between the close of Rolls period in the Electoral Act and the Referendum Act.

#### **Item 11 – Subsection 9(3)**

70. Item 11 would repeal the now redundant definition of “working day” previously contained in subsection 9(3).

#### **Item 12 – Subparagraph 10(a) of Schedule 4**

71. Item 12 would substitute the reference to subsection 102(4A) of the Electoral Act in subparagraph 10(a) of Schedule 4 to the Referendum Act with a reference to subsection 102(5). This would reflect the new numbering of substituted section 102 of the Electoral Act (see item 5).

## **Part 2 – Application**

### **Item 13 – Application**

72. Item 13 would clarify that the repeal of the amendments contained in the 2006 Act relating to the close of Rolls provisions applies prospectively to all elections and referendums, the writs for which are issued on or after the commencement of Schedule 1.

## **Schedule 2 – Amendments relating to prisoner voting**

### **Overview**

73. On 30 August 2007, the High Court delivered Orders in *Roach*, declaring subsection 93(8AA) and paragraph 208(2)(c) of the Electoral Act (as inserted by items 15 and 61 of Schedule 1 to the 2006 Act) to be invalid. The High Court also declared sections 93, 109 and 208 and subsection 221(3) of the Electoral Act (as in force prior to amendments contained in items 3, 4, 13, 14, 15, 50, 61 and 62 of Schedule 1 to the 2006 Act) to be in force and valid. On 26 September 2007, the High Court published its reasons.

74. The items of Schedule 1 to the 2006 Act listed above had purportedly removed voting rights from all prisoners serving a sentence of full-time imprisonment. Under these amendments, prisoners serving a sentence of imprisonment, although disqualified from voting, would be entitled to remain on, or be added to, the electoral Roll. The disqualification from voting was achieved by ensuring that prisoners did not appear on certified lists of voters. Prisoners serving sentences of imprisonment were identified in monthly lists of convictions, forwarded by the Controllers-General of Prisons of each State and Territory.

75. As a result of the High Court's decision, voting eligibility reverted to the legal position prior to the amendments contained in the 2006 Act. Under this position, prisoners serving a sentence of imprisonment of 3 years or longer were disqualified from voting. Their names were removed from the electoral Roll by a process of objection, following receipt of information from Controllers-General of Prisons.

76. Schedule 2 to the Bill would implement the *Roach* decision by reinstating the previous disqualification, for prisoners serving a sentence of imprisonment of 3 years or longer, from voting at a federal election.

77. Schedule 2 to the Bill would also implement the Government's Response to Recommendation 47 of the JSCEM Report to ensure that while prisoners serving a sentence of imprisonment of 3 years or longer would be disqualified from voting, they would remain on, or be able to be added to, the electoral Roll. This was an aspect of the legislative scheme in place under the amendments contained in the 2006 Act. This aspect of the 2006 Act was not itself affected by the reasons supporting the *Roach* decision.

78. To ensure that the Electoral Act reflects the constitutional position, Schedule 2 to the Bill would repeal and substitute provisions of the Electoral Act, the whole of which were declared to be invalid, as well as those which had been amended by items of the 2006 Act, the effect of which was disregarded by the High Court in *Roach*, in declaring the law as in force and valid.

79. Consequential amendments to the Referendum Act would also be made to ensure consistency between certified lists of voters at referendums and federal elections.

## **Human Rights**

80. In *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41, the European Court of Human Rights considered a blanket ban on the right of convicted prisoners to vote, under the equivalent provision of the European Convention on Human Rights to Article 25 of the ICCPR. The European Court found that the purpose of the measure (to prevent crime by sanctioning the conduct of convicted prisoners and enhance civic responsibility and respect for the rule of law) was legitimate. However, the European Court also found that a blanket ban on the right of prisoners to vote was not proportionate to this legitimate aim, and hence breached the European Convention on Human Rights.

81. In *Roach*, the High Court decision had a similar outcome and invalidated the disqualification of all prisoners serving a sentence of imprisonment from voting, as introduced by the 2006 Act. However, the High Court's reasoning was based on constitutional, rather than human rights, grounds.

82. The Bill would amend the text of the Electoral Act to reduce the disqualification from voting from all prisoners serving a sentence of imprisonment (as described under the amendments introduced by the 2006 Act) to those prisoners serving a sentence of imprisonment of 3 years or longer. This would reflect the current constitutional position.

83. The principle of proportionality requires a degree of seriousness in the offence to warrant suspension of a basic political right. Sentences of 3 years or more are indicative of the seriousness of the offence. The Bill aims to ensure that the limitation on the right to vote as a consequence of the disqualification from voting by prisoners serving a term of imprisonment of 3 years or longer is objective, reasonable, proportionate and non-discriminatory and is intended to give better effect to Article 25 of the ICCPR.

## **Part 1 – Amendments**

### ***Commonwealth Electoral Act 1918***

#### **Item 1 – Subsection 93(2)**

84. Item 1 would repeal and substitute subsection 93(2) of the Electoral Act, which allows an elector whose name is on the Roll for a Division to vote at House of Representatives elections for that Division and at Senate elections which include the Division.

85. Item 13 of Schedule 1 to the 2006 Act had amended subsection 93(2) to subject its operation to subsection 93(8AA). Subsection 93(8AA) had been inserted by item 15 of Schedule 1 to the 2006 Act and contained the disqualification for all prisoners, serving a sentence of imprisonment, from voting.

86. The High Court in *Roach* had declared that section 93, as in force prior to the amendments contained in the 2006 Act (including item 13 of Schedule 1 to the 2006 Act), to be in force and valid.

87. Schedule 2 to the Bill would also repeal and substitute subsection 93(8AA) in a form reflecting the constitutional position (see item 2). As such, subsection 93(2) would be repealed and substituted in the same form.

88. A minor wording change would be made to refer to “Members of the House of Representatives” rather than “Members of House of Representatives”.

### **Item 2 – Subsections 93(8) and (8AA)**

89. Item 2 would repeal and substitute subsections 93(8) and (8AA) of the Electoral Act.

90. Item 14 of Schedule 1 to the 2006 Act had purportedly repealed paragraph 93(8)(b) which had provided that persons serving a sentence of imprisonment of 3 years or longer for an offence against the law of the Commonwealth, or of a State or Territory, were not entitled to have their names placed on, or retained on, the electoral Roll, or to vote in federal elections.

91. Item 15 of Schedule 1 to the 2006 Act had replaced subsection 93(8AA) to specify that a person serving a sentence of imprisonment for any offence against the law of the Commonwealth or of a State or Territory is not entitled to vote at any federal elections.

92. In effect, the 2006 Act had moved the disqualification from voting for prisoners from subsection 93(8) into subsection 93(8AA). In this way, it had removed the prior ban on prisoners, serving a sentence of imprisonment of 3 years or longer, from being entitled to be placed on, or retained on the electoral Roll.

93. Items 3 and 4 of Schedule 1 to the 2006 Act had also introduced, as subsection 4(1A) of the Electoral Act, a definition of “sentence of imprisonment” to clarify that the disqualification only applied to prisoners serving a sentence of full-time detention. The Explanatory Memorandum to the 2006 Act explains that prisoners serving alternative sentences (such as periodic or home detention, as well as those serving a noncustodial sentence or released on parole), would not be disqualified from voting.

94. The High Court in *Roach* had declared that section 93, as in force prior to the amendments contained in the 2006 Act (including items 3, 4, 14 and 15 of Schedule 1 to the 2006 Act), to be in force and valid.

95. Item 2, if enacted, would retain the disqualification of prisoners serving a sentence of imprisonment from voting at federal elections in substituted subsection 93(8AA). However, the duration of the sentence of imprisonment necessary to disqualify a prisoner from voting is increased to 3 years or longer, reflecting the current constitutional position.

96. Item 2 would retain the definition of *sentence of imprisonment* contained in subsection 4(1A) of the Electoral Act. Although this definition is not expressly repealed and reinstated, if the Electoral Act were to be amended by this Bill, the Electoral Act would be interpreted anew in light of the amendments, and its validity and operation would turn on the manner in which the amendments interact with the other provisions of the Electoral Act, including the definitional sections contained in section 4.

97. Item 2 would also renumber the paragraphs contained in subsection 93(8).

98. Substituted subsection 93(8AA) would not include the words “for an offence against the law of the Commonwealth or of a State or Territory”, previously contained in paragraph 93(8)(b), prior to the amendments enacted by the 2006 Act, and in subsection 93(8AA), following the 2006 Act amendments. Given that subsection 93(8AA) relies on the term *sentence of imprisonment*, which is defined in subsection 4(1A) as “detention on a full-time basis for an offence against a law of the Commonwealth or a State or Territory”, it is not necessary to retain these words within subsection 93(8AA).

### **Item 3 – Section 109**

99. Item 3 would repeal and substitute section 109 of the Electoral Act.

100. Item 50 of Schedule 1 to the 2006 Act had repealed and replaced section 109 of the Electoral Act.

101. Prior to the 2006 Act amendments, the Controller-General of Prisons was required to forward lists of names, addresses, occupations and sexes of all persons who, during the preceding month, had been convicted in the State (or Territory) and were serving a sentence of imprisonment of 3 years or longer.

102. By virtue of section 112 of the Electoral Act, the reference to a “State” throughout section 109 is deemed to also include a reference to the Australian Capital Territory and the Northern Territory.

103. Subsection 109(1), as inserted by the 2006 Act, had expressed this requirement in greater detail, by requiring the Controllers-General of Prisons to include information about prisoners who had both commenced, and ceased, sentences of imprisonment during the preceding month. By referring to sentences of imprisonment and not sentences of imprisonment of 3 years or longer, it had also reflected the purported disqualification of all prisoners serving a sentence of imprisonment from voting, introduced by the 2006 Act.

104. Section 109, as inserted by the 2006 Act, had also contained a subsection (2), which had allowed for the update of the monthly lists in the event of the issue of a writ for a federal election, up to the date of the writ.

105. The High Court in *Roach* had declared that section 109, as in force prior to the amendments contained in the 2006 Act (including item 50 of Schedule 1 to the 2006 Act) to be in force and valid.

106. Item 3 would retain the more detailed form of section 109, as introduced by the 2006 Act, whilst updating it to reflect the constitutional position post *Roach*.

107. Item 3 would substitute subsection 109(1) to require the Controller-General of Prisons of a State (or Territory) to forward to the Electoral Commissioner, at the beginning of each month, a list of the names, addresses, occupations and sexes of all persons who, in the preceding month:

- (a) began serving a sentence of imprisonment of 3 years or longer in the State (or Territory); and
- (b) ceased to serve a sentence of imprisonment of 3 years or longer in the State (or Territory).

108. Item 3 would also substitute subsection 109(2), to require the Controller-General of Prisons of a State (or Territory) to forward to the Electoral Commissioner, within 4 days of the close of the Rolls for an election, a list of persons who, between the last monthly list forwarded under subsection 109(1) and the day of the close of the Rolls:

- (a) began serving a sentence of imprisonment of 3 years or longer in the State (or Territory); and
- (b) ceased to serve a sentence of imprisonment of 3 years or longer in the State (or Territory).

109. The reference to the “close of the rolls” in substituted section 109, rather than to the “issue of the writ” as contained in the section 109 inserted by the 2006 Act, would reflect the close of Rolls amendments contained in Schedule 1 to this Bill.

110. The substituted section 109 would not include references to persons who “were convicted in the State” which had been contained in previous subparagraphs 109(1)(a)(i), 109(2)(b)(i), 109(2)(a)(i) and 109(2)(b)(i), as inserted by the 2006 Act. As the disqualification of prisoners from voting contained in substituted subsection 93(8AA) is related to the serving of a *sentence of imprisonment*, defined in subsection 4(1) of the Electoral Act, the reference to a conviction is not necessary. This also resolves a potential anomaly as to which list transferred prisoners are to be included in, that is, persons convicted of an offence in one State (or Territory) and serving a sentence of imprisonment in a different State (or Territory).

111. Under the substituted section 109, this issue would not arise, as the monthly list would be based on the physical presence of the person in a prison under the control of a State or Territory Controller-General of Prisons. Paragraph 109(1)(b) and 109(2)(b) are intended to be read to include persons who have finished serving a sentence of

imprisonment in the State (or Territory), regardless of whether the whole term was served in that State.

112. The reference to “convicted in the State” in the section 109, as inserted by the 2006 Act, operated as a method of linking the lists forwarded by each Controller-General of Prisons, to sentences of imprisonment in the State or Territory over which he or she has control. In the substituted section 109, this would be achieved by adding the words “in the State” after references to sentences of imprisonment of 3 years or longer.

113. The substituted section 109 would also not include the words “for any offence” which had been included in subparagraphs 109(1)(a)(ii) and 109(2)(a)(ii), and paragraphs 109(1)(b) and 109(2)(b) of section 109, as inserted by the 2006 Act. The term *sentence of imprisonment* is defined in subsection 4(1) and these additional words are not necessary.

114. The reference to the term “month” throughout substituted section 109 is intended to refer to the calendar month, meaning the months of January, February, March etc., and not the period of one month, such as 15 January to 14 February.

115. The term *Controller-General of Prisons* is defined in subsection 4(1) of the Electoral Act.

116. Under new subsection 4(7A) of the Electoral Act (that would, if enacted, be introduced by item 1 of Schedule 1) the reference in substituted section 109 to “an election for a Division” also extends to a Senate election that includes the Division.

#### **Item 4 – Subsection 208(2)**

117. Item 4 repeals and substitutes subsection 208(2) of the Electoral Act, which deals with certified lists of voters.

118. Item 61 of Schedule 1 to the 2006 Act had inserted paragraph 208(2)(c) into the Electoral Act, which removed prisoners serving a sentence of imprisonment (as disqualified from voting in federal elections by subsection 93(8AA), inserted by the 2006 Act) from the certified list of voters.

119. Prior to the 2006 Act amendments, as prisoners serving a sentence of imprisonment had not been able to be retained on, or added to the electoral Roll, removal from the certified list was not necessary.

120. The High Court in *Roach* had declared paragraph 208(2)(c), as inserted by the 2006 Act, to be invalid. The High Court had also declared that section 208, as in force prior to the amendments contained in the 2006 Act (including item 61 of Schedule 1 to the 2006 Act), to be in force and valid.

121. Schedule 2 to the Bill would also repeal and substitute, in a form reflecting the constitutional position, subsection 93(8AA) (see item 2). As such, item 4 substitutes subsection 208(2), in the form contained in the 2006 Act amendments.

### **Item 5 – Subsection 221(3)**

122. Item 5 repeals and substitutes subsection 221(3) of the Electoral Act. Subsection 221(3) provides that, for the purposes of section 221 and subject to the exceptions listed, the electoral Rolls in force at the time of the election are conclusive evidence of the right of each person enrolled on the Rolls to vote as an elector.

123. Item 62 of Schedule 1 to the 2006 Act had amended subsection 221(3) to add prisoners covered by the disqualification from voting (contained in subsection 93(8AA), as inserted by the 2006 Act) as an exception to the general rule that the electoral Rolls in force at an election are conclusive evidence of a person's entitlement to vote.

124. Prior to the 2006 Act amendments, as prisoners serving a sentence of imprisonment had not been able to be retained on, or added to the electoral Roll, this exception was not necessary.

125. The High Court had declared that subsection 221(3), as in force prior to the amendments contained in the 2006 Act (including item 62 of Schedule 1 to the 2006 Act), to be in force and valid.

126. Schedule 2 to the Bill would also repeal and substitute, in a form consistent with the constitutional position, subsection 93(8AA) (see item 2). As such, item 5 would substitute subsection 221(3), in substantially the same form as had been contained in the amendments in the 2006 Act.

127. For readability, the exceptions to the general rule listed in subsection 221(3) would be contained in separate paragraphs, and minor wording changes would be made to reflect current drafting practice.

### ***Referendum (Machinery Provisions) Act 1984***

#### **Item 6 – At the end of subsection 22(2)**

128. Item 6 adds a new paragraph (c) at the end of subsection 22(2) of the Referendum Act, which deals with certified lists of voters for referendums.

129. New paragraph 22(2)(c) of the Referendum Act would mirror paragraph 208(2)(c) of the Electoral Act, and ensure that certified lists of voters are consistent for referendums and federal elections.

### **Part 2 – Application and transitional**

#### **Item 7 – Application and transitional**

130. Subitem 7(1) would ensure that amendments made by Schedule 2 to this Bill apply in relation to elections and referendums the writs for which are issued on or after the commencement of the amendments.

131. Subitem 7(2) would ensure that subsection 109(1), as inserted by item 3 of Schedule 2 to this Bill, applies in relation to months beginning on or after the commencement of the Bill as an Act.

132. Subitem 7(3) would ensure that subsections 93(8AA) and paragraphs 109(1)(b) and 109(2)(b), as amended by Schedule 2 to this Bill, apply to sentences of imprisonment beginning before, on or after commencement of this Bill.

133. Subitem 7(4) would ensure that if subsection 109(2) (as amended by Schedule 2 to this Bill) enters into force and a writ for an election is issued before the first list is forwarded under subsection 109(1) (as amended by Schedule 2 to this Bill) then the reference to the last list forwarded under subsection 109(1) in subsection 109(2) of this Bill should be read as a reference to a list forwarded under section 109 (as in force prior to the amendments contained in the 2006 Act). Subitem 7(4) is intended to apply separately in relation to each Controller-General of Prisons.