Electoral Backgrounder

COMPULSORY VOTING

April 2010

Introduction

1. *Electoral Backgrounders* are published by the Australian Electoral Commission (AEC) to provide a basic introduction to electoral law, policy and procedures for the information and guidance of all interested parties.

2. The AEC administers the conduct of federal elections under the provisions of the *Commonwealth Electoral Act 1918* (the Act). In 1911, the former Act was amended to make enrolment compulsory. In 1924, to increase voter turnout and reduce party campaign expenditure, the Act was amended to make voting at federal elections compulsory. The Act is available on the Attorney-General's Commonwealth Law website at www.comlaw.gov.au. Unless otherwise specified, all references to sections are to sections of the Act. Also please note, the words 'voter' and 'elector' are used interchangeably throughout this publication.

3. This *Backgrounder* provides introductory information in relation to compulsory voting and its contents are a guide only. If you are in doubt about the interpretation of the law in particular circumstances you should seek your own independent legal advice.

4. The view of the operation of the law presented here is consistent with advice provided to the AEC by its legal advisers, but in the final analysis it is for the courts to decide upon the interpretation of the law in any particular case. Readers should not rely on the information in this document as a statement of how the law will apply in any particular case.

5. This *Backgrounder* discusses compulsory voting in practice under the following headings:

   - Voting is compulsory
   - Non-voters
   - Valid and sufficient reasons
   - Conclusion

6. The AEC itself does not have an official view on whether enrolment and voting should or should not be compulsory. This is a matter for the Parliament to decide. The AEC conducts all elections according to the law in force at the time.

Voting is compulsory

7. Subsection 245(1) of the Act provides that: 'it shall be the duty of every elector to vote at each election'.

8. An 'elector' is someone whose name appears on the electoral roll. The Act requires Australian citizens aged 18 years and over to enrol. The Act also entitles persons enrolled as at 25 January 1984 who were British subjects within the meaning of the relevant citizenship law, to remain on the electoral roll.

9. These enrolment and voting requirements are subject to some qualifications:

Please note this update replaces Electoral Backgrounder No 17 published October 2007.

Electoral Backgrounders are published for the general information of AEC staff and people interested in electoral issues. Electoral Backgrounders present and analyse the issues on various topics, but do not promote a particular position or represent legal advice, and should not be relied upon as such. Anyone requiring legal advice should consult their own legal advisers.

AEC
Australian Electoral Commission

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- Australian citizens who are 17 years of age are entitled to enrol to vote before they turn 18, (ss. 93 and 100 of the Act);
- persons of unsound mind and persons who have been convicted of treason or treachery are not entitled to enrol or vote (see s. 93 of the Act);
- persons serving a sentence of three years or longer are not entitled to enrol or vote*;
- qualified Norfolk Islanders may enrol (s. 101(1A)) and once enrolled must vote; and
- Antarctic electors, eligible overseas electors, and itinerant electors are exempt from compulsory voting (see s. 245(17) of the Act).

* Subsection 93(8AA) and 208(2)(c) of the Act were held invalid by the High Court in Roach v. Electoral Commissioner and the Commonwealth on 30 August 2007. The orders returned the law to the situation pre-2006.

10. Electors may fulfil their duty to vote in a number of ways. Electors may vote in person at a polling place on election day, or by declaration vote. There are a number of types of declaration votes:

- postal votes;
- pre-poll votes;
- provisional votes; and
- absent votes.

11. Declaration votes allow an elector to fulfil their obligations by voting before election day or in a different division from the division in which they are enrolled on election day. Provisional votes are also available where a person's name is unable to be located on the roll. For more information on types of voting see the AEC website at www.aec.gov.au or phone 13 23 26.

12. Changes to legislation mean that all provisional voters will need to provide evidence of identity (e.g. a driver's licence)either at the time of voting or by the close of business on the first Friday following election day.

13. If an elector believes they are not going to be in the division in which they are enrolled on election day, they can obtain information on how to make a declaration vote from the AEC website at www.aec.gov.au or phone 13 23 26.

14. When attending a polling place to vote on election day, s. 233 of the Act requires an elector, on receiving a ballot paper, to retire alone to an unoccupied voting compartment and there, in private, mark his or her vote on the ballot paper. The elector must then fold the ballot paper so as to conceal his or her vote and deposit it in the ballot box.

15. If the elector is an absent voter, they must provide their marked and folded ballot paper to the presiding officer, who will then seal the ballot paper in a declaration envelope and place it in the ballot box.

16. Certain electors may be permitted to vote outside a polling place if they are unable to enter, for example because of physical disability, illness, or advanced pregnancy (see s. 234A of the Act).

Non-voters

17. Apparent non-voters are identified using certified lists of voters. The certified lists contain information from the electoral roll on who is entitled to vote at an election.

18. Electors voting in person are required to have their names marked off the certified list of voters at the polling place before they are issued with ballot papers (s. 232 the Act). Declaration voters complete a declaration certificate before they vote that allows their names to be marked off the certified lists of voters before their votes are entered into the count.

19. The certified lists then become a record of who has voted and who appears not to have voted.

20. Under s. 245(2) of the Act, a list of the names and addresses of the electors who appear to have failed to vote at an election must be prepared for each division. After election day, the names and addresses on all certified lists of voters for all divisions across Australia are scanned by computer. This scanning process produces a report on apparent non-voters and apparent multiple voters.

21. Within three months after election day, each Divisional Returning Officer (DRO) must send by post a penalty notice to every elector whose name and address appears on the list of apparent non-voters.

22. The DRO is not required to send a penalty notice to electors who have died, were absent from Australia on election day, were known to be ineligible to vote at the election, or who have supplied a valid and sufficient reason for not voting.

23. The penalty notice posted to an elector advises that he or she appears to have failed to vote at the election and that it is an offence to fail to vote at an election without a valid and sufficient reason. The elector is further advised that if he or she does not wish to have the matter dealt with by a court, the elector may, within a specified time either:

- Advise the DRO of the circumstances in which they did in fact vote
- Advise the DRO of the valid and sufficient reason why they did not vote, or
- Pay to the DRO a penalty of $20.

24. If no reply is received to the first penalty notice, a second penalty notice must be sent by the DRO.

25. Under subsection 245(11) of the Act, if an elector is unable to respond to correspondence from the DRO because of absence from his or her residential address or because of physical incapacity, then another elector who has personal knowledge of the facts may respond on behalf of the elector who appears to have failed to vote.

26. If the elector pays to the DRO the $20 penalty for failing to vote, then the matter ends there.

27. Where the elector writes to the DRO providing a reason for not voting, and the DRO is not satisfied that the reason provided is valid and sufficient, then the DRO must write again to the elector advising that the DRO is not satisfied, and that if the elector does not wish to have the matter dealt with by a court, the elector may, within a specified time period, pay to the DRO a penalty of $20. If the elector then pays to the DRO the $20 penalty for failing to vote, the matter ends there.

28. An elector may be prosecuted pursuant to s. 245(15) for failing to vote at an election without a valid and sufficient reason, or for making a statement in response to a penalty notice, or to the further notice by the DRO, that is, to his or her knowledge, false or misleading in a material particular. The court may impose a maximum penalty of $50. In addition, court costs may also be payable.

29. It should be noted that if a non-voter has been convicted and fined by a court, but decides not to pay the fine, then it is for the court to decide what action should be taken or if a further penalty should be imposed. The action taken by the court in relation to fine defaulters may vary depending on the state or territory in which the conviction is recorded, and may involve community service orders, seizure of goods, or a short period in jail. In some jurisdictions the court may have no alternative to ordering a jail sentence for fine defaulters. However, this is a matter for the courts and not for the AEC.

Valid and sufficient reasons

30. The original decision of the DRO as to whether a reason for not voting is valid and sufficient is based on the merits of each individual case, in accordance with the law as previously interpreted by the courts, and within the boundaries of administrative guidelines developed by the AEC to assist DROs.

31. Under subsection 245(14) of the Act the fact that an elector believes it to be a part of his or her religious duty to abstain from voting constitutes a valid and sufficient reason for not voting.

32. The decisions of the court on the interpretation of the term 'valid and sufficient reason' have developed over the years into a substantial body of law that guides the DROs in their decision-making in individual cases.

33. In *Judd v McKeon* (1926) 38 CLR 380, Mr Judd provided the following reason for not voting at a Senate election:

> *All the political parties and their candidates participating in the election support and do all in their power to perpetuate capitalism with its exploitation of the working class, unemployment, prostitution, etc. The Socialist Labour Party, of which I am a member, stands for the ending of capitalism and the inauguration of socialism – and, consequently, its members are prohibited from voting for the aforementioned supporters of capitalism.*
>
> *The Socialist Labour Party has paid and lost hundreds of pounds in Federal election deposits for its candidates. The unjust penalty of 25 pounds on each candidate penalizes us if we participate in a Federal election, and your letter suggests that we will be penalized if we don't. Is this fair?*

In the High Court it was decided that this was not a valid and sufficient reason, Chief Justice Knox, and Justices Duffy and Starke, remarked:

> *These reasons do not purport to express the views of the appellant but those of the party*

to which he belongs; and in that view his only excuse, which is clearly insufficient, is that his party prohibits him from voting.... But if the reasons be taken as representing the individual views of the appellant they amount to no more than the expression of an objection to the social order of the community in which he lives. In our opinion such an objection is not a valid and sufficient reason for refusing to exercise his franchise.

The High Court gave some practical examples of what would be regarded as valid and sufficient reasons 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 in such a case. One might also imagine cases where an intending voter on his way to the poll was diverted to save life, or to prevent crime, or to assist at some great disaster, such as a fire: in all of which cases, in my opinion, the law would recognise the competitive claims of public duty.

However, the Court warned this was not the only class of reason that would be accepted, it will depend on the circumstances in each case.

34. In *Lubcke v Little [1970] VR 807*, Mr Little testified that he had no preference among the candidates at the election. On appeal, the Supreme Court of Victoria found that the reason given by Mr Little was not valid and sufficient:

In my opinion, the respondent does not, by his possession of a genuinely held inability to form a preference, ... thereby gain immunity from the sanction imposed by [the Act] if he fails to vote. The voting is certainly preferential ... but it does not follow that a subjective incapacity on the part of the voter to determine that he prefers one candidate in an election to another affords a valid and sufficient reason for failing to vote.

35. In *Faderson v Bridger (1971) 126 CLR 271*, the High Court on appeal, where all three Justices affirmed the principles laid down in Judd v McKeon. Chief Justice Barwick stated:

... However much the elector may say he has no personal preference for any candidate, that none of them will suit him, he is not asked that question nor required to express by his vote that opinion. He is asked to express a preference amongst those who are available for election. That is to state which of them, if he must have one or more of them as Parliamentary representatives, as he must, to mark down his vote in an order of preference of them.

36. In *Krosch v Springell; ex parte Krosch [1974] QdR 107*, the Magistrate found that Mr Springell had a valid and sufficient reason for not voting in a Queensland State election. At the polling place Mr Springell had handed to the presiding officer the following note:

I do not consider that any of the candidates standing for the seat of Rockhampton are worthy of my vote. This also applies to the parties they represent. The main problems of the day, such as the environmental crisis, the population explosion and the economic problems associated with these are non-issues. Instead we have been treated to mudslinging, noise pollution, tree desecration and polemical discussions of trivia.

In *Krosch v Springell* the Supreme Court of Queensland overturned the Magistrate's decision on appeal, and affirmed the High Court decision in *Judd v McKeon*.

37. In *O'Brien v Warden (1981) 37 ACTR 13*, the Magistrate was told by Mr Warden that he had arrived in Canberra a little over a week before the Territory election for the ACT House of Assembly, and at the time he knew nothing about any of the 24 candidates. He said that there was not enough time before the election to find out sufficient information to enable him to decide on an order of preference that, in accordance with the law, he was required to show by his marking of the ballot paper. The Magistrate held that he had shown a valid and sufficient reason for failing to vote and dismissed the charge of failure to vote without a valid and sufficient reason.

Chief Justice Blackburn of the ACT Supreme Court overturned the Magistrate's decision on appeal, affirming the principles in *Judd v McKeon*, and concluded as follows:

In my opinion the true basis of this case is that the absence, from the mind of the elector, of any preference for any candidate over any other is not a valid and sufficient reason for failing to vote...

In Lubcke v Little ... , it seems to me, if I may say so, that Crockett J took the same view as I do of what Judd v McKeon actually

decided. The fine shade of difference between the facts of the two cases is that in Judd v McKeon the elector's absence of preference was the result of his equal disapproval of all the candidates, whereas in Lubcke v Little the report only shows that in fact the elector had no preference, without showing the reason why he had no preference; for all that the reader can tell, he may have thought all the candidates equally desirable as members of Parliament. At any rate, Crockett J came to the same conclusion, namely that the elector had no valid or sufficient excuse.

Returning to the reasons advanced by Mr Warden, Chief Justice Blackburn went on:

... In my opinion the Act does not oblige the elector to make a true expression of his preference among the candidates. On one view he must make an expression of apparent preference; on another he need not express himself intelligibly or at all.

... The decided cases prevent me from thinking that the legislature intended to spare the consciences of those to whom to vote insincerely is distasteful. A fortiori, there can be no reason to think that it is intended to spare from the inconvenience of a visit to the polling booth those for whom to comply with the Act is a meaningless formality, objectionable only because it is a waste of time.

It seems, therefore, that ... the fact that he has - for whatever reason - no preference to express, is not a rational excuse for failing to perform it, and therefore not a 'valid and sufficient reason' within the meaning of that phrase in ... the Act.

Conclusion

38. The AEC is able to assist organisations and individuals by informing them of the legislative requirements in relation to compulsory voting at federal elections, however, the AEC cannot provide legal advice on compulsory voting.

39. Anyone who is in doubt about the interpretation of the law in particular circumstances should consult the exact provisions of the Act and seek their own legal advice.

40. Anyone who believes there is a case for legislative amendment to the Act should lodge a submission to the Joint Standing Committee on Electoral Matters at Parliament House.

41. Court decisions dealing with the subject of compulsory voting may be accessed through public libraries or the Australasian Legal Information Institute Website at www.austlii.edu.au

- *Judd v McKeon (1926) 38 CLR 380*
- *Lubcke v Little [1970] VR 807*
- *Faderson v Bridger (1971) 126 CLR 271*
- *Krosch v Springell; ex parte Krosch [1974] QdR 107*
- *O'Brien v Warden (1981) 37 ACTR 13*

Endnotes

The *Commonwealth Electoral Act 1918* can be purchased over the counter in major cities, or accessed through any major public library, or the ComLaw website www.comlaw.gov.au. For information about over the counter or mail order sales, ring CanPrint Information Services 1300 889 873.

Further information in relation to compliance with the Act is set out in the AEC's *Electoral Backgrounder* publications which can be found on the AEC's website at http://www.aec.gov.au/About_AEC/Publications/Backgrounders/index.htm.

AEC Publications

The AEC has available a number of publications for people interested in the electoral process including:

- *Electoral Pocketbook:* a concise hand book of electoral facts and statistics
- *Electoral Boundaries Maps:* maps showing the geographic boundaries of the 150 electoral divisions
- *Nominations pamphlet:* key facts for people considering standing for election
- *Electoral Newsfle series:* editions are produced on various electoral events
- *Candidates Handbook:* a handbook to assist candidates standing for election to the Senate and House of Representatives
- *Scrutineers Handbook:* an information handbook for scrutineers at federal elections and referendums
- *Election Funding and Financial Disclosure Handbook*: a handbook of funding and disclosure requirements of candidates and political parties.

Copies of these and other publications are available from the AEC website www.aec.gov.au, phoning 13 23 26 or at national, state, territory and divisional offices.

Media Liaison

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Director
Media Communications Strategy Section
02 6271 4415

Assistant Director
Media Communications Strategy Section
02 6271 4724

www.aec.gov.au
National Enquiry Service 13 23 26

ISSN 1440 – 8007 | Authorised by Kathy Mitchell, West Block Offices, Queen Victoria Terrace, Parkes ACT 2600