4. The Franchise

By international standards, Australians enjoy a relatively broad voting franchise. All adult citizens, eighteen years old and over, are entitled to vote, with a few exceptions, such as categories relating to mental capacity, treason convictions and long-term prisoners. And of course, eligible Australians are not only entitled to vote, they are compelled to vote. The definition of mental capacity does at times raise questions over the interpretation of Section 93 of the Commonwealth Electoral Act 1918, which states ‘by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting’. While there are sound arguments to exclude those of ‘unsound mind’ from voting, determination of who is of ‘unsound mind’ is problematic, and electoral officials tend not to become involved in interpretation of the section, and rely on the medical evidence provided to them. Australia’s laws on mental capacity stem from British law, and it is interesting to note that it was only in 2006 that Britain abolished its law that ‘idiots’ could not vote (idiocy being a permanent and congenital state), while ‘lunatics’ (being an acquired and transitory condition) could vote only during lucid intervals.\(^1\)

The Australian franchise is citizen based, rather than resident based (with one significant exception, discussed below), unlike many countries that allow permanent residents, after they have lived in the country for a stipulated period, to vote. This becomes an interesting debate when compared with the right to vote for citizens living abroad. Australians living abroad, who might not be paying Australian taxes, may use their votes to influence Australian government policies and spending, while permanent, non-citizen residents who pay Australian taxes and are contributors to Australian society do not have a voice through the ballot box. This brings to mind the old phrase ‘taxation without representation is tyranny’. Countries where residents may vote include Uruguay (15-year residency qualification), Malawi (seven years), Chile (five years) and New Zealand (one year). In addition, numerous countries in the European Union (EU) provide reciprocal voting rights for residents from other EU countries, though generally only for local government elections. In countries with residency qualifications where there is a significant influx of migrants, the migrants’ views and policy priorities can have a significant impact on the conduct of elections. This forces political parties to consider the interests of ethnic groups, due to their voting power.

For Australian citizens living overseas, voting rights are retained if there is an intention to return to Australia within six years; however, citizens who have

not applied for enrolment as overseas voters within three years of departing
Australia will be disenfranchised. In 2010, more than 16 000 citizens were
enrolled as eligible overseas electors. Australian voting rights for expatriate
citizens are considered to be generally in the middle of the international
spectrum when compared with other countries. When it is time to vote in an
election, eligible overseas electors and citizens temporarily away from Australia
have the opportunity to attend polling stations set up at diplomatic posts, such
as embassies, high commissions and consulates. For the 2010 election, more
than 70 000 citizens used this service at more than 100 locations.

This chapter now concentrates on two aspects of the franchise that have
attracted significant interest and discussion in recent years—that is, the right
of certain non-citizen residents to vote in Australian elections, and prisoners’
voting rights.

Non-citizen residents’ voting rights

In 1984 under the Hawke Labor Government, the qualification for the franchise
was changed from British subjects who were Australian residents to Australian
citizens. Because of the high levels of migration from Britain and other British
Commonwealth countries to Australia, especially in the post–World War II
period, this had the potential to disenfranchise hundreds of thousands of British
subjects. So a ‘grandfather’ clause (Section 93 of the Commonwealth Electoral Act
1918) was included in the legislation to allow British subjects who were on the
electoral roll prior to 1984 to remain on the roll. There are 49 countries covered
by the ‘British subject’ clause, including the United Kingdom, Canada, New
Zealand, India, Singapore, Fiji, Papua New Guinea and Sri Lanka. Interestingly,
Ireland, which is not a British Commonwealth country, is included, while
South Africa, which was not a member of the Commonwealth at the time of the
legislation due to its apartheid policies, is not.

Although the impact of this exemption continues to dissipate over time, it
remains significant, as an assessment of individual electorates indicates. In
2008, more than 162 000 electors with the British subject notation remained on
the Australian electoral roll, with 13 electoral divisions where ‘British subjects’
made up more than 2 per cent of the roll (see Table 4.1). In general elections
there are invariably several seats decided on a small margin, making the number

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2 According to Graeme Orr, quoted in the JSCEM [Joint Standing Committee on Electoral Matters]. Report
on the Conduct of the 2007 Federal Election and Related Matters Thereto. Canberra: Commonwealth of Australia,
p. 298.
of British enrolments significant. In the past two general elections, six of the 26 results listed in the table were decided by a margin less than the number of British enrolments (in bold).

Table 4.1 Electors with ‘British Subject’ Notation at 30 September 2008

<table>
<thead>
<tr>
<th>Division</th>
<th>British subject notation</th>
<th>Total enrolment</th>
<th>Proportion of British subjects/total enrolment (%)</th>
<th>2PP margin at 2007 election (%)</th>
<th>2PP margin at 2010 election (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wakefield (SA)</td>
<td>3693</td>
<td>96 621</td>
<td>3.82</td>
<td>6.59 Labor</td>
<td>11.95 Labor</td>
</tr>
<tr>
<td>Brand (WA)</td>
<td>2870</td>
<td>94 849</td>
<td>3.03</td>
<td>5.62 Labor</td>
<td>3.33 Labor</td>
</tr>
<tr>
<td>Dunkley (Vic.)</td>
<td>2659</td>
<td>93 565</td>
<td>2.84</td>
<td>4.04 Coalition</td>
<td>1.02 Coalition</td>
</tr>
<tr>
<td>Kingston (SA)</td>
<td>2784</td>
<td>98 959</td>
<td>2.81</td>
<td>4.42 Labor</td>
<td>13.91 Labor</td>
</tr>
<tr>
<td>Canning (WA)</td>
<td>2665</td>
<td>97 778</td>
<td>2.73</td>
<td>5.58 Coalition</td>
<td>2.19 Coalition</td>
</tr>
<tr>
<td>Flinders (Vic.)</td>
<td>2595</td>
<td>96 357</td>
<td>2.69</td>
<td>8.25 Coalition</td>
<td>9.11 Coalition</td>
</tr>
<tr>
<td>Makin (SA)</td>
<td>2540</td>
<td>95 347</td>
<td>2.66</td>
<td>7.70 Labor</td>
<td>12.20 Labor</td>
</tr>
<tr>
<td>Mayo (SA)</td>
<td>2522</td>
<td>97 630</td>
<td>2.58</td>
<td>7.06 Coalition</td>
<td>7.35 Coalition</td>
</tr>
<tr>
<td>Hasluck (WA)</td>
<td>1923</td>
<td>83 412</td>
<td>2.31</td>
<td>1.26 Labor</td>
<td>0.57 Coalition</td>
</tr>
<tr>
<td>Casey (Vic.)</td>
<td>1959</td>
<td>90 019</td>
<td>2.18</td>
<td>5.93 Coalition</td>
<td>4.18 Coalition</td>
</tr>
<tr>
<td>Throsby (NSW)</td>
<td>1851</td>
<td>89 161</td>
<td>2.08</td>
<td>23.46 Labor</td>
<td>12.11 Labor</td>
</tr>
<tr>
<td>La Trobe (Vic.)</td>
<td>1940</td>
<td>93 304</td>
<td>2.08</td>
<td>0.51 Coalition</td>
<td>0.91 Labor</td>
</tr>
<tr>
<td>McMillan (Vic.)</td>
<td>1779</td>
<td>88 281</td>
<td>2.02</td>
<td>4.79 Coalition</td>
<td>4.41 Coalition</td>
</tr>
</tbody>
</table>

The arguments against allowing this class of voter to be enrolled are that it is discriminatory against long-term Australian residents from non-British countries and also that it is possibly racist, if not in its intent, then at least in its outcomes, as the majority of the beneficiaries are white. Another argument is put forward by Daryl Melham, a Labor MP who has chaired the Joint Standing Committee on Electoral Matters for more than 13 years. Melham argues that since the reform occurred in 1984, many more countries now allow dual citizenship, thereby removing one argument that might have discouraged British subjects from taking up Australian citizenship.4

The High Court has stated that permanent residents should not necessarily be regarded as part of ‘the people’ to whom the Australian Constitution entitles voting rights, but the current situation is discriminatory. A fairer situation would be to allow all permanent residents (including a specified qualification regarding length of residency) to be entitled to vote, irrespective of their country of origin, or limiting the voting entitlement to Australian citizens only.

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If the latter is adopted (that is, removing the British subject clause), there is a reasonable argument to retain an exemption for citizens of those countries that still do not allow dual citizenship, such as India and Singapore.

The prisoner franchise

Supporters of prisoner enfranchisement argue that voting is a fundamental right and denial of the vote is racist, as Indigenous Australians are imprisoned at 12–15 times the non-Indigenous rate. Also, it is argued that denying a right to vote is counterproductive to the rehabilitative aspect of incarceration. Detractors say that prisoners have broken the ‘social contract’ by committing serious crimes and therefore deserve ‘civil death’ by disenfranchisement. While prisoners account for only a small percentage of the total potential voting population, the range of views on prisoner voting entitlements ensures that this issue becomes a ‘political football’ whenever reforms are suggested.

There are quite divergent voting entitlements for prisoners in democracies around the world, as Massicotte et al.’s comparative study of 63 countries reveals. In 16 of the 63 countries in the study (25 per cent), all prisoners have a right to vote. This group includes Denmark, Germany, South Africa and Sweden. A further 16 countries (25 per cent), such as the Netherlands, New Zealand and Spain, allow a partial franchise, dependent on the length of sentence or the type of offence committed. In 24 of the countries studied (38 per cent), including Brazil, India and the United Kingdom, all prisoners are disenfranchised.

A detailed analysis of the philosophical arguments for different countries’ approaches to the prisoner franchise is outside the scope of this book. Instead, the focus is on the variation that exists within Australia and the processes undertaken to determine prisoners’ entitlements at the Commonwealth, State and Territory levels. From this, an assessment is made of the motivating forces driving Australian prisoner franchise laws: the participation principle of fairness, partisan self-interest, or a mixture of both.

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8 No information was provided for the remaining seven countries. Louis Massicotte et al. 2004. *Establishing the Rules of the Game: Election Laws in Democracies*, pp. 18–25.
Changes to Commonwealth laws

The Hawke Labor Government extended the prisoner franchise in its 1983 reforms. The franchise had remained largely unchanged since Federation, with voting rights extended only to those imprisoned for an offence with a maximum penalty of less than one year. Labor extended the franchise to those imprisoned for offences with maximum penalties of less than five years. These provisions were difficult to administer, as State controllers-general of prisons needed to determine the maximum possible penalties for offences, irrespective of prisoners’ actual sentences. Subsequently, the Keating Labor Government changed the provision in 1995 so that all prisoners ‘sentenced’ to terms of less than five years could vote. This had the effect of further extending the franchise.

When the Coalition came to power in 1996, there was an immediate push to not only restrict the prisoner franchise, but also remove it entirely. In 1997, the Coalition-dominated JSCEM recommended that no prisoners should be entitled to enrol or vote. The Coalition’s attempt to legislate for this change in 1999 was defeated in the Senate; however, the Coalition was successful in restricting the prisoner franchise in 2004, reducing the ‘less than five years’ provision to ‘less than three years’. While the Coalition’s legislation called for total prisoner disenfranchisement, Labor argued that a three-year qualification was a more suitable restriction as it coincided with a full term of the Australian Parliament. The Coalition agreed to this compromise in 2004 because it lacked the necessary numbers in the Senate to achieve its preferred outcome.

After the Coalition gained a Senate majority in 2005, it returned to its previous position of removing the franchise for all prisoners in full-time detention—a change estimated to affect approximately 20,000 prisoners. While the Coalition has consistently argued against any prisoners having the right to vote, analysis of the interview data indicated some opposition to this stance within the Coalition parties. As one Liberal parliamentarian stated:

I was a minority in my own party. The majority of my party had the John Howard/Eric Abetz line that if you were in prison, you didn’t have a right to vote. I don’t take that view. I think that, as the law said previously, if you’re doing more than three years, you didn’t have the right to vote, which is probably fair enough.

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But I was dead against taking the right away from someone who was doing a short sentence. I felt that was completely unjust. They’re in prison paying their debt to society. It’s not as though it’s a difficult matter to go and take their vote. They shouldn’t have lost [the vote].

In its 2000 report, the JSCEM stated that the prisoner franchise should not be removed ‘until there is sufficient and widespread public support for a change’. The government asserted that its 2006 move was supported by the Australian electorate; this is not, however, borne out by the submissions received by the Senate Finance and Public Administration Committee’s inquiry into the Bill. Of the 39 submissions that addressed the prisoner franchise issue, only three expressed support for the Coalition’s proposed change (from the Liberal Party, The Nationals and Festival of Light). While it would be erroneous to argue that these figures are representative of the general view of the Australian electorate, it is significant that there was minimal explicit support for the change outside the Coalition parties.

There is very little information about public opinion on this issue; however, one newspaper poll in 2007 put public support for prisoners’ voting rights at 62 per cent (albeit only a small, unrepresentative sample). While such an unscientific survey might be inconclusive, some of the arguments put forward by the Coalition are even more so. During one parliamentary debate on the issue, senior Liberal Senator Nick Minchin argued that the government position stood up to the ‘pub test’—that is, the majority of people in a hotel bar would support the government’s position—suggesting perhaps that, apart from its ideological position on the issue, the Coalition also supported the change as a populist (and partisan) measure.

Many of the submissions to the JSCEM inquiry opposing the change cited Article 25 of the International Covenant on Civil and Political Rights (ICCPR), which states that all citizens shall have the right and opportunity to vote at elections. This argument is consistent with developments in Canada and the United Kingdom in recent years. In Canada, no prisoners have been disenfranchised since the Supreme Court ruled in 2002 that disenfranchisement was in breach of the country’s Charter of Rights and Freedoms. While the United Kingdom disenfranchises all prisoners, in 2004 and 2005 the European Court of Human Rights found this to be in contravention of the European Convention on Human Rights.

The ICCPR also refers to the purpose of prison being a place to rehabilitate offenders back into society. Some JSCEM submissions argued that the denial of voting rights removed the benefits of preparing prisoners for their transition

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10 The Festival of Light was a lobby group promoting ‘Christian values’ and ‘family values’. It is now known as Family Voice Australia.
back into society through the restoration of their responsibilities as members of the community. Furthermore, they pointed to the disproportionate impact on young males (the prison population is 93 per cent male) and Indigenous Australians.

The 2007 High Court challenge

The Howard Government’s law disenfranchising all prisoners was challenged in the High Court in 2007 by Vickie Lee Roach, an Indigenous woman who had been sentenced to prison for a total of six years on five burglary-related offences. The Roach case\textsuperscript{11} was based on a number of arguments, but primarily that disenfranchisement of all prisoners was contrary to the constitutional requirement that parliament be ‘directly chosen by the people’. In addition, it was argued that disenfranchisement denied prisoners their implied right to freedom of political expression and communication.

In September 2007, the High Court determined (by a 4–2 majority) that the blanket disenfranchisement was unconstitutional; however, it upheld the law previously in effect that prisoners serving sentences of three years or more would be disenfranchised. The reasoning of the High Court was that the blanket ban was an arbitrary disenfranchisement of a particular class of citizen, without regard to the circumstances in which those citizens became part of the prisoner class.

Justices Gummow, Kirby and Crennan’s joint lead judgment refers to the 2004 legislative change that restricted the franchise to prisoners serving sentences of less than three years. They argued that such a restriction still gave regard to the seriousness of the offence as a measure of fitness to participate in the electoral process. This view was supported by Chief Justice Gleeson, who also suggested that a more restrictive disenfranchisement based on a lesser term (for example, prisoners serving terms of one year or more) would not necessarily be invalid. Gummow, Kirby and Crennan, however, appeared to be less positive towards the prospect of a more restrictive disenfranchisement, noting that the three-year sentence threshold mirrors the three-year electoral cycle that is entrenched in the Constitution.

\textsuperscript{11} Roach v Electoral Commissioner [2007] HCA 43.
Prisoner franchise at the State and Territory levels

At the Australian sub-national level, there is a similar divergence of entitlements as occurs internationally. Three jurisdictions (Victoria, Queensland and the Northern Territory) adopt the Commonwealth standard—that is, following the High Court’s 2007 Roach decision that prisoners serving terms of three years or less are entitled to vote. The Australian Capital Territory had adopted the Commonwealth standard of disenfranchisement until 2006. An aspect of the Howard Government’s reforms, however, was that while prisoners were disenfranchised, they remained on the electoral roll. Section 128 of the Australian Capital Territory’s Electoral Act 1992 states that all enrolled electors are entitled to vote. The Howard reforms, perhaps unintentionally, actually extended the vote to all prisoners in the Territory. As one administrator noted:

The ACT made it known to the Commonwealth that the ACT thought, given their human rights stance, that all prisoners should have the right to vote…I don’t know who came up with the idea…which was that everyone in prison can enrol, but if you’re in prison full-time you can’t vote for federal elections, which gives the ACT what it wanted.

The effect of the 2007 High Court decision was to revert to the previous Commonwealth law (including the removal of prisoners from the roll). This therefore disenfranchised all prisoners for ACT elections. In response, the Stanhope Labor Government enacted its own legislation to enfranchise all prisoners. This was the first occasion on which the Australian Capital Territory administered an ‘ACT only’ category of enrolment separate to the Commonwealth.

Tasmania independently enfranchises prisoners serving sentences of less than three years (Section 31[2], Electoral Act 2004). New South Wales (Section 25, Parliamentary Electorates and Elections Act 1912) continues to enfranchise prisoners serving sentences of less than one year. This was also the case for Western Australia (Section 18, Electoral Act 1907) until it amended its Act in 2007 to completely disenfranchise all prisoners, in line with the Commonwealth change. In May 2008 the Carpenter Labor Government in Western Australia introduced new legislation to extend the franchise to prisoners serving sentences of less than three years, but the Bill lapsed on the prorogation of parliament ahead of the 2008 general election. Following a change of government in 2008, in mid-2009, the Barnett Coalition Government amended the legislation, reverting to the previous one-year sentence provision. South Australia has long-established laws enfranchising all prisoners, irrespective of the length of their sentences.
In light of the High Court decision, and particularly Justices Gummow, Kirby and Crennan’s comments linking three-year sentences to the Australian Constitution’s requirement for three-year electoral cycles, there could be some scope to argue that New South Wales’ and Western Australia’s one-year sentence threshold, alongside four-year electoral cycles, could provide conditions for a constitutional challenge. For example, the Australian Human Rights Commission does not believe that denying the vote to long-term prisoners satisfies the ‘reasonableness’ test at international law; however, there do not appear to be any moves in legal or human rights circles to mount such a challenge.

Partisan impacts of prisoner voting

There is a belief, repeatedly expressed in the interviews, that allowing prisoners to vote provides a distinct advantage to the Labor Party. As one parliamentarian noted:

Obviously that does benefit Labor. I was a scrutineer at a federal election at the remand centre and there were 14 people voting and I’m sure they all voted Labor or Green, but you’re not talking a lot of people.

While results from recent federal elections do tend to suggest that this is the case, the advantage does not appear to be substantial, or beyond what could be expected in the general population. As Table 4.2 illustrates, the number of prisoners voting is small, but their votes generally favour Labor (though voting was more evenly divided at the 2010 election).

Table 4.2 Prisoner Voting: Federal Elections 2001–10, Two-Party Preferred

<table>
<thead>
<tr>
<th>Electorate and jurisdiction</th>
<th>2001</th>
<th>2004</th>
<th>2007</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fraser, ACT</td>
<td>10</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Bass, Tas.</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>Franklin, Tas.</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>Kalgoorlie, WA</td>
<td>90</td>
<td>16</td>
<td>46</td>
<td>20</td>
</tr>
<tr>
<td>O’Connor, WA</td>
<td>1</td>
<td>0</td>
<td>11</td>
<td>13</td>
</tr>
<tr>
<td>Canning, WA</td>
<td>-</td>
<td>7</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>Durack, WA</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>80</td>
</tr>
<tr>
<td>Pearce, WA</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>13</td>
</tr>
<tr>
<td>Lingiari, NT</td>
<td>77</td>
<td>10</td>
<td>90</td>
<td>89</td>
</tr>
<tr>
<td>Total</td>
<td>178</td>
<td>30</td>
<td>245</td>
<td>200</td>
</tr>
</tbody>
</table>

Note: These are electorates in which separate prisoner voting statistics are available.

Source: AEC election results.
Two electorates in which Labor appears to have obtained a large advantage are in the seats of Kalgoorlie and Lingiari in the 2001 and 2004 elections. These two seats have the highest proportions of Indigenous people in the country and, combined with the high imprisonment rate of Indigenous Australians, these are the likely reasons for such high Labor support in these seats. The 91 per cent support for Labor from prisoners in Lingiari in 2004 is consistent with the non-prisoner support for Labor in remote booths of Lingiari that have high Indigenous populations, such as Ti Tree Station (98.35 per cent Labor, two-party preferred), Titjikala (93.33 per cent), Kintore (86.99 per cent) and Willowra (84.19 per cent).

Analysis of interview data and parliamentary debates suggests that, although Labor might receive some electoral advantage from entitling prisoners to vote, their support for the prisoner franchise is based on genuine philosophical grounds rather than the prospect of partisan advantage. Likewise, the Liberal Party might see some small electoral advantage in denying prisoners the vote, but also tends to base its position on ideology. Comments by Liberal politicians such as Senator Minchin suggest, however, that populist positioning could also be a factor in the Liberal Party’s policy. The participation principle of fairness supports the broadest possible franchise; however, Australia’s mix of prisoner enfranchisement laws appears to be consistent with the diversity of laws applied internationally.