

# **Review of Ballot-Paper Formality Guidelines and Recount Policy.**

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October 2008

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Attachments

- 1 Terms of Reference
- 2 Formality of ballot-papers: Principles and guidance set out and cited in *Mitchell v Bailey*
- 3 AEC documents: Guidance on ballot-paper formality
- 4 AEC Recount Policy
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## **1. Introduction**

The first count for the Division of McEwen (McEwen) in the 2007 Federal Election resulted in a majority of 6 votes for the Australian Labor Party candidate, Mr Rob Mitchell. This was the smallest margin identified in a House of Representatives division since 1974. The Australian Electoral Commission (AEC) decided to undertake a recount of the over 100,000 votes cast. During the recount, 643 ballot-papers were reserved for the decision of the Australian Electoral Officer (the AEO) of Victoria in regard to the formality of those ballot-papers. The recount resulted in a majority of 12 for the Liberal Party of Australia candidate, Ms Fran Bailey. The available evidence suggests this is the first time that a recount in a House of Representatives election has changed the result. Mr Mitchell petitioned the Court of Disputed Returns (CDR), submitting that the AEO had admitted ballot-papers that were informal and rejected ballot-papers that were formal. On 2 July 2008, the CDR, handed down its judgement, increasing Ms Bailey's margin from 12 to 31 and providing guidance for the consideration of the admission or rejection of ballot-papers, that is, on whether ballot-papers should be treated as formal or informal.

In light of the guidance provided by the Court, the Electoral Commissioner (EC), Mr Ian Campbell, decided that a review should be undertaken to:

- Identify measures to improve the quality, consistency, transparency and accountability of decision-making by electoral officials on the formality of ballot-papers; and
- Identify any necessary changes to the existing policies, guidelines, procedures, manuals and training produced by the AEC on the formality of ballot-papers.

Given the potential link between decisions on the formality of ballot-papers and the case for undertaking recounts, the review is also required to consider the AEC's policy on recounts and identify possible criteria for accepting or rejecting requests for a recount.

The detailed terms of reference for the review are at [Attachment 1](#).

## 2. Timeline of Events: Division of McEwen 2007<sup>1</sup>

This section identifies the timeline of key events for McEwen from polling day on 24 November 2007 through the initial counting of votes, and the recount, to the judgement of the CDR in respect of costs handed down on 11 July 2008.

### 2007

**Saturday, 24 November:** Polling day: ordinary, provisional and absent votes were cast by electors at polling places between 8 am and 6 pm. Ordinary votes were counted at the polling places in McEwen, for the purposes of providing an election night tally, which at the conclusion of counting showed Mr Mitchell leading by 558 votes.

Throughout the initial and subsequent stages of the counting and checking process, scrutineers appointed by candidates are entitled to attend and observe. The number of scrutineers is limited to one per candidate for each officer counting votes. Scrutineers are entitled to object to the admission or rejection of any ballot-paper. The officer conducting the scrutiny then decides whether the vote is formal or informal and marks the ballot-paper 'admitted' or 'rejected'. In a minority of cases where a scrutineer disputes the decision of an officer, the ballot-paper is 'reserved' for a final decision by the Divisional Returning Officer (DRO), the senior officer in a division.

**Sunday, 25 November:** On the basis of counting on polling day, the AEO (effectively the AEC state manager) identified three 'close' Divisions in Victoria – McEwen, La Trobe and Corangamite – that the State Office would monitor. Staff from the State Office initially visited these electorates on 26 November, consulting with the DROs and providing advice and offering the continuing support of the State Office. (McEwen and La Trobe were also on the AEC National Office list of close seats and Corangamite was added to the National Office list on 29 November.)

Counting of pre-poll ballot-papers commenced at the McEwen Divisional Counting Centre in Seymour.

**Monday, 26 November:** A fresh scrutiny commenced of ordinary ballot-papers received at the Divisional Counting Centre from polling places across McEwen. The fresh count included a check of ballot-papers for formality, first preference totals and tallies of the preferred vote for Mr Mitchell and Ms Bailey. The counting continued until 10 December and, in addition to ordinary votes, included postal votes, which may be accepted up to 13 days after polling day, namely 7 December 2007.

**Saturday, 8 December:** The counting of pre-poll, postal and absent votes was finalised and scrutineers were aware of the outcome of the indicative two-candidate preferred count.

**Monday, 10 December:** The DRO for McEwen (the DRO) concluded the distribution of preferences, resulting in a majority for Mr Mitchell of 6 votes as follows:

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<sup>1</sup> This timeline draws on the affidavit of the Australian Electoral Officer for Victoria, filed on 5 March 2008 in the Federal Court of Australia in *Mitchell v Bailey (No 2)* [2008] FCA 692.

Mr Mitchell	48,416
Ms Bailey	48,410
Informal	<u>3,823</u> (3.8%)
Total	100,649

Ms Bailey wrote to the DRO setting out a number of reasons supporting a request for a recount. Independently of the specific issues raised in Ms Bailey’s letter, the AEO, in close consultation with the EC and in accordance with section 279 of the *Commonwealth Electoral Act 1918* (CEA), directed the DRO to conduct a recount of all ballot-papers.

**Tuesday, 11 December:** The AEC issued a media release announcing the decision to undertake a recount, noting that candidates would be entitled to appoint scrutineers to observe the recount. The DRO advised all candidates that the recount would commence the following day and in a separate advice, specified the detailed arrangements for the recount, including the role of scrutineers and arrangements for the referral of disputed ballot-papers to the AEO.

Section 281 of the CEA, covering the reservation of disputed ballot-papers, provides in part that:

“(1) The officer conducting a re-count may, and at the request of any scrutineer shall, reserve any ballot-paper for the decision of the Australian Electoral Officer.

(2) the Australian Electoral Officer shall decide whether any ballot-paper so reserved is to be allowed and admitted or disallowed and rejected.”

**Wednesday, 12 December:** The DRO commenced the recount at the Divisional Counting Centre. In total, 4,116 ballot-papers were declared to be informal in the recount. The DRO estimates between 1200 and 2000 ballot-papers were referred for his personal decision on formality. Scrutineers disagreed with the decision of the DRO in respect of 643 ballot-papers and these were reserved for the decision of the AEO.

**Thursday, 13 December:** The AEO advised candidates that he would commence consideration of reserved ballot-papers the next day at his office in Melbourne and that they were each entitled to appoint one scrutineer to observe the process.

**Friday, 14 December and Monday, 17 December:** The AEO made decisions in respect of 406 ballot-papers on 14 December and decisions on the remaining 237 ballot-papers on 17 December.

**Wednesday, 19 December:** The AEC announced that the recount of all ballot-papers resulted in a majority for Ms Bailey of 12 votes as follows:

Mr Mitchell	48,253
Ms Bailey	48,265
Informal	<u>4,116</u> (4.1%)
Total	100,634

The recount identified a number of errors that contributed to a net decrease of 15 ballot-papers from 100,649 to 100,634. As well, the recount took account of the AEO's decisions on the formality of reserved ballot-papers which contributed to the increase in informal ballot-papers of 293 – from 3,823 to 4,116.

**Thursday, 20 December:** The DRO declared Ms Bailey as the elected candidate for McEwen.

**Friday, 21 December:** The EC certified in writing that Ms Bailey was the elected candidate, attached the certificate to the writ for the general election relating to the members of the House of Representatives to be elected from Victoria, and returned the writ to the Governor-General.

Subparagraph 355(e)(ii) of the CEA provides that a person has 40 days from the date the last writ was returned to file in the Registry of the High Court to lodge a petition to the CDR (i.e. by 30 January 2008).

## **2008**

**Friday, 25 January:** Mr Mitchell disputed the outcome of the election by petition to the CDR, complaining that a significant number of the 643 reserved ballot-papers had been wrongly rejected by the AEO.

**Thursday, 21 February:** The petition was heard before Justice Crennan of the High Court. The Court ordered that the matter be remitted to the Federal Court of Australia (FCA) and set a timetable for submissions to be filed by each party. The Court also ordered that the AEC deliver to the Victorian Registry of the FCA the 643 ballot-papers reserved for the consideration of the AEO.

**Friday, 28 March:** The first directions hearing before Justice Tracey of the FCA, sitting as the CDR, between Mr Mitchell (Petitioner), and Ms Bailey (First Respondent) and the AEC (Second Respondent). During the directions hearing submissions were made by Counsel on what, if any, access would be provided to the reserved ballot-papers. Arising out of the hearing the parties undertook to provide submissions to the Court on the principles of formality and an agreed submission on the process to be adopted for the hearings.

**Tuesday, 22 April:** The Court handed down its reasons for its decision that the Petitioner and the First Respondent could not view copies of the 643 reserved ballot-papers (*Mitchell v Bailey (No 1)* [2008] FCA 426).

**Friday, 2 May:** In a second directions hearing, Justice Tracey indicated that he was considering providing Counsel for the Petitioner and Counsel for the First Respondent with access to the reserved ballot-papers.

**Wednesday, 21 May:** This was the first day of two days of full hearing before Justice Tracey. The Court ordered that Counsel for Mr Mitchell and for Ms Bailey were to have access to the reserved ballot-papers under Court supervision so that they could identify the ballot-papers where the decision of the AEO was disputed. Subsequently,

in their submissions to the Court, Counsel for both parties disputed only 285 of the 643 ballot-papers.

**Tuesday, 17 June:** On the second day of the hearing, Counsel made submissions to the Court on ballot-paper formality.

**Wednesday, 2 July:** The CDR handed down its judgement that the decisions of the AEO in respect of 153 of the 643 reserved ballot-papers should be changed, finding that 12 ballot-papers should have been treated as informal rather than formal, and that 141 should have been treated as formal rather than informal (*Mitchell v Bailey (No2)* [2008] FCA 692) (*Mitchell v Bailey*). The Court's decisions resulted in an increased majority for Ms Bailey of 31 votes as follows:<sup>2</sup>

Ms Bailey	48,339
Mr Mitchell	48,308
Informal	<u>3,987</u> (4.0%)
Total	100,634

**Friday, 11 July:** The CDR handed down its judgement that the Commonwealth should meet the legal costs of both Ms Bailey and Mr Mitchell. The Commonwealth had not opposed the making of such orders (*Mitchell v Bailey (No3)* [2008] FCA 1029).

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<sup>2</sup> The figures in this paragraph take account of the Endnote to the decision by the Court, subsequent to the decision being handed down on 2 July 2008. The majority for Ms Bailey identified at paragraph 84 of *Mitchell v Bailey* was 27 rather than 31.



### 3. Reasons for this Review

The main reason for the AEC initiating this review can be simply stated. It was seen as surprising that the CDR should reverse almost 24%, or 153, of the AEO's decisions in respect to the formality of the 643 reserved ballot-papers. While it is accepted that the line between the formality and informality of a ballot-paper can sometimes be difficult to determine, the CEA and AEC manuals and training provide extensive guidance for decision-makers. It was against this background that the judgement created concern that it could reduce confidence in the administration of the Commonwealth electoral system. As the Chairman of the Joint Standing Committee on Electoral Matters (JSCEM), Mr Daryl Melham MP, has stated:

“What shakes me a little bit is that the court in reviewing 643 finds in [153] instances differently from an AEO. That shakes me up a little bit in terms of close ballot results, whichever side of the ledger they are.”<sup>3</sup>

Associated with such a significant judicial variation of the AEO's decisions and the earlier AEC decision to undertake a recount in McEwen, there was concern that electoral candidates experiencing a narrow defeat on the initial count may be much more likely to request recounts and/or petition the CDR disputing the validity of an election outcome. In effect, petitioners could be encouraged to take their chances on a different decision-maker getting them over the line in a close vote. They could cite the decision to undertake a recount in McEwen and the judgement of the CDR in support of such petitions. The possibility of increased disputation is justifiably seen as putting at risk the high level of confidence in the Commonwealth electoral system.

This review acknowledges the reasoning leading to such concerns and understands why the Chairman of JSCEM has been 'a little bit' shaken by the events in McEwen. However, this review assesses the events in McEwen to be of less concern when considered in a broader historical context. More importantly, there are a number of quite modest changes that should significantly reduce the variability of decision-making on ballot-paper formality in evidence in McEwen. In short, the concerns can be addressed.

The following sections of this report consider the historical context and measures to improve decision-making on the formality of ballot-papers and the management of close counts and recounts.

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<sup>3</sup> Joint Standing Committee on Electoral Matters, Committee Hansard, 11 August 2008, page 22. [www.aph.gov.au/hansard/joint/commtee/J11098.pdf](http://www.aph.gov.au/hansard/joint/commtee/J11098.pdf). The figure of 153 has been substituted for the figure of 154 actually referred to by the Chairman. For an explanation refer to footnote No.2.

## 4. McEwen in Historical Context

### 4(a) Australia's democratic electoral heritage

It may not be widely appreciated that Australia has a proud history of electoral system design and administration.

“In the pantheon of representative democracy, Australia has its name stamped on many of the major advances in electoral system design as well as on the steps towards democratising electoral laws...As early as 1859 the bulk of the Australian colonies had established systems of parliamentary government with adult male suffrage. In 1894, South Australia was second only to New Zealand in extending voting rights to women for its lower house elections.”<sup>4</sup>

“Australia was the first nation to invent itself through the ballot box – to vote itself into existence through a series of popular referenda...The existence of this democratic nation was to be confirmed by its enrolment on the new Commonwealth electoral roll...Almost two million names were entered on the roll in 1903, believed to be some 96 per cent of the adult population. This was undoubtedly the most comprehensive enrolment of any nation up to that time for the purposes of democracy.”<sup>5</sup>

Emeritas Professor Hughes<sup>6</sup> has observed that:

“The continuities over the first hundred years of federal electoral administration – initially (1902) with an ordinary departmental structure, then (1977) under statutory officers, and most recently (1984) under a statutory commission – are quite remarkable and likely to be maintained. One of the most striking continuities is the degree of independence that has prevailed throughout that period.”<sup>7</sup>

In order to explain this feature of administrative history, Hughes suggests that:

“The best starting point is the recognition that electoral independence is subject to the rule of law. Electoral administration, carrying out duties and exercising discretions, is tightly constrained by statutory detail...[T]he comprehensive availability of judicial redress insulates the AEC and preserves its independence.”<sup>8</sup>

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<sup>4</sup> Farrell, David M and McAllister, Ian, 2006, The Australian Electoral System, University of NSW Press, page 1.

<sup>5</sup> Sawyer, Marion, 2003, ‘Enrolling the People: Electoral Innovation in the new Australian Commonwealth’, Chapter 5 in Orr G, Mercurio B and Williams G, Realising Democracy, The Federation Press, pages 52-53.

<sup>6</sup> Dr Hughes is Emeritas Professor at the School for Political Science and International Studies, the University of Queensland and served as Commonwealth Electoral Commissioner 1984-89.

<sup>7</sup> Hughes, Colin A, 2003, ‘The Independence of the Commissions: The Legislative Framework and the Bureaucratic Reality’, Chapter 16 in Orr, Mercurio and Williams, Realising Democracy, pages 205-206.

<sup>8</sup> Hughes, page 206.

#### 4(b) Court judgements on election outcomes

While there have been numerous court cases involving Commonwealth electoral laws, they have most frequently related to general matters of election administration (e.g. the entitlement to appear on the electoral roll, the registration of political parties, etc) and the eligibility of candidates under section 44 of the *Constitution*.

*Mitchell v Bailey* is only the second or possibly third case dealing with the outcome of a Commonwealth House of Representatives divisional election<sup>9</sup>. Another case, *Kean v Kerby* [1920] HCA 35, related to the Division of Ballarat in the general election on 13 December 1919. The count resulted in a majority of 1 for Mr Edwin Kerby, with total votes of 13,569 for Mr Kerby and 13,568 for Mr David McGrath. The case is instructive and, of course, the CDR had regard to the judgement in considering *Mitchell v Bailey*.

Justice Isaacs was the judge in *Kean v Kerby*. Sir Isaac Isaacs became Chief Justice of the High Court in 1931, and Governor-General, 1931-36. Justice Isaacs considered the facts in two broad categories, (a) official administrative errors that disenfranchised certain electors and (b), deciphering the markings on certain ballot-papers. In respect of the former, the Court was quite harsh, noting that “[i]n some cases these errors were due to almost incredible carelessness on the part of local Presiding Officers.”<sup>10</sup> On the other hand, Justice Isaacs’ tone is more forgiving on the matter of formality, observing at one point that “[t]he next is a rejected vote. This, like the first, has given me great cause for consideration.”<sup>11</sup> Justice Isaacs, it should be noted was trying to discern the voters’ real intent on ballot-papers with just two candidates and it was necessary for voters to indicate the preferred candidate by marking only one box. In *McEwen* in 2007 there were eight candidates and voters were required to number every box to cast a formal vote.

Justice Isaacs’ decisions in regard to the formality of certain ballot-papers added two votes for each candidate. He ruled, however, that the election was absolutely void because of the administrative errors that served to disenfranchise a number of voters. (In the subsequent election held on 10 July 1920, Mr McGrath secured a winning margin of 3,615 votes, compared with a deficit of one vote at the general election on 13 December 1919.)

The AEC ‘Ballot Papers Formality Policy’ includes an attachment with a selection of significant observations by Justice Isaacs in *Kean v Kerby*, including:

“The ballot being a means of protecting the franchise, must not be made an instrument to defeat it.”

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<sup>9</sup> Following the election of 31 May 1913, Mr Hedges lodged a petition in the CDR seeking orders for the production of the electoral roll used by the DRO for Fremantle “in connection with the re-checking of the count of such election.” (*Hedges v Burchell* (1913) 17 CLR 327). This case did not address the formality of votes but the concluding comments of the judge suggests that there was some attempt to challenge the count. If *Hedges v Burchell* is categorised as a challenge to a count, *Mitchell v Bailey* would be the third such case. It was not a close count, with total votes cast of 28,628 and Burchell winning by 3,203 votes.

<sup>10</sup> *Kean v Kerby* at 451.

<sup>11</sup> *Kean v Kerby* at 468.

“Where the intention is clear, doubtful questions of form should be resolved in favour of the franchise.”

“The language of the Act read as a whole and in favour of the franchise as all such Acts should read.”

“The mark he made is a clumsy dot or a clumsy figure 1. It is very inartistic but remembering that voters may be young or old, ill or well, scholarly or not, I resolve the doubtful question of form in favour of the franchise, there being no doubt as to the real intention.”

In a comment following these judicial observations, the AEC document states that “[t]he problems identified by Justice Isaacs are as relevant today as they were then.”

#### **4(c) The courts, close elections and effective, transparent administration**

As noted, judicial redress based on the formality of ballot-papers in respect of House of Representatives election outcomes has been exceedingly rare – two or three cases in the period since the passage of the original *Commonwealth Electoral Act 1902*. Two factors seem relevant in explaining the rarity of court challenges: (a) the size of the winning margin; and (b) the effectiveness and transparency of electoral administration. These factors are related. In situations where there is great confidence in the effectiveness of administration it is less likely that results will be subject to challenge. Transparency is important in building confidence not least because administrative decisions and procedures that are subject to scrutiny by stakeholders are likely to be more rigorous and effective than those that are never subject to external scrutiny.

Being “open, transparent and accountable” was identified as an AEC value in its Corporate plan for 2007-08 and in its National Business Plan for 2008-2009. The Code of Conduct issued by the International Institute for Democracy and Electoral Assistance elaborates on the principle of transparency in the following terms:

“For an election to be successful, participants in the process have to feel able to accept the decisions of the election administration. Those participants will most likely feel able to accept those decisions if they can easily satisfy themselves that the decisions were made appropriately. To do that, they must have access to the information on which decisions are based...[E]lection administrators should be prepared:

- (i) To justify their decisions.
- (ii) To make freely available the information on which each decision was based.
- (iii) To arrange effective and reasonable access to relevant documents and information, within the framework of the country’s electoral and freedom of information laws.”<sup>12</sup>

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<sup>12</sup> International Institute for Democracy and Electoral Assistance, 1997, ‘Code of Conduct for the Ethical and Professional Administration of Elections’, pages 12-13.

It is no coincidence that the CDR cases dealing with Commonwealth House of Representatives election outcomes involve very close counts: the Division of Ballarat in 1919 (margin of 1) and McEwen in 2007 (margin of 6). (The only other result identified that was closer than McEwen was for the Division of Stirling in 1974 which, like Ballarat involved a margin of 1 on the initial count, increasing to a margin of 12 in a recount.) There may be a general impression that close results are quite common because there are usually a number of seats where the outcome remains uncertain on election night and time is required to receive and count absentee and postal votes and uncertainty can arise because the distribution of these votes can differ significantly from the distribution of ordinary votes counted on election night. As well, perceptions of a ‘close result’ can differ. In an electoral division with around 100,000 voters, a candidate who loses by 500 votes could reasonably claim to have lost in a ‘close result’ – a swing of 0.251% would have secured victory. In respect to the outcome in McEwen and the implications of differing decisions on the formality of ballot-papers, a margin of 500 votes could not be considered to be a ‘close result’.

In some assessments of the judgement in *Mitchell v Bailey* there has been particular focus on the fact that the Court reversed the decisions of the AEO in respect of almost 24% or 153 of the 643 reserved ballot-papers. From an alternative perspective, it is worth noting (a), notwithstanding the “borderline” status of reserved ballot-papers, the three successive decision-makers on the formality of the 643 reserved ballot-papers, the DRO, AEO and CDR were all in agreement on 411, almost two thirds of the total and (b), that the balance of 232 votes represents only 0.23% of the total cast. More importantly, the available evidence shows that disagreements on formality do not consistently favour particular candidates. In 1920 Justice Isaacs reversed the decisions on the formality of 4 ballot-papers and the total votes of **each** candidate increased by 2. In 2008, the CDR reversed the decisions on the formality of 153 ballot-papers and the total number of formal votes for one candidate increased in net terms by 74 and the votes for the other candidate increased by 55.

The movement in McEwen between the initial count and the decision of the CDR was 37 from a majority of 6 for Mr Mitchell to a majority of 31 for Ms Bailey. On this experience a margin at most of 100 votes might be considered a ‘close result’. In the last 5 general elections, (i.e. since March 1996) involving votes in an aggregate of 746 electoral divisions, only 5 divisions have been identified, including McEwen, in which the winning margin was less than 100 votes – see Table 1.

**Table 1: Close results (less than margin of 100) since 1996**

<b>Election</b>	<b>Division</b>	<b>Margin</b>
24.11.2007	McEwen	31
24.11.2007	Bowman	64
10.11.2001	Hinkler	64
03.10.1998	Bass	78
10.11.2001	Solomon	88

Over a much longer period, covering the last 14 general elections, starting with May 1974, in only 2 divisions have the results been closer than the final margin of 31 in

McEwen, namely, 12 on a recount in Stirling in 1974 and 14 in Hawker in March 1990.

#### **4(d) Summary**

History shows that only very close election results are likely to be subject to challenges in the CDR. Challenges are rare because close results are rare. As well, the impact of different decisions on whether to admit or reject ballot-papers is muted because the available evidence indicates that changes do not favour particular candidates or parties. In combination with measures to achieve more consistent decision-making on whether to admit or reject ballot-papers, history suggests that court challenges to Commonwealth election results will continue to be rare.

## **5. Formality of Ballot-Papers: The Decision-Making Environment**

The main purpose of this review is to distil the guidance provided in *Mitchell v Bailey* on the formality or otherwise of ballot-papers and to recommend consequential changes in AEC policies, manuals and training. The objective will be to achieve greater accuracy and consistency in decision-making. In developing ways to achieve that objective, it is useful to consider the environment in which decisions are made on whether to accept or reject individual ballot-papers. As discussed below, the decision-making environment for a DRO and an AEO are more challenging, indeed often tense compared with the situation of a judge or, indeed this review of the decisions of the DRO, AEO and the CDR on a selection of the reserved ballot-papers. Drawing this distinction is in no way intended to 'excuse' what the CDR has found to be incorrect decisions by electoral officers on a number of ballot-papers. Rather, the purpose is to acknowledge the dynamics of the normal decision-making environment so as to assist in designing strategies to achieve greater accuracy and consistency in decision-making, particularly in the tense situation of close election counts.

It is useful to distinguish between the initial result and the recount in McEwen. In the initial count, a DRO is the final decision-maker with respect to formality (paragraph 274(7)(b) of the CEA). In a recount an AEO is responsible for deciding whether ballot-papers are admitted or rejected. Most decisions on the formality of ballot-papers are taken by officers-in-charge of individual counts and not contested by scrutineers. At any one time there may be counts being undertaken at several points (tables) within a Divisional Counting Centre.

At the initial count in McEwen there were 3,823 informal votes (3.8%) and in the recount there were 4,116 informal votes (4.1%). In excess of 4,000 votes in each count would have been considered to be potentially informal. However, only a proportion of those ballots were referred for direct decision by the senior responsible officer – most decisions on informality are clear cut because, for example, the ballot-paper is blank or the voter marks only one square. In the McEwen recount the DRO estimates that 1,200 to 2,000 ballot-papers would have been referred to him for decision and of those, 643 were reserved for decision by the AEO.

As illustrated by the experience in McEwen, in a close election, decisions on formality are very important but this is by no means the only responsibility of these officers during an election count. DROs have particular challenges, managing a significant workforce, most of them temporary, often working in facilities that are not purpose built. On most days during the initial count at the Divisional Counting Centre (26 November to 8 December) there were between 12 and 30 staff employed by the AEC and between 6 and 16 party scrutineers involved with both the House of Representatives and Senate ballot-papers. On most days during the recount in Seymour (12 December to 17 December), there were around 15 permanent and temporary staff and around 26 scrutineers.

In a close count, pressures intensify in a counting centre. Staff directly involved in the count recognise the consequences of any errors. Scrutineers will focus more intensely on processes and decisions on the formality of ballot-papers. As well, progress on the

count will be monitored by senior AEC management and attract the attention of the media. As noted earlier, the AEO identified McEwen as one of three ‘close’ Victorian divisions on election night. However, it was only late in the second week of the initial counting period that McEwen emerged as a ‘cliff-hanger’, influencing the working environment for officials and scrutineers. The timeline in Table 2 shows the ‘end of counting’ majority for each day from polling day through to the conclusion of the initial count on 10 December 2007.

**Table 2: Progressive outcome of initial McEwen count**

		Majority	
		Mr Mitchell	Ms Bailey
November	24 Saturday	558	
	25 Sunday		na
	26 Monday		506
	27 Tuesday		862
	28 Wednesday		862
	29 Thursday		396
December	30 Friday		na
	5 Wednesday		213
	6 Thursday		194
	7 Friday		77
	8 Saturday	6	

The relationship between scrutineers and electoral officials has been described in the following terms by Mr Phillip Green, the Electoral Commissioner for the Australian Capital Territory:

“Relations between scrutineers and electoral officials can be strained at times. One cause of this tension maybe a tendency for electoral officials to consider scrutineers an inconvenience rather than as an integral part of the election process. This tension most often arises during scrutines of votes, particularly in close seats, where there is a conflict between the need for a fast result and the need for scrutineers to observe details of the count. In these cases electoral officials can see scrutineers as unreasonably delaying the count, by asking electoral officials to count more slowly or to display the details of particular ballot-papers for scrutineers to read.”<sup>13</sup>

“...While scrutineers display great interest in ruling votes informal and formal, their primary interest is usually in maintaining that votes arguably for their candidates are formal, and that votes arguably for their opponents are informal.”<sup>14</sup>

A news report described the recount in McEwen in the following terms:

“Sources from both sides said the recount provoked heated exchanges between scrutineers. “Its been pretty nasty,” a scrutineer said yesterday.”<sup>15</sup>

<sup>13</sup> Green, Phillip, 2003, ‘Transparency and Elections in Australia: The role of scrutineers in the Australian electoral process’, Chapter 17 in Orr, Mercurio and Williams, *Realising Democracy*, page 226.

<sup>14</sup> Green, page 225.

<sup>15</sup> Doherty, Ben, “Labor may challenge Bailey’s 12-vote victory”, *The Age*, 19 December 2007.



During the initial count and the recount in McEwen there were over 60 scrutineers appointed by Mr Mitchell and over 50 appointed by Ms Bailey who attended counting at various times. Particularly during the recount, the teams of scrutineers included senior, experienced personnel. For example, the scrutineers for Mr Mitchell included at various times three members of the Victorian State Parliament, the State Secretary (and Campaign Director) and both Assistant Secretaries of the Victorian Branch of the Australian Labor Party (ALP). The scrutineers for Ms Bailey included the Director of the Victorian Division of the Liberal Party of Australia (Liberal Party).

As indicated in his affidavit to the CDR, in reaching a decision on the formality of each reserved ballot-paper, the AEO “on occasion...found it necessary to use a magnifying glass and to consult relevant documents such as the [Commonwealth Electoral] Act, scrutineers’ handbook and the Manual for Officers-in-Charge of a Polling Place.”<sup>16</sup> In regard to the role of scrutineers, the AEO indicated that:

“The bulk of the process was observed by scrutineers for [Mr Mitchell and Ms Bailey]. On occasions, the scrutineers made oral submissions to me about individual ballot-papers. I took any such submissions into account before making my decisions. Also on occasion, the scrutineers left the room. Accordingly, they did not observe the consideration of every ballot-paper.”<sup>17</sup>

The scrutineers referred to by the AEO included the State Secretary for the ALP and the Director of the Victorian Division of the Liberal Party.

The guidance on the admission or rejection of ballot-papers provided by the CDR in *Mitchell v Bailey* is discussed in the next section. If this guidance is to be reflected accurately in decisions taken in the potentially tense environment during close election counts, **it is recommended that :**

- (i) The briefs (manuals or handbooks) documenting guidelines on formality for decision-makers made available to scrutineers should be as comprehensive as, and identical in their relevant wording to those available to electoral officials;**
- (ii) Officials should brief scrutineers on the guidelines at the commencement of counting processes;**
- (iii) Copies of the guidelines on formality should be readily available in counting centres;**
- (iv) Officials should be prepared to fully explain their reasoning by reference to the guidelines in relation to their decisions on specific ballot-papers; and**
- (v) At least in recounts, scrutineers should be prepared to explain their reasoning for seeking the reserving of ballot-papers by reference to the guidelines.**

As discussed in section 7(c) below, proposal (i) involves changes. Proposals (ii), (iii) and (iv) represent current requirements although the extent to which they are

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<sup>16</sup> Affidavit of the Australia Electoral Officer for Victoria of 5 March 2008, paragraph 24(d).

<sup>17</sup> Affidavit of the Australia Electoral Officer for Victoria of 5 March 2008, paragraph 24(e).

implemented probably varies somewhat. Proposal (v) involves a change, although some scrutineers would commonly provide supporting arguments. The main objective of making comprehensive information on the formality of ballot-papers available to scrutineers as well as officials, in conjunction with recommendations (iv) and (v), is to facilitate discussion of borderline cases. In terms of the more general debate about individuals' rights and responsibilities, the objective is to minimise the likelihood of officials simply exercising their 'right' to make a decision and scrutineers simply exercising their 'right' to object; and maximise the responsibility of all participants at least initially, to discuss the facts of individual 'borderline' ballot-papers having regard to the available information and guidance on formality.

## 6. *Mitchell v Bailey*: Judicial Guidance on Formality

In *Mitchell v Bailey* the CDR sets out principles and guidance to be taken into account in considering the admission of ballot-papers as formal or their rejection as informal. The main finding related to the need to consider the ballot-paper as a whole, but the Court also provided guidance on unconventional markings, initials annotated on ballot-papers and the lack of official markings on ballot-papers. A summary of the principles enunciated by the CDR and selected extracts from the judgement are at Attachment 2. The key elements of the guidance are discussed below.

### 6(a) The ballot-paper as a whole

The most important principle in considering the formality of ballot-papers highlighted by the Court is that “ballot-papers should be read and construed as whole.”<sup>18</sup> This principle is elaborated in the following terms:

“Electors are required to place consecutive numbers opposite the names of each candidate. If, as is the present case, there are eight candidates and the elector had written seven of the eight numbers clearly and the remaining notation bears a reasonable resemblance to the eighth number it will more readily be concluded that what appears is the remaining number than might be the case if the notation is examined in isolation. The Court will not, however, assume that a mark is a representation of a missing number in a sequence if it resembles a number already inscribed on the paper or if it bears no reasonable resemblance to any identifiable figure.”<sup>19</sup>

The AEO’s interpretation of this principle was the main issue in *Mitchell v Bailey*, at least in terms of the number of decisions on ballot-papers. The petitioner (Mr Mitchell) complained that at least 40 of the 643 reserved ballot-papers had been wrongly rejected by the AEO and in respect of 32 of these ballot-papers, it was asserted that a poorly formed individual figure was clear when consideration was given to the ballot-paper as a whole. This review has examined each of the 153 ballot-papers where the CDR reversed the decision of the AEO, as well as the reasons (where they are stated) for particular ballot-papers in the Schedule to the Court’s judgement. On the basis of that examination it is reasonable to conclude that it is the application of the principle of reading a ballot-paper as a whole that accounts for the great majority of the 153 ballot-papers where the CDR reversed the decision of the AEO. Typical reasons stated by the Court in respect of individual ballot-papers include the following:

“Figure in [x] square reasonably resembles a [y].”

“Eight consecutive numbers each reasonably discernable”

“There are not eight consecutive reasonably decipherable numbers.”

It should be noted that the Court’s application of the principle of the ‘ballot-paper as a whole’ can mean that ballot-papers with more than one poorly formed number can be admitted as formal. This is illustrated by the following explanation for a decision:

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<sup>18</sup> *Mitchell v Bailey*, paragraph 52.

<sup>19</sup> *Mitchell v Bailey*, paragraph 55.

“Reasonably discernable 6 in the second square, a reasonably discernable 3 in the sixth square, a reasonably recognised 5 in the seventh square and a blank square.”

In sum, the key guidance from *Mitchell v Bailey* relates to the application of the principle of the ballot-paper as a whole and the ability to decipher a consecutive series of numbers. If a clear statement of this principle is incorporated in revised guidelines and training for officials and scrutineers, the concerns arising from the 2007 McEwen election should be able to be addressed and in all likelihood eliminated. Ways to achieve that outcome are considered in section 7.

## **6(b) Unconventional markings**

The unconventional form of figures marked on a ballot-paper is often a factor bearing on the formality of a ballot-paper. In general, the CDR concluded “that it is not possible to frame prescriptive “rules” to resolve disputes. Value judgements informed by principles are required.”<sup>20</sup> The Court did, however, identify a couple of specific markings that should be accepted:

“Many people, for example, place a horizontal stroke across the vertical stem of the figure seven. Some commence the figure one with an upward angular stroke before writing the familiar vertical stroke. A ballot-paper will not be informal merely because one or more of these variants is used.”<sup>21</sup>

A more obscure variant of a standard form evident among the 643 reserved McEwen ballot-papers concerns the number 5. There are 10 ballot-papers which the CDR rejected on the grounds that there were “two figure 3s” on the ballot-paper. On reviewing these particular ballot-papers, as well as a number of others, it appears that some people strike the upper horizontal tail on a 5 to the left rather than the conventional right. The result of this ‘left handed’ 5 is a number similar to a 3. While the origins of the 7s and 1s referred to by the CDR have been sourced to continental Europe, this review has been unable to source either a domestic or international explanation for what has been described above as a left handed 5. While officials and scrutineers might be alert to this marking, the reason for identifying this unconventional 5 is to underscore the Court’s observation that it is frequently judgement informed by principle rather than prescriptive rules that is required to resolve disputes as to formality.

## **6(c) Initials annotated on a ballot-paper**

Paragraph 268(1)(d) of the CEA provides that a ballot-paper will be informal if “it has upon it any mark or writing...by which, in the opinion of the Divisional Returning Officer, the voter can be identified...” Established AEC guidance on formality provides that a person’s initials annotated on a ballot-paper will not usually identify a

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<sup>20</sup> *Mitchell v Bailey*, paragraph 52.

<sup>21</sup> *Mitchell v Bailey*, paragraph 54.

voter.<sup>22</sup> The CDR in *Mitchell v Bailey* has confirmed this guidance, supporting this approach in part by noting that on a divisional roll with around 100,000 voters there will frequently be several, if not numerous people with the same two initials.

#### **6(d) Lack of official markings**

An authentic ballot-paper needs to be initialled by the presiding officer or include the official mark – paragraph 268(1)(a) of the CEA. However, the absence of such official markings will not render a ballot-paper informal if, subject to subsection 268(2) of the CEA, “the Divisional Returning Officer responsible for considering the question of the formality of the ballot-paper is satisfied that it is an authentic ballot-paper on which a voter has marked a vote.” On several ballot-papers in McEwen the DRO annotated his reasons for judging that the ballot-paper is authentic, namely “DRO convinced the ballot-paper came from a legitimate pre-poll envelope through the dec exchange.”<sup>23</sup> The Court rejected these ballot-papers because the annotation did not include the precise terms of subsection 268(2). To comply with this provision of the CEA, it is necessary for the DRO to annotate that they are “satisfied that it is an authentic ballot-paper.”

#### **6(e) Summary**

**It is recommended that the following guidance provided by the CDR in *Mitchell v Bailey* be included in AEC manuals, handbooks and training:**

- (i) Ballot-papers should be read and construed as a whole, with one or more poorly formed numbers to be deciphered in the context of a consecutive series of numbers rather than as single numbers in isolation;**
- (ii) Poorly formed numbers must bear a reasonable resemblance to identifiable numbers;**
- (iii) Unconventional but recognisable numbers such as continental 1s and 7s are acceptable;**
- (iv) Initials annotated on a ballot-paper will not usually identify a voter and therefore does not provide a basis for rejecting a ballot-paper; and**
- (v) If a ballot-paper lacking official markings is considered authentic, then the annotation made by the DRO under subsection 268(2) of the CEA should specify that the DRO is “satisfied that it is an authentic ballot-paper.”**

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<sup>22</sup> See for example, AEC, 2007, ‘Polling Place Procedures Manual’, page 118.

<sup>23</sup> The ‘dec exchange’ is an AEC administrative process whereby declaration envelopes containing pre-poll, absentee and postal votes and postal vote applications are sent to the Division in which the person was enrolled to vote.

## **7. Formality of Ballot-Papers: Policies, Guidelines, Procedures, Manuals and Training**

This section identifies the key changes to AEC policies, documents and training necessary to implement the guidance provided by the CDR in *Mitchell v Bailey* and ensure more consistent decision-making on whether to admit or reject ballot-papers. It reviews the existing documents as they relate to decisions on formality and recommends broad changes to the documents and their availability.

### **7(a) The documents under review**

The AEC documents examined in this review are as follows:

- Ballot Papers Formality Policy (Formality Policy), current as at 16 November 2007;
- Polling Place Procedures Manual (PPPM): Officer-in-charge, Second-in-charge, Polling Place Liaison Officer, Election 07;
- Polling Place Procedures Manual (PPPM): Ordinary Vote Issuing Officers, Ballot Box Guards, Queue Controllers, Election 07;
- Scrutineer's Handbook, Election07;
- Electoral Backgrounder No. 18 – Informal Voting, October 2007; and
- Training of Operational Staff Manual, Module 12 - Managing Divisional Office Scrutinies (Training Manual), February 2008.

Information about the purpose, distribution and frequency with which these documents are updated is provided in [Attachment 3](#). These documents, with the exception of the Formality Policy, cover a wide range of legislative obligations and administrative procedures in addition to guidance for decision-makers on the formality of ballot-papers. Copies of the Formality Policy and those sections of the other documents dealing specifically with the formality of ballot-papers are also included in [Attachment 3](#).

By way of general comment, this review found the set of documents to be clearly written and well set out. Before considering general changes to take account of the experience in McEwen in 2007 and specifically with the guidance provided by the CDR in *Mitchell v Bailey*, it is useful to consider the treatment of the whole of ballot-paper principle in the set of AEC documents.

### **7(b) Whole of ballot-paper principle**

The key guidance from *Mitchell v Bailey* related to the application of the principle of the ballot-paper as a whole and the scope to decipher a consecutive series of numbers. As concluded in section 6(a), it was the interpretation of this principle that accounted for the great majority of the 153 ballot-papers where the CDR reversed the decision of the AEO.

The PPPMs, Training Manual and Scrutineer’s Handbook do not directly address the whole of ballot-paper principle. It can be argued that the following two points about informality in the manuals are relevant to the principle:

- “The sequence of numbers is broken”
- “The elector’s intention is unclear.”

However, all the associated examples included in the manuals and the Scrutineer’s Handbook to illustrate formal and informal ballot-papers comprise perfectly formed figures. No linkage is ever drawn between consecutive numbering, poorly formed numbers and formality. The Formality Policy does directly address the matter at issue in *Mitchell v Bailey*. It states in part:

“1.5.3 If a voter marks a ballot paper with words or figures in a language other than English, the ballot paper can be accepted if it is established that the voter’s intention is clear.

1.5.4 The following should guide any decisions about numerals or words used on ballot papers:

- Any widely accepted variation in form should be accepted
- A general principle of reasonableness should be applied
- The context of the ballot paper as a whole should provide significant guidance (e.g. if a ballot paper has a clearly indicated sequence of numbers bar one and another unclear marking, it may be reasonable to presume that the unclear marking represents the missing number in the sequence, provided there is even a passing resemblance to the number)
- Where a decision is difficult to make, the principle of erring on the side of the franchise should be adhered to.”

This review considers that, subject to one qualification, this guidance is consistent with the guidance provided by the CDR in *Mitchell v Bailey*. The qualification relates to the number of unclear markings or poorly formed numbers. The Formality Policy refers to “a clearly indicated sequence of numbers bar one and another unclear marking...” The CDR found in *Mitchell v Bailey* that the ‘discernable sequence of numbers’ test may mean that a formal ballot-paper could include more than one unclear marking. This needs to be reflected in the revised guidance.

In discussing section 1.5.4 of the Formality Policy with the AEO as part of this review, the AEO noted the reference at the end of the third dot point to ‘even a passing resemblance to that number’. He considered that most of the variations between his decisions and those of the CDR reflected judgements about how ‘passing’ or close is the resemblance between a marking on a ballot-paper and a well formed conventional number. As the AEO, Mr Wight stated at the hearings of the Joint Standing Committee on Electoral Matters on 11 August 2008:

“I can only say from my point of view what has happened is that the court had been able to discern numbers better than I could and so has deemed

more ballots to be admitted...than I had, and that was on the basis that they could reasonably discern the numbers. Most of them related to interpretation of numbers, as opposed to other, if you like, more technical provisions of the act<sup>24</sup>

On the basis of this review of the differences in the content of the Formality Policy and the other manuals and Scrutineer's Handbook and consideration of the differences between the CDR and the AEO, **it is recommended that two changes in AEC documents are required:**

- **The guidance on formality and the ballot-paper as a whole presented at section 1.5.3 and 1.5.4 of the Formality Policy, modified to allow for more than one unclear marking, should be incorporated in the relevant ballot-paper formality sections of all AEC documents; and**
- **The illustrations of formal and informal ballot-papers included in AEC documents should include actual examples of poorly formed numbers on formal ballot-papers as well as extremely poorly formed numbers that would render a ballot-paper informal.**<sup>25</sup>

## **7(c) The availability and distribution of documents**

The content and scope of the information relating to the formality of ballot-papers differs between the various AEC documents identified at section 7(a) above. The documents have been prepared for different target audiences – the Scrutineer's Handbook obviously for scrutineers and PPPMs for officials during elections. The Formality Policy is primarily intended for the information of permanent AEC officials, including AEOs and DROs. The accessibility of the information contained in these documents varies. Some parts of the AEC manuals that are developed for internal use are publicly available in accordance with the requirements of the *Freedom of Information Act 1982* (FOI Act). However, under the FOI Act other parts of these manuals are claimed to contain sensitive material that would be exempt from disclosure under a number of provisions – e.g. section 37 (law enforcement), section 40 (substantial adverse effect on the proper and efficient conduct of the operations of the AEC) and section 42 (legal advice). Given that specific FOI requests are required to be lodged to access parts of these documents, their contents could not be described as being readily available to the public at the present time. This situation has led to some concerns being raised that the information on the formality of ballot-papers and other information on the declaration of the polls should be publicly available and not merely for use by AEC permanent staff.<sup>26</sup>

In section 5 above it is recommended that the guidelines on formality for decision-makers made available to scrutineers should be identical to those available to electoral officials. The most effective way to achieve the necessary degree of transparency would be to prepare a single comprehensive set of information on formality, including

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<sup>24</sup> Joint Committee on Electoral Matters, Committee Hansard, 11 August 2008, page 9.

<sup>25</sup> Such mock-ups of actual ballot-papers would have to be prepared in a way that maintains the secrecy of the ballot.

<sup>26</sup> See evidence of Mr Mark Dreyfus, QC, MP before the Joint Standing Committee on Electoral Matters, Committee Hansard, 11 August 2008, page 94.



guidelines and illustrative ballot-papers for decision-makers on the admission or rejection of ballot-papers. **It is recommended that this single comprehensive set of information be made available on the AEC website at [www.aec.gov.au](http://www.aec.gov.au).** This information would effectively supersede the existing Formality Policy and could be incorporated in each of the PPPMs, Training Manual and the Scrutineers Handbook. If, in order to contain the overall size of the Polling manuals and the Scrutineers Handbook, it was necessary to reduce somewhat the amount of information incorporated in these documents it should not compromise the requirement that the PPPMs and Scrutineers Handbook contain an identical set of information.

#### **7(d) Notification of changes in guidance and procedures**

The PPPMs and Scrutineer's Handbook include a wide range of information critical to the effective administration of an election, in addition to guidance on the formality of ballot-papers. These documents are updated and reprinted for every Federal election. The use made of these publications is likely to differ significantly between persons officiating or scrutineering at their first election and persons who have performed one of these roles numerous times: officers preparing for their ninth or tenth election may well decide to not read the latest manual or handbook from cover to cover! New editions of these publications do, however, often include modifications and changes to processes and procedures. If the changes are not taken up consistently across electoral Divisions, the difference will become apparent, not least to major political parties that are well placed to bring a state-wide or national perspective to the administration of elections.

It is possibly less likely that prospective changes to guidance in respect of the formality of ballot-papers flowing from the CDR judgement in *Mitchell v Bailey* will go unnoticed because it has attracted attention within 'electoral circles'. Readers of the manuals are likely to be looking for these changes. As a general practise, however, it is recommended that new editions of manuals and handbooks should include, either early in the body of the document or in an accompanying flyer, a section clearly identifying pages that include any significant changes to policies, procedures or guidance.

## 8. Recount Policy

The discussion of the reasons for this review in section 3 identified concerns that electoral candidates experiencing a narrow defeat on the initial count may be more likely to request recounts in light of the AEC decision to undertake a recount in McEwen and the subsequent significant variation of the AEO's decisions by the CDR. Accordingly, the terms of reference also require the review to consider the AEC's policy on recounts.

### 8(a) Current Recount Policy

Section 279 of the CEA provides that:

“At any time before the declaration of the result of a House of Representatives election the Divisional Returning Officer may, on the request of any candidate setting forth the reasons for the request, or of the officer's own motion, and shall, if so directed by the Electoral Commissioner or the Australian Electoral Officer, re-count the ballot-papers contained in any parcel or in any other category determined by the Australian Electoral Officer or the Electoral Commissioner.”

The current AEC Recount Policy implemented from June 2007 is at [Attachment 4](#). The key features of the policy can be summarised as follows:

- (i) “There is no minimum number under which a recount will occur”...because “given the checks and balances” in the scrutiny system “significant sorting errors are highly unlikely to go undetected.”
- (ii) The reasons for a request should be specific, preferably identifying specific ballot-papers and associated counting incidents or allegations that could change the result of the election;
- (iii) Consistent with the specific reasons justifying a recount, the recount should be confined only to those categories of ballot-papers necessary to resolve the issues identified;
- (iv) Requests will be considered only after all scrutinies are complete and before the declaration of the poll for the Division; and
- (v) Notwithstanding the absence of a statutory right of appeal to an AEO or the Electoral Commissioner (EC) in the event that a DRO refuses a request for a House of Representatives divisional recount, it is assumed such an appeal would be possible and therefore, a DRO should not directly consult a person (AEO or EC) who might later have to consider the same request.

In reviewing Recount Policy it is useful to distinguish several elements of the policy:

- Whether a ‘close result’ itself is sufficient reason to undertake a recount;
- Related to the first point, the potential sources of error or variation that can contribute to changes in the margin and result; and

- The relationship between the decision-making hierarchy within the AEC and the scope for more senior officials to be consulted by DROs responding to requests for a recount.

## 8(b) The ‘close result’ threshold and the history of recounts

The question as to whether a close result alone is sufficient reason for a recount is much debated within the AEC and the policy appears to have changed over time. The current policy is clear: “There is no minimum number under which a recount will occur.” It is instructive to consider this policy in historical context: what has the AEC actually done in response to requests for recounts in recent decades? Recent history is summarised in Table 3. The table shows that in the period since 1984 there have been 8 recounts plus 6 requests for recounts refused in House of Representatives elections. In only one case (the Division of Hinkler in 1984) is it clear that a recount was conducted where the margin in the initial count was more than 100. As well, in only one case (the Division of Bowman in 2007) has a recount been refused where the margin has been less than 100. In sum, recent history suggests that officials generally agree to undertake a recount when the margin is close, defined here as less than 100 votes.

**Table 3: House of Representatives recount requests and recounts since 1984**

Requests refused:			Recounts undertaken:			
Year	Division	Margin	Year	Division	Initial	Recount
1984	Petrie	776	1984	Forde	38	43
1996	Dobell	117	1984	Hinkler	237	221 <sup>(c)</sup>
2004	Deakin	- <sup>(a)</sup>	1993	Bass	n/a <sup>(d)</sup>	40
2004	Kingston	119	1993	Bendigo	78 <sup>(e)</sup>	98
2004	Swan	104	1998	Bass	16	78
2007	Bowman	64 <sup>(b)</sup>	2001	Hinkler	56	64
			2001	Solomon	n/a	88
			2007	McEwen	-6 <sup>(f)</sup>	12

Notes: (a) Request related to a recount at only one polling place rather than the division as a whole where the margin was 8,040.

(b) Request refused by DRO and second request also refused by AEO.

(c) Request refused by DRO but second request agreed by AEO.

(d) Information on the initial count is not clear, however information on AEC files and newspaper reports suggests there was only a small change between the initial count and the recount – probably less than 10 votes.

(e) As reported in Bendigo Advertiser, 30 March 1993, page 1.

(f) Negative sign indicates successful candidate in the recount was behind in the initial count.

n/a - Not readily available

Information on recounts is not readily available. The details in Table 3 were drawn together from a search of files, in many cases guided by the recollections of long

serving AEC officers.<sup>27</sup> The search was not exhaustive so the data in Table 3 cannot be regarded as definitive. The search revealed that a similar exercise was undertaken in 1977, identifying recounts during the period 1958-1977. The information from the earlier review identified 14 recounts, of which 6 involved margins on recount greater than 100. The details are provided in Attachment 5.

One of the recounts included in the attachment relates to the Division of Moreton in 1961. In the initial count the margin in favour of the Liberal Party candidate was 115 votes and in the recount, the margin increased to 130 votes. More significantly, the win for the late Sir James Killen in Moreton meant that the Menzies Liberal-Country Party Government was returned with a majority of only 2 seats, 62 to 60. The election of the speaker of the House of Representatives reduced the effective majority to one. In Moreton in 1961 it is obvious that the consequences of the count extended well beyond the career prospects of the candidates in that particular division.

The following extracts from Sir James Killen's memoir suggests that the count in Moreton exhibited all the characteristics of a close count discussed in section 5 above:

“One of my desperate problems was to get highly experienced scrutineers who knew the Electoral Act and who were available to take part in the scrutiny. [It was arranged] for the best scrutineer in New South Wales to go to Queensland...The metropolitan supervisor of Liberal field organisers in Sydney...flew to Brisbane and took over Liberal scrutiny. Counting and checking of votes continued on Sunday. [Eight days after polling day.] The Divisional Returning Officer was relieved because of illness. The strain in the electoral office was substantial. Divisional Returning Officers from throughout the metropolitan area came in to assist.”<sup>28</sup>

News reports indicated that “[t]here was high tension in the re-check yesterday with scrutineers challenging any likely doubtful ballot-paper.”<sup>29</sup>

### **8(c) Counting errors**

In a House of Representatives count there are 3 separate scrutinies undertaken in the full view of scrutineers:

- First, counting of ordinary votes at polling places on election night;
- Second, the so-called fresh scrutiny at Divisional Counting Centres under the authority of a DRO; and
- Third, during the full distribution of preferences the ballot-papers of lower placed candidates are examined to determine which of the remaining candidates should be allocated the next available preference.

It is against this background that the current policy states that “significant sorting errors are highly unlikely to go undetected.” Possible errors that are generally detected

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<sup>27</sup> In addition to the file search, the reports of inquiries into Federal Elections by the Joint Standing Committee on Electoral Matters and AEC submissions to those inquiries were also examined for evidence on recounts.

<sup>28</sup> Killen, Sir James, 1989, Killen: Inside Australian Politics, Mandarin, pages 49-50.

<sup>29</sup> Courier Mail, 18 December 1961.

include the misplacement of bundles of ballot-papers (typically 50) into the pile for the wrong candidate or the transposition of a figure to the wrong row of a results sheet. In McEwen the recount identified errors that had not been detected in the initial count, resulting in a net reduction of 15 in the total number of votes from 100,649 to 100,634. This reduction reflected a combination of partially offsetting errors, including supposed bundles of 50 ballot-papers that actually comprised one or several ballot-papers different from 50 and two errors where an incorrect figure had been entered on a counting sheet.

The recount in McEwen, as well as the CDR judgement in *Mitchell v Bailey*, also illustrated how variations in decisions on formality can contribute to different margins in a count. The number of informal votes increased by 293 from 3,823 in the initial McEwen count to 4,116 in the recount. Of this increase, 191 are accounted for by the decisions of the AEO to reverse decisions taken by the DRO in the initial count. The balance reflects changed decisions between the initial count and the recount made under the authority of the DRO, although not necessarily all of those decisions would have been made personally by the DRO in both the initial count and the recount.

The history of recounts, including recent experience in McEwen demonstrates that notwithstanding the rigor of the scrutinies, there is still scope for human error in the sorting and counting process. The significance of an error will depend on both its magnitude and the size of the margin. The evidence for the period since 1984 detailed in Table 3 shows that the magnitude of errors detected in recounts have not been great. The average difference is 22 votes for the 6 recounts where the margins for both the initial count and the recount are available. (The initial count margins for the Divisions of Bass in 1993 and Solomon in 2001 are not readily available.) The size of the change between the initial count and the recount in McEwen was 18 votes, close to the average. However, the direction of the change combined with the very narrow initial margin meant it was very significant because it changed the outcome of the election. The file searches undertaken for this review suggest that the recount in McEwen is unique insofar as it is the only recount that has changed the result of a divisional election.

On the basis of the foregoing review of recount history and the evidence of albeit relatively small errors in counts of around 100,000 votes, **it is recommended that the key elements of the recount policy should be revised to read as follows:**

- **A request for a recount needs to identify specific ballot-papers and associated significant counting process errors or irregularities that could change the result of an election within a division, unless the margin of votes on the initial count is less than 100, in which case a recount will be undertaken as a matter of course.**

The introduction of a threshold for an automatic recount should reduce somewhat the tensions that build-up during a very close initial count. While the application of a 'close result' threshold of 100 votes for an automatic recount would change current policy, it is unlikely to impact significantly on the frequency of recounts. For example, a rigid application of a 100 vote threshold may not have changed the actual number of recounts undertaken since 1984. A recount may not have been agreed to in the Division of Hinkler in 1984 and a recount would have been undertaken in the Division of Bowman in 2007 – refer Table 3. (This assessment assumes that the

margins on the initial counts in the Division of Bass in 1993 and the Division of Solomon in 2001 were less than 100.)

As noted in section 8(b), the historical information on recounts has been drawn together from file searches based on the recollection of long serving AEC officers, supplemented by newspaper reports and, in the case of the Division of Moreton, also by information in a personal memoir. **It is recommended that the details of all future recounts and requests for recounts should be systematically documented and assessed by National Office.** The file should include copies of the requests for a recount and any response from the AEC, as well as details of votes in the initial count and the reasons for any variation between the initial count and the recount. An ability to systematically compare and contrast recount processes and results should provide the basis for a more consistent approach to managing recounts.

#### **8(d) Decision-making hierarchy on recounts**

If a DRO refuses a request for a recount, the present policy assumes that there are rights of appeal to the AEO and/or the EC and therefore, a DRO should not directly consult the AEO or EC because they might later have to consider the same request. In 1984 the DRO for the Division of Hinkler refused an initial request for a recount but the AEO agreed in response to a second request. In the Division of Bowman in 2007 both the DRO and the AEO refused successive requests for a recount. In McEwen, as noted in the timeline, on 10 December Ms Bailey wrote to the DRO requesting a recount but independently of that process, following consultation with the EC, the AEO directed the DRO to conduct a recount of all ballot-papers.

The avoidance of direct consultation between a DRO, AEO and EC in regard to the response to a request for a recount may be desirable on legal grounds so as to avoid the possibility of a DRO exercising a personal discretionary power at the direction or behest of another person. In terms of effective operational management arrangements, however, it seems inappropriate for the chief executive not to be involved in decisions on such important matters. In the period since 1984, in the context of general elections there have been counts in 1337 divisions but the available evidence suggest that only 8 have been subject to a recount. While recounts may be rare, they are potentially significant events. The recount in McEwen changed the election result. The recount following an initial count margin of 1 vote in the Division of Stirling in 1974 took place in the context of a close general election outcome – the ALP achieved a majority of 5 seats, 66 to 61 seats. There has not been a closer result in terms of House of Representatives seats since 1974. In Moreton in 1961, a different outcome may have resulted in another general election. Senior management and desirably the chief executive should be directly involved in decisions of such potential significance. While DROs are likely to be best placed to address the specific matters a candidate may raise in regard to the conduct of divisional polling and counting, it is senior management that is best placed to address the broader considerations. For example, in Moreton it seems entirely appropriate that a recount was undertaken notwithstanding that the initial count margin exceeded 100 in a division that included less than 55,000 voters.

Further, as the experience in McEwen confirmed, tight results attract the attention of the media and much more senior, experienced scrutineers. Divisional staff require the support and assistance of correspondingly senior AEC State and National Office staff in these potentially stressful situations in close seats. Indeed the way in which the counting and fresh scrutines are managed in close divisions, including possibly a willingness to recheck processes questioned by scrutineers, can influence the likelihood of candidates requesting a recount. In turn, the transparency and effectiveness of a recount will influence the likelihood of a candidate petitioning the CDR. The greater the confidence that candidates and senior party officials have in the thoroughness of a count, including the consistency and accuracy of decisions on whether to admit or reject ballot-papers, the lower the likelihood of the outcome being challenged.

In 2007 McEwen was identified as a 'close seat' on the day following polling day and senior AEC officials followed developments in these seats. For the recount in McEwen, a number of experienced staff were transferred from other Divisions to support the DRO. This was an appropriate strategy. As the initial count in McEwen demonstrated, it was not until late in the count, about 12 days after polling day, that the count became very close: under 200 votes. In order for the AEC to achieve the necessary flexibility and scope to transfer resources in response to changing circumstances across divisional counts, senior management from State and National Offices need to monitor carefully the progress in close seats. This review is aware that the elements of an effective strategy for managing close counts is under active consideration by management and this work is endorsed.

**It is recommended, consistent with the practise of identifying close seats to be followed during counting, that senior State and National Office executives monitor progress in those seats, to ensure that additional experienced support and resources are readily available to address the heightened expectations in regard to transparency and attention to detail that arise in close counts.**

The constraint on the scope for a DRO to consult the AEO and EC in considering requests for a recount should not be such an issue if the recommendation to 'automatically' undertake recounts where margins are less than 100 is adopted. Nevertheless, **this review recommends that senior management emphasise the importance of the existing policy whereby DROs and AEOs are expected to consult senior managers in the State and National Office respectively, including informing the Deputy Electoral Commissioner, before deciding whether to undertake a recount.** In situations where the EC considers that it is prudent on the basis of broader considerations to undertake a recount, the Commissioner is empowered to order a recount regardless of the judgements of a DRO based on considerations specific to the count in a particular division.

### **8(e) Recount policy and concerns about McEwen**

The reasons for this review, discussed in section 3, included concerns arising from the findings by the CDR in *Mitchell v Bailey* that electoral candidates experiencing a narrow defeat on the first count may be much more likely to request recounts and/or petition the CDR disputing the validity of an election outcome. Section 6 discussed

the key guidance provided by the CDR on formality in *Mitchell v Bailey* and it was shown in section 7 that the ‘discernable sequence of numbers’ test was not covered in the manuals and guidelines generally available to polling officials and not covered fully in the Ballot Papers Formality Policy implemented in November 2007. As well as incorporating the CDR guidance on formality in these documents, section 7 recommended more widespread distribution of comprehensive guidance on whether ballot-papers should be treated as formal or informal. It is considered that those changes, in combination with the change in recount policy and more particularly, improvements in the management and resourcing of close counts will be sufficient to effectively address the concerns arising from the election in McEwen in 2007.

It is acknowledged that these recommendations constitute modifications rather than major change to the existing administrative arrangements for Commonwealth elections. Major or drastic changes are not considered necessary and in reaching that conclusion this review is mindful of advice provided by the former Prime Minister of the United Kingdom, the Rt. Hon. Tony Blair in a speech in 2005, when he said:

“We are in danger of having a wholly disproportionate attitude to the risks we should expect to run as a normal part of life. This is putting pressure on policy-making...to act to eliminate risk in a way that is out of all proportion to the potential damage...

So what to do? First recognise the problem...Instead of the ‘something must be done’ cry that goes up every time there is a problem or a ‘scandal’, we make it clear we will reflect first and regulate only after reflection.”<sup>30</sup>

The narrow margin in the McEwen election count, recount and the subsequent CDR judgement did generate concerns that had the potential to put at risk public confidence in the administration of Australian elections. It has been shown, however, that such narrow margins are exceedingly rare. The modifications recommended in this review are considered sufficient to address the source of the concerns and in that sense judged to be proportional to the risks identified.

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<sup>30</sup> Blair, Rt. Hon. Tony, Speech on Compensation Culture given at University College London, 25 May 2005.



## 9. Summary of Conclusions

This review arose from the CDR decisions in *Mitchell v Bailey* to reverse almost 24%, or 153, of the AEO's decisions in respect to the formality of the 643 reserved ballot-papers in the recount of votes in McEwen. Associated with such a significant judicial variation of the AEO's decisions and the earlier AEC decision to undertake a recount in McEwen, there was concern that electoral candidates experiencing a narrow defeat on the initial count may be much more likely to request recounts and/or petition the CDR disputing the validity of an election outcome.

There would be grounds for significant concern if: (a) election results were frequently as close as they were in McEwen in 2007; and (b) there was negligible scope to improve: (i) decision-making on the formality of ballot-papers in particular; and (ii), the management of close counts and recounts in general. However, very close results are rare and there are obvious ways to improve guidance for decisions-makers on the formality of ballot-papers and enhance recount policy and procedures. In sum, the concerns arising from the election in McEwen can be addressed by a number of quite modest changes.

**McEwen – a rare event:** Very close divisional election results are rare. The initial count in McEwen produced a margin of 6 votes in favour of Mr Mitchell. The margin following the recount was 12 in favour of Ms Bailey and the decision of the CDR increased Ms Bailey's margin to 31. In the last 5 general elections (i.e. since March 1996) involving votes in an aggregate of 746 electoral divisions, only 5 divisions have been identified, including McEwen, in which the winning margin was less than 100 votes.

In the period since 1984, in the context of a general election there have been elections in 1,337 divisions, but the available evidence suggests that only 8 have been subject to a recount. The file searches undertaken for this review, extending back earlier than 1984, suggest that the recount in McEwen may be unique insofar as it involved a change in the result of a divisional election.

Court challenges to the outcome of House of Representatives divisional elections also have been very rare – at most 3 and *Mitchell v Bailey* is only the second that has addressed the grounds for assessing the formality of votes. Moreover, the evidence from these cases shows that the impact of disagreements on formality is muted because they do not consistently favour particular candidates. While the Court reversed the decisions on the formality of 153 of the 100,634 ballot-papers in McEwen, the total number of formal votes for one candidate increased in net terms by 74 and the votes for the other candidate increased by 55.

**Guidance on formality and AEC manuals:** The key guidance in *Mitchell v Bailey* emphasised the requirement for ballot-papers to be read and construed as a whole, with one or more poorly formed numbers to be deciphered in the context of a consecutive series of numbers rather than as single number in isolation. It was the interpretation of this principle of 'the ballot-paper as a whole' that accounted for the great majority of the 153 ballot-papers where the CDR reversed the decision of the AEO.

It was found that the main AEC documents, the PPPMs, Training Manual and Scrutineer's Handbook do not directly address the whole of ballot-paper principle. The Formality Policy which is prepared primarily for the information of permanent AEC officials does address the whole of ballot-paper principle and the interpretation of unclear markings or poorly formed numbers. However, the Formality Policy document refers to one unclear marking in a consecutive series of numbers, whereas the CDR found in *Mitchell v Bailey* that the 'discernable sequence of numbers' test may mean that a formal ballot-paper could include more than one unclear marking. In sum, there was a gap in AEC guidance for the consideration of the admission or rejection of ballot-papers. This can be addressed by incorporating the 'discernable sequence of numbers' test supported by realistic illustrations of poorly formed numbers in AEC manuals. The provision of publicly available comprehensive guidance for the consideration of the admission or rejection of ballot-papers should provide the basis for greater consistency and accuracy in decision-making on the formality of ballot-papers.

**Recount Policy:** Two factors are considered relevant in explaining the rarity of requests for recounts and court challenges to election results: (a) the size of the winning margin; and (b), the effectiveness and transparency of electoral administration. In situations where there is great confidence in the effectiveness of administration it is less likely that results will be subject to challenge. The current AEC Recount Policy provides that "there is no minimum number under which a recount will occur" because "given the checks and balances" in the scrutiny system "significant sorting errors are highly unlikely to go undetected." Evidence for the period since 1984 supports this judgement. The average difference is 22 votes for the 6 recounts where the margins for both the initial count and the recount are available. The size of the change between the initial count and the recount in McEwen, 18 votes, was close to the average. However the direction of the change combined with the narrow initial margin meant it was very significant because it changed the result of the election.

The question as to whether a close result alone is sufficient reason for a recount is much debated within the AEC. The available historical evidence on recounts and requests for recounts suggests that in practise, the AEC generally undertakes recounts when the margin is less than 100 votes. It is concluded that there would be merit in introducing 100 votes as an automatic threshold for recounts and for State and National Office executives to monitor progress in close seats, to ensure that additional support is readily available to address the inevitable pressures that arise in close counts. The introduction of a threshold for an automatic recount should reduce somewhat the tensions that build-up during a very close initial count.

## 10. Recommendations

### Guidance on formality

- A. The following guidance provided by the CDR in *Mitchell v Bailey* should be incorporated in AEC manuals, handbooks and training:
- (i) Ballot-papers should be read and construed as a whole, with one or more poorly formed numbers to be deciphered in the context of a consecutive series of numbers rather than as single numbers in isolation;
  - (ii) Poorly formed numbers must bear a reasonable resemblance to identifiable numbers;
  - (iii) Unconventional but recognisable numbers such as continental 1s and 7s are acceptable;
  - (iv) Initials annotated on a ballot-paper will not usually identify a voter and therefore does not provide a basis for rejecting a ballot-paper; and
  - (v) If a ballot-paper lacking official markings is considered authentic, then the annotation made by the DRO under subsection 268(2) of the CEA should specify that the DRO is “satisfied that it is an authentic ballot-paper” – Section 6(e).
- B. A single comprehensive set of information on formality, including guidelines and illustrative ballot-papers for decision-makers on the admission or rejection of ballot-papers should be made available on the AEC website at [www.aec.gov.au](http://www.aec.gov.au). The illustrative ballot-papers should include actual examples of poorly formed numbers on formal ballot-papers as well as extremely poorly formed numbers that would render a ballot-paper informal – Sections 7(b) and 7(c).
- C. To assist decision-making in the potentially tense environment of close election counts:
- (i) The briefs (manuals or handbooks) documenting guidelines on formality for decision-makers made available to scrutineers should be as comprehensive as, and identical in their relevant wording to, those available to electoral officials;
  - (ii) Officials should brief scrutineers on the guidelines at the commencement of counting processes;
  - (iii) Copies of the guidelines on formality should be readily available in counting centres;
  - (iv) Officials should be prepared to fully explain their reasoning by reference to the guidelines in relation to their decisions on specific ballot-papers; and
  - (v) At least in recounts, scrutineers should be prepared to explain their reasoning for seeking the reserving of ballot-papers by reference to the guidelines – Section 5.

## **Recount Policy**

- D.** A threshold for an ‘automatic’ recount should be introduced with the key elements of recount policy revised to read as follows: A request for a recount needs to identify specific ballot-papers and associated significant counting process errors or irregularities that could change the result of an election within a division, unless the margin of votes on the initial count is less than 100, in which case a recount will be undertaken as a matter of course – Section 8(c).
- E.** The details of all future recounts and requests for recounts should be systematically documented and assessed by National Office – Section 8 (c).
- F.** Consistent with the practise of identifying close seats to be followed during counting, senior State and National Office executives should monitor progress in those seats, to ensure that additional experienced support and resources are readily available to address the inevitable and appropriate increase in expectations in regard to transparency and attention to detail that arise in close counts – Section 8(d).
- G.** Senior management should emphasise the importance of the existing policy whereby DROs and AEOs are expected to consult senior managers in the State and National Office respectively, including informing the Deputy Electoral Commissioner, before deciding whether to undertake a recount – Section 8(d).

## **Acknowledgements**

I have had the full support and cooperation of AEC officials in the preparation of this report. I am most grateful for that assistance. In particular, I want to thank the former Electoral Commissioner, Mr Ian Campbell and Ms Sonja Gasser for legal advice and administrative support and Ms Katrina Ponturo for secretarial support.

Detailed information on the McEwen election and counts was provided in interviews with the following persons: Mr Daryl Wight, AEO for Victoria; Mr Tim Glanville, former Deputy State Manager, Victorian State Office; Mr Steven Kennedy, Director Operations, Victorian State Office; Mr Robert Berglund, DRO for McEwen; and party scrutineers, Mr Stephen Newnham, State Secretary and Campaign Director, Australian Labor Party, Victorian Branch and Mr Julian Sheezel, former State Director, Liberal Party of Australia, Victorian Division. (The current Victorian State Director of the Liberal Party of Australia, Mr Tony Nutt also attended the meeting with Mr Sheezel.)

I am also grateful to a number of AEC officials who provided information and advice, including comments on various drafts of this report: Mr Paul Dacey, Ms Barbara Davis, Mr Tim Evans, Mr Iain Loganathan, Mr Michael Maley, Ms Kathy Mitchell, Mr Doug Orr, Mr Tim Pickering, Mr Paul Pirani, Mr Michael Ross, Ms Bronwen Shelley and Mr Peter Verkerk.



## TERMS OF REFERENCE

### Background

On 2 July 2008, the Federal Court, sitting as the Court of Disputed Returns, handed down its judgment in the matter of *Mitchell v Bailey (No.2)* [2008] FCA 692 relating to disputed ballot papers in the federal election for the Division of McEwen. The Court decision sets out the principles to be applied to the consideration of the admission or rejection of ballot-papers. In any close poll, there will always be a focus placed on the admission or rejection of ballot-papers. The Electoral Commissioner has decided that with such detailed guidance from the Court, a review should be undertaken of the impact of the Court's findings. This review should take full account of the policies, guidelines, procedures, manuals and training provided to electoral officials about the requirements of the *Commonwealth Electoral Act 1918* when making decisions about the formality of ballot-papers for future elections.

### The review

The review is to identify action that should be taken by the Australian Electoral Commission (AEC) to ensure that processes and procedures are in place for future elections to address the matters identified in the Court's decision. The review will culminate in the provision of a report to the Electoral Commissioner that sets out findings and recommendations and presents a way forward on dealing with these matters.

In conducting the review, the reviewer will:

- consider the specific ballot-papers and the Court's decision in Mitchell and any implications in the way in which electoral officials are supported by AEC policies, guidelines, procedures, manuals, and training in making decisions about the formality of ballot-papers;
- consult with key stakeholders about the impact of the Court's decision on the scrutiny process for electoral events;
- identify measures to improve the quality, consistency, transparency and accountability of decision-making by electoral officials on the formality of ballot-papers; and
- identify any necessary changes to the existing policies, guidelines, procedures, manuals and training produced by the AEC on the formality of ballot-papers.

A request for a recount, and the decision whether or not to undertake a recount, is often directly linked to decision-making by electoral officials about the formality of ballot papers. Given this link, the reviewer should also consider the AEC's policy on recounts with a view to providing advice on criteria for accepting or rejecting any future requests for a recount.

The report of the review is to be provided to the Electoral Commissioner in accordance with the terms and conditions of engagement.





**FORMALITY OF BALLOT-PAPERS:  
PRINCIPLES AND GUIDANCE SET OUT IN  
MITCHELL V BAILEY (NO 2) [2008] FCA 692**

**Principles**

- 1) “doubtful questions of form should be resolved in favour of the franchise where there is no doubt as to the intention of the voter”.<sup>31</sup>
- 2) “voters annotate their ballot-papers with such a wide variety of different marks which cause the formality of the ballot-papers to be called into question that it is not possible to frame prescriptive “rules” to resolve disputes. Value judgements informed by principle are required”.<sup>32</sup>
- 3) “When seeking to determine the voter’s intention resort must be had, exclusively, to what the voter has written on the ballot-paper.
- 4) The ballot-paper should be read and construed as whole.
- 5) A voter’s intention will not be expressed with the necessary clarity unless the intention is unmistakable and can be ascertained with certainty”.<sup>33</sup>

**Guidance on “a wide variety of different marks”**

“In seeking to give effect to this approach in dealing with the reserved ballot-papers in the present case it is necessary to bear in mind that voters come from a range of cultural backgrounds. **The same figure may be written differently by different people.** Many people, for example, place a horizontal stroke across the vertical stem of the figure seven. Some commence the figure one with an upward angular stroke before writing the familiar vertical stroke. A ballot-paper will not be informal merely because one or more of these variants is used. It is also to be remembered that many voters are old or infirm and that, for these reasons, **some are not able to write with firm strokes.** Figures formed from wavy lines appear in many papers. So long as the resulting figures are intelligible the ballot-paper will be treated as formal. Some voters, having placed a number in a particular square then either realised that he or she had made a mistake or changed his or her mind. Instead of obtaining a new ballot-paper the voter has overwritten the original number with a different number. Where this has occurred and the **overwritten number** is clearly legible I have treated the overwritten number as expressing the true intention of the voter”.<sup>34</sup> (Bolding added)

**Guidance on the “ballot-paper as a whole”**

“It is also necessary to consider each ballot-paper as a whole. Electors are required to place consecutive numbers opposite the names of each candidate. If, as is the present case, there are eight candidates and the elector has written seven of the eight numbers clearly and the remaining notation bears a reasonable resemblance to the eighth

<sup>31</sup> *Langer v Commonwealth* (1996) 186 CLR 302, per Justice Gummow.

<sup>32</sup> *Mitchell v Bailey* (No 2) [2008] FCA 692 at paragraph 52, per Justice Tracey.

<sup>33</sup> *Mitchell v Bailey*.

<sup>34</sup> *Mitchell v Bailey* at paragraph 54.

number it will more readily be concluded that what appears is the remaining number than might be the case if the notation is examined in isolation. The Court will not, however, assume that a mark is a representation of a missing number in a sequence if it resembles a number already inscribed on the paper or if it bears no reasonable resemblance to any identifiable figure. Some submissions made by both the petitioner and the first respondent sought to suggest that an illegible notation should be treated as a missing number when it was examined “in the context of the ballot-paper as a whole” or when “considering the ballot-paper as a whole.” In my view such submissions amounted to a veiled invitation to make a guess as to the voter’s intention. Such invocations were only of assistance when they were directed to notations which bore a reasonable resemblance to the “missing” number”.<sup>35</sup>

### **Guidance on initials annotated on a ballot-paper**

“The phrasing of s 268(1)(d) begs the question, *by whom* “the voter can be identified”. A family friend or a close personal relative of the voter might readily identify the voter’s handwriting and recognise the initials as those of the voter. On the other hand, an electoral official, a scrutineer or a judge constituting the Court of Disputed Returns who did not know the voter would not be able to identify the voter merely by looking at the initials. In my view, s 268(1)(d) will only render a ballot-paper on which initials have been written informal if the notation would enable a person who is authorised by the Act to have access to the ballot-paper to identify the voter”.<sup>36</sup>

“The initials on ballot-papers 232 and 530 are clearly written. They do not, however, enable me to identify the voters who placed the initials on the ballot-papers. Even had I had resort to the Electoral Roll I could not have determined the names of the voters because there were a considerable number of electors in the Division of McEwen who had the same initials. In the case of ballot-paper 596 the initial is not even clearly written. It offers no assistance in identifying the voter.

Accordingly, in my opinion, the unauthorised markings or writing on each of the three ballot-papers do not allow the voter to be identified. It follows that, there being no other basis upon which any of the ballot-papers might be considered to be informal, each of the ballot-papers is formal and should be admitted to the count”.<sup>37</sup>

### **Guidance on lack of official markings**

An authentic ballot-paper needs to be initialled by the presiding officer or include the official mark – section 268(1)(a) of the *Commonwealth Electoral Act 1918* (CEA) If, subject to subsection 268(2) of the CEA, a Divisional Returning Officer (DRO) is satisfied that a ballot-paper is authentic, the judgement requires that when annotating the ballot-paper, a DRO should use the precise terms of section 268(2) namely, I am “satisfied that it is an authentic ballot-paper”. Rather than assert the ‘authenticity’ of the ballot-paper, the McEwen DRO actually annotated what appeared to be his reasons for judging that the ballot-paper is authentic, namely “...DRO convinced the ballot paper came from a legitimate pre-poll envelope through the dec exchange.”

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<sup>35</sup> *Mitchell v Bailey* at paragraph 55.

<sup>36</sup> *Mitchell v Bailey* at paragraph 64.

<sup>37</sup> *Mitchell v Bailey* at paragraphs 68-69.

## **AEC DOCUMENTS: EXTRACTS PROVIDING GUIDANCE ON BALLOT-PAPER FORMALITY**

### **Extract 1: Ballot Papers Formality Policy**

The purpose of the Ballot Paper Formality Policy is to ensure that ballot-papers are correctly identified as formal or informal in accordance with the *Commonwealth Electoral Act 1918*. This Policy forms part of the Election Procedures Manual (Divisional Office). This manual provides advice to divisional staff on election-related policy and procedures and is reviewed and updated as necessary.

The extracts in this attachment are from the updated on 16 November 2007. The extract includes sections 1.5 and 1.6 of the Policy and comments on ballot-paper formality by Justice Isaacs in Attachment A to the Policy.

### **MANUALS**

#### **Extract 2: Polling Place Procedures Manual**

The Polling Place Procedures Manual - Officer in Charge (OIC), Polling Place Liaison Officer (PPLO) provides guidance to OICs and PPLOs on their role and polling place procedures. These are updated for each election.

The extracts in this attachment cover formality in House of Representatives ballot-papers from a version specifically produced for use in the 2007 Federal Election.

#### **Extract 3: Scrutineer's Handbook**

The Scrutineer's Handbook is produced for each election for the information of candidates, scrutineers and other interested persons. These are updated prior to each electoral event to take account of legislative change and any feedback.

The extracts in this attachment are from the Handbook specifically produced for use in the 2007 Federal Election. Extracts are from section 5 on Formality of Votes relating to formality in House of Representatives ballot-papers, as well as Appendix 3 which provide examples of ballot-papers.

#### **Extract 4: Training of Operational Staff (TOOS)**

TOOS are training modules made available on the intranet for state offices to use for operational training of staff and in some cases have e-learning modules so that staff can undertake self-learning. They are reviewed and updated as necessary.

The extracts in this attachment are from the February 2008 version of Module 12 (including its Attachment A), the February 2006 version of Handout 1, and the October 2005 version of Handout 2.



## Extract 1: Ballot Papers Formality Policy

### 1.5 Formality of ballot papers

- 1.5.1 Any ballot paper (Senate, House of Representatives or Referendum) is an informal ballot paper if a first preference for one candidate and then order preference for the other candidates is not recorded [s.268(1)(b) CEA].
- 1.5.2 Any absent vote ballot paper found in a ballot box, otherwise than in a declaration certificate, is informal. Such instances may occur where an absent voter has placed ballot papers directly into a ballot box, instead of into a declaration certificate. Where you have reason to believe that this occurred, the presence of House of Representatives ballot papers for other divisions will be obvious. With Senate and referendum ballot papers, it may be possible to identify the ballot paper(s) concerned by checking the initials of the issuing officer on the back of the ballot paper during the scrutiny. Any such ballot papers should be placed in an appropriately marked *discarded* ballot paper envelope (EF022) for reconciliation purposes [s.268(1)(e) CEA].
- 1.5.3 If a voter marks a ballot paper with words or figures in a language other than English, the ballot paper can be accepted if it is established that the voter's intention is clear.
- 1.5.4 The following should guide any decision about numerals or words used on ballot papers:
- Any widely accepted variation in form should be accepted
  - A general principle of reasonableness should be applied
  - The context of the ballot paper as a whole should provide significant guidance (e.g. if a ballot paper has a clearly indicated sequence of numbers bar one and another unclear marking, it may be reasonable to presume that the unclear marking represents the missing number in the sequence, provided there is even a passing resemblance to that number)
  - Where a decision is difficult to make, the principle of erring on the side of the franchise should be adhered to
- 1.5.5 A ballot paper that contains slogans or symbols may be treated as formal as long as the voter's intention is clear [s.268(3) CEA].**
- 1.5.6 A ballot paper is not informal on the basis that a wrong type of ballot paper was issued (e.g. postal for ordinary). However, a House of Representatives ballot paper for the wrong candidates and division, or a Senate ballot paper for the wrong candidates and State/Territory (as may be found inside a declaration vote) is informal (i.e. a House of Representatives ballot paper for another division found inside a declaration envelope for the claimed division is informal and should not be treated as disallowed). A referendum ballot paper allocated to another State/Territory is not informal for that reason.

- 1.5.7 A fully printed ballot paper for a division may be altered to become a ballot paper for another division (i.e. the names of the candidates etc are deleted by the issuing officer, and replaced by the names of candidates division etc for the other division). If a ballot paper does not contain the names of every candidate for the division, the vote is informal, irrespective of the way the voter has voted. A ballot paper is acceptable with the surname name only of a candidate, as long as no two candidates share a surname - the intention of this section is that each candidate's surname name (at least) appears on the ballot paper. In addition, if a candidate's given names only are listed on the ballot paper, the vote is informal irrespective of the way the voter has voted. [s.202 CEA]
- 1.5.8 A voter may choose to include an additional name (and a "box" for the placement of a vote against that candidate's name) on the ballot paper as a 'write-in' candidate. This should be ignored in deciding the formality of the ballot paper. If the ballot paper is otherwise formal, it should be treated as such.
- 1.5.9 In the case of ballot papers prepared by polling officials (e.g. "open" ordinary or postal ballot papers):
- If a ballot paper is prepared so that the political party names are not all correctly listed (e.g. wrong party names listed against the candidates or party names not listed) the vote is formal if the voter has otherwise recorded a formal vote (i.e. the voter's intention is taken to be that they voted for the candidate rather than the party) [s.366 CEA]
  - If a ballot paper has the names of any candidate spelt incorrectly (provided the identity of the candidate is still clear) the vote is formal if the voter has otherwise recorded a formal vote
  - If a ballot paper has the names of the candidates in the wrong order, the vote is formal if the voter has otherwise recorded a formal vote.

## 1.6 Formality of House of Representatives Ballot Papers

- 1.6.1 In addition to the "informality" provisions listed above, a House of Representatives ballot paper is informal if:
- It does not indicate the voter's first preference for any candidate
  - Any preference is repeated
  - The consecutive sequence of preferences is broken (except where there are only two candidates), or
  - More than one square (representing the last preference only) is left blank
- 1.6.2 The CEA does not specify that the use of an indicator other than a figure "1" as an expression of a voter's first preference will make a vote informal, as long as the voter's intention is clear, (e.g. the use of "ONE", "1st", "FIRST", "1" **or the letter "A" (in a series of letters)** is an acceptable indication of a first preference).

- 1.6.3 In the event that more than one style of preference numbering appears on a ballot paper (e.g. 1st, II, 3), it will be informal if more than one of those numbers indicates a first preference. Where a mixture of numbers and letters appear to have been used to indicate preferences (e.g. A, B, 3, 4 or 1, 2, C, 4) the inconsistency in marking renders the voter's intention unclear and the ballot paper is informal.
- 1.6.4 Where there are more than 8 candidates and letters have been used to indicate preferences, the letters "I" and "O" should not be misconstrued as the numbers "1" and "0", respectively. 1.6.5 A tick or cross is not acceptable and makes the vote informal if it appears instead of a valid preference mark against the name of a candidate.
- 1.6.5 Where there are only two candidates and a first preference is given for one candidate only, any other preference for the other candidate is formal. Where there are three or more candidates and the voter has indicated a first preference for one candidate (and only one) and has included other preferences in an unbroken sequence for all other candidates (or all other candidates except one, representing the voter's last preference) the vote is formal. Although zero ("0") is accepted as a number, its use can only be construed in favour of formality where there are just two candidates. In any other case, the voter's intention is unclear.

#### **ATTACHMENT A: Comments on Ballot Paper Formality by Justice Isaacs**

In 1919 Justice Isaacs, who later became Sir Isaac Isaacs, Chief Justice of the High Court 1931, and Governor General of Australia 1931-36, made the following observations when handing down his judgement in the Court of Disputed Returns for the House of Representatives seat of Ballarat "Kean v Kerby":

"The ballot being a means of protecting the franchise, must not be made an instrument to defeat it."

"Where the intention is clear, doubtful questions of form should be resolved in favour of the franchise."

"The language of the Act read as a whole and in favour of the franchise as all such Acts should read."

"The mark he made is a clumsy dot or a clumsy figure 1. It is very inartistic but remembering that voters may be young or old, ill or well, scholarly or not, I resolve the doubtful question of form in favour of the franchise, there being no doubt as to the real intention."

"The law forbidding identification marks does not contemplate shutting out a transparently honest attempt to vote rendered necessary by neglect of an official."

The problems identified by Justice Isaacs are as relevant today as they were then.





## House of Representatives scrutiny


### Formality


House of Representatives ballot papers must contain one number '1' and consecutive numbers in every other box, or every box except one, to be formal.

A House of Representatives ballot paper will be considered informal when:

- any number is repeated
- more than one box is left empty
- the sequence of numbers is broken
- the elector's intention is unclear
- the number 1 does not appear against any candidate (no first preference)
- a cross (×) or a tick (✓) has been used instead of a number 1 to show the elector's preference
- it is marked in any way by which the voter can be identified, such as a legible signature (initials will not usually identify a voter)
- an additional name has been added to the ballot paper as a candidate and the voter has indicated a preference that is not the last preference for that additional candidate
- the number '0' is used to indicate a preference where there are more than two candidates.

**Alterations to the numbers, or numbers placed outside the box, do not make a ballot paper informal provided that the elector's intention is clear. If the OIC is unable to determine the formality of a ballot paper, it should be put with the informal ballot papers; when in doubt, it is informal. All ballot papers, whether formal or informal, will be rechecked by the DRO.**

 **BALLOT PAPER**  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY



**Number the boxes from 1 to 6 in the order of your choice.**

JONES, Kevin  
DEMOCRATS

1 PETERS, Jean  
ONE NATION


2 MATHEWS, Paul  
THE GREENS

2 COOPER, Ann  
LABOR PARTY


3 MAYER, Alan  
LIBERAL


4 BROWN, Robert  
INDEPENDENT

**Remember ... number every box to make your vote count**



INFORMAL

 **BALLOT PAPER**  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY



**Number the boxes from 1 to 6 in the order of your choice.**

4 JONES, Kevin  
DEMOCRATS

6 PETERS, Jean  
ONE NATION


3 MATHEWS, Paul  
THE GREENS

1 COOPER, Ann  
LABOR PARTY


2 MAYER, Alan  
LIBERAL


5 BROWN, Robert  
INDEPENDENT

**Remember ... number every box to make your vote count**



FORMAL

 **BALLOT PAPER**  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY



**Number the boxes from 1 to 6 in the order of your choice.**

JONES, Kevin  
DEMOCRATS

PETERS, Jean  
ONE NATION


MATHEWS, Paul  
THE GREENS

2 COOPER, Ann  
LABOR PARTY


1 MAYER, Alan  
LIBERAL


3 BROWN, Robert  
INDEPENDENT

**Remember ... number every box to make your vote count**



INFORMAL

 **BALLOT PAPER**  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY



**Number the boxes from 1 to 6 in the order of your choice.**

5 JONES, Kevin  
DEMOCRATS

3 PETERS, Jean  
ONE NATION


1 MATHEWS, Paul  
THE GREENS

6 COOPER, Ann  
LABOR PARTY


2 MAYER, Alan  
LIBERAL


4 BROWN, Robert  
INDEPENDENT

**Remember ... number every box to make your vote count**



FORMAL

 **BALLOT PAPER**  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY



**Number the boxes from 1 to 6 in the order of your choice.**

5 JONES, Kevin  
DEMOCRATS

6 PETERS, Jean  
ONE NATION


2 MATHEWS, Paul  
THE GREENS

COOPER, Ann  
LABOR PARTY


3 MAYER, Alan  
LIBERAL


4 BROWN, Robert  
INDEPENDENT

**Remember ... number every box to make your vote count**



INFORMAL

 **BALLOT PAPER**  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY



**Number the boxes from 1 to 6 in the order of your choice.**

JONES, Kevin  
DEMOCRATS

PETERS, Jean  
ONE NATION


MATHEWS, Paul  
THE GREENS

COOPER, Ann  
LABOR PARTY

MAYER, Alan  
LIBERAL

BROWN, Robert  
INDEPENDENT

**Remember ... number every box to make your vote count**



INFORMAL

### Formality guide for House of Representatives ballot papers

#### Examples of formal House of Representatives ballot papers:

A	B	C	D	E	F	G	H	I	J	K	L	
1	1st	I	ONE	1	1	1	1✓	A	2 ✕	1 ✕		1
2	2nd	II	TWO	2	2	2	2	B	1	2 ✕		2
3	3rd	III	THREE	3	3	3	3	C	3	3		3
4	4th	IV	FOUR	4	4	4	4	D	4	4		4
5	5th	V	FIVE		5	5	5	E	5	5		5

**G:** This vote would be informal if the 1st preference had clearly been crossed out, instead of the cross being overwritten with a '1'.

**J-K:** These votes would be informal if the cross had clearly been overwritten with a number that was different from the adjacent number.

#### Examples of informal House of Representatives ballot papers:

M	N	O	P	Q	R	S	T	U	V	W	
1	1	1	X	✓		6	1	1	A	1	
2	2	2	2	2	2	2	2	2	B	2	3
3		3	3	3	3	3	3	3	3	3	2
4	4	5	4	4	4	4	4		4	4	
0	5	6	5	5	5	5	4		5	5	
						1					

**M:** The '0' is not a valid preference, except when there are only 2 candidates.

**N:** The 3rd preference is missing and cannot be inferred – s.268(1) of the *Commonwealth Electoral Act* deems the missing preference to be the voter's last.

**O:** The sequence of preferences has been broken (there is no 4th preference).

**P-R:** There is no 1st preference. Ticks and crosses are not valid preference marks on House of Representatives ballot papers.

**S:** There is no 1st preference for a candidate. In this case the preference has been expressed for someone or something other than a candidate.

**T:** There is no 5th preference- the 4th preference has been repeated.

**U:** There is no 4th or 5th preference.

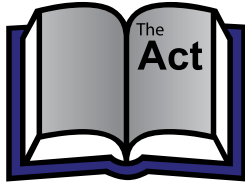
**V:** The elector has used a combination of numerals and letters.

**W:** The voter's intention is unclear.



# 5

## FORMALITY OF VOTES



- Part XVI, 'The polling',
- Part XVIII, 'The scrutiny'
- Schedule 3, 'Rules for the conduct of a preliminary scrutiny of declaration votes'

As a scrutineer, you have the right to challenge the admission or rejection of any ballot paper at the **scrutiny**. The grounds for a challenge may be the formality or informality of the ballot paper. You therefore need to know the difference between an **informal** vote and a formal vote. This chapter goes into some detail about the differences. Appendix 3 contains examples of how the formality of votes is determined.

### Formality check at the scrutiny

A vote is recorded by marking squares on the ballot paper. The scrutiny of ballot papers has two stages:

- an initial formality check, where votes that do not satisfy certain criteria are excluded; and
- a subsequent examination of those votes that pass the formality check to determine which candidate has been elected.



If the polling place officials conducting the scrutiny are in doubt about the formality of a ballot paper they will put it in a separate pile. All ballot papers that have been put aside will be checked later by staff at the divisional office.

### Casting a formal vote

#### House of Representatives

To cast a formal vote, a voter at a House of Representatives election:

- places the number **1** in the square on the ballot paper opposite the name of the candidate who gets their first preference; and
- places consecutive numbers **2 3 4** (and so on, as needed), **without repeating any number**, in the squares opposite the names of the remaining candidates to indicate the order of preference for them.

A House of Representatives vote marked **1 2 3 3 3** ... is not formal. Any vote marked in this way will be rejected as informal.


# Sample AEC election advertising

On election day, you'll receive two ballot papers: a green one for the House of Representatives, and a white one for the Senate.

## Green ballot paper – Number every box.

For the green ballot paper, you must put a '1' in the box beside the candidate who is your first choice, '2' in the box beside your second choice and so on, till you have numbered **every** box.

Don't use ticks, crosses, or leave boxes blank, or your vote won't count.




**BALLOT PAPER**  
**HOUSE OF REPRESENTATIVES**  
**YOUR STATE**  
ELECTORAL DIVISION OF  
**YOUR ELECTORATE**

OPTIONAL LEGIT ONLY

**Number the boxes from 1 to 8 in the order of your choice.**

6	Candidate A <small>POLITICAL PARTY</small>
3	Candidate B <small>INDEPENDENT</small>
5	Candidate C <small>POLITICAL PARTY</small>
1	Candidate D <small>POLITICAL PARTY</small>
8	Candidate E <small>POLITICAL PARTY</small>
2	Candidate F <small>POLITICAL PARTY</small>
4	Candidate G
7	Candidate H <small>POLITICAL PARTY</small>

**Remember...number every box to make your vote count**



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Australian Electoral Commission

## White ballot paper – Two ways to vote.

For the white ballot paper, you have a choice of ways to vote:

### Above the line

You can just mark '1' in the box above the line for the party or group of your choice. By doing this, you're following the Group Voting Ticket and allowing the order of your votes to be determined by your party or group. To find out more about the Group Voting Tickets visit [www.aec.gov.au](http://www.aec.gov.au)

**SENATE BALLOT PAPER**  
**YOUR STATE 2007**  
ELECTION OF 6 SENATORS

**You may vote in one of two ways**

**either** By marking the single figure 1 in each and only one of these squares to indicate the voting ticket you wish to cast on your vote

A PARTY A	B PARTY B	C PARTY C	D
--------------	--------------	--------------	---

**or** By placing the numbers 1 to 5 in the order of your preference

A PARTY A	B PARTY B	C PARTY C	D	E
CANDIDATE A <small>POLITICAL PARTY</small>	CANDIDATE C <small>POLITICAL PARTY</small>	CANDIDATE E <small>POLITICAL PARTY</small>	CANDIDATE G <small>POLITICAL PARTY</small>	CANDIDATE I <small>INDEPENDENT</small>
CANDIDATE B <small>POLITICAL PARTY</small>	CANDIDATE D <small>POLITICAL PARTY</small>	CANDIDATE F <small>POLITICAL PARTY</small>	CANDIDATE H <small>POLITICAL PARTY</small>	

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**SAMPLE**

**OR**

### Below the line

You can choose to fill in every box below the line in the order of your preference. You must put a '1' in the box beside the candidate who is your first choice, '2' in the box beside your second choice and so on, till you have numbered **every** box.

**SENATE BALLOT PAPER**  
**YOUR STATE 2007**  
ELECTION OF 6 SENATORS

**You may vote in one of two ways**

**either** By marking the single figure 1 in each and only one of these squares to indicate the voting ticket you wish to cast on your vote

A PARTY A	B PARTY B	C PARTY C	D
--------------	--------------	--------------	---

**or** By placing the numbers 1 to 5 in the order of your preference

A PARTY A	B PARTY B	C PARTY C	D	E
5 CANDIDATE A <small>POLITICAL PARTY</small>	1 CANDIDATE C <small>POLITICAL PARTY</small>	8 CANDIDATE E <small>POLITICAL PARTY</small>	4 CANDIDATE G <small>POLITICAL PARTY</small>	3 CANDIDATE I <small>INDEPENDENT</small>
9 CANDIDATE B <small>POLITICAL PARTY</small>	7 CANDIDATE D <small>POLITICAL PARTY</small>	2 CANDIDATE F <small>POLITICAL PARTY</small>	6 CANDIDATE H <small>POLITICAL PARTY</small>	

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**SAMPLE**

## What if I make a mistake?

If you get it wrong, don't worry: just ask for another ballot paper, and start again.

[irrelevant text deleted]

## Formality checks

There are two tests for formality of ballot papers. These are:

- whether the ballot paper is authentic and does not identify the voter; and
- whether the voter has performed his or her duty in marking the ballot paper sufficiently well for it to be accepted.

## Authenticity tests

To be accepted as formal, a ballot paper:

- must be authenticated by the official mark or the initials of the issuing officer, or must, in the opinion of the DRO, be an authentic ballot paper;
- must not have any unauthorised writing on it that could identify the voter; and
- must, in the case of a **declaration vote**, have been enclosed in a declaration envelope.

## Acceptable numbering

### *House of Representatives*

A House of Representatives ballot paper is formal if:

- the number **1** appears in the square opposite the name of one, and only one, candidate (the first preference);
- the other squares on the ballot paper have consecutive numbers, indicating an unbroken consecutive sequence of preferences;
- no number is repeated; and
- no more than one square (representing the last preference only) is left blank.



Ticks or crosses on a House of Representatives ballot paper will render it informal. However, a ballot paper that represents the required sequence by roman numerals (I, II, III, ...) **or** by ordinal numbers (1st, 2nd, 3rd, ...) **or** by letters (A, B, C, ...) can be accepted as formal.

[irrelevant text deleted]



## Appendix 3: Formal and informal ballot papers

This appendix presents examples of formal and informal ballot papers from hypothetical House of Representatives and Senate elections.

### House of Representatives

Pages 62–4 show 10 examples of formal and informal ballot papers from a House of Representatives election.

### Senate

Pages 65–9 show nine examples of formal and informal ballot papers from a Senate election.

## House of Representatives ballot paper examples

Example 1

BALLOT PAPER  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY

**Number the boxes  
from 1 to 6 in the  
order of your choice.**

3	FRANKS, David DEMOCRATS
one	WILLIAMS, Adam ONE NATION
two	SCOTT, Kim THE GREENS
5	CARTER, Heath LABOR PARTY
6	ALWIN, Richard LIBERAL
4	ANDREWS, Sara INDEPENDENT

Remember ... number every box  
to make your vote count

AEC  
Australian Electoral Commission

1. **Formal** because numbers can be written as words rather than figures

Example 2

BALLOT PAPER  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY

**Number the boxes  
from 1 to 6 in the  
order of your choice.**

X	FRANKS, David DEMOCRATS
2	WILLIAMS, Adam ONE NATION
5	SCOTT, Kim THE GREENS
4	CARTER, Heath LABOR PARTY
3	ALWIN, Richard LIBERAL
6	ANDREWS, Sara INDEPENDENT

Remember ... number every box  
to make your vote count

AEC  
Australian Electoral Commission

2. **Informal** because X is not a valid first preference mark i.e. no number 1

Example 3

BALLOT PAPER  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY

**Number the boxes  
from 1 to 6 in the  
order of your choice.**

<input type="checkbox"/>	FRANKS, David DEMOCRATS
<input type="checkbox"/>	WILLIAMS, Adam ONE NATION
<input checked="" type="checkbox"/>	SCOTT, Kim THE GREENS
<input type="checkbox"/>	CARTER, Heath LABOR PARTY
<input type="checkbox"/>	ALWIN, Richard LIBERAL
<input type="checkbox"/>	ANDREWS, Sara INDEPENDENT

Remember ... number every box  
to make your vote count

AEC  
Australian Electoral Commission

3. **Informal** because ✓ is not a valid first preference mark and no numbers have been used

Example 4

BALLOT PAPER  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY

**Number the boxes from 1 to 6 in the order of your choice.**

1	FRANKS, David DEMOCRATS
2	WILLIAMS, Adam ONE NATION
3	SCOTT, Kim THE GREENS
4	CARTER, Heath LABOR PARTY
5	ALWIN, Richard LIBERAL
6	ANDREWS, Sara INDEPENDENT

Remember ... number every box to make your vote count

4. **Formal** because there is one first preference and consecutive numbers in all squares

Example 5

BALLOT PAPER  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY

**Number the boxes from 1 to 6 in the order of your choice.**

5	FRANKS, David DEMOCRATS
2	WILLIAMS, Adam ONE NATION
1	SCOTT, Kim THE GREENS
6	CARTER, Heath LABOR PARTY
4	ALWIN, Richard LIBERAL
3	ANDREWS, Sara INDEPENDENT

*Save the Planet*

Remember ... number every box to make your vote count

5. **Formal** because squares are numbered consecutively beginning with one; the handwritten addition is irrelevant and, in this case, does not obscure a preference or identify a voter.

Example 6

BALLOT PAPER  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY

**Number the boxes from 1 to 6 in the order of your choice.**

3	FRANKS, David DEMOCRATS
3	WILLIAMS, Adam ONE NATION
2	SCOTT, Kim THE GREENS
1	CARTER, Heath LABOR PARTY
4	ALWIN, Richard LIBERAL
5	ANDREWS, Sara INDEPENDENT

Remember ... number every box to make your vote count

6. **Informal** because a number is repeated

Example 7

BALLOT PAPER  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY

**Number the boxes from 1 to 6 in the order of your choice.**

<input type="checkbox"/>	FRANKS, David DEMOCRATS
<input type="checkbox"/>	WILLIAMS, Adam ONE NATION
<input type="checkbox"/>	SCOTT, Kim THE GREENS
<input type="checkbox"/>	CARTER, Heath LABOR PARTY
<input type="checkbox"/>	ALWIN, Richard LIBERAL
<input type="checkbox"/>	ANDREWS, Sara INDEPENDENT

Remember ... number every box to make your vote count

7. **Informal** because it has been left completely blank

Example 8

BALLOT PAPER  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY

**Number the boxes from 1 to 6 in the order of your choice.**

7	FRANKS, David DEMOCRATS
6	WILLIAMS, Adam ONE NATION
5	SCOTT, Kim THE GREENS
4	CARTER, Heath LABOR PARTY
3	ALWIN, Richard LIBERAL
2	ANDREWS, Sara INDEPENDENT

1. *Bart Simpson*

Remember ... number every box to make your vote count

8. **Informal** because there is no first preference mark against a nominated candidate

**Examine informal ballot papers**

Each and every informal ballot paper must be carefully examined fully for formality. Ballot papers which are found to be formal are to be transferred to the correct candidate bundles. Staff are not to count on No. 1s or 'flick' ballot papers at this time.

**Examine formal ballot papers**

Every formal ballot paper must be examined fully for formality and retained in 1st preference order.

Miss-sorts are to be transferred to the correct candidate bundles. Ballot papers that are found to be informal are to be transferred to the informal bundle.

Any ballot papers objected to by scrutineers should be referred to the officer-in-charge who will then refer these ballot papers to the DRO for a decision. On making the decisions, the DRO will write or stamp 'admitted at fresh scrutiny' or 'rejected at fresh scrutiny' on the back of the ballot paper with the date and his/her initials. The DRO's decision is final at this scrutiny. [s.267(1) CEA]

Count ballot papers (No. 1s) **face up** and bundle into 50s, retaining the original packaging card, then tick or amend in red any alterations on the card.

If any miss-sort or other error is significant it must be noted on the fresh scrutiny result slip and the DRO must enter these details into the election diary.

Enter results onto the HoR Fresh Scrutiny result slip (**NRFS**).

[irrelevant text deleted]

## 12.2 House of Representatives Formality

HoR ballot papers must contain one number '1' and consecutive numbers in every other box, or every box except one, to be formal.

A HoR ballot paper will be considered **informal** when:

- any number is repeated; or
- more than one box is left empty; or
- the sequence of numbers is broken; or
- the elector's intention is unclear; or
- the number '1' does not appear against any candidate (no first preference); or
- a cross (×) or a tick (✓) has been used instead of a number '1' to show the elector's preference; or
- it is marked in any way by which the voter can be identified, such as a signature and the signature is legible (initials will not usually identify a voter); or
- an additional name has been added to the ballot paper as a candidate and the voter has indicated a preference that is not the last preference for that additional candidate; or
- the number '0' is used to indicate a preference where there are more than two candidates.
- See **Attachment A** for formal/informal ballot paper examples and quick reference guide.

Note: Alterations to the numbers, or numbers placed outside the box, do not make a ballot paper informal provided that the elector's intention is clear. If staff are unable to determine the formality of a ballot paper it should be put with the informal ballot papers. All informal ballot papers will be rechecked by the DRO.

[irrelevant text deleted]

## Attachment A

### Quick Reference Guide to Formality of House of Representatives Ballot Papers

Examples of formal House of Representatives ballot papers:


A	B	C	D	E	F	G	H	I	J	K	L	
1	1st	I	ONE	1	1	<del>1</del>	1✓	A	2 ✕	1 ✕		1
2	2nd	II	TWO	2	2	2	2	B	1	2 ✕		2
3	3rd	III	THREE	3	3	3	3	C	3	3		3
4	4th	IV	FOUR	4	4	4	4	D	4	4		4
5	5th	V	FIVE		5	5	5	E	5	5		5

**G:** This vote would be informal if the 1st preference had clearly been crossed out, instead of the cross being overwritten with a '1'.

**J-K:** These votes would be informal if the cross had clearly been overwritten with a number that was different from the adjacent number.

# Quick Reference Guide to Formality of House of Representatives Ballot Papers

## Formal/Informal Ballot Paper Examples

 **BALLOT PAPER**  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY

*Number the boxes from 1 to 6 in the order of your choice.*

FRANKS, David  
DEMOCRATS

WILLIAMS, Kim  
ONE NATION

SCOTT, Adam  
THE GREENS

CARTER, Heather  
LABOR PARTY


ALLEN, Robert  
LIBERAL

ANDREWS, Sally  
INDEPENDENT

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

INFORMAL

 **BALLOT PAPER**  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY

*Number the boxes from 1 to 6 in the order of your choice.*

FRANKS, David  
DEMOCRATS

WILLIAMS, Kim  
ONE NATION

SCOTT, Adam  
THE GREENS

CARTER, Heather  
LABOR PARTY


ALLEN, Robert  
LIBERAL

ANDREWS, Sally  
INDEPENDENT

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

FORMAL

 **BALLOT PAPER**  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY

*Number the boxes from 1 to 6 in the order of your choice.*

FRANKS, David  
DEMOCRATS

WILLIAMS, Kim  
ONE NATION

SCOTT, Adam  
THE GREENS

CARTER, Heather  
LABOR PARTY


ALLEN, Robert  
LIBERAL

ANDREWS, Sally  
INDEPENDENT

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

INFORMAL

 **BALLOT PAPER**  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY

*Number the boxes from 1 to 6 in the order of your choice.*

FRANKS, David  
DEMOCRATS

WILLIAMS, Kim  
ONE NATION

SCOTT, Adam  
THE GREENS

CARTER, Heather  
LABOR PARTY


ALLEN, Robert  
LIBERAL

ANDREWS, Sally  
INDEPENDENT

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

FORMAL

 **BALLOT PAPER**  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY

*Number the boxes from 1 to 6 in the order of your choice.*

FRANKS, David  
DEMOCRATS

WILLIAMS, Kim  
ONE NATION

SCOTT, Adam  
THE GREENS

CARTER, Heather  
LABOR PARTY


ALLEN, Robert  
LIBERAL

ANDREWS, Sally  
INDEPENDENT

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

INFORMAL

 **BALLOT PAPER**  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY

*Number the boxes from 1 to 6 in the order of your choice.*

FRANKS, David  
DEMOCRATS

WILLIAMS, Kim  
ONE NATION

SCOTT, Adam  
THE GREENS

CARTER, Heather  
LABOR PARTY

ALLEN, Robert  
LIBERAL

ANDREWS, Sally  
INDEPENDENT

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

INFORMAL

## Quick Reference Guide to Formality of House of Representatives Ballot Papers

### Examples of informal House of Representatives ballot papers:

M	N	O	P	Q	R	S	T	U	V	W
1	1	1	X	✓		6	1	1	A	1
2	2	2	2	2	2	2	2	2	B	2
3		3	3	3	3	3	3	3	3	3
4	4	5	4	4	4	4	4		4	4
0	5	6	5	5	5	5	4		5	5
						1				

- M:** The '0' is not a valid preference, except when there are only 2 candidates.
- N:** The 3rd preference is missing and cannot be inferred – s.268(1) of the *Commonwealth Electoral Act* deems the missing preference to be the voter's last.
- O:** The sequence of preferences has been broken (there is no 4th preference).
- P-R:** There is no 1st preference. Ticks and crosses are not valid preference marks on House of Representatives ballot papers.
- S:** There is no 1st preference for a candidate. In this case the preference has been expressed for someone or something other than a candidate.
- T:** There is no 5th preference- the 4th preference has been repeated.
- U:** There is no 4th or 5th preference.
- V:** The elector has used a combination of numerals and letters.
- W:** The voter's intention is unclear.

# Quick Reference Guide to Formality of House of Representatives Ballot Papers

## Examples of formal House of Representatives ballot papers:

A	B	C	D	E	F	G	H	I	J	K	L	
1	1st	I	ONE	1	1	1	1✓	A	2 ✗	1 ✗		1
2	2nd	II	TWO	2	2	2	2	B	1	2 ✗		2
3	3rd	III	THREE	3	3	3	3	C	3	3		3
4	4th	IV	FOUR	4	4	4	4	D	4	4		4
5	5th	V	FIVE		5	5	5	E	5	5		5

**G:** This vote would be informal if the 1st preference had clearly been crossed out, instead of the cross being overwritten with a '1'.

**J-K:** These votes would be informal if the cross had clearly been overwritten with a number that was different from the adjacent number.

## Examples of informal House of Representatives ballot papers:

M	N	O	P	Q	R	S	T	U	V	W	
1	1	1	X	✓		6	1	1	A	1	
2	2	2	2	2	2	2	2	2	B	2	3
3		3	3	3	3	3	3	3	3	3	2
4	4	5	4	4	4	4	4		4	4	
0	5	6	5	5	5	5	4		5	5	
						1					

**M:** The '0' is not a valid preference, except when there are only 2 candidates.

**N:** The 3rd preference is missing and cannot be inferred – s.268(1) of the *Commonwealth Electoral Act* deems the missing preference to be the voter's last.

**O:** The sequence of preferences has been broken (there is no 4th preference).

**P-R:** There is no 1st preference. Ticks and crosses are not valid preference marks on House of Representatives ballot papers.

**S:** There is no 1st preference for a candidate. In this case the preference has been expressed for someone or something other than a candidate.

**T:** There is no 5th preference- the 4th preference has been repeated.



**U:** There is no 4th or 5th preference.

**V:** The elector has used a combination of numerals and letters.

**W:** The voter's intention is unclear.



# Formality of House of Representatives Ballot Papers

 **BALLOT PAPER**   
 HOUSE OF REPRESENTATIVES  
 VICTORIA  
 ELECTORAL DIVISION OF  
 CASEY

**Number the boxes from 1 to 6 in the order of your choice.**

FRANKS, David  
 DEMOCRATS

1 WILLIAMS, Kim  
 ONE NATION

2 SCOTT, Adam  
 THE GREENS

2 CARTER, Heather  
 LABOR PARTY



3 ALLEN, Robert  
 LIBERAL

4 ANDREWS, Sally  
 INDEPENDENT

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

**INFORMAL**

 **BALLOT PAPER**   
 HOUSE OF REPRESENTATIVES  
 VICTORIA  
 ELECTORAL DIVISION OF  
 CASEY

**Number the boxes from 1 to 6 in the order of your choice.**

4 FRANKS, David  
 DEMOCRATS

6 WILLIAMS, Kim  
 ONE NATION

3 SCOTT, Adam  
 THE GREENS

1 CARTER, Heather  
 LABOR PARTY



2 ALLEN, Robert  
 LIBERAL

5 ANDREWS, Sally  
 INDEPENDENT

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

**FORMAL**

 **BALLOT PAPER**   
 HOUSE OF REPRESENTATIVES  
 VICTORIA  
 ELECTORAL DIVISION OF  
 CASEY

**Number the boxes from 1 to 6 in the order of your choice.**

FRANKS, David  
 DEMOCRATS

WILLIAMS, Kim  
 ONE NATION

SCOTT, Adam  
 THE GREENS

2 CARTER, Heather  
 LABOR PARTY



1 ALLEN, Robert  
 LIBERAL

3 ANDREWS, Sally  
 INDEPENDENT

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

**INFORMAL**

 **BALLOT PAPER**   
 HOUSE OF REPRESENTATIVES  
 VICTORIA  
 ELECTORAL DIVISION OF  
 CASEY

**Number the boxes from 1 to 6 in the order of your choice.**

5 FRANKS, David  
 DEMOCRATS

3 WILLIAMS, Kim  
 ONE NATION

1 SCOTT, Adam  
 THE GREENS

6 CARTER, Heather  
 LABOR PARTY



2 ALLEN, Robert  
 LIBERAL

4 ANDREWS, Sally  
 INDEPENDENT

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

**FORMAL**

 **BALLOT PAPER**   
 HOUSE OF REPRESENTATIVES  
 VICTORIA  
 ELECTORAL DIVISION OF  
 CASEY

**Number the boxes from 1 to 6 in the order of your choice.**

5 FRANKS, David  
 DEMOCRATS

6 WILLIAMS, Kim  
 ONE NATION

2 SCOTT, Adam  
 THE GREENS

CARTER, Heather  
 LABOR PARTY



3 ALLEN, Robert  
 LIBERAL

4 ANDREWS, Sally  
 INDEPENDENT

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

**INFORMAL**

 **BALLOT PAPER**   
 HOUSE OF REPRESENTATIVES  
 VICTORIA  
 ELECTORAL DIVISION OF  
 CASEY

**Number the boxes from 1 to 6 in the order of your choice.**

FRANKS, David  
 DEMOCRATS

WILLIAMS, Kim  
 ONE NATION

SCOTT, Adam  
 THE GREENS

CARTER, Heather  
 LABOR PARTY

ALLEN, Robert  
 LIBERAL

ANDREWS, Sally  
 INDEPENDENT

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

**INFORMAL**

# House of Representatives Formality and Informality

Please indicate if the following House of Representatives ballot papers are formal or informal and the reason for your decision.

1.

Formal/Informal

Reason:

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2.

Formal/Informal

Reason:

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3.

Formal/Informal

Reason:

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# House of Representatives Formality and Informality

4.

 **BALLOT PAPER**   
 HOUSE OF REPRESENTATIVES  
 VICTORIA  
 ELECTORAL DIVISION OF  
 CASEY

**Number the boxes from 1 to 6 in the order of your choice.**

1	FRANKS, David DEMOCRATS
2	WILLIAMS, Kim ONE NATION
3	SCOTT, Adam THE GREENS
4	CARTER, Heather LABOR PARTY
5	ALLEN, Robert LIBERAL
6	ANDREWS, Sally INDEPENDENT

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

**Formal/Informal**

**Reason:**

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5.

 **BALLOT PAPER**   
 HOUSE OF REPRESENTATIVES  
 VICTORIA  
 ELECTORAL DIVISION OF  
 CASEY

**Number the boxes from 1 to 6 in the order of your choice.**

5	FRANKS, David DEMOCRATS
2	WILLIAMS, Kim ONE NATION
1	SCOTT, Adam THE GREENS
6	CARTER, Heather LABOR PARTY
4	ALLEN, Robert LIBERAL
3	ANDREWS, Sally INDEPENDENT

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

**Formal/Informal**

**Reason:**

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6.

 **BALLOT PAPER**   
 HOUSE OF REPRESENTATIVES  
 VICTORIA  
 ELECTORAL DIVISION OF  
 CASEY

**Number the boxes from 1 to 6 in the order of your choice.**

3	FRANKS, David DEMOCRATS
3	WILLIAMS, Kim ONE NATION
2	SCOTT, Adam THE GREENS
1	CARTER, Heather LABOR PARTY
5	ALLEN, Robert LIBERAL
4	ANDREWS, Sally INDEPENDENT

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

**Formal/Informal**

**Reason:**

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# House of Representatives Formality and Informality

7.


**BALLOT PAPER**  
 HOUSE OF REPRESENTATIVES  
 VICTORIA  
 ELECTORAL DIVISION OF  
**CASEY**

*Number the boxes from 1 to 6 in the order of your choice.*

<input type="checkbox"/>	FRANKS, David <small>DEMOCRATS</small>
<input type="checkbox"/>	WILLIAMS, Kim <small>ONE NATION</small>
<input type="checkbox"/>	SCOTT, Adam <small>THE GREENS</small>
<input type="checkbox"/>	CARTER, Heather <small>LABOR PARTY</small>
<input type="checkbox"/>	ALLEN, Robert <small>LIBERAL</small>
<input type="checkbox"/>	ANDREWS, Sally <small>INDEPENDENT</small>

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

**Formal/Informal**

**Reason:**

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8.


**BALLOT PAPER**  
 HOUSE OF REPRESENTATIVES  
 VICTORIA  
 ELECTORAL DIVISION OF  
**CASEY**

*Number the boxes from 1 to 6 in the order of your choice.*

<input type="checkbox"/> 7	FRANKS, David <small>DEMOCRATS</small>
<input type="checkbox"/> 6	WILLIAMS, Kim <small>ONE NATION</small>
<input type="checkbox"/> 5	SCOTT, Adam <small>THE GREENS</small>
<input type="checkbox"/> 4	CARTER, Heather <small>LABOR PARTY</small>
<input type="checkbox"/> 3	ALLEN, Robert <small>LIBERAL</small>
<input type="checkbox"/> 2	ANDREWS, Sally <small>INDEPENDENT</small>
<input type="checkbox"/> 1	<i>Bart Simpson</i>

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

**Formal/Informal**

**Reason:**

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9.


**BALLOT PAPER**  
 HOUSE OF REPRESENTATIVES  
 VICTORIA  
 ELECTORAL DIVISION OF  
**CASEY**

*Number the boxes from 1 to 6 in the order of your choice.*

<input type="checkbox"/> 2	FRANKS, David <small>DEMOCRATS</small>
<input type="checkbox"/> 6	WILLIAMS, Kim <small>ONE NATION</small>
<input type="checkbox"/> 4	SCOTT, Adam <small>THE GREENS</small>
<input type="checkbox"/> 5	CARTER, Heather <small>LABOR PARTY</small>
<input type="checkbox"/> 3	ALLEN, Robert <small>LIBERAL</small>
<input type="checkbox"/> 1	ANDREWS, Sally <small>INDEPENDENT</small>

*Go Sally,  
I voted for you  
John Smith*

Remember... number every box to make your vote count

Australian Electoral Commission **AEC**

**Formal/Informal**

**Reason:**

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# House of Representatives Formality and Informality

10.

**BALLOT PAPER**  
HOUSE OF REPRESENTATIVES  
VICTORIA  
ELECTORAL DIVISION OF  
CASEY

*Number the boxes  
from 1 to 6 in the  
order of your choice.*

<input type="checkbox"/>	FRANKS, David	2
	DEMOCRATS	
<input type="checkbox"/>	WILLIAMS, Kim	1
	ONE NATION	
<input type="checkbox"/>	SCOTT, Adam	5
	THE GREENS	
<input type="checkbox"/>	CARTER, Heather	3
	LABOR PARTY	
<input type="checkbox"/>	ALLEN, Robert	6
	LIBERAL	
<input type="checkbox"/>	ANDREWS, Sally	4
	INDEPENDENT	

Remember... number every box  
to make your vote count

Australian Electoral Commission **AEC**

**Formal/Informal**

**Reason:**

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## Recount Policy

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Implementation Procedures relevant to this Policy.....	3

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### Date of Implementation

June 2007

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### Purpose of Policy

To ensure recounts are conducted in accordance with the CEA.

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### Detailed Policy Statement

#### 1.1 Legislative Background

- 1.1.1 Section 278 of the *Commonwealth Electoral Act* (CEA) allows a candidate to ask the Australian Electoral Officer (AEO) for a recount of Senate ballot papers, and specifically provides for an appeal to be made to the Electoral Commissioner (EC) if the AEO refuses the request.
- 1.1.2 Section 279 of the CEA allows a recount of the House of Representatives votes to be ordered by the Divisional Returning Officer (DRO), AEO or EC.

#### 1.2 Scrutiny Processes Background

- 1.2.1 **House of Representatives** - There are 3 separate scrutines undertaken in full view of scrutineers as a normal part of the counting process:
- The first is at the polling place on election night where ballot papers are counted by polling staff
  - The second is at the DRO's office where the ballot papers are re-examined and recounted under the control of the DRO in the week following polling day during a process determined under the CEA as a "fresh" scrutiny. This involves a recount of first preferences and the 'Two Candidate Preferred' (TCP) results. Additionally, all declaration vote envelopes that are admitted to "further" scrutiny are opened, to remove ballot papers for first preference and TCP counting, and then a "fresh" scrutiny of these ballot papers is also undertaken to re-examine and recount to ensure results are accurate
  - The third count is undertaken to complete the full distribution of preferences (or 'scrutiny for information' where a distribution of preferences is not required). At

this count the ballot papers of lower placed candidates are examined to determine which of the remaining candidates should be allocated the next available preference. The candidate with the least number of first preference votes is excluded first

- 1.2.2 **Senate** - Ballot papers counted in polling places and those extracted from admitted declaration vote envelopes for 'above the line' (ATL) Senate groups are also subject to the "fresh" scrutiny process, while the Senate ballot papers for 'below the line' (BTL) are despatched to a central scrutiny centre in each State and Territory for data entry and verification to ensure accuracy in a system known as 'Easycount Senate' which calculates the quota and distributes preferences to produce the results
- 1.2.3 Results from House of Representatives and Senate "fresh" scrutiny counts, and the House of Representatives distribution of preferences, are entered into the AEC's Election Management System (ELMS). All results are entered progressively and the results are regularly uploaded to the AEC's website.
- 1.2.4 It should be noted that all scrutines in polling places and AEC offices are open to scrutineers who have been appointed to represent candidates. In practice all scrutines in close seats are attended by large numbers of scrutineers, and the count is slower to some extent. By the time a result has been determined, ballot papers have been fully counted and reviewed two or three times, therefore a significant missort or undetected counting error is unlikely.

### 1.3 Evaluating a request for a recount

- 1.3.1 The general guidelines observed in evaluating requests for a recount are as follows:
1. A recount may take place where there are valid and specific grounds for supposing that it could change the result of the election in the Division or State/Territory or where there are specific grounds for determining the need for a recount of specific ballot papers (eg. in response to specific allegations/incidents).
  2. A request for a recount which does not plead any valid and specific grounds should be refused.
  3. Wherever possible, the grounds pleaded by the candidate requesting the recount should be used to narrow down to as small a category as possible the ballot papers which need to be re-examined.
  4. There is no minimum number under which a recount will occur.
  5. Only one recount of any (set of) ballot papers will occur.
  6. Requests for recounts will only be considered, and actioned, in the period after the completion of all scrutines and before the declaration of the poll in that Division (for HOR ballot papers) or State/Territory (for Senate ballot papers).
- 1.3.2 In the absence of specifically alleged errors, it is unlikely that a recount would be required at either a House of Representatives or a Senate election, no matter how close the margins in the scrutiny had been. Given the checks and balances in both scrutiny systems, significant sorting errors are highly unlikely to go undetected.
- 1.3.3 As a general rule, the decision maker should not agree to any recount, the purpose of which was only to attempt to boost the first preference votes of a candidate to at least 4% for public funding purposes, or to avoid forfeiture of a nomination deposit, or because the candidate did not have scrutineers in attendance at a particular scrutiny.
- 1.3.4 In the case of a House of Representatives election, the CEA does not confer a specific right of appeal where a DRO or AEO refuses an initial request for a recount.



However, it is implicit that a candidate so refused could lay their claims successively before the EC, or AEO and EC, as the case may be. In this environment, it is important that a judgment is made on the merits of the case put to them, and therefore, to avoid any perception of bias, direct consultation should not occur with someone who might later have to consider the same request.

- 1.3.5 In the case of a Senate election, if the relevant AEO refuses a request for a recount, the candidate may appeal to the EC to direct a recount.
- 1.3.6 However, it is appropriate, and not inconsistent with the statute, that consultation by the decision maker does occur. In practice, it is expected that a DRO would consult with senior State Office or National Office staff to seek views on the merits of any request, and an AEO similarly with senior National Office staff, in the event of a request for recount.
- 1.3.7 The Deputy Electoral Commissioner must be informed immediately when **any** request for recount is made to ensure a common awareness across the AEC of any such requests.

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## **Policy Contacts**

Director, Elections Systems and Policy.

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## **Related Policies and References**

HoR Scrutiny Policy

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## **Implementation Procedures relevant to this Policy**

EPM DO Part 13, subpart 4



## IDENTIFIED RECOUNTS 1958 - 1977

The information on recounts in this attachment is drawn from Australian Electoral Office file number E79/614, Recounts of Elections. The information was provided by Australian Electoral Officers in response to a request from the Chief Australian Electoral Officer in December 1976. As for the information presented in Table 3 in the report, the information collected in 1977 appears to be based on a file search guided by the recollection of long serving electoral office staff. Accordingly it cannot be treated as a definitively comprehensive list. In most cases only the final (recounted) margin is readily available. The initial count margin is provided for the 4 divisions where the information was on file, or in the case of Moreton, reported in the Courier Mail newspaper of 20 December 1961.

<b>Year</b>	<b>Division</b>	<b>Recount margin</b>	<b>Initial margin</b>
1958	St George	59	n.a
	Kalgoorlie	179	140
1961	Evans	72	n.a
	Moreton	130	115
1969	Sturt	1207	n.a
	St George	69	n.a
1972	Lilley	35	n.a
	Parramatta	359	n.a
	Paterson	437	n.a
1974	Stirling	12	1
1975	Corio	20	n.a
	St George	56	n.a
	Capricornia	136	n.a
1977	Grey	65	25

n.a: Not readily available