



Our Ref: 12/1181

Dr Kilian Perrem
Inquiry Secretary
Joint Standing Committee on Electoral Matters
Department of the House of Representatives
PO Box 6021
PARLIAMENT HOUSE
CANBERRA ACT 2600

Dear Dr Perrem

Inquiry into the Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012

I refer to the public hearing of the Joint Standing Committee on Electoral Matters (the Committee) on 4 February 2013 at which the Australian Electoral Commission (AEC) was asked to provide the Committee with some additional information. The following information is provided in response to those requests.

Premature opening of ballot boxes

Training and procedures for pre-poll voting

At page 2 of the Proof Hansard, Mrs Bishop asked the AEC to provide information concerning training and procedures for pre-poll voting at the 2010 and 2013 federal elections.

Mrs BRONWYN BISHOP: You might take these questions on notice: (1) in the 2010 instruction period, which electorates had face-to-face instruction and which did not? I would like lists of both. I would like to see the material that was prepared for our electoral staff telling them that there had been a change in the law and that they could no longer treat pre-poll votes as declaration votes. Mr Gray also made a list of recommendations as to what should be done to ensure this does not happen again. You have told this committee that you have put procedures in practice to ensure that it does not happen again. I would like to see those instructions and how you have recorded that and how that material is disseminated. It seems to me that, at no stage, either in our report on the 2010 election nor in Mr Gray's investigation,

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nor in your response to Mr Gray's election, had anybody suggested at any time that the votes contained in boxes that are opened in error in that way should automatically be excluded from scrutiny.

[...]

Mr Killesteyn: We will take all of those detailed questions on notice about which polling official received face-to-face training. Can I seek some clarification, Mrs Bishop: is that right across the board in every electorate or were you simply confining the question to Boothby and Flynn?

Mrs BRONWYN BISHOP: Every electorate.

AEC response

Face-to-face training for pre-poll voting centre Officers-In-Charge

For the 2010 federal election the AEC had a national policy regarding training offered for various roles. For pre-poll voting centres (PPVCs), the Officers-in-Charge (OICs) were required to undertake face-to-face training. Most divisions operated PPVCs and associated staffing and training. The tables at Attachment A, list the divisions which records reflect had allocated PPVC OIC roles for the 2010 federal election (and therefore should have undertaken face-to-face training) and those that did not.

Table A at Attachment A shows that 142 divisions had allocated PPVC OIC roles. Eight divisions did not have PPVC OICs; these are listed at Table B of Attachment A. The majority of these eight divisions either did not open pre-poll centres or had pre-poll services that were provided jointly with a nearby division which provided the required training.

For the 2013 federal election the AEC will require all staff in pre-poll centres to undertake face-to-face training.

Procedures provided to PPVC OICs

At the 2010 federal election all PPVC OICs were supplied with a *Pre-poll Voting Election Procedures Handbook*. A copy of this Handbook is at Attachment B with sections relating to the handling of ballot boxes at pages 114 and 126. Specific mention was made at page 20 in the 2010 Handbook of the changes of law that altered the way in which votes needed to be handled in PPVCs.

A copy of the revised handbook to be used at the 2013 election, *Officer-in-Charge Pre-poll Voting Election Procedures Handbook*, is at Attachment C. Sections relating to handling of ballot boxes are at pages 14, 15 and 33.

Please note that the materials contained in Attachments B and C have been provided to the Committee in hard copy and are not replicated in electronic form.

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Reminders of appropriate procedures to be followed will also be included on materials which will be used at PPVCs in 2013. These are at Attachment D, and include:

- an OIC lanyard containing key instructions for pre-poll operations, including explicit instructions regarding the opening of ballot boxes;
- an OIC place card with explicit instructions regarding the opening of ballot boxes; and
- highly visible ballot box stickers with explicit instructions regarding the opening of ballot boxes.

The AEC's submission of 11 February 2013 to the Committee detailed the actions undertaken by the AEC to implement the recommendations of Mr Gray's investigation and report. Key elements of the AEC's actions to implement the recommendations of Mr Gray's report were also highlighted in the AEC's supplementary submission of 11 February 2013 to the Committee:

- "Training materials have been released for all AEC staff that explain the circumstances that led to the votes being excluded, and which detail the correct procedures to be followed when ballot boxes are used at polling.
- Training materials for pre-poll voting staff highlight the importance of ballot boxes remaining sealed until they are legally authorised to be open. To supplement this training, more robust ballot box seals have been bought and labels have been produced to go on pre-poll ballot boxes, to alert staff that the boxes cannot be opened early. Officer-In-Charge Returns have been modified to allow the Divisional Returning Officer (DRO) to more actively monitor how ballot box seals are being managed, by having a separate 'seals' page for each ballot box that can be faxed to the DRO on request."

Consideration of need for clarity around treatment of votes in ballot boxes opened in error

The Electoral Commissioner, Mr Ed Killesteyn, in his evidence before the Committee at page 2 of the Proof Hansard, subsequently outlined how the need for clarity around the operation of the existing provisions in relation to treatment of votes in ballot boxes opened prematurely had arisen, in the following terms:

Mr Killesteyn: [...] The issue, however, in relation to excluding of the ballots comes as a consequence of a different matter, and that was during the consideration by the Electoral Commission of what to do once those errors were discovered, we sought advice from the Attorney-General's Department, and the advice was not as definite as one might like in such a difficult and sensitive area.

Mrs BRONWYN BISHOP: I was going to come to that. I would like to see the advice.

Mr Killesteyn: The advice from the Attorney-General's was that it would be prudent—and that was the phrase that was used—to exclude the ballots, but it was not necessarily clear that that was the

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appropriate action, and when the full Electoral Commission considered the matter subsequently, we took the Gray report to the full Electoral Commission, constituted by Peter Heerey as the chair, me and Brian Pink. The commission thought it was important for the law to be clarified rather than simply relying on prudence. In this case the suggestion was that the discretion as to whether the ballots should be included or not should be taken away from the Electoral Commission and made clear in the act—and that is essentially what this provides for, that the discretion is taken away; it makes it clear in the act that the ballot should be excluded.

CHAIR: Is that basically what the end of paragraph 6.2 in your submission is?

Mr Killesteyn: That is true.

CHAIR: Just generally reporting that it was in need of further clarity and that is what—

Mr Killesteyn: That is correct.

Legal advice regarding the exclusion of votes in relation to Boothby and Flynn was provided to the AEC from the Australian Government Solicitor (AGS). Consideration of this issue by the Electoral Commission was described in the AEC's first submission (submission 87) to this Committee's Inquiry into the conduct of the 2010 federal election at paragraph 6.3.12:

"The Commission noted that whilst the AEC had external legal advice supporting the exclusion of the ballot papers, following the outcome of the report from Mr Gray, the legal basis for the exclusion was in need of further clarity. Accordingly, the Commission recommended that this issue be brought to the attention of JSCEM with a proposal to amend the Electoral Act to clarify issues around the opening of ballot-boxes and the exclusion (if appropriate) of affected ballot papers from the count due to polling official errors."

The AEC subsequently recommended to this Committee that "the Electoral Act and Referendum Act be amended to specifically provide that a ballot box may not be opened before the close of polling other than in accordance with the provisions of the Electoral Act. However, a savings provision in the event of an official error should be included."

As the Committee is aware, its report of the inquiry subsequently recommended that the Electoral Act be amended "to specifically provide that a ballot box containing votes cast by electors may not be opened before the close of polling other than in accordance with the relevant provisions of the Electoral Act". The report however, also stated that, "the Committee does not accept that a savings provision is necessary as the AEC must ensure that circumstances such as those that occurred in Boothby and Flynn do not reoccur".

The Government response to this recommendation is provided for in the Bill that is the subject of this inquiry; it proposes to exclude votes contained in prematurely opened ballot boxes from scrutiny.

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Wire seals for ballot boxes.

At page 12 of the Proof Hansard, Mrs Bishop asked the AEC for a sample of the new seals for use with ballot boxes in pre-poll voting centres.

Senator RYAN: [...] What are the new seals? Are you allowed to tell us?

Mrs BRONWYN BISHOP: Let us see some examples. Send us some copies.

Senator RYAN: I am just wondering if you have upgraded them.

Mrs BRONWYN BISHOP: Send us examples of the seal.

Ms Neilson: We can do that.

AEC Response

Wire seals to be used accompany this submission.

Legal advice from the Australian Government Solicitor

At pages 2 to 3 of the Proof Hansard, Mrs Bishop requested a copy of the legal advice the AEC received from the AGS.

Mrs BRONWYN BISHOP: [...] Mr Gray refers twice in his report to the fact that you took legal advice and therefore the votes were excluded from the scrutiny. I would like this committee to have that advice. [...]

Mr Killesteyn: We will take that on notice.

AEC Response

A copy of the AGS advice provided to the AEC on 30 August 2010 is at Attachment E.

Direct enrolment and direct update of enrolment process

At pages 2 to 3 of the Proof Hansard, the AEC undertook to provide further information regarding direct enrolment and direct update processes and implementation of these processes to date.

Mr Killesteyn: I am more than happy to lay out the process for federal direct enrolment. I am more than happy to lay out the process for use of this tax data. I have done a little bit of that now. If you want more information, I am happy to take that on notice.

Mrs BRONWYN BISHOP: I will tell you what would be useful: for you to give us an accurate breakdown of what has happened with regard to the list you have already used. We had the report that came from Mr Green originally, that of the people who were added to the role for the New South Wales election—and you contacted those people—only 20 per cent were prepared to fill out a form to go on the federal roll. Now you have got your own automatic enrolment legislation. No doubt, you have just shoved them on anyway. The point is—

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Mr Killesteyn: I reject the notion that we are 'shoving them on', Mrs Bishop. There is a very detailed, forensic process to determine—

Mrs BRONWYN BISHOP: I am afraid that I cannot accept that the AEC has a forensic process, because of your history.

Mr Killesteyn: I will provide evidence of that.

AEC Response

Direct enrolment and update process

The direct enrolment and address update process comprises the following steps:

- a. Data in – data from another government agency is loaded into AEC systems.
- b. Matching and integrity – data is cross-referenced against other data sources including the electoral roll and citizenship data to determine eligibility.
- c. Exclusions – individuals not eligible for direct enrolment and address update (including special category groups) are excluded from the process and may be contacted through other AEC channels, such as the standard Continuous Roll Update (CRU) mail review program.
- d. Notification – the AEC writes to the electors to advise them of the intent to enrol or update their address details, including the option to reply within 28 days.
- e. Responses – any change or response received within the 28 day period is processed by divisional offices.
- f. Update – the electoral roll is updated for electors who do not respond to the AEC and the elector advised about the outcome.

Matching and integrity checking

Data from other government sources with strict evidence of identity requirements is matched against the electoral roll to identify potential electors who are not on the roll or whose enrolled address is not accurate. Matching is done using a specialist information technology system, in the main, and in cases where a precise match cannot be made there is intervention by a trained AEC staff member. Under direct enrolment and update, all of the standard matching and integrity business rules as used in the AEC's CRU mail review program are applied.

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In deciding whether an individual should be enrolled there are three overriding principles:

- certainty about the identity of the individual - ensuring that information supplied can be associated with a unique individual;
- determination that an individual is an Australian citizen - and therefore eligible to be enrolled; and
- certainty about the address - enrolment and voting are address-based, therefore it is important to establish the appropriate address at which an elector should be enrolled.

The checks undertaken at this stage are numerous, and include but are not limited to:

- ensuring that the address provided is one contained on the AEC's Address Register, or can be verified and therefore added to the Address Register;
- ensuring that the address for mailing has reliable mail delivery¹; and
- removing individuals who have features which are incompatible with direct enrolment and address update.

There are several electoral features which are incompatible with direct enrolment and address update. Where these features are determined through the matching and verification process no direct update or enrolment action will be undertaken. These features include:

- silent electors and addresses that have a current silent elector, prisoners, deceased, unsound mind, businesses, itinerants, MPs enrolled for their elected division rather than their residential address (as outlined in subsection 99(4) of the *Commonwealth Electoral Act 1918*);
- where data indicates that there has been a revocation or renunciation or citizenship;
- electors with pending enrolment updates - where an enrolment transaction is underway but requires further details from the elector, or current elector-initiated enrolment applications;
- where direct update action would result in the elector being updated for the same address they are already enrolled at;
- where AEC records indicate that the elector has a more recent enrolment transaction completed since the date of the other government agency data;

¹ This requirement ensures that individuals will receive communications in time to respond before the deadline.

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- if the other government data would update the electors' address for an address they lived at previously;
- the information is for an elector who been subject to AEC enrolment activity within the last 90 days (for example, has been the recipient of a letter from the AEC);
- the person is already enrolled at an address which is in close proximity to the address identified in the other government data;
- the address supplied in the other government agency data does not meet AEC requirements for an 'enrollable' address;
- the other government agency data contains insufficient information for a direct update or enrolment to occur;
- records indicate that the person would be a new enrolment, but the AEC has insufficient evidence of citizenship (passport / Department of Immigration and Citizenship data);
- the AEC has another direct enrolment or address update transaction (ie. duplicate) underway for the elector, and
- an overseas or incomplete postal address is supplied in the other government agency data.

The AEC establishes an individual's citizenship status for new enrolments using authoritative sources. These sources include:

- previous electoral rolls and previous enrolment records where the person has been enrolled;
- Department of Immigration and Citizenship data for those who have acquired citizenship; and
- passports data where the individual has an Australian passport.

The AEC notes that it is currently in negotiations to obtain birth data from relevant state and territory registries for inclusion in the citizenship status data sources.

Records that do not satisfy these checks are either diverted to the existing CRU mail review program or removed from the process.

Implementation

In November 2012 the AEC commenced a staged implementation of direct enrolment and update processes. The staged implementation consists of a number of 'cycles' commencing in Tasmania. The results from the Tasmanian cycle are at

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Attachment F. Whilst two other cycles have commenced, no enrolments or enrolment updates have been effected at this point as it is too early.

I trust that the above information is of assistance to the Committee.

Yours sincerely

Tom Rogers
Acting Electoral Commissioner

13 February 2013

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List of attachments

- Attachment A** Divisions at the 2010 federal election which records reflect had allocated PPVC OIC roles
- Attachment B** 2010 Pre-poll Voting Election Procedures Handbook
- Attachment C** 2013 Officer-in-Charge Pre-poll Voting Election Procedures Handbook
- Attachment D** Materials issued by the AEC which will be used at PPVCs in 2013:
- PPVC OIC lanyard
 - PPVC OIC place card
 - Pre-poll and mobile ballot box stickers
- Attachment E** Legal advice form the Australian Government Solicitor
- Attachment F** Implementation of direct enrolment and update processes - Cycle 1 Tasmania

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Attachment A - Divisions at the 2010 federal election which records reflect had allocated PPVC OIC roles

Table A – Divisions with PPVC OICs

Australian Capital Territory	Canberra
	Fraser
New South Wales	Banks
	Barton
	Bennelong
	Berowra
	Blaxland
	Bradfield
	Calare
	Charlton
	Chifley
	Cook
	Cowper
	Cunningham
	Dobell
	Eden-Monaro
	Farrer
	Gilmore
	Grayndler
	Greenway
	Hughes
	Hume
	Hunter
	Kingsford Smith
	Lindsay
	Lyne
	Macarthur
	Mackellar
	Macquarie
	McMahon
	Mitchell
	New England
	Newcastle
	North Sydney
	Page
	Parkes
	Parramatta
	Paterson
	Reid
	Richmond
	Riverina
	Robertson

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	Shortland
	Sydney
	Throsby
	Warringah
	Watson
	Wentworth
	Werriwa
Northern Territory	Lingiari
	Solomon
Queensland	Blair
	Bonner
	Bowman
	Brisbane
	Capricornia
	Dawson
	Dickson
	Fadden
	Fairfax
	Fisher
	Flynn
	Griffith
	Groom
	Herbert
	Hinkler
	Leichhardt
	Lilley
	Longman
	Maranoa
	McPherson
	Moncrieff
	Moreton
	Oxley
	Petrie
	Rankin
	Ryan
	Wide Bay
	Wright
South Australia	Adelaide
	Barker
	Boothby
	Grey
	Hindmarsh
	Kingston
	Makin
	Mayo
	Port Adelaide

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	Sturt
	Wakefield
Tasmania	Bass
	Braddon
	Denison
	Franklin
	Lyons
Victoria	Aston
	Ballarat
	Batman
	Bendigo
	Bruce
	Calwell
	Casey
	Chisholm
	Corangamite
	Corio
	Deakin
	Dunkley
	Flinders
	Gellibrand
	Gippsland
	Goldstein
	Gorton
	Higgins
	Holt
	Hotham
	Indi
	Isaacs
	Jagajaga
	Kooyong
	La Trobe
	Lalor
	Mallee
	Maribyrnong
	McEwen
	McMillan
	Melbourne
	Melbourne Ports
	Menzies
	Murray
	Scullin
	Wannon
	Wills
Western Australia	Brand
	Canning

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	Durack
	Forrest
	Fremantle
	Hasluck
	O'Connor
	Pearce
	Perth
	Swan

Table B - Divisions that did not have allocated PPVC OICs*

New South Wales	Fowler
Queensland	Forde
	Kennedy
Western Australia	Cowan
	Curtin
	Moore
	Stirling
	Tangney

* The majority of these eight divisions either did not open pre-poll centres or had pre-poll services that were provided jointly with a nearby division which provided the required training.

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Attachments B and C

Attachment B - 2010 Pre-poll Voting Election Procedures Handbook

Attachment C - 2013 Officer-in-Charge Pre-poll Voting Election Procedures Handbook

(Attachments B and C are provided in hard copy format only.)

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Attachment D - Materials issued by the AEC which will be used at PPVCs in 2013

- PPVC OIC lanyard
- PPVC OIC place card
- Pre-poll and mobile ballot box stickers

(Materials appear on pages that follow)

Officer In Charge

PRE-POLL VOTING

This pass remains at all times the property of the Australian Electoral Commission (AEC). Unauthorised use may lead to prosecution. If found, please return to the nearest AEC office. To find your closest AEC office, call **13 23 26** or visit **www.aec.gov.au/contact**



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Do NOT open any ballot boxes before 6pm on the day of the election unless under the direction of the DRO.

Security of election material

- ballot papers and certified lists to be locked in a container and held in secure storage
- ballot boxes must not be left unattended in public
- when transporting ballot material, ensure vehicle is locked and store ballot papers in locked container (where possible).

Monitor staff

- ensure polling place procedures are being correctly followed by staff throughout the day
- ensure staff record the hours they work each day and sign the attendance record at the end of the pay period.

Contact with DRO

- advise daily polling figures
- advise if running low on materials
- advise of any accidents or injuries in the PPVC
- advise of any other issues.

Pre-poll OIC Return (EF070)

- track declaration / ordinary votes issued by counting and recording in the return the number of counterfoils / certificates at the end of each polling day
- conduct the final ballot paper reconciliations on the last day of polling.

Sealing ballot boxes

Preparation of a new ballot box. The OIC must:

- show the empty ballot box to any person present
- seal the box by threading security seals through the holes which attach the lid to the base, so that the box cannot be opened without first breaking the seals (use wire seals for ordinary pre-poll ballot boxes)
- enter details of ballot box number and security seal numbers in the record of ballot boxes and security seals section of the OIC return (this record requires the signatures of the OIC and a witness).

ORDINARY BALLOT BOXES MUST NOT BE OPENED UNTIL 6PM ON ELECTION DAY.

DECLARATION BALLOT BOXES MUST NOT BE OPENED UNLESS DIRECTED BY THE DRO.

At the close of polling each day (or if a ballot box is full) you must use a plastic seal to seal the box in the following manner:

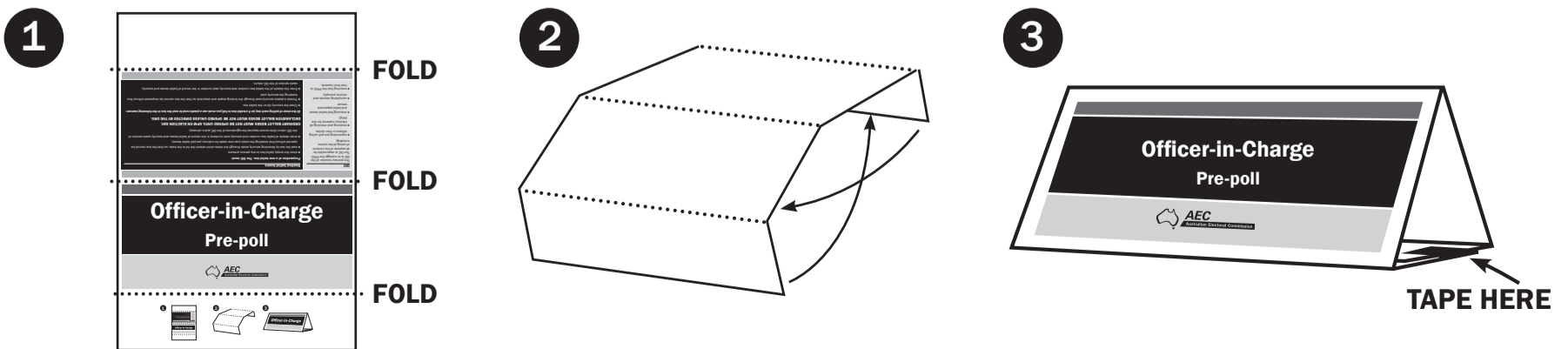
- Close the security lid on the ballot box
- Thread a plastic security seal through the locking staple and snap-lock so that the box cannot be reopened without first breaking the security seal
- Enter the details of the ballot box number and security seal number in the record of ballot boxes and security seals section of the OIC return.

OIC

The primary function of the OIC is to manage the PPVC. The OIC is responsible for all aspects of the conduct of voting at the centre, including:

- supervising pre-poll voting officers in their duties
- receiving and checking all election material for the PPVC
- ensuring that ballot boxes and ballot papers are secure
- completing records and returns promptly
- ensuring that the PPVC is free from hazards.

Officer-in-Charge Pre-poll



Pre-poll and mobile ballot box opening instructions



Ordinary votes

The ballot box must not be opened before 6pm on polling day and only as instructed by the DRO

Declaration votes

The ballot box must not be opened unless instructed by the DRO



Pre-poll and mobile ballot box opening instructions



Ordinary votes

The ballot box must not be opened before 6pm on polling day and only as instructed by the DRO

Declaration votes

The ballot box must not be opened unless instructed by the DRO



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Attachment E - Legal advice from the Australian Government Solicitor

(Document appears on pages that follow)



Our ref. 10045064

30 August 2010

Mr Paul Pirani
Chief Legal Officer
Australian Electoral Commission
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KINGSTON ACT 2604

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Darwin

Dear Mr Pirani

ISSUES WITH BALLOT-BOXES CONTAINING PRE-POLL ORDINARY BALLOT PAPERS

1. Thank you for your email of 25 August 2010 in which you requested urgent advice in relation to possible contraventions of the *Commonwealth Electoral Act 1918* (the Act) relating to ballot-boxes containing pre-poll ordinary ballot papers.

SUMMARY OF ADVICE

2. In the present circumstances, we consider that the better course of action is not to include the ballot papers in the count and to quarantine those papers (although for the reasons we discuss below, it is possible that a court might take a different view).
3. If the discarded votes could affect the outcome of the election, we think it would be appropriate for the Australian Electoral Commission (AEC) to file a petition disputing the election in the court of disputed returns as permitted by s 357.
4. We cannot see any other way of correcting the errors and consider that there is real doubt as to whether s 285 is available in the present circumstances.

BACKGROUND

5. The following background is taken from your request for advice:

Background

Division 3 of Part XVA of the Electoral Act commenced operation on 14 July 2010 and was inserted by Schedule 1 to the *Electoral and Referendum Amendment (Pre-poll Voting and Other Measures) Act 2010*. In essence these new provisions enabled an elector who qualified for a pre-poll vote under Schedule 2 to the Electoral Act to cast their ballot papers as ordinary votes in their home Division. Section 200DP of the Electoral Act sets out the requirement that at the end of each day of pre-poll ordinary voting, the ballot-box was to be sealed in the presence of scrutineers. Subsection 200DP(2) of the Electoral Act provides that after the pre-poll ordinary ballot-box has been sealed "it must on no account be opened except in accordance with this Act".

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Section 200DR of the Electoral Act provides that subject to any directions from the Divisional Returning Officer, the voting officer “must with the least possible delay, forward each sealed pre-poll ordinary ballot-box for the purposes of scrutiny”.

The scrutiny provisions are set out in subsections 273(2) and 274(2) of the Electoral Act and include the requirement to “exhibit for the inspection of scrutineers each pre-poll ordinary ballot-box...received from a voting officer ...”.

The incidents

The AEC has become aware of two incidents where the above requirements of the Electoral Act have not been complied with.

Oaklands Park Pre-poll Voting Centre – Division of Boothby

It appears that the Officer in Charge of the Oaklands Park PPVC provided two small plastic ballot-boxes on each day of pre-polling (one for House of Representatives ballot papers and the other for Senate ballot papers). After the close of pre-polling each day the Office in Charge broke the seals on the two small ballot-boxes containing pre-poll votes in the presence of at least one other polling official and the details of the numbers of ballot papers were recorded and witnessed. The ballot papers were removed and placed in two larger plastic ballot boxes that were sealed with fresh seals each day. These larger plastic ballot boxes are still official AEC ballot-boxes that are used in polling places which historically receive larger numbers of ballot papers. This action took place in a secure room after all the public had left at the end of each day of pre-poll voting. The two larger sealed ballot-boxes were then delivered to the Boothby scrutiny centre for the counting team on 21 August 2010 at 5.30 pm. No scrutineers were present at the Oaklands Park PPVC when the Officer in Charge opened the original ballot-boxes.

The two larger ballot-boxes were opened at the Boothby counting centre at about 8.15pm on 21 August 2010 for the commencement of counting in the presence of scrutineers. It was immediately noticed by scrutineers (as the ballot papers were neatly stacked) and questioned as to where they had come from. One of the plastic ballot-boxes contained 2,977 House of Representatives ballot papers while the other contained 2,980 Senate ballot papers.

Blackwater Pre-poll Voting Centre – Division of Flynn

On Friday 20 August 2010 after 6pm (i.e. the evening before polling day) the Officer in Charge of the Blackwater PPVC broke the seals of the ballot-boxes containing House of Representatives and Senate ballot papers and commenced to count the pre-poll ordinary ballot papers (it is presently understood that this involved 452 House of Representatives ballot papers and the same number of Senate ballot papers). This was not done in the presence of scrutineers. The Officer in Charge was advised by the Divisional Returning Officer to immediately replace these ballot papers into a ballot-box and to place a fresh seal on the ballot-box. The Officer in Charge complied with this request but it was later discovered that he had also placed some pre-poll declaration envelopes into the resealed ballot-box. The pre-poll ballot-box was removed to the AEC Divisional Office. After the close of polling on 21 August 2010, the Divisional Returning Officer in the presence of other AEC staff broke the seal on the ballot-box and extracted the declaration vote envelopes for the purpose of including these envelopes in the exchange process (in which they are sent to their home Division) and then resealed the ballot-box. The ballot-box was then sealed and has remained under quarantine.

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Australian Government Solicitor

6. You seek our advice as to whether:
 - a) the above actions have resulted in there being a requirement to exclude these pre-poll ordinary ballot papers from the count; and
 - b) s 285 or any lawful means exists to overcome the AEC polling officials' errors so that these pre-poll ordinary ballot papers are able to be included in the count; and
 - c) whether, in the event that neither of these errors can affect the result of the election, the AEC should be taking any other action.

ADVICE

7. In our view, the Act has been contravened at both the Oaklands Park Pre-Poll Voting Centre (Oaklands) and the Blackwater Pre-Poll Voting Centre (Blackwater). Section 200DP(2) provides that 'after a pre-poll ordinary ballot-box has been sealed, it must on no account be opened except as allowed by this Act'. The only situations in which a pre-poll ordinary ballot-box can be opened are to allow the ballot-box to be used again on a later day in accordance with the requirements of s 200DQ or during the scrutiny process provided for in ss 273 and 274. Nothing in the Act:
 - permits a pre-poll ordinary ballot-box to be opened for the purpose of counting the ballot papers and transferring those ballot papers to another ballot box as occurred in Oaklands;
 - permits a pre-poll ordinary ballot-box to be opened for the purposes of counting the ballot papers prior to the scrutiny (which can only occur at the end of polling day) as occurred in Blackwater.
8. The question that now arises is: what is the effect of non-compliance with the requirements of the Act? There is an issue as to whether non-compliance with the statutory requirements rendered the votes invalid. In *Maloney v McEacharn* (1904) 1 CLR 77, the High Court held that postal votes that were not properly attested were invalid. The court viewed the requirements for attestation to be mandatory.
9. Similarly, a good argument can be made that the requirements of the Act relating to the opening of ballot-boxes are crucial to maintaining the integrity of the votes cast. In the present circumstances, non-observance of those requirements means that it is possible that the ballots could have been tampered with or that information about voting patterns could have been disclosed to electors prior to polling day. Such action would affect the integrity of the vote. In addition, the wording of s 200DP(2), and particularly the use of the words 'on no account' is a strong indication that Parliament considered compliance with this requirement to be crucial and one that must be observed.
10. Having said this, we do not think it is entirely clear that the ballot papers in question should be excluded from the count.

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- The Act does not expressly require or permit electoral officials to exclude ballot papers in the circumstances under consideration.
 - Under the Act, the only basis on which an ordinary ballot paper can be rejected is where it is informal. The term informal ballot paper is defined in s 268 and, in our view, the ballot papers in question are not informal within the meaning of s 268.
 - In *Mitchell v Bailey (No 2)* (2008) 169 FCR 529 (*Mitchell*), the Federal Court held that a ballot paper must be included in the count if it is a formal vote. For example, Tracey J said (at 537):

If a ballot paper is not informal the officer conducting the scrutiny will have no legal basis for rejecting it. An implied obligation to admit such a ballot-paper to the count thereby arises. Once admitted it is to be counted.
 - The validity of the ballot papers can be considered by the Court of Disputed Returns and Part XXII specially envisages that the Court of Disputed Returns will consider errors made by electoral officials in this process (s 365).
 - The question of whether non-compliance with formal requirements invalidates an action is one on which minds may differ. We note here that in *Fenlon v Radke* [1996] 2 Qd R 157 the Queensland Court of Disputed Returns held that the failure of polling officials to strictly comply with a requirement to take declaration votes out of their envelopes and put them in a sealed ballot box without unfolding them did not invalidate the votes in question or the election. In that case the court made comments to the effect that it would be an 'bizarre' result if electoral officials could invalidate what would otherwise be valid votes by disregarding statutory requirements.
11. In the present circumstances, we consider that the better course of action is not to include the ballot papers in the count and to quarantine those papers.
- As discussed above, there is High Court authority that votes are invalid where there has been a breach of a provision of the Act that affects the integrity of votes. We think that the current breach is of a similar kind.
 - While ss 273 and 274 provide for the scrutiny of ordinary ballot papers, we doubt that that mechanism is intended to exhaust the circumstances in which ballot papers may not be counted. We say this because if the requirements of those sections are observed, officials are required to separately parcel 'formal' and 'informal' papers. Whatever course of action is taken, there would appear to be a risk of the ballot papers in question becoming mixed with other ballot papers such that they could cease to be identified and considered in proceedings in the Court of Disputed Returns.
 - We think that *Mitchell* can reasonably be distinguished on the basis that it concerned the question of whether s 268 of the Act had been properly applied and there was no question that the votes should have been excluded due to wider concerns about their validity.

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12. If the discarded votes could affect the outcome of the election, we think it would be appropriate for the AEC to file a petition disputing the election in the Court of Disputed Returns as permitted by s 357. We note that similar action was taken by the AEC in *AEC v Towney* (1994) 51 FCR 250 (although that case involved a situation in which the legislation in question required the ballot papers to be excluded from the count).
13. There is a question here about whether the AEC can count the votes to determine if the outcome of an election would be affected, but we have not considered this issue at this stage. We would be happy to so if this would be helpful.
14. We cannot see any other way of correcting the errors. In particular, we think that there is real doubt as to whether s 285 is available in the present circumstances. We doubt that an error in the keeping of the ballot box or in counting the votes earlier than they should have been can be described as an 'error ... *in* the ... transmission or, return of any ... ballot papers' (emphasis added).
15. Mr Peter Lahy, Deputy General Counsel, has read and agrees with this advice.

Yours sincerely

Bridget Gilmour-Walsh
Senior General Counsel

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Attachment F - Implementation of direct enrolment and update processes

Cycle 1: Tasmania

Data sources used for this cycle:	Centrelink National Exchange of Vehicle and Driver Information Systems (NEVDIS)
Number of letters mailed:	The AEC mailed 6 614 letters, of which: <ul style="list-style-type: none"> • 375 were letters of intent to directly enrol an elector, • 3 092 were letters of intent to directly update an elector's address, and • 3 147 were letters mailed to electors asking that they take action to enrol or update their enrolment details.
Date letters were mailed:	20 November 2012
Date direct enrolment/update action was applied to the electoral roll:	19 December 2012
Outcomes as at 19 December 2012 from letters of intent to directly enrol an elector or update an elector's address:	111 new enrolments 236 re-enrolments 2 901 address updates 219 responses which did not result in a direct enrolment or update transaction, of which: <ul style="list-style-type: none"> • 1 is under investigation; • 64 letters of intent were superseded as the elector provided an enrolment application. These have not been processed as direct enrolment or update transactions; • 154 transactions were stopped and no further processing took place.*
*Reasons a direct enrolment or update transaction may be stopped:	<ul style="list-style-type: none"> • Return to sender – 106 • Deceased elector – 1 • Unsound mind – 1 • Other – 46

Divisions	Direct enrolment		Direct update	Total
	New enrolments	Re-enrolments	Update of address details	Outcomes
BASS	21	41	664	726
BRADDON	21	44	568	633
DENISON	34	72	688	794
FRANKLIN	19	39	500	558
LYONS	16	40	480	536
Other State*	0	0	1	1
Total	111	236	2 901	3 248

Note: * 1 enrolment was processed in NSW after an elector advised that they had moved again.