SUBMISSION 169.8

AEC
Australian Electoral Commission

Mr Daryl Melham MP
Chair
Joint Standing Committee on Electoral Matters (JSCEM)
Parliament House
CANBERRA ACT 2600

Dear Mr Melham

I refer to your letter dated 26 August 2008 addressed to the previous Electoral Commissioner, Mr Ian Campbell, in which you sought additional information from the Australian Electoral Commission (AEC) concerning processes that could be adopted to deal with disputed ballot-papers. I apologise for the delay in responding to your letter. However, as you will no doubt appreciate, this delay has been caused by the need for the AEC to await and consider your letter in the context of the Report from Mr Alan Henderson PSM which included in its terms of reference a range of matters that directly impact on the questions raised in your letter.

In that letter you referred to the time taken to resolve the petition lodged with the Court of Disputed Returns (CDR) in McEwen and stated that there may be *"other measures by which similar situations might be resolved without recourse to the Court"*. In particular, you referred to possible measures for replacing the current system contained in the *Commonwealth Electoral Act 1918* (the Electoral Act) for the review of reserved ballot-papers by the Australian Electoral Officer (AEO) with a *"consensual arbitration"* process that would involve the formation of a new review body. You requested that the AEC respond to the following questions:

1. *What are the benefits to be gained, or the disadvantages arising from the implementation of a system of consensual arbitration for decisions on the formality of challenged ballot papers in a recount situation?*
2. *What would be the most appropriate composition of such a body and why?*
3. *What legislative amendments would be required to be made to enable such a body to operate?*
4. *What rules or procedures would be required to enable the operation of such a body (this question relates to rules for the conduct of meetings at which the body receives challenged ballot papers, receives submissions relating to challenged ballot papers, forms opinions about challenged ballot papers and delivers decisions about challenged ballot papers and any other processes considered to be necessary for the conduct of its business)?*
5. *What other matters should be brought to the attention of the Committee when considering this matter?*

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Discussion

The AEC notes that there has already been some discussion of this issue in the JSCEM submissions and hearings. Submission No.187, from Associate Professor Graeme Orr, referred to the following issues arising from the CDR decision on the McEwen petition:

- the parties should be given access to disputed ballot-papers by the AEC and the CDR;
- the AEC should publish an updated user friendly guide to formality of ballot-papers;
- electoral officials (including retired electoral officials) should not sit in judgment on the decisions of other electoral officials in a court setting; and
- the Act could be amended to insert a minimum vote margin below which there is an automatic new election.

The AEC also notes that at the JSCEM hearing of 11 August 2008, Mr Mark Dreyfus QC MP, the Member for Isaacs, gave evidence (EM 89 to EM 98). At EM 95 there was a discussion about the CDR process and the creation of some new conciliation process that intervenes from decisions made by the AEC before a petition to the CDR. Issues raised included:

- a conciliation process involving scrutineers, representatives of the candidates and AEC officials;
- a more formal review process involving the Administrative Appeals Tribunal;
- a dispute resolution process that is more flexible and speedier; and
- whether the consensual arbitration decisions could be final.

The AEC's understanding of the requirements of the *Constitution* are that the High Court is always the final arbiter of electoral disputes and that, in the absence of some referendum agreeing to alter sections 73, 75 and 76 of the *Constitution*, it is not possible for the Parliament to enact laws that remove the original and appellate jurisdiction of the High Court. As is shown in the High Court decision in *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, the power of the Parliament to enact legislation to remove or limit the right to seek judicial review (e.g. by the enactment of a privative clause) is extremely limited. Accordingly, the AEC raises the issue for consideration by the Committee that any proposed 'consensual arbitration' process may not be able to replace the CDR.

The AEC has examined your letter in the context of the recommendations made by Mr Henderson in relation to whether it may be possible to develop greater knowledge of the formality rules and involving the stakeholders in a process that is more transparent and accountable. The initial AEC view is that:

- 'consensual arbitration' is not appropriate when dealing with the formality of ballot-papers;
- to replace the AEO with some other review process runs the risk of delaying the return of the writ as the current CDR process only applies after the return of the writs;

- any additional review panel will only add a layer of further decision-making and add to the delays in the final outcome on disputed ballot-papers;
- some work should be done around the recording of decisions by the AEO to make it more transparent and accountable;
- training and information for both AEC staff and scrutineers would assist with ensuring that everyone is aware of the formality rules;
- close seat management should be reviewed as any major changes in dealing with disputed ballot-papers should be limited to only close seats (e.g. with a margin of 100 votes or less).

The AEC is unclear as to exactly what is covered within the scope of 'consensual arbitration' in the context of dealing with disputed ballot-papers. Presumably, this could involve the parties having further access to the ballot-papers, leading evidence (e.g. about initials on ballot-papers, etc), making submissions, presenting arguments and being legally represented. Also it is unclear whether it is proposed that the decisions of the arbitrator would be determinative and binding on the parties.

The AEC notes the following information comes from the National Alternative Dispute Resolution Advisory Council (NADRAC) website on the scope of 'arbitration'.

> **Arbitration** is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination. Arbitration is particularly useful where the subject matter of the dispute is highly technical, or the rigours of court-like procedure are desired with greater confidentiality. In such circumstances, a person who has expertise in the field may act as arbitrator.

The AEC understands that the fundamental assumption underpinning an arbitration scheme is that parties are in dispute and that the purpose of the exercise is to resolve the dispute between them so as to avoid litigation. However, this implies that at the point at which the parties reach agreement on an issue, it will be taken to have been resolved, according to the terms of the agreement. This is inherently so in the case of mediation and conciliation, and may well be the case in practice in relation to arbitration.

When a recount is taking place the electoral process is still on foot as the writs for the election will not have been returned. As such, both the DRO and the AEO are required to exercise statutory powers in accordance with the requirements of the Electoral Act. At present, the clear obligation placed on the electoral officials is to identify the relevant law relating to the counting of ballot papers to the best of their ability, the relevant "facts" relating to the marking and authenticity of the ballot papers and to apply the law to the facts in such a way as to arrive at a correct decision. In so proceeding, the electoral officials, provided that they identify the facts and apply the law correctly, are operating in a way that meets the needs of the entire community, by giving effect in the electoral context to the rule of law, and doing equal justice to the rights of individual voters. The role of scrutineers is to observe the process, so that in the event anything miscarries, they will be in a position to raise their concerns in a petition to the CDR, through which the intervention of the courts can be sought to ensure that the facts and law have been correctly identified, and the law correctly applied.

The AEC would be concerned if the inevitable result of such arbitration would, to a greater or lesser extent, change the focus of the process from one on correctly identifying the facts and applying the law, to one on producing a meeting of minds of parties to the process. This would appear to give rise to two potential problems.

First, it is by no means clear that the interested parties can be definitively identified. While it may be tempting to assume that there will be only two seriously engaged parties (the leading two candidates), in fact it may be the case that all the candidates will have interests which will come into play during a recount. Under preferential voting, the order of exclusion of candidates can become critically important (to the point where party scrutineers have in some cases had an interest in seeing the votes for their own candidate set aside as informal). In addition, the less strongly supported candidates may be focussed not on winning, but on securing the return of their deposits, or reaching the 4% first preference vote threshold for the receipt of public funding.

Secondly, and most importantly, the key individuals whose interests (and indeed, rights) need to be protected in a recount are the voters who marked the ballot papers. It would appear to be wrong in principle if arbitration resulted in a ballot paper being set aside as informal not on its intrinsic merits, but on the basis of an agreement between one or more interested parties taking part in an arbitration process. Such a result would have the effect of compromising the rights of the voters at the expense of an agreement being reached between the representatives of the candidates.

The AEC also notes the comments made by Justice Tracey in the case of *Mitchell v Bailey (No. 2)* [2008] FCA 692 that *"Value judgments informed by principle are required"* to determine *"the real intention of the voter"* and in applying the formality rules set out in that decision. The exercising of such *"Value judgments"* would need to be undertaken by persons who are clearly impartial to the outcome and the political processes. The current schema in the Electoral Act is clearly based on the supposition that it is the DRO and the AEO who possess the necessary experience, skills and knowledge to determine the formality of disputed ballot-papers. It is unclear to the AEC which other persons, outside the independent judiciary and electoral officials, would be in the possession of such skills and available to conduct any arbitration process.

The AEC is of the view that, in addition to the publications and training of stakeholders in the formality rules, some greater transparency in the decision-making process by the AEO would assist in both identifying those ballot-papers that are really in dispute and preventing unnecessary challenges. This could be achieved by a minor amendment to the reserved ballot-paper process in sections 279B and 281 of the Electoral Act requiring the AEO to provide a brief indication of the basis for the decisions on formality similar to that used by His Honour in the Schedule to the CDR decision in *Mitchell v Bailey.* Given that the formality rules are now well established, the issue in contention will be the exercising of the *"Value judgments"* in applying those rules to a particular ballot-paper.

The AEC also notes that the petition in McEwen is the first that involved the formality of ballot-papers since the High Court decision in *Kean v Kerby* (1920) 27 CLR 449. Accordingly, these types of challenges are rather rare. There would appear to be some risk that the inclusion of some other review process to deal with disputed ballot-papers could increase the number of challenges on these matters.

Response to questions

1. Based on the above discussion, the AEC's response to the questions raised in your letter are that we are currently of the view that the a system of 'consensual arbitration' is not appropriate to dealing with disputed ballot-papers and that the risks associated with any major change to the current processes would outweigh any benefits in relation to timeliness and transparency of decisions.
2. The exercising of *"Value judgments"* on the formality of ballot-papers would need to be undertaken by persons who are clearly impartial to the outcome and the political processes. The current schema in the Electoral Act is clearly based on the supposition that it is the DRO and the AEO who possess the necessary experience, skills and knowledge to determine the formality of disputed ballot-papers. It is unclear to the AEC which other persons (outside the Courts) would be in the possession of such skills and available to conduct any arbitration process.
3. Changes to sections 279B and 281 of the Electoral Act would be required as a minimum.
4. Additional rules relating to the parties having further access to the ballot-papers, leading evidence (e.g. about initials on ballot-papers), making submissions, presenting arguments and being legally represented, would add significantly to both the costs and potentially delay the outcome of an election by delaying the return of the writ.
5. See the above discussion.

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

Yours sincerely

Paul Dacey
Acting Electoral Commissioner

27 / November 2008