

Formality issues

- 8.1 At the 2007 election more than 510,000 electors cast votes in the House of Representatives elections were deemed to be informal by electoral officials, thereby excluding them from the count. While this represents a decline of around 95,000 informal votes compared to the 2004 election, the disenfranchisement of hundreds of thousands of electors, effectively disqualifying them from deciding who should represent them and form government is of continuing concern.
- 8.2 This chapter examines the range of factors that contributed to informality at the 2007 election for the House of Representatives and the Senate and possible ways to reduce informality. Issues arising out of the Court of Disputed Returns' decision on the McEwen petition and the Australian Electoral Commission's (AEC) response to the decision along with the AEC's subsequent review of formality guidelines are also examined.

Background

- 8.3 As noted in chapter 2, the rate of informal voting in the House of Representatives and Senate elections declined across all jurisdictions at the 2007 election compared to the 2004 election. This was the first decline in the national rate of informal voting since the 1993 election.¹ While the decline is significant, it is of note that there were still over 510,000 informal votes cast for the House of Representatives.²

1 Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election* (2009), Research report number 11, p 2.

2 Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election* (2009), Research report number 11, p 9.

- 8.4 The AEC's analysis of informality following the 2007 election found that there appear to be four significant influences that correlate strongly with higher than average informality rates:
- divisions with high candidate counts;
 - differences in state and federal electoral systems;
 - proximity to other election events; and
 - a high proportion of citizens from non-English speaking backgrounds.³
- 8.5 These four areas of influence on informality have been consistently identified as strong predictors of informality by the AEC.⁴
- 8.6 A ballot paper may be ruled informal for a number of reasons including:
- the ballot paper is not marked at all;
 - the ballot paper does not have the official mark and has not been initialled by the polling official and the ballot paper is not authentic in the opinion of the Divisional Returning Officer;
 - the ballot paper has writing on it which identifies the voter;
 - in the case of an absent, postal or provisional vote the ballot paper is not contained in the declaration envelope; and
 - the voter has not marked a vote correctly for it to be considered acceptable in accordance with section 268 of the *Commonwealth Electoral Act 1918*.⁵
- 8.7 The AEC notes that Australia traditionally has one of the highest rates of spoiled or informal ballots among established democracies, given the compulsory enrolment and voting nature of this country's electoral system.⁶

3 Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election* (2009), Research report number 11, p 2.

4 Australian Electoral Commission, *Informal Vote Survey House of Representatives 2001 Election* (2003), Research Report number 1; *Analysis of Informality during House of Representatives 2004 Election* (2005), Research report number 7.

5 Australian Electoral Commission, *Electoral pocketbook: election 2007* (2009), p 56; *Commonwealth Electoral Act 1918*, s 268.

6 Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election* (2009), Research report number 11, p 7.

House of Representatives

8.8 At a national level, informal voting in House of Representatives elections declined for the first time since the 1993 election. Changes in informality at a national level from election to election have generally been consistent across the states and territories, although some jurisdictions, most notably, NSW and South Australia, have recorded higher informality for a number of elections (table 8.1).

Table 8.1 Informal voting, House of Representatives, 1983 to 2007 elections (per cent)

State/ territory	1983	1984	1987	1990	1993	1996	1998	2001	2004	2007
NSW	2.2	5.7	4.6	3.1	3.1	3.6	4.0	5.4	6.1	5.0
VIC	2.2	7.5	5.3	3.5	2.8	2.9	3.5	4.0	4.1	3.3
QLD	1.3	4.5	3.4	2.2	2.6	2.6	3.3	4.8	5.2	3.6
WA	2.0	7.1	6.6	3.7	2.5	3.2	4.2	4.9	5.3	3.9
SA	2.0	7.1	6.6	3.7	4.1	4.1	4.5	5.5	5.6	3.8
TAS	2.3	5.9	5.0	3.3	2.7	2.4	3.1	3.4	3.6	2.9
ACT	2.2	4.7	3.5	3.0	3.4	2.8	2.9	3.5	3.4	2.3
NT	4.4	4.6	5.8	3.4	3.1	3.4	4.2	4.6	4.4	3.9

Source Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election (2009)*, Research report number 11, p 7.

8.9 There are a number of factors to consider when looking at the longer term trend in informality at House of Representatives elections:

- the spike in informality at the 1984 House of Representatives election is generally attributed to the introduction of above-the-line voting in Senate elections;⁷ and
- between the 1984 and 1996 elections, ballot papers that were assumed to have been accidentally marked non-consecutively for the House of Representatives (1,2,3,3,...) were counted as formal votes. The ballot was accepted as formal and preferences distributed up to the point where the mistake of numbering began. These ballot papers then became 'exhausted'.

8.10 Following each election, the AEC undertakes a survey of informal ballot papers to identify the possible causes that influence informal voting at federal elections. The largest proportion of informal votes at the 2007 election were those with a '1 only' (30 per cent), followed by blank ballot

7 Democratic Audit of Australia, submission 45, p 7; Australian Electoral Commission, submission 169.1, Annex 9, p 165.

papers (20 per cent), non-sequential numbering (18 per cent), and marks and scribbles (15 per cent) (table 8.2).

Table 8.2 Informality, by category and jurisdiction, 2007 election (% of total informal vote)

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Blank	25.8	18.2	15.0	15.4	26.9	29.3	22.3	23.5
1 only	25.9	36.2	24.7	36.4	24.3	17.3	21.6	18.0
Incomplete numbering	3.1	5.3	3.6	5.3	3.3	4.5	2.9	4.6
Tick or cross	10.2	11.0	15.2	9.4	12.8	7.2	8.1	8.3
Non sequential	9.9	15.8	24.4	15.2	15.9	15.0	21.7	26.3
Marks and scribbles	22.4	11.5	13.3	16.2	14.9	25.1	20.3	16.9
Voter identified	0.1	0.1	0.2	0.0	0.0	0.0	0.1	0.1
Other	2.6	1.9	3.6	2.2	1.9	1.6	2.9	2.3
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Source Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election (2009)*, Research report number 11, p 11.

8.11 The overall number of informal House of Representatives ballot papers declined by over 95,000 at the 2007 election when compared to the 2004 election. The categories of informal voting that made the largest contribution to the decline were the number of '1 only' ballot papers (down by over 45,000), the number of blank ballot papers (down by over 26,000) and the number of ballot papers with marks and scribbles (down by almost 14,600).⁸

8.12 The 10 divisions with the highest overall informality in 2007 were all in western Sydney (figure 8.1), with five of these divisions also having the highest 'poor English' ranking, indicating that they have the lowest levels of English proficiency out of all of the national divisions.⁹ The AEC noted that:

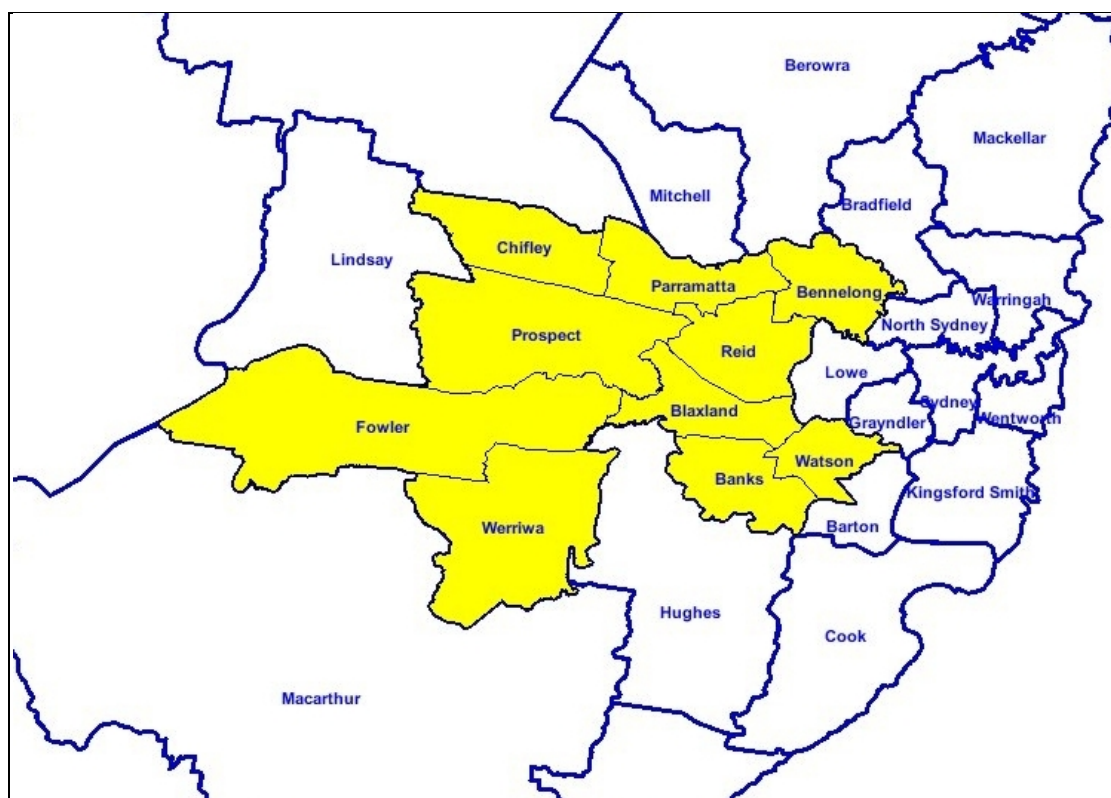
In fact the five divisions with the highest levels of informality in 2007 also featured in the top ten for the 2004 and 2001 elections, indicating that any voter confusion over different systems is likely to be extenuated by other factors. The persistence of this high informality in certain divisions suggests other factors are also

⁸ Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election (2009)*, Research report number 11, p 10.

⁹ Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election (2009)*, Research report number 11, p 12.

important, given state elections in NSW do not all necessarily fall in close proximity to the federal event.¹⁰

Figure 8.1 Divisions with the highest informality rates at the 2007 election



Source Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election (2009)*, Research report number 11, p 13.

8.13 AEC research on informality at the 2007 House of Representatives election confirmed previous results that attributed informality to the four factors of (1) divisions with high candidate counts, (2) differences in state and federal electoral systems, (3) the proximity to other election events and (4) the proportion of citizens from non-English speaking backgrounds.¹¹ The AEC noted that:

- divisions which have a higher than average number of candidates are generally more likely to also have higher than average rates of informality. Number of candidates was found to have a strong correlation with informality, explaining approximately one-quarter of change within informality rates. The decrease in informal voting across

10 Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election (2009)*, Research report number 11, p 12.

11 Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election (2009)*, Research report number 11, pp 2–3.

the past two federal elections coincided with a decrease of the average number of candidates per division (7.27 in 2004 to 6.66 in 2007);

- differences between state and federal electoral systems has a significant impact on unintentional informal voting. The evidence suggests that electors who can cast a valid ballot with a '1 only' preference in state elections (NSW and QLD) may be conditioned to do the same for the federal House of Representatives ballot, not knowing this is actually informal in the federal system;
- proximity to another electoral event may increase the level of informality in a federal election. There may be confusion for those voters coming from a state electoral system, such as NSW, that has different criteria for casting a formal ballot. The confusion surrounding how to cast a formal vote appears to contribute to unintentional informality in some states; and
- it is possible that linguistic and cultural barriers experienced by some NESB electors may amplify problems associated with high candidate numbers and state/federal electoral differences. This issue appears particularly relevant in NSW, which has a comparatively high proportion of NESB electors. In 2007, five of the top six divisions with the highest rates of informality, were also the top five electorates with the highest proportion of NESB. The 14 divisions with the highest rates of informality in 2007, all border each other in a concentration based around western Sydney.¹²

8.14 Optional preferential voting is used for House of Assembly elections in NSW and Queensland; with electors only required to indicate a single preference ('1') on the ballot paper for a vote to be counted as formal. Lower house elections in all other states and territories generally use full preferential voting systems (box 8.1).

12 A Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election* (2009), Research report number 11, pp 2-3.

Box 8.1 Voting systems by jurisdiction*New South Wales*

Legislative Assembly	Optional allocation of preferences
Legislative Council	Optional allocation of preferences above the line and partial preferential if voting below the line

Victoria

Legislative Assembly	Full preferential voting
Legislative Council	Single preference when voting above the line (plus group ticket voting) and full preferential when voting below the line

Queensland

Legislative Assembly	Optional allocation of preferences
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Western Australia

Legislative Assembly	Partial preferential voting
Legislative Council	Single preference when voting to the left of the line (plus group ticket voting) and full preferential when voting to the right of the line

South Australia

House of Assembly	Full preferential voting
Legislative Council	Single preference when voting above the line (plus group ticket voting) and full preferential when voting below the line

Tasmania

House of Assembly	Partial preferential voting
Legislative Council	Partial preferential voting

ACT

Legislative Assembly	Partial preferential voting
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Northern Territory

Legislative Assembly	Full preferential voting
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Source Electoral Council of Australia, 'Electoral Systems', viewed on 18 May 2009 at <http://www.eca.gov.au/systems/index.htm>; Bennett S and Lundie R, 'Australian Electoral Systems', *Research paper no 5 2007-08* (2007), p 31.

8.15 The AEC noted that informality at Legislative Assembly elections in NSW and for the Legislative Assembly in Queensland, were lower than for House of Representatives elections in these states since 2003 (table 8.3).

Table 8.3 Comparison of state and federal elections – overall informality rate, New South Wales and Queensland, 2003 to 2009 (per cent)

Election	2003	2004	2006	2007	2008	2009
NSW Legislative Assembly election	2.62%			2.69%		
NSW – House of Representatives federal election		6.1%		4.95%		
QLD Legislative Assembly election		1.99%	2.08%			1.94%
QLD - House of Representatives federal election		5.2%		3.56%		

Source Australian Electoral Commission, submission 169.17, p 8.

8.16 While the average number of candidates per division declined in the 2007 House of Representatives elections, there were 10 divisions where informality increased when compared to the 2004 election. In seven of these divisions, the number of candidates increased from the previous election (table 8.4).

Table 8.4 Informality rate and number of candidates in divisions where informality increased at the 2007 election

Division	Number of candidates 2007 election	Number of candidates 2004 election	Difference between 2007 and 2004 elections	Change in informality 2007 election compared to 2004 election (percentage points)
Murray	9	7	+2	+1.06
Richmond	7	8	-1	+0.67
Bendigo	9	5	+4	+0.67
Grayndler	7	5	+2	+0.56
Bennelong	13	7	+6	+0.38
Parkes	7	5	+2	+0.25
New England	0	0	0	+0.11
Mallee	6	6	0	+0.10
Page	10	8	+2	+0.07
Riverina	5	4	+1	+0.05

Source Australian Electoral Commission, 'Virtual Tally Room, House of Representatives, House of Representatives Results, Candidates', viewed on 26 May 2009 at <http://results.aec.gov.au/13745/Website/HouseCandidatesBySurname-13745-A.htm>; 'Virtual Tally Room, House of Representatives, Candidates', viewed on 26 May 2009 at <http://results.aec.gov.au/12246/results/HouseCandidatesBySurname-12246-A.htm>.

8.17 The number of divisions with more than nine candidates at the 2007 election (8), was lower than that for the 2004 election (13), with the division of Bennelong having the highest number of candidates at the 2007 election (13), one less than the 14 candidates who stood for the division of Greenway at the 2004 election.¹³ The strong relationship between the number of candidates and informality gives rise to risks that 'ballot flooding' (running large numbers of candidates to make the ballot paper bigger and voting more difficult) can impact on election results by leading to a significant increase in informality.

Senate

8.18 All states and territories recorded a decline in informality at the 2007 Senate elections (table 8.5). Informality in Senate elections at a national level has been lower than House of Representative elections since the 1998 election.¹⁴

Table 8.5 Informal voting, Senate, by jurisdiction, 1996 to 2007 elections (per cent)

State/territory	1996	1998	2001	2004	2007
NSW	3.8	3.3	3.5	3.5	2.2
VIC	3.6	3.8	5.6	5.1	3.2
QLD	3.3	3.0	3.0	2.8	2.3
WA	3.5	2.7	3.6	3.5	2.4
SA	3.3	2.8	3.1	3.5	2.4
TAS	3.2	3.1	3.3	3.4	2.6
ACT	2.5	2.0	2.3	2.5	1.7
NT	2.8	2.0	2.8	3.1	1.9
National average	3.5	3.2	3.9	3.8	2.5

Source Australian Electoral Commission, *Electoral pocketbook: election 2007 (2009)*, p 56.

8.19 The rate of informality in Senate elections is generally below that for House of Representatives elections. However, the AEC noted that at least eight divisions (Gorton, Maribyrnong, Bruce, Hotham, Batman, Scullin,

13 Australian Electoral Commission, 'Virtual Tally Room, House of Representatives, House of Representatives Results, Candidates', viewed on 26 May 2009 at <http://results.aec.gov.au/13745/Website/HouseCandidatesBySurname-13745-A.htm>; 'Virtual Tally Room, House of Representatives, Candidates', viewed on 26 May 2009 at <http://results.aec.gov.au/12246/results/HouseCandidatesBySurname-12246-A.htm>.

14 Australian Electoral Commission, *Electoral pocketbook: election 2007 (2009)*, p 56.

Melbourne and Calwell) reported a higher informality rate for the Senate than the House of Representatives at the 2007 election.¹⁵

- 8.20 When ruling a Senate ballot paper informal, the categorisation of whether the informality related to an attempt to vote above the line or below the line is problematic.¹⁶ The AEC noted that:

Each Senate ballot paper essentially contains two different voting systems on the one ballot paper, which creates difficulties in clearly separating informal above-the-line (ATL) votes and informal below-the-line (BTL) votes. Some types of informal votes, such as blank ballot papers or a ballot paper incorrectly marked both above and below the line cannot be inferred to be informal ATL or informal BTL. Inferring intention in other types of informally marked ballot papers is also problematic – is a ballot paper marked with only a ‘1’ next to the first candidate of a below the line grouping an informal ATL vote or an informal BTL vote?¹⁷

- 8.21 The AEC did not conduct a survey of informality for Senate ballot papers following the 2007 election. In 2001, a national informal ballot paper survey was conducted, which found that over one-half of the informal votes cast in South Australia’s 2001 half Senate election resist categorisation as either informal above-the-line or below-the-line. (That is, the categories of ‘blank ballot paper’, ‘writing, slogan, poetry’ and ‘other’) and another quarter of informal votes could be interpreted as being either informal above the line or informal below the line (ballot papers marked with a first preference only below the line) (table 8.6).¹⁸

15 Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election* (2009), Research report number 11, p 18.

16 Australian Electoral Commission, submission 169.6, p 1.

17 Australian Electoral Commission, submission 169.6, p 1.

18 Australian Electoral Commission, submission 169.6, p 2.

Table 8.6 Types of informal voting, 2001 South Australian Senate election

Category	Number	Proportion
Blank Ballot Paper	10,375	34.0%
1st Pref Only marked below the line	7,742	25.3%
Writing, slogans, poetry	2,854	9.3%
Less than 90 per cent of boxes numbered below the line	2,690	8.8%
Other	2,623	8.6%
More than one number 1 above the line	1,346	4.4%
More than one number 1 below the line	845	2.8%
Large number of repeating numbers or missing numbers below the line	830	2.7%
Ticks and crosses below the line	617	2.0%
Combination of ticks and crosses above the line	413	1.4%
Use of letters above the line	154	0.5%
No 1st preference below the line	67	0.2%
Total	30,556	100.0%

Source Australian Electoral Commission, submission 169.6, p 2.

Efforts to reduce informality at the 2007 election

8.22 The AEC reported to the committee that strategies implemented in 2007 to reduce informality included:

- the AEC analysed ABS data at the polling place level to identify polling places with both high informality at the 2004 election and high populations of 'culturally and linguistically diverse' groups. On this basis, the AEC expanded its recruitment drive to employ staff for selected polling places who could speak the targeted language(s) for those communities. These polling officials were provided with a badge indicating the language that they spoke (in 21 languages).
- some polling places played a DVD of translated formality television advertisements, either in a loop of all languages or in selected languages according to their elector profile.
- the three questions issuing officers are required to ask of electors were translated into 21 languages and made available for divisions to download and have available at polling places as required.
- how to vote guides (instructions on how to vote in English and translated into 21 languages in a flipchart format) were supplied to each polling place, mobile polling team and early voting centre.

- Polling staff in divisions with the highest 2004 informality levels were provided with extra training.¹⁹
- 8.23 In addition to this specific work, the AEC noted that a range of publications included information about how to vote. The AEC's communication strategy also included elements aimed at reducing informality.²⁰
- 8.24 The committee noted that in relation to NSW, the AEC intended to continue to research and analyse the informal voting figures from the 2007 election to understand which mix of strategies may have had the greatest impact in working to reduce informality levels at the 2007 election.²¹

Comments on informality by inquiry participants

- 8.25 Inquiry participants' comments on informality at the 2007 election related mainly to the need to continue with strategies to reduce informality and examine the harmonisation of federal and state/territory voting arrangements.
- 8.26 The Liberal Party of Australia welcomed the fall in informality at the 2007 election and commended the AEC on the consultative approach it took after the 2004 election to ensure its advertising and information campaigns were effective.²² The Liberal Party of Australia noted that:
- We believe it is important the AEC continues to produce advertising and information campaigns that target informality. In doing so we encourage the AEC to again work in consultation with the parties to ensure the most simple and effective campaigns are developed.²³
- 8.27 Mr Eric Jones considered that greater resources should be directed to reduce informality, including utilising part-time 'political and youth political officers' who speak the major Non-English language in high informal rate areas to conduct voting and general democratic educational programmes for the year prior to an election.²⁴ Mr Jones supported such an arrangement being delivered by the AEC or through funding provided to the political parties:

19 Australian Electoral Commission, submission 169, p 64.

20 Australian Electoral Commission, submission 169, p 65.

21 Australian Electoral Commission, submission 169.15, p 4.

22 Liberal Party of Australia, submission 156, p 5.

23 Liberal Party of Australia, submission 156, p 5.

24 Jones E, submission 95, p 9.

Why should the political parties do this type of work? To be seen to be putting something back into the democratic process. There is a lot of cynicism about politicians and politics out in the broader community and perhaps this might help in building up their position in the eyes of the community.

However, if the above is not acceptable, at least try it on a trial basis by funding and having the AEC employ such people for the year before an election.²⁵

- 8.28 University of Melbourne academic Dr Sally Young considered that various strategies should be continued to reduce informality including:

Civics education, the AEC conducting education programs and running advertisements on voting (including during non-election periods as a way of better reaching voters before the sound and fury of an election campaign begins and when many other political messages are then competing for their attention), as well as writing to voters from non-English speaking backgrounds in their own languages to advise them on voting procedures.²⁶

- 8.29 Participants advocating that voting systems be harmonised across the federal and state/territory elections considered that such an approach would contribute to reducing informality, with some suggesting a move to optional preferential voting in the House of Representatives.²⁷ Mr William Bowe referred to research that indicated confusion between state and territory systems contributed one percentage point to informality in those jurisdictions where optional preferential voting was used at a state level.²⁸

- 8.30 The Nationals supported harmonising voting systems as a means of addressing informality, noting that:

The Nationals recommend the Committee work with the State and Territory jurisdictions to get a common voting system nationwide. Compulsory preferential voting has been the traditional voting system in Australia since federation and is the system used in the majority of State jurisdictions. The Nationals recommend it should be implemented in every State and Territory to reduce voter confusion and informal voting.²⁹

25 Jones E, submission 95, pp 9–10.

26 Young S, submission 77, p 2.

27 Bowe W, submission 106, p 2; Hon Peter Lindsay MP, Member for Herbert, submission 57, p 3; The Nationals, submission 145, p 3; Getup!, submission 155, p 13.

28 Bowe W, submission 106, p 2.

29 The Nationals, submission 145, p 3.

- 8.31 The New South Wales Government expressed its concern about the continuing high proportion of informal votes in the state, noting that the 15 electorates with the highest rates of informal voting are all located in the state.³⁰ The New South Wales Government supported the adoption of optional preferential voting at a federal level, noting that:

A significant factor is the difference in voting arrangements between New South Wales, where preferential voting is optional, and the Commonwealth, where preferential voting is compulsory. This leads to voter confusion, resulting in a higher number of otherwise valid votes being classified as informal.

I encourage the Committee to consider the benefits of optional preferential voting in the interests of removing inconsistency between State and Federal voting arrangements. State and Federal education programs designed to improve voter understanding of the electoral process would no doubt be more effective if consistent voting arrangements applied across all jurisdictions.³¹

- 8.32 The Democratic Audit of Australia considered that the adoption of optional preferential voting, which requires voters to only number '1' for a vote to be counted, should be considered for House of Representatives elections and for voting below the line for Senate elections.³²
- 8.33 As an alternative to optional preferential voting, the Democratic Audit of Australia proposed the re-introduction of the 'savings' provision that was part of voting arrangements between 1983 and 1998.³³

Committee conclusion

- 8.34 The committee welcomes the reduction in informality recorded at the 2007 election compared to the 2004 elections. While the decline in the overall informality rate is a positive outcome, the committee remains concerned about the persistently high levels of informality recorded in some divisions, particularly in south western Sydney.
- 8.35 Although harmonisation of voting systems appears to provide some opportunity to reduce informality, the committee does not consider that it is necessary to harmonise this aspect of electoral arrangements –

30 NSW Government, submission 161, p 1.

31 NSW Government, submission 161, pp 1-2.

32 Democratic Audit of Australia, submission 45, p 7.

33 Democratic Audit of Australia, submission 45, p 7.

decisions about what voting system is appropriate for each jurisdiction should be left to each respective parliament to determine.

- 8.36 The committee does not support a change to adopting optional preferential voting for House of Representatives elections. However, the committee has examined a range of savings provisions that could be adopted. These are discussed later in this chapter.
- 8.37 With the drivers of higher informality generally well understood, it is important that the AEC continue its efforts to address informality, particularly in areas that consistently record relatively high levels of informality.

Recommendation 34

- 8.38 **The committee recommends that the Australian Electoral Commission increase efforts to improve electors' understanding of the federal voting systems and take appropriate measures to reduce the rate of informal voting, especially in electorates with a high percentage of electors from non-English speaking backgrounds.**

'Saving' informal votes

- 8.39 As pointed out in chapter 2, a set of protections or savings provisions apply to ballot papers and operate to ensure that ballot papers are included in the count as long as they express valid preferences. These protections are known as formality provisions.
- 8.40 For Senate elections, an elector may vote by placing the single figure '1' in one and only one of the squares above the line, or by placing consecutive numbers beginning at 1 until all squares below the line are numbered.
- 8.41 A number of savings provisions ensure that where mistakes are made in expressing preferences on Senate ballot papers the ballot papers may still be regarded as formal. These include provisions that allow for:
- a first preference mark to be indicated by the presence of the number '1', or a tick, or a cross in a square above the line;³⁴

34 *Commonwealth Electoral Act 1918*, s 239.

- less than complete numbering below the line;³⁵ and
 - a ballot paper which is informal below the line to be counted if it is formal above the line.³⁶
- 8.42 Similarly, a number of savings provisions ensure that where mistakes are made in expressing preferences on House of Representatives ballot papers, those ballot papers may still be regarded as formal. These include a provision that allows for ballot papers with a first preference for one candidate and an order of preference for all the remaining candidates except one to be regarded as formal, with the blank square deemed to be the voter's last preference, and where there are only two candidates in a House of Representatives election and the ballot paper contains a first preference for one candidate and the other square is blank or contains a number other than two it may be deemed formal.³⁷
- 8.43 Prior to the 1998 federal election, a further provision existed in the Commonwealth Electoral Act that 'saved' votes where electors had made numbering errors in marking their House of Representatives ballot paper, keeping such votes in the count up to the point where the error had been made.
- 8.44 A different savings provision still exists in elections for the House of Assembly in South Australia, serving to keep votes in the count where voters mark only the single preference '1' despite a full preferential voting system being in place there.

Savings provision for the South Australian House of Assembly elections

- 8.45 Elections for the South Australian House of Assembly use compulsory preferential voting, with a savings provision in place to include as many votes as possible with incomplete or out of sequence preferences. Elections for the South Australian Legislative Council are similar to the Senate voting requirements, with voters able to make a single preference above the line or complete all preferences below the line.
- 8.46 Under the voting system for the House of Assembly, all candidates in an electorate have the right to register one or two ticket votes. On election day, copies of each of the tickets registered in an electorate are displayed on the voting screens of every polling place in that electorate. These

35 *Commonwealth Electoral Act 1918*, s 270.

36 *Commonwealth Electoral Act 1918*, s 269 (1).

37 *Commonwealth Electoral Act 1918*, s 268 (1)(c).

provide a guide to voters on how to fill in the sequence of further preferences for their first choice candidate. A candidate's how to vote material is required to match the registered ticket vote and parties are banned from advocating a vote that does not include preferences.³⁸

- 8.47 The approach adopted for South Australian House of Assembly elections ensures that votes marked with a single preference, which can include a single number '1' as well as a tick or a cross, are included in the count, with preferences beyond those preference expressed directed according to the registered tickets.³⁹
- 8.48 The impact of this savings provision on the rate of informality for South Australian House of Assembly elections is to markedly reduce the informality rate, which would, at a minimum, be twice as high without the savings provision (table 8.7).

Table 8.7 South Australian House of Assembly informal and ticket voting, 1985 to 2006 state elections (per cent)

	1985	1989	1993	1997	2002	2006
Total informal votes	3.5	2.8	3.1	4.0	3.1	3.6
Accepted ticket votes	4.1	6.0	5.9	4.9	4.0	4.6

Source Green A, submission 62.1, p 14.

- 8.49 The effect of the savings provision at the 2006 South Australian state election was noted by Mr Antony Green, who told the committee that:

At the 2006 South Australian election, a total of 35,029 informal votes were recorded, a rate of 3.6 per cent, compared to 5.2 per cent in the Legislative Council. Compared to Victoria, Western Australia, and Commonwealth elections in every state, South Australia is the only state using compulsory preferential voting where lower house informal voting is less than upper house informal voting.

In total, 43,553 votes were admitted to the count after being 'saved' by the use of registered ticket votes. All of these votes would have been informal under the Commonwealth Electoral Act. Under Commonwealth formality rules, the South Australian lower house informal vote would have been 8.1 per cent, not 3.6 per cent.⁴⁰

38 Green A, submission 73 to the Joint Standing Committee on Electoral Matters inquiry into the 2004 election, p 14.

39 Green A, transcript, 23 July 2008, p 7.

40 Green A, submission 62, p 3.

Savings provisions for non-sequential numbering in the Commonwealth Electoral Act

8.50 As previously noted, between the 1984 and 1996 federal elections a savings provision existed in the Commonwealth Electoral Act that meant that a House of Representatives ballot paper would be deemed formal provided that it bore a unique first preference, and numbers - any numbers, in all of the remaining squares, or in all but one (with that last square left blank).⁴¹ The provision was part of section 270 of the Commonwealth Electoral Act and applied only to House of Representatives ballot papers and read:

'(2) Where a ballot-paper in a House of Representatives election in which there are 3 or more candidates-

- (a) has the number 1 in the square opposite to the name of a candidate;
- (b) has other numbers in all the other squares opposite to the names of candidates or in all those other squares except one square that is left blank; and
- (c) but for this subsection, would be informal by virtue of paragraph 133 (1) (c), then-
- (d) the ballot-paper shall not be informal by virtue of that paragraph;
- (e) the number 1 shall be taken to express the voter's first preference;
- (f) where numbers in squares opposite to the names of candidates are in a sequence of consecutive numbers commencing with the number 1- the voter shall be taken to have expressed a preference by the other number, or to have expressed preferences by the other numbers, in that sequence; and
- (g) the voter shall not be taken to have expressed any other preference.

(3) In considering, for the purposes of subsection (1) or (2), whether numbers are in a sequence of consecutive numbers, any number that is repeated shall be disregarded.'⁴²

41 Australian Electoral Commission, submission 169.1, p 31.

42 Australian Electoral Commission, submission 169.1, p 163.

8.51 As noted by the AEC, the parliament recognised the possibility that section 270(2) might appear to offer optional preferential voting for the House of Representatives in contradiction to the requirement for full preferential voting in section 240, and accordingly enacted section 329(3) to make it an offence to distribute how-to-vote cards that might induce electors to vote otherwise than in accordance with the instructions on the ballot paper.⁴³

8.52 Commencing at the 1987 election, a series of campaigns were conducted by several individuals advocating that electors not vote at all, cast an optional preferential vote under then section 270(2), or that they vote informal. The AEC noted that:

At the 1987 election, a campaign was run in Victoria advising electors not to vote at all, or to cast an optional preferential vote under then section 270(2), or to vote informal. The AEC sought injunctions against the campaigners (Mr van Moorst and Mr Langer) on the basis of these three campaign objectives. The Court awarded injunctions to prevent the campaigners from advocating not voting at all, and to prevent them from inducing electors to vote otherwise than in accordance with the instructions on the ballot paper. However, the Court decided that as it was not unlawful to vote informal, it could not be illegal to advocate informal voting.

At the 1990 election, the campaigners did not proceed with their planned advocacy, so there was no need for the AEC to initiate court proceedings. However, as a consequence of an indication that such campaigns may be run in the future, the 1990 JSCEM recommended to Parliament a further tightening of the penalties to protect the full preferential voting system. Section 329A was enacted in 1992:

- '(1) A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240.
- In this section: 'publish' includes publish by radio or television.'

At the 1993 election, Mr Langer indicated that he was intending to run a campaign advocating informal voting and optional

43 Australian Electoral Commission, submission 169.1, p 163.

preferential voting. After receiving warnings from the AEC, on 5 March 1993 he applied to the High Court for an injunction to prevent the AEC from intimidating him, and a declaration that section 329A was unconstitutional. The High Court dismissed his injunction application, but referred the constitutionality of section 329A to the Full Bench.

On 7 February 1996 (8 days after the issue of the writs for the 1996 election) the High Court decided³ that section 329A was a valid enactment of Parliament.

At the 1996 election, Mr Langer again indicated that he was intending to run a campaign advocating informal voting and optional preferential voting and after he published an advertisement which was clearly in breach of section 329A, the AEC obtained an injunction against him from the Victorian Supreme Court. Mr Langer immediately defied that injunction, and was sent to jail for contempt of court. Mr Langer then appealed the injunction to the Federal Court and lost. He then appealed the contempt order and was given early release from jail.⁴⁴

- 8.53 Following the 1996 election, the then Joint Standing Committee on Electoral Matters examined the operation of the savings clause and the impact of sections 329(3) 329A on the electoral process. The committee found that in its view, 'the Langer affair has clearly shown that section 329A is an ineffective and heavy-handed provision' and recommended that section 329A and related provisions should be repealed, while the wording of section 240 should be clarified.⁴⁵
- 8.54 In 1998, the former sections 270(2), 329(3) and 329A of the Commonwealth Electoral Act were repealed by the *Electoral and Referendum Amendment Act 1998*, and section 240(2) was introduced, so that section 240 now reads:

240 Marking of votes in House of Representatives election

(1) In a House of Representatives election a person shall mark his or her vote on the ballot-paper by:

- (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and

44 Australian Electoral Commission, submission 169.1, pp 163–164.

45 Australian Electoral Commission, submission 169.1, p 164.

- (b) writing the numbers 2, 3, 4 (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them.
- (2) The numbers referred to in paragraph (1)(b) are to be consecutive numbers, without the repetition of any number.⁴⁶
- 8.55 The AEC noted that the current wording 'clearly prescribes full preferential voting, and both the savings provision and sanctions for advocating other than full preferential voting have been removed'.⁴⁷
- 8.56 In 1996, when non-sequentially numbered ballot papers were last admitted as formal and were classified by the AEC as 'exhausted', a total of 48,979 such votes were cast out of 10,883,852 formal votes (0.45 per cent). The exhausted votes were of a similar magnitude for each of the states and territories, NSW (0.46 per cent), Vic (0.49 per cent), QLD (0.26 per cent), WA (0.62 per cent), SA (0.51 per cent), TAS (0.21 per cent), ACT (0.49 per cent), NT (0.48 per cent).⁴⁸
- 8.57 At the 1998 election, the first following the abolition of the savings provision, the level of informality for the House of Representatives election rose from 3.4 per cent to 4.2 per cent.⁴⁹ It is not known how much of the increase was due to the removal of the savings provision. Three years later at the 2001 election, around 15,000 Langer-style votes were identified by the AEC as part of its informal vote survey for the election. The proportion of 'Langer style' informal votes as a proportion of total informal votes varied significantly across jurisdictions (table 8.8).

46 *Commonwealth Electoral Act 1918*, s 240.

47 Australian Electoral Commission, submission 169.1, p 164.

48 Australian Electoral Commission, submission 169.1, p 165.

49 Australian Electoral Commission, Analysis of informal voting: House of Representatives 2007 election (2009), Research report number 11, p 7.

Table 8.8 'Langer style' informal votes, by jurisdiction, 2001 election (per cent)

State/territory	Langer style	Non sequential	Total informal votes
New South Wales	2.37%	22.52%	5.42%
Victoria	3.22%	10.49%	3.98%
Queensland	2.00%	14.15%	4.83%
Western Australia	4.18%	21.75%	4.92%
South Australia	1.05%	13.40%	5.54%
Tasmania	6.88%	13.17%	3.40%
Australian Capital Territory	0.83%	7.66%	3.52%
Northern Territory	14.56%	15.06%	4.64%
National	2.68% (15,564)	17.18% (99,946)	4.82% (580,590)

Source Australian Electoral Commission, *Research report number 1: Informal vote survey, House of Representatives, 2001 election (2002)*, p 8.

- 8.58 The AEC estimates that if such ballot papers had been able to be counted at the 2007 election, up to 90,149 additional ballot papers would have been admitted across Australia, representing 17.79 per cent of total informal votes at the 2007 election.⁵⁰
- 8.59 The AEC notes that those ballot papers that were saved by the operation of section 270(2) are likely to fall into three categories – those so marked deliberately to take advantage of the savings clause; those so marked accidentally in the belief that preferences were optional and those so marked accidentally. The AEC considered that it is not possible to identify the motivation behind ballot paper markings, although previous AEC research reports have examined the possible environmental determinants of ballot paper informality.⁵¹
- 8.60 It is of note that for the 10 divisions in NSW recording the highest rates of informality at the 2007 election, votes classified as 'non sequential' are more likely to feature as a reason why votes were ruled informal compared to the NSW average (table 8.9).

50 Australian Electoral Commission, submission 169.1, p 164.

51 Australian Electoral Commission, submission 169.1, p 164.

Table 8.9 Highest informality divisions, by informality type, 2007 election (per cent)

Division	Totally blank	'1' only	Incomplete numbering	Ticks and crosses	Non sequential	Marks and scribbles	Other (symbols, illegible, other)
Blaxland	19.04	34.54	7.61	10.85	15.03	9.98	2.95
Watson	16.57	46.15	5.30	10.10	7.82	10.72	3.34
Chifley	18.51	28.56	8.53	11.57	25.73	6.09	1.01
Prospect	18.44	34.76	3.26	19.12	11.16	8.87	4.39
Fowler	14.61	42.62	2.05	21.53	6.53	10.99	1.67
Reid	19.53	32.81	6.67	10.3	14.34	14.52	1.83
Parramatta	18.81	30.63	11.22	7.64	20.7	9.43	1.57
Werriwa	19.12	41.8	4.24	13.31	10.34	10.36	0.83
Banks	18.87	40.23	5.28	10.38	11.54	10.15	3.55
Bennelong	11.31	22.15	11.99	5.31	32.79	9.77	6.68
NSW average	18.21	36.23	5.29	11	15.78	11.51	1.98

Source Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election (2009)*, Research report number 11, pp 11 and 15.

8.61 The AEC considered that any reintroduction of the savings provision, while appearing to be relatively simple, would instead 'reinstate policy conflicts in the Commonwealth Electoral Act remedied by the 1998 amendments'.⁵²

8.62 Some of the basic policy conflicts identified by the AEC in 1996 were that with the savings provision in place, the Commonwealth Electoral Act:

- required full preferential voting;
- prohibited inducing optional preferential voting;
- prohibited the advocacy of optional preferential voting;

but

- allowed certain optional preferential votes as formal.⁵³

8.63 The AEC considered that these contradictions would occur again if a savings provision were introduced. The AEC noted that:

While various courts had consistently upheld the Parliament's intentions in enacting the above provisions of the Commonwealth Electoral Act, there was a perception that there was a 'loophole' in the Commonwealth Electoral Act that allowed for the avoidance of

52 Australian Electoral Commission, submission 169.1, p 164.

53 Australian Electoral Commission, submission 169.1, p 166.

the requirement for full preferential voting. This perception may have been exacerbated by the increased availability of optional preferential voting at state elections; it remains possible that some electors are confused by the different ballot paper marking requirements across Commonwealth and state elections.

It is also clear that the reintroduction of a savings provision alone would see an increase in the number of House of Representatives ballot papers that were not fully preferred. Not only could non-aligned campaigns re-emerge to advocate less than full preferential voting, but experience in those states and territories with optional preferential voting show that political campaigns themselves move towards advocating exhausting a ballot paper to limit preference flows to other groups and parties.⁵⁴

- 8.64 The AEC considered that without a reintroduction of the sanctions that prevented advocating other to vote in a way other than in accordance with full preferential voting 'the effect would be to allow for open and possibly widespread advocacy of optional preferential voting at federal elections'.⁵⁵ The AEC noted that:

This would send a clear signal that Parliament was accepting in principle that optional preferential voting should exist as an alternative to full preferential voting for federal elections, although the Commonwealth Electoral Act may not clearly state as much. The question would then arise as to why Parliament does not expressly provide for optional preferential voting in the Commonwealth Electoral Act, rather than allowing it to exist only as a 'loophole'.

Of more concern is the possibility that if Parliament were to introduce savings provisions without prohibiting advocacy in relation to those provisions, public confusion about the real intentions of the legislators on the method of voting required under the Commonwealth Electoral Act can be expected to increase under the pressure of well-organised public campaigns in support of optional preferential voting. The AEC does not believe that this potential confusion can be properly and appropriately addressed by AEC education campaigns alone.⁵⁶

54 Australian Electoral Commission, submission 169.1, p 166.

55 Australian Electoral Commission, submission 169.1, p 167.

56 Australian Electoral Commission, submission 169.1, pp 167-168.

Committee conclusion

- 8.65 The committee supports the retention of full preferential voting for House of Representatives elections. That said, it is important that where an elector expresses a clear preference but makes a mistake when completing the ballot paper, that the vote should be included in the count up to the point where the mistake is made.
- 8.66 The savings provision used for South Australian House of Assembly elections significantly reduces informality and would have potentially 'saved' almost 154,000 votes at the 2007 federal election, had such a provision been included in the Commonwealth Electoral Act. However, the committee considers that the South Australian model which also saves votes where only a single preference is expressed (including a '1', a tick or a cross), is a step too far, in that it may actively encourage optional preferential voting rather than operating as a genuine savings provision.
- 8.67 The AEC has provided evidence that up to 90,000 votes may have been cast in 2007 where the ballot paper included non-sequential numbering.⁵⁷ The number of votes in this category has remained at this level for the past three elections. One-third of these informal votes are cast in NSW, with significant numbers also recorded in Victoria, Queensland and Western Australia (table 8.10).

Table 8.10 Number of informal votes attributed to non-sequential numbering, 2001 to 2007 elections

	2001	2004	2007
New South Wales	40,040	33,914	33,375
Victoria	14,683	25,122	23,136
Queensland	9,750	11,729	13,290
Western Australia	10,695	11,143	12,416
South Australia	6,972	7,829	6,180
Tasmania	1,303	964	1,473
Australian Capital Territory	492	363	524
Northern Territory	615	840	960
Total	84,550	91,904	91,354

Source Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election (2009)*, Research report number 11, p 10; Australian Electoral Commission, *Informal Vote Survey House of Representatives 2001 Election (2003)*, Research Report number 1; *Analysis of Informality during House of Representatives 2004 Election (2005)*, Research report number 7.

- 8.68 Further, there are clear risks associated with ballot flooding given the strong relationship between higher number of candidates and higher

57 Australian Electoral Commission, submission 169.1, p 164.

informality rates. Of the 10 divisions with the highest informality rates in NSW at the 2007 election, those with the highest numbers of candidates (Blaxland, Chifley, Reid and Parramatta) were associated with a higher than average proportion of ballot papers ruled informal because of non-sequential numbering errors (table 8.11). In these 10 divisions alone, 10,091 ballot papers were ruled informal due to non-sequential numbering.

Table 8.11 Informality in the 10 NSW divisions with the highest informality rates, 2007 election

Division	Informality rate (%)	Change in informality compared to 2004 election (% points)	Number of candidates 2007 election	Change in number of candidates compared to 2004 election	Proportion of informal votes due to non-sequential numbering (%)	Number of votes ruled informal due to non-sequential numbering
Blaxland	9.49%	-0.78	8	0	15.03%	1,221
Watson	9.05%	0.05	6	-1	7.82%	625
Chifley	7.99%	-2.11	9	+1	25.73%	1,795
Prospect	7.73%	-1.68	5	-1	11.16%	742
Fowler	7.67%	-1.44	4	-1	6.53%	424
Reid	7.57%	-3.77	7	-1	14.34%	933
Parramatta	6.56%	-1.97	10	-1	20.70%	1,238
Banks	6.36%	-1.57	6	-1	11.54%	647
Werriwa	6.53%	-1.45	6	-1	10.34%	576
Bennelong	6.22%	-0.24	13	+6	32.79%	1,890
NSW average	4.90%	-1.20	7	-0.6	15.78%	681

Source Australian Electoral Commission, *Analysis of informal voting: House of Representatives 2007 election (2009)*, Research report number 11, pp 13, 38–86; 'Virtual Tally Room, House of Representatives, House of Representatives Results, Candidates', viewed on 26 May 2009 at <http://results.aec.gov.au/13745/Website/HouseCandidatesBySurname-13745-A.htm>; 'Virtual Tally Room, House of Representatives, Candidates', viewed on 26 May 2009 at <http://results.aec.gov.au/12246/results/HouseCandidatesBySurname-12246-A.htm>.

- 8.69 The committee's preference therefore is to reinstate the savings provisions that existed in the Commonwealth Electoral Act between the 1984 and 1996 elections to include those ballot papers where there are non consecutive numbering errors in the count up to the point at which the numbering errors began.
- 8.70 While the committee acknowledges the AEC's concerns in relation to the potential re-emergence of campaigns advocating for optional preferential voting, the committee considers that these concerns do not justify the exclusion of up to 90,000 votes where electors have expressed clear preferences for a number of candidates but may have made mistakes in

numbering their ballot paper. Such a savings provision will also provide some insurance that election results are not affected by deliberate attempts to increase the number of candidates (and thereby leading to a rise in the informality rate) to influence the outcomes of an election.

- 8.71 Under the committee's proposal, votes marked with a single preference (either a '1', a tick, or a cross), will not be saved. The committee therefore does not consider that the reinstatement of the savings provision should be seen as accommodating optional preferential voting.
- 8.72 The committee recognises that the reinstatement of such a provision would need to be accompanied by an appropriate penalty provision to deter the advocacy of a vote other than in accordance with full preferential voting.

Recommendation 35

- 8.73 The committee recommends that:
- Section 240 (2) of the *Commonwealth Electoral Act 1918*, which provides that the numbers on House of Representatives elections ballot papers are to be consecutive numbers, without the repetition of any number, be repealed, and
 - the savings provision contained in paragraph 270 (2), repealed in 1998, which provided that in a House of Representatives election in which there were more than three candidates, and where a full set of preferences was expressed on the ballot paper, but there were non-consecutive numbering errors, the preferences would be counted up to the point at which the numbering errors began, at which point the preferences were taken to have 'exhausted', be reinstated to the *Commonwealth Electoral Act 1918*, and
 - the Government amend the *Commonwealth Electoral Act 1918* to provide a penalty provision sufficient to deter the advocacy of 'Langer style voting'.

Implications arising from the McEwen petition

- 8.74 The Court of Disputed Returns' (CDR) decision on the McEwen petition and the subsequent review of the AEC's ballot paper guidelines and recount policy have significant implications for the administration of elections by the AEC.
- 8.75 The committee has examined the decision and throughout the Inquiry has canvassed various options designed to mitigate against similar experiences occurring in future elections.

Court of Disputed Returns process and decision

- 8.76 As noted in chapter 2, a petition was filed with the Court of Disputed Returns on 25 January 2008, relating to the conduct of the recount in the division of McEwen.
- 8.77 A summary of the events commencing with the count of ballot papers in the division of McEwen through to the court's decision is outlined in table 8.12.
- 8.78 The final decision by the court was made on 2 July 2008, with the court ruling that the final margin in favour of Ms Fran Bailey was 27 votes.⁵⁸
- 8.79 In coming to this view, the court conducted a review of 643 'reserved' ballot papers that had been set aside during the recount when scrutineers challenged the decisions of the Divisional Returning Officer. As a result of the court's review of these ballot papers, the Court reversed 154 of the decisions made by the Australian Electoral Officer during the recount in respect of the 643 ballot papers on which it ruled.⁵⁹
- 8.80 The court also made a number of important observations in respect of issues associated with ruling on the formality of ballot papers and developed a set of 'principles' (the first two 'cardinal' principles and the second three 'subordinate' principles) that reflected past practice in ruling on formality including elements of various judgements by courts on these matters. The principles developed were:
- That the ballot, being a means of protecting the franchise, should not be made an instrument to defeat it;

58 *Mitchell v Bailey (No 2) [2008] FCA 692*, paragraph 84.

59 *Mitchell v Bailey (No 2) [2008] FCA 692*, Schedule.

- Doubtful questions of form should be resolved in favour of the franchise where there is no doubt as to the real intention of the voter;
- When seeking to determine the voter's intention resort must be had, exclusively, to what the voter has written on the ballot paper;
- The ballot paper should be read and construed as a whole; and
- A voter's intention will not be expressed with the necessary clarity unless the intention is unmistakable and can be ascertained with certainty.⁶⁰

8.81 Three ballot papers, which did not bear the initials of the presiding officer, were ruled to be informal under s 268(1)(a) of the Commonwealth Electoral Act.⁶¹ The three ballot papers were of different appearance and of these, two appeared to be initialled on the back by the DRO as being admitted to the recount accompanied by the text 'DRO convinced the ballot paper came from a legitimate pre-poll envelope through the dec exchange'.⁶²

8.82 While paragraph 268(1)(d) of the Commonwealth Electoral Act 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...', the court ruled that three ballot papers, which had on them what appeared to be initials, to be formal votes.⁶³ This was consistent with, and confirmed established AEC guidance on formality, which provides that a person's initials annotated on a ballot-paper will not usually identify a voter, 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.⁶⁴

60 *Mitchell v Bailey (No 2)* [2008] FCA 692, paragraph 52.

61 *Mitchell v Bailey (No 2)* [2008] FCA 692, paragraph 77.

62 *Mitchell v Bailey (No 2)* [2008] FCA 692, paragraphs 74–78.

63 *Mitchell v Bailey (No 2)* [2008] FCA 692, paragraph 69.

64 *Mitchell v Bailey (No 2)* [2008] FCA 692, paragraph 63.

Table 8.12 Timeline of events, division of McEwen, 2007 election

Date	Event								
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.								
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.								
Monday 10 December	<p>The DRO for McEwen (the DRO) concluded the distribution of preferences, resulting in a majority for Mr Mitchell of 6 votes as follows:</p> <table data-bbox="612 853 979 999"> <tr> <td>Mr Mitchell</td> <td>48,416</td> </tr> <tr> <td>Ms Bailey</td> <td>48,410</td> </tr> <tr> <td>Informal</td> <td>3,823 (3.8%)</td> </tr> <tr> <td>Total</td> <td>100,649</td> </tr> </table> <p>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 Australian Electoral Officer (AEO), in close consultation with the Electoral Commissioner and in accordance with section 279 of the Commonwealth Electoral Act, directed the DRO to conduct a recount of all ballot-papers.</p>	Mr Mitchell	48,416	Ms Bailey	48,410	Informal	3,823 (3.8%)	Total	100,649
Mr Mitchell	48,416								
Ms Bailey	48,410								
Informal	3,823 (3.8%)								
Total	100,649								
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 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	<p>The AEC announced that the recount of all ballot-papers resulted in a majority for Ms Bailey of 12 votes as follows:</p> <table data-bbox="612 1637 979 1783"> <tr> <td>Mr Mitchell</td> <td>48,253</td> </tr> <tr> <td>Ms Bailey</td> <td>48,265</td> </tr> <tr> <td>Informal</td> <td>4,116 (4.1%)</td> </tr> <tr> <td>Total</td> <td>100,634</td> </tr> </table> <p>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.</p>	Mr Mitchell	48,253	Ms Bailey	48,265	Informal	4,116 (4.1%)	Total	100,634
Mr Mitchell	48,253								
Ms Bailey	48,265								
Informal	4,116 (4.1%)								
Total	100,634								
Thursday 20 December	The DRO declared Ms Bailey as the elected candidate for McEwen.								

Table (continued)

Table 8.12 (continued)

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.								
2008									
Friday 25 January	Mr Mitchell disputed the outcome of the election by petition to the Court of Disputed Returns (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 (<i>Mitchell v Bailey (No 1)</i> [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 (<i>Mitchell v Bailey (No2)</i> [2008] FCA 692) (<i>Mitchell v Bailey</i>). The Court's decisions resulted in an increased majority for Ms Bailey of 31 votes as follows: <table data-bbox="606 1624 981 1792"> <tr> <td>Ms Bailey</td> <td>48,339</td> </tr> <tr> <td>Mr Mitchell</td> <td>48,308</td> </tr> <tr> <td>Informal</td> <td>3,987 (4.0%)</td> </tr> <tr> <td>Total</td> <td>100,634</td> </tr> </table>	Ms Bailey	48,339	Mr Mitchell	48,308	Informal	3,987 (4.0%)	Total	100,634
Ms Bailey	48,339								
Mr Mitchell	48,308								
Informal	3,987 (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 (<i>Mitchell v Bailey (No3)</i> [2008] FCA 1029).								

Source Henderson A, *Review of ballot-paper formality guidelines and recount policy (2008)*, pp 2-5, (exhibit 4).

Henderson review

- 8.83 Following the decision of the Court of Disputed Returns (CDR) decision, the AEC commissioned Mr Alan Henderson PSM to conduct a review to identify action that should be taken by the AEC to ensure that processes and procedures are in pace for future elections to address the matters identified in the Court's decision.⁶⁵ The review was to:
- 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.⁶⁶
- 8.84 Given the potential link between decisions on the formality of ballot-papers and the case for undertaking recounts, the review was also required to consider the AEC's policy on recounts and identify possible criteria for accepting or rejecting requests for a recount.⁶⁷
- 8.85 Judicial redress based on the formality of ballot-papers in respect of House of Representatives election outcomes has been exceedingly rare, with two or three cases in the period since the passage of the original Commonwealth Electoral Act 1902.⁶⁸ Mr Henderson considered that 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. Mr Henderson noted that:

These factors are related. In situations where there is great confidence in the effectiveness of administration it is less likely

65 Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), attachment 1, p 36 (exhibit 4).

66 Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), attachment 1, p 36 (exhibit 4).

67 Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), p 36 (exhibit 4).

68 Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), p 9 (exhibit 4).

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.⁶⁹

- 8.86 Mr Henderson noted that close results are rare, with only five divisions in the last five federal elections having a winning margin of less than 100 votes.⁷⁰ Court challenges to the outcome of House of Representative divisional elections have also been rare – with at most three cases identified since federation.⁷¹ Mr Henderson noted that:

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 55.⁷²

Guidance on formality and Australian Electoral Commission manuals

- 8.87 The key guidance in the CDR decision in Mr Henderson's view, 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.⁷³ Mr Henderson considered that 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.⁷⁴
- 8.88 After reviewing the AEC's guiding documents on formality, Mr Henderson found that the main AEC documents, the Polling Place Procedures Manual, Training of Operational Staff Manual and Scrutineer's Handbook 'do not directly address the whole of ballot-paper principle'. Mr Henderson also considered that 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

69 Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), p 9 (exhibit 4).

70 Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), p 30 (exhibit 4).

71 Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), p 8 (exhibit 4).

72 Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), p 30 (exhibit 4).

73 Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), p 30 (exhibit 4).

74 Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), p 30 (exhibit 4).

unclear markings or poorly formed numbers. In relation to the Formality Policy, Mr Henderson considered that there was some divergence between the Formality Policy and the CDR decision. Mr Henderson noted that:

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.⁷⁵

8.89 Mr Henderson made a number of recommendations to provide additional guidance to AEC officials and scrutineers on ballot paper informality. Mr Henderson recommended that:

- The following guidance provided by the CDR in *Mitchell v Bailey* should be incorporated in AEC manuals, handbooks and training:
 - ⇒ 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;
 - ⇒ Poorly formed numbers must bear a reasonable resemblance to identifiable numbers;
 - ⇒ Unconventional but recognisable numbers such as continental 1s and 7s are acceptable;
 - ⇒ 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
 - ⇒ If a ballot-paper lacking official markings is considered authentic, then the annotation made by the Divisional Returning Officer (DRO) under subsection 268(2) of the Commonwealth Electoral Act should specify that the DRO is 'satisfied that it is an authentic ballot paper' – Section 6(e).

75 Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), p 30 (exhibit 4).

- 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. 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).
- To assist decision-making in the potentially tense environment of close election counts:
 - ⇒ 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;
 - ⇒ Officials should brief scrutineers on the guidelines at the commencement of counting processes;
 - ⇒ Copies of the guidelines on formality should be readily available in counting centres;
 - ⇒ Officials should be prepared to fully explain their reasoning by reference to the guidelines in relation to their decisions on specific ballot-papers; and
 - ⇒ 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 5.⁷⁶

Recount policy

8.90 Mr Henderson noted that 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.⁷⁷ Mr Henderson considered that the evidence for the period since 1984 supports this judgement, noting that:

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

⁷⁶ Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), p 30 (exhibit 4).

⁷⁷ Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), p 31 (exhibit 4).

meant it was very significant because it changed the result of the election.⁷⁸

- 8.91 In considering whether there should be an 'automatic' threshold for conducting a recount, Mr Henderson noted that the AEC generally undertakes recounts when the margin is less than 100 votes. Mr Henderson considered that there would be some 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'.⁷⁹
- 8.92 Mr Henderson made a number of recommendations in relation to the AEC's recount policy, recommending that:
- 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).
 - The details of all future recounts and requests for recounts should be systematically documented and assessed by National Office – Section 8 (c).
 - 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).
 - 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).⁸⁰

78 Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), p 31 (exhibit 4).

79 Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), p 31 (exhibit 4).

80 Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), p 31 (exhibit 4).

- 8.93 The committee notes that the AEC already commenced administrative action to implement the recommendations from the Henderson Report relating to training and information materials.⁸¹ The AEC noted that:

It is anticipated that this action will assist in addressing any reasonable concerns about the AEC's handling of disputed ballot papers. The CDR decision has provided the AEC with clear guidance on the application of the formality rules in the Commonwealth Electoral Act. Additionally, the AEC now has a wealth of examples and precedents of disputed ballot papers that have been ruled upon by the CDR and which have been analysed and adapted to form the basis of new manuals, handbooks and training.⁸²

Process for handling disputed ballot papers

- 8.94 During the course of the inquiry the committee explored the option of replacing the single decision-maker for dealing with reserved ballot papers in a recount situation with a panel of three comprising the relevant AEO and two other AEC officers at the Senior Executive Service level or equivalent.⁸³ The committee also examined whether such a process should involve discussions between the three members in the presence of (or absence of) scrutineers, and whether it was necessary for the panel to come up with a written statement of reasons as to the reasons behind the rulings on individual ballot papers.⁸⁴
- 8.95 The rationale behind such a move would be to increase confidence in rulings on disputed ballot papers thereby avoiding a lengthy CDR process and the associated uncertainty of an election result. The replacement of a single AEO ruling on disputed ballot papers would not change the existing process whereby parties can petition the CDR disputing an election result.
- 8.96 The AEC's final response to this issue took account of the findings of the Henderson review and the CDR decision on the McEwen petition. The AEC noted that the report by Mr Henderson sets out for the AEC the broad guidance given by the CDR on formality and recommended that a single comprehensive set of information on formality be developed.⁸⁵ The

81 Australian Electoral Commission, submission 169.17, p 9.

82 Australian Electoral Commission, submission 169.17, p 9.

83 Mr Mark Dreyfus QC MP, Member for Isaacs, transcript, 11 August 2008, p 96.

84 Australian Electoral Commission, submission 169.8, pp1-5.

85 Australian Electoral Commission, submission 169.17, p 9.

AEC was of the view that the provision of such information was likely to increase transparency in the process, noting that:

The development of such information, and the training of AEC officers and the stakeholders on the formality rules flowing from the CDR decision and the Henderson Report, will provide greater transparency in the decision-making process by the AEO and will assist in both identifying those ballot papers that are really in dispute and preventing unnecessary challenges.⁸⁶

8.97 In the AEC's view, changing the existing single decision-maker to include some panel arrangements involved a number of risks that would not necessarily reduce delays in the return of the writs.⁸⁷ The AEC noted that:

To replace the AEO with a panel that includes the AEO and two other senior AEC officers could give rise to concerns that the relatively straightforward process that currently exists will be elevated to a court-like setting with the panel needing to retire to make final decisions and then returning before the scrutineers to notify them of the panel's decision. An alternative process would be to have the panel discuss the matters before the scrutineers and reach a decision in their presence. This alternative process then raises the issue about how any minority views are resolved in front of scrutineers.

Inherent risks of increasing the lodging of petitions to the CDR challenging the panel's decisions in the absence of transparency appear to exist if either of these two processes were to be adopted. The risks would clearly increase where the panel decision was not unanimous and that lack of unanimity occurred in the presence of scrutineers. This would also run the risk described by Associate Professor Graeme Orr in Submission No. 187 that the panel 'would be sitting in judgment on the decisions of other electoral officials in a court setting'.

The AEC is concerned that delays in the return of the writs would occur if any new process involving a proposed decision-making panel results in the need for a written statement of reasons to be prepared and published. The imposition of a requirement to provide statements of reasons would appear to be inevitable to preserve transparency in decision-making if the panel was to retire

86 Australian Electoral Commission, submission 169.17, p 9.

87 Australian Electoral Commission, submission 169.17, pp 8-9.

from the presence of scrutineers to consider the disputed ballot papers.⁸⁸

8.98 In his review, Mr Henderson recommended that officials should be prepared to 'fully explain their reasoning by reference to the guidelines in relation to their decisions on specific ballot papers'.⁸⁹ The AEC noted that presently, this full explanation of the reasoning of the decision-maker occurs when the AEO conducts the scrutiny of the reserved ballot papers in the presence of the scrutineers. This is all done orally as only the final decision itself (i.e. 'admitted' or 'rejected') is required to be recorded in writing (see subsection 279B(7) of the Electoral Act).⁹⁰

8.99 In the AEC's view, this recommendation does not require the decision-maker to provide a formal statement of reasons and that the adoption of such an alternative process would create additional risks. The AEC noted that:

This would clearly create risks that additional time may be required to formally record the basis for decisions and to obtain legal advice in the preparation of formal reasons for decision.⁹¹

8.100 The AEC therefore suggested that rather than adopt a three person panel model, the effectiveness of the measures to be adopted to implement the recommendations of the report from Mr Henderson should be reviewed after the next federal election in which an AEO is required to review reserved ballot papers under sections 279B, 280 and 281 of the Commonwealth Electoral Act.⁹²

Committee conclusion

8.101 The committee recognises that the closeness of the result in the division of McEwen and the resulting Court of Disputed Returns' petition was a relatively rare event in the context of federal elections.

8.102 That said, the reversal of almost one-quarter of the AEO's decisions in respect of the 643 reserved ballot papers is of concern and may be seen as putting community confidence in election results at risk. There is also the possibility of increased disputation, as candidates in tight election contests

88 Australian Electoral Commission, submission 169.17, p 10.

89 Henderson A, *Review of ballot-paper formality guidelines and recount policy* (2008), p 14 (exhibit 4).

90 Australian Electoral Commission, submission 169.17, p 10.

91 Australian Electoral Commission, submission 169.17, p 10.

92 Australian Electoral Commission, submission 169.17, p 11.

may be encouraged to take their chances by having the results of elections reviewed by a different decision maker.

- 8.103 The committee supports the review process adopted by the AEC following the decision by the Court of Disputed Returns on the McEwen petition.
- 8.104 The committee endorses the AEC's proposed response in implementing the recommendations by Mr Henderson, which the committee agrees, should provide for a greater understanding by electoral officials and scrutineers about rulings on formality.
- 8.105 The additional transparency associated with the publication of guidelines on formality, which incorporate illustrative ballot papers based on the judgement by the Court of Disputed Returns in the McEwen petition, is also welcomed.
- 8.106 The committee supports the AEC's arguments in continuing with a single electoral official (the AEO for the respective jurisdiction), to rule on formality in a recount situation, given the AEC's adoption of the recommendations in the Henderson review.
- 8.107 The committee also supports the AEC proposal that the process be reviewed after the next federal election in which an AEO is required to review reserved ballot papers under sections 279B, 280 and 281 of the Commonwealth Electoral Act.
- 8.108 It is of concern to the committee, however, that those ballot papers which were considered formal by the DRO even though they did not contain the initials of an issuing officer nor a watermark were not annotated by the DRO in such a way as to reflect the requirements of s268(2) of the Commonwealth Electoral Act.
- 8.109 The committee also agrees with the recommendation by Mr Henderson that section 268(2) be amended to require a Divisional Returning Officer who rules a ballot paper to be formal despite the ballot paper not containing either the initials of a issuing officer or the official mark, to annotate the ballot paper with the words 'I am satisfied that this is an authentic ballot paper'.
- 8.110 This move is complementary to the committee's support of moves by the AEC to amend the wording of s209A in order to allow for ballot papers to be printed with a 'feature approved by the Electoral Commission'. In combination, these amendments will serve to eliminate confusion about ballot paper formality (see recommendation 36 below).
- 8.111 Accordingly, the committee recommends that the AEC adopt all of the recommendations contained in the report prepared by Mr Henderson,

with the exception of recommendation A(v) from that report which is the subject of recommendation 37 of the committee.

Recommendation 36

- 8.112 **The committee recommends that the Australian Electoral Commission adopt all recommendations contained in the report entitled *Review of Ballot-Paper Formality Guidelines and Recount Policy* prepared for the Australian Electoral Commission by Mr Alan Henderson, except for recommendation A(v) which is the subject of recommendation 37.**

Recommendation 37

- 8.113 **The committee recommends that section 268(2) of the *Commonwealth Electoral Act 1918* be amended to provide that in those cases where the Divisional Returning Officer responsible for considering the question of the formality of a ballot paper, is satisfied that the ballot paper is not informal, because the Divisional Returning Officer is satisfied that it is an authentic ballot paper on which a voter has marked a vote, the Divisional Returning Officer be required to annotate the ballot paper with the words 'I am satisfied that this is an authentic ballot paper'.**

Clarification of permitted official marks, and removals to 'on-demand' printing of ballot papers

- 8.114 While ballot papers are typically printed on water marked paper, the Commonwealth Electoral Act includes provisions that give the AEC some flexibility to print ballot papers utilising regular printers. Such provisions are usually used by the AEC in the early stages of postal voting and at Australian embassies overseas.⁹³ Where ballot papers are printed locally, the formality requirements of the Commonwealth Electoral Act require that the ballot paper is authenticated by the initials of the presiding officer.⁹⁴
- 8.115 According to the AEC, it had received advice from the Australian Government Solicitor following the CDR decision on the McEwen petition

93 Australian Electoral Commission, submission 169.18, p 7.

94 Commonwealth Electoral Act, s 268.

that put a narrower construction on the meaning of paragraph 209A(b). The Australian Electoral Commission noted that:

It is restrictive because of the legal interpretation of the word 'overprint'. What we have done, to some extent, may not have been strictly legal in terms of the act but we need the flexibility. It is just the wording in that section of the act. For example, we need the flexibility when we print ballot papers from files sent overseas before they actually get ballot papers.⁹⁵

8.116 In the AEC's view, it was clearly not intended, at the time that paragraph 209A(b) was inserted in the Act, that there would be a critical distinction between ballot papers which had acquired their colour through printing with a coloured wash, and ballot papers which had acquired their colour through having been printed on dyed stock.⁹⁶ Furthermore, the AEC noted that:

The advice has highlighted the need to have a provision sufficiently flexible to enable the use of evolving technology for security printing (including 'on demand' printing) – which these days can include methods which do not fall within the definition of 'overprinting', such as the use of stock with markings visible under ultraviolet light, or even the inclusion of holograms.⁹⁷

Committee conclusion

8.117 The committee notes the AEC's legal advice and considers that there is benefit in providing the AEC with additional flexibility in the printing of ballot papers.

Recommendation 38

8.118 **The committee recommends that paragraph 209A(b) of the *Commonwealth Electoral Act 1918* and paragraph 25A(b) of the *Referendum (Machinery Provisions) Act 1984* be repealed, and replaced with the words 'a feature approved by the Electoral Commission'.**

95 Dacey P, Australian Electoral Commission, transcript, 11 May 2009, p 34.

96 Australian Electoral Commission, submission 169.18, p 8.

97 Australian Electoral Commission, submission 169.18, p 8.