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The Parliament of the Commonwealth of Australia

# **Advisory Report on the Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012**

**Joint Standing Committee on Electoral Matters**

February 2013  
Canberra

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## Chair's foreword

The Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012 introduces a suite of measures in response to seven recommendations of the committee's report *The 2010 Federal Election: Report on the conduct of the election and related matters*.

The amendments in the Bill set out the procedures to be followed when a ballot-box is opened prematurely; remove the requirement for an applicant for a pre-poll ordinary vote to complete and sign a certificate; provide that pre-poll voting cannot commence earlier than four days after the date fixed for declaration of nominations; bring forward the deadline for applications for postal votes by one day; provide for further fixed periods of time to complete inquiries into objections against a proposed redistribution of electoral boundaries; and allow the Commissioner of Taxation and other taxation officers to provide some forms of taxpayer information to the Australian Electoral Commission to maintain the veracity of the roll of electors.

The Bill also makes a number of related minor and technical amendments

In referring the Bill, the Selection Committee wished the Electoral Matters Committee to further scrutinise its amendments and ensure consideration was given to any unintended consequences. During the committee's inquiry, issues arose regarding the exclusion of ballots, the new pre-poll voting arrangements, and the ability of the AEC to use taxpayer information to update the electoral roll.

The Bill provides that prematurely opened ballots must be excluded from the count. At the 2010 federal election, ballot boxes were opened prematurely due to an official error in two pre-poll voting centres. Due to the legislative ambiguity regarding the appropriate response to these breaches, the Australian Electoral Commission sought legal advice. The advice was that it would be prudent for these ballots to be excluded. The Commission subsequently recommended to the committee that the appropriate action be clarified in the Electoral Act and that votes should be reinstated if the incident proved to be an official error.

The Bill does not contain a vote savings provision and the committee did not support one in its 2010 federal election report. Having carefully considered the evidence in this inquiry however, the committee took the view that votes should be reinstated if a ballot box is handled unlawfully by any person but no tampering of ballot papers has occurred. The committee's view is that this balances voter enfranchisement and electoral integrity. The committee recommends that the vote savings procedures proposed by the Electoral Commission to this inquiry be incorporated in the Bill.

The committee heard also that the Electoral Act lacks clarity on whether the penalties faced by an electoral official who deliberately and unlawfully interferes with a ballot box or ballot papers are the same as the penalties facing a member of the public for this offence. The committee recommends that the Bill be amended to clarify this in the legislation.

The removal of the requirement for a pre-poll ordinary voter to complete a certificate will provide efficiencies in polling place management and align the Commonwealth with a number of state and territory jurisdictions. Moving the commencement of pre-poll voting back by one day will allow sufficient time to print the many millions of ballot papers required for a federal election. Moving the deadline for postal vote applications forward by one day will reduce the chance that postal ballots will be received too late. Increasing the fixed periods of time to inquire into further objections to a proposed electoral boundary redistribution will provide the Electoral Commission with valuable additional time to conduct these inquiries. Allowing the Electoral Commission to use certain taxpayer information to update the roll of electors is a logical extension of existing continuous roll update processes, and direct enrolment using third party information. The committee is satisfied that this will not undermine roll integrity.

These provisions of the Bill were recommended in the 2010 federal election report of the committee and continue to be supported by the committee.

On behalf of the committee I thank the organisations and individuals who assisted the committee during the inquiry through submissions and by participating in the public hearing. I also thank my colleagues on the committee for their work and contribution to this report, and the secretariat for their work on this inquiry.

**Daryl Melham MP**  
**Chair**



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## **Membership of the Committee**

**Chair** Mr Daryl Melham MP

**Deputy Chair** The Hon Alexander Somlyay MP

**Members** The Hon Bronwyn Bishop MP Senator Simon Birmingham  
The Hon Alan Griffin MP Senator Carol Brown  
Ms Amanda Rishworth MP Senator Helen Polley  
Senator Lee Rhiannon  
Senator Scott Ryan

## **Committee Secretariat**

**Secretary** Mr Stephen Boyd

**Inquiry Secretary** Dr Kilian Perrem

**Administrative Officers** Ms Natasha Petrović  
Ms Carissa Skinner





## **Terms of reference**

On 29 November 2012 the Selection Committee requested the Committee to inquire into and report on the Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012.

Under Standing Order 222(e), reports of the Selection Committee are treated as having been adopted by the House when they are presented.



## List of abbreviations

AEC	Australian Electoral Commission
AEO	Australian Electoral Officer
ATO	Australian Taxation Office
ICCPR	International Covenant on Civil and Political Rights
DRO	Divisional Returning Officer
GPV	General Postal Voter
OIC	Officer-In-Charge
PPVC	Pre-poll voting centre
PVA	Postal vote application
PVP	Postal vote pack
the Bill	Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012



# Recommendation

## 2 Issues in the Bill

### Recommendation 1 (paragraph 2.42)

That the House of Representatives and the Senate pass the Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012 after introducing:

- a vote savings measure to the procedures to be followed if ballot boxes are opened prematurely. This vote savings measure should incorporate the elements proposed by the AEC to this inquiry and provide that ballot papers that have not been tampered with in any way must be reinstated to the count but otherwise excluded. This savings measure should apply at any stage of the scrutiny to a ballot box that has been unlawfully handled by any person; and
- an amendment to the *Commonwealth Electoral Act 1918* explicitly stipulating that any electoral official who deliberately and unlawfully interferes with a ballot box or ballot papers be subject to the same penalty as any other person who commits this offence.



## Introduction

### Referral of the Bill

- 1.1 On 29 November 2012 the Selection Committee referred the Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012 (the Bill) to the Joint Standing Committee on Electoral Matters (the committee) for inquiry and report.
- 1.2 The Bill was introduced into the House of Representatives on the same day by the Minister for Defence, the Hon Stephen Smith MP, on behalf of the Special Minister of State, the Hon Gary Gray AO MP.
- 1.3 The Selection Committee outlined the following reasons for referral:  
REASONS FOR REFERRAL/PRINCIPAL ISSUES FOR CONSIDERATION:  
To further scrutinise the Bill to ensure consideration is given to any unintended consequences.<sup>1</sup>

### Overview and purpose of the Bill

- 1.4 The Bill is described in the Explanatory Memorandum (EM) as implementing the Government's response to recommendations 3, 9, 10, 11, 15, 29 and 30 of the committee's report entitled *The 2010 Federal Election: Report on the conduct of the election and related matters*.<sup>2</sup>

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1 House of Representatives Selection Committee, *Report No. 73*, 29 November 2012, p. 4.

2 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [3].

## 1.5 These recommendations are:

■ **Recommendation 3**

The Committee recommends that relevant legislation governing the protection of personal data collected by the Australian Taxation Office (ATO), which would prevent the ATO from providing enrolment relevant data to the Australian Electoral Commission (AEC), be amended to allow such data to be shared with the AEC for the purposes of facilitating enrolment.

■ **Recommendation 9 (unanimous)**

The Committee recommends that the *Commonwealth Electoral Act 1918* be amended, wherever appropriate, to specifically provide that a ballot box containing votes cast by electors may not be opened before the close of polling other than in accordance with the relevant provisions of the Act.

■ **Recommendation 10**

The Committee recommends that the requirement at section 200DH of the *Commonwealth Electoral Act 1918* for an applicant for a pre-poll ordinary vote to complete and sign a certificate be repealed.

■ **Recommendation 11**

The Committee recommends that section 200D of the *Commonwealth Electoral Act 1918* be amended to provide that an application for a prepoll vote cannot be made before the Monday, 19 days before polling day.

■ **Recommendation 15 (unanimous)**

The Committee recommends that subsection 184(5), and any other relevant provisions, of the *Commonwealth Electoral Act 1918* be amended to provide that the deadline for the receipt of postal vote applications be 6 pm on the Wednesday, three days before polling day.

■ **Recommendation 29 (unanimous)**

The Committee recommends that section 72, and any other relevant sections, of the *Commonwealth Electoral Act 1918* be amended to provide that, where an augmented Electoral Commission has formed an opinion that its proposed redistribution is significantly different to the Redistribution Committee proposal, a further fixed period be provided during which the actions required by subsection 72(13) of the Act are to be undertaken.

■ **Recommendation 30 (unanimous)**

The Committee recommends that the *Commonwealth Electoral Act 1918* be amended to provide that, where a further fixed period is provided during which the actions required by subsection 72(13) of the Act are to be undertaken, the number of days specified in subsection 72(2) of the Act also be increased by the same number of days provided for in the further fixed period.<sup>3</sup>

1.6 The Bill amends the *Commonwealth Electoral Act 1918* (the Electoral Act), the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act), and the *Taxation Administration Act 1953* (the Taxation Administration Act).<sup>4</sup>

1.7 The Bill contains provisions that:

- set out the procedures to be followed when a ballot-box is opened prematurely, that is, before the close of the poll, other than in accordance with the relevant provisions of the Electoral Act and Referendum Act;
- require ballot papers included in a ballot-box that is opened prematurely to be excluded from scrutiny;
- remove the requirement under the Electoral Act and Referendum Act for an applicant for a pre-poll ordinary vote to complete and sign a certificate;
- provide that pre-poll voting cannot commence earlier than 4 days after the date fixed for declaration of nominations for any type of election or by-election;
- brings forward the deadline for applications for postal votes by one day from the Thursday before polling day to the Wednesday before polling day;
- provide for further fixed periods of time to be provided to the augmented Electoral Commission (as defined in section 70 of the Electoral Act) to complete its inquiries into objections against proposed redistribution of electoral boundaries;
- amend the Taxation Administration Act to allow the Commissioner of Taxation and other taxation officers to provide some forms of taxpayer information to the Australian Electoral Commission for the purposes of administering the Electoral Act and Referendum Act; and
- make a number of related minor and technical amendments.<sup>5</sup>

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3 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, pp. xx-xxvi.

4 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [2].

- 1.8 In his second reading speech, the Minister stated that the Bill ‘will substantially improve the interactions that Australians have with elections and referendums’.<sup>6</sup>
- 1.9 The EM notes that ‘costs associated with implementation of the measures contained in this Bill will be absorbed by the Australian Electoral Commission from existing resourcing’.<sup>7</sup>
- 1.10 The EM also incorporates a statement of compatibility with human rights that concludes:
- The Bill is compatible with human rights because it does not limit the right to vote contained in Article 25 of the ICCPR. To the extent that it contains provisions that indirectly limit this right (provisions dealing with the ballot papers), those provisions are nevertheless reasonable for the purposes of paragraph 10 of General Comment 25, on the basis that they are necessary to ensure the integrity of the voting process and will only apply in very limited circumstances. The Bill does not limit the right to privacy contained in Article 17 of the ICCPR. However, to the extent that they limit the right to privacy, those limitations are not arbitrary or unlawful. They are reasonable, necessary and proportionate to achieving the legitimate aim of enabling the Electoral Commissioner to directly enrol a person and update a person’s enrolment.<sup>8</sup>
- 1.11 Schedules 1 and 2 of the Bill are each in two parts. Part 1 of each schedule contains the amendments and part 2 contains the application provisions for these amendments. Schedule 1 contains the main provisions of the Bill except for the postal voting amendments which are in Schedule 2.

## **Premature opening of a ballot box**

- 1.12 The Bill sets out new procedures to be followed if ballot boxes are opened before the close of the poll, other than in accordance with the Electoral Act.

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5 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [2].

6 The Hon Stephen Smith MP, Minister for Defence and Deputy Leader of the House, *House of Representatives Hansard*, 29 November 2012, p. 6.

7 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [2].

8 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [6].



- 1.13 Item 24 of the Bill inserts a provision (section 238B) before section 239. Under section 238B, an officer who becomes aware of an unauthorised opening of a ballot box will seal the ballots in a parcel to give to the Divisional Returning Officer (DRO). None of these sealed ballots will be counted. Item 32 inserts an equivalent provision (section 41AB) before section 41A of the Referendum Act.
- 1.14 Consequential and other technical amendments to the Electoral Act are made by items 25 and 26 and to the Referendum Act by items 49 and 50. These new procedures will also apply to a poll taken in Antarctica.
- 1.15 At the 2010 federal election, ballot boxes containing pre-poll ordinary votes were opened prematurely at pre-poll voting centres (PPVCs) at Oaklands Park in the division of Boothby (SA) and at Blackwater and Emerald in the division of Flynn (Qld).<sup>9</sup>
- 1.16 The AEC became aware of this breach shortly after polling day and issued media releases declaring the seriousness of the matter. The AEC engaged the services of a former Electoral Commissioner, Mr Bill Gray AM, to undertake an urgent examination of the facts surrounding each incident and to report his findings and recommendations.<sup>10</sup>
- 1.17 In his report, which is provided at Appendix C, Mr Gray concluded that the incidents were polling official errors, not tampering, and therefore recommended:
- That the training materials and working manuals for the OIC [Officer in Charge] of a PPVC be reviewed with a view to highlighting the necessity to ensure that all procedures and practices are consistent with the requirements of the Electoral Act. In particular, the need to ensure the integrity of the ballot papers and ballot boxes should be given special prominence in training materials and in working manuals used at a PPVC.
  - That a highly visible stick-on label be attached to each ballot box used in a PPVC at the time it is first sealed (perhaps adjacent to each side seal), that makes clear that the ballot box is not, on any account, to be opened.
  - That the record of ballot boxes and security seals form be routinely examined by divisional staff either when visiting a PPVC or by means of a fax or scanned copy in relation to PPVCs located in country

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9 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 46.

10 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 46.

regions. This practice should be included in the operating manuals for DROs and their staff.<sup>11</sup>

- 1.18 In its report on the 2010 federal election, the committee notes that these recommendations were supported by the Liberal Party of Australia and the Australian Labor Party stating:

While submitters were troubled that the incidents had occurred, most were of the view that the AEC took appropriate steps to ensure that the events were reported in a transparent manner and that prompt action was taken to investigate and address the causes.<sup>12</sup>

- 1.19 In its submission to the 2010 federal election inquiry, the AEC advised that the three person Electoral Commission met formally and accepted all three recommendations in the Gray report. The AEC recommended:

...that the Commonwealth Electoral Act and the *Referendum (Machinery Provisions) Act 1984* should be amended to specifically provide that a ballot box may not be opened before the close of polling other than in accordance with the provisions of the Commonwealth Electoral Act, and that a savings provision in the event of an official error be included.<sup>13</sup>

- 1.20 The committee agreed in its 2010 federal election report that the Electoral and Referendum Acts should be amended so that a ballot box may not be opened before the poll closes (Recommendation 9). The committee did not agree however that a savings provision is necessary stating that '...the AEC must ensure that circumstances such as those that occurred in Boothby and Flynn do not reoccur.'<sup>14</sup>

## Pre-poll voting arrangements

- 1.21 The Bill provides that applicants for a pre-poll ordinary vote will no longer need to complete and sign a certificate. In his second reading speech, the Minister commented that 'this requirement is not consistent with other forms of ordinary voting which only require a verbal

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11 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, pp. 46-47.

12 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 12.

13 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 47.

14 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 49.

- declaration, does not serve a useful purpose and will be omitted by this bill'.<sup>15</sup>
- 1.22 This provision of the Bill implements recommendation 10 of the committee's report on the 2010 federal election.<sup>16</sup>
- 1.23 Item 12 repeals paragraph 200DH of the Electoral Act requiring an applicant for a pre-poll ordinary vote to complete and sign a certificate. Items 8 to 11, 13 to 23, and 27 and 28 are consequential to item 12. Many of these items replace the term 'issuing officer' with 'voting officer'. This is because the concept of an issuing officer is no longer relevant if certificates are no longer required. An issuing officer is a subset of voting officer.<sup>17</sup>
- 1.24 Item 40 repeals section 73CH of the Referendum Act requiring an applicant for a pre-poll ordinary vote to complete and sign a certificate. Items 29 to 31, 35 to 39, 41 to 48 and 51 and 52 are consequential to item 40, including the substitution of 'issuing officer' for 'voting officer'.<sup>18</sup>
- 1.25 The 2010 federal election was the first to have pre-poll ordinary voting. The committee notes in its report on the 2010 election that despite the mishandling of pre-poll votes in Boothby and Flynn, pre-poll ordinary voting proceeded without incident in all other locations.<sup>19</sup>
- 1.26 In its submission to the 2010 federal election inquiry, the AEC notes the overall success of pre-poll ordinary voting and that 996 875 home division pre-poll votes were cast in 2010, representing 28.5 per cent of all early votes in this election.<sup>20</sup>
- 1.27 The AEC further submitted to the 2010 federal election inquiry that including those home division pre-poll votes cast as ordinary votes, it counted more than 11 million votes on polling night, which is around one million more votes than were counted on polling night at the 2007 federal election.<sup>21</sup>

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15 The Hon Stephen Smith MP, Minister for Defence and Deputy Leader of the House, *House of Representatives Hansard*, 29 November 2012, p. 6.

16 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 50.

17 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [9].

18 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [13].

19 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 48.

20 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 47.

21 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 48.

- 1.28 The committee comments in its 2010 federal election report that:
- Issuing pre-poll votes as ordinary votes and counting them on polling night removes the need for the votes to be placed in envelopes and transported to the divisional offices. Further, it takes away the requirement for them to be put through time consuming preliminary scrutiny procedures, thus speeding up the count and allowing more resources to be devoted to other tasks.<sup>22</sup>
- 1.29 The Liberal Party of Australia welcomed the new pre-poll arrangements which allowed pre-poll votes cast in their home division to be counted on election night. The Liberal Party stated:
- It is undoubtedly advantageous that a significant number of votes are able to be included in the results on the night. Our scrutineers confirmed that, on the whole, the count of pre-poll votes proceeded smoothly and without disruption to the count of ordinary votes.<sup>23</sup>
- 1.30 The AEC submitted to the 2010 federal election inquiry that the practice of requiring electors to complete and sign a declaration when casting ordinary votes was an unnecessary step. It suggested that removing this requirement could potentially speed up the issuing process. The AEC also noted that written declarations are no longer required in a number of state and territory jurisdictions, with no issues of integrity having been reported.<sup>24</sup>
- 1.31 In making recommendation 10 in its majority report on the 2010 federal election, the committee notes:
- ... the obvious success of the move to issuing pre-poll ordinary votes, and is confident that there is no justifiable reason for retaining the written declaration for pre-poll votes issued as ordinary votes.<sup>25</sup>
- 1.32 However the committee acknowledges in relation to the written declaration requirements for pre-poll that:
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22 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 47.

23 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 48.

24 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 48.

25 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 49.

Opposition Committee members feel that section 200DH of the Commonwealth Electoral Act being repealed will increase the likelihood of voter fraud and threaten the integrity of the electoral roll. Providing a signature when placing a pre-poll vote is not an onerous responsibility for the elector and Opposition members believe there is not only no reason to repeal this section of the Commonwealth Electoral Act but doing so could lead to an increase in fraudulent voting. Opposition Committee members therefore reject Recommendation 10.<sup>26</sup>

- 1.33 The Bill also provides that pre-poll voting cannot commence earlier than four days after the declaration of nominations for an election or by-election.<sup>27</sup>
- 1.34 In his second reading speech, the Minister stated that:
- Depending on the type of election, whether it is for the House of Representatives or the Senate or both, the act currently provides different days for the commencement of pre-poll voting and very minimal times are provided for the Australian Electoral Commission to print and distribute ballot materials to early voting centres across Australia in time for polling to commence. This is a sensible small amendment which provides a consistent time frame for when pre-poll voting can commence.<sup>28</sup>
- 1.35 Items 6 and 7 amend subsections 200D(4) and (5) of the Electoral Act to delay the making of pre-poll applications until the fourth day after nominations are declared.<sup>29</sup> Items 33 and 34 make equivalent amendments to subsections 73B(4) and (5) of the Referendum Act so that if a referendum is held in conjunction with an election, voting for both will commence at the same time.<sup>30</sup>
- 1.36 This provision of the Bill implements recommendation 11 of the committee's report on the 2010 federal election in which the committee

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26 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 50.

27 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [8].

28 The Hon Stephen Smith MP, Minister for Defence and Deputy Leader of the House, *House of Representatives Hansard*, 29 November 2012, p. 6.

29 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [8].

30 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [13].

concluded that ‘an application for a pre-poll vote should not be made prior to the Monday, 19 days before polling day’.<sup>31</sup>

- 1.37 The AEC recommended changing the timetable for the commencement of pre-poll voting in its submission to the 2010 federal election inquiry. The AEC commented on the logistical difficulties in distributing more than 43 million ballot papers along with Senate group voting ticket booklets. The AEC further submitted that just 24 hours is available after the deadline for the lodgement of group voting tickets before pre-poll voting can commence.<sup>32</sup>
- 1.38 The committee states in its 2010 federal election report that it ‘understands the complexities involved in preparing, printing and distributing ballot papers in the short window of opportunity that exists following the deadline for the lodgement of group voting tickets’.<sup>33</sup>

### **Postal voting deadline**

- 1.39 The Bill provides that the deadline for the receipt of applications for postal votes will be brought forward by one day to 6 pm on the Wednesday three days before polling day.
- 1.40 This amendment is described in the EM as:
- ...a practical amendment that reflects the reality that there is limited chance of electors receiving postal voting materials that are sent out after the current deadline of 6pm on the Thursday before polling day. The existing deadline is potentially misleading to electors who might expect that as long as they have met the deadline, they will receive their postal voting materials in time for them to be able to cast their vote before the close of polling.<sup>34</sup>
- 1.41 Item 1 (Schedule 2) amends subsection 184(5) of the Electoral Act by omitting the words ‘Thursday that is 2 days’ and substituting ‘Wednesday that is 3 days’. This item therefore brings forward the deadline for applications for postal votes by one day. Items 2 and 3 are consequential

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31 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 50.

32 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 48.

33 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 50.

34 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [16].

- to item 1 and make the same substitution to subsection 188(4) of the Electoral Act.<sup>35</sup>
- 1.42 Item 4 also substitutes 'Wednesday that is 3 days' in subsection 55(5) of the Referendum Act so that the PVA deadline is also one day earlier in referendum polls. Items 5 and 6 are consequential to item 4 and make the same substitution to subsection 61(2B).<sup>36</sup>
- 1.43 Postal voting continues to increase at every election. The AEC submitted to the 2010 federal election inquiry that it issued 133 832 more postal votes in 2010 than it did in 2007. The AEC further advised in that submission that for the 2010 election it received 821 836 postal vote applications (PVAs) in addition to 209 426 GPVs registered, totalling 1 031 262 applications in all. The AEC also issued 957 322 postal voting packs (PVPs) in 2010, with another 9 252 PVPs issued at overseas posts.<sup>37</sup>
- 1.44 In its submission to the 2010 federal election inquiry, the AEC stated:
- Under current arrangements, an application for a postal vote may be made up until 6 pm on the Thursday before polling day. Statistics for the 2010 federal election show that PVPs sent in response to PVAs received on the Thursday before polling have a limited chance of being received by the voter in time for them to complete and return them to the AEC, whereas a far higher percentage of those issued in the 24 hour period prior to that are received back in time to be admitted to the count. The AEC is concerned that by having a deadline so close to polling day electors may be misled into thinking that they will receive their ballot papers in time to complete and return them before the close of polling, when the reality it is that in many cases they will not.<sup>38</sup>
- 1.45 The AEC submitted to the 2010 federal election inquiry that the cut off time for PVAs should be one day earlier, consistent with the current provision in New South Wales.<sup>39</sup> The committee agreed in its 2010 federal election report (Recommendation 15).<sup>40</sup>
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35 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, pp. [16-17].

36 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [17].

37 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 54.

38 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 57.

39 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 58.

40 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 62.

- 1.46 Opposition members of the committee expressed reservations, asserting that:

...moving the day for postal vote applications to be received from 6 pm Thursday before polling day to 6 pm Wednesday before polling day will disadvantage postal voters by giving them less time to send in their application. Postal voters are well aware that there can be a delay in processing forms and leaving it late could mean they don't receive their ballot papers on time. However, it is better to focus on the efficiency of the AEC in processing these forms rather than giving electors less time to send in their application. The task of the AEC is to serve voters, not to make their own job easier.<sup>41</sup>

- 1.47 These amendments will apply to any elections or referendums for which the writs are issued on or after 1 January 2014.<sup>42</sup>

## **Electoral boundary redistributions**

- 1.48 The Bill provides that the augmented Electoral Commission will have additional fixed periods to consider further objections to proposed electoral boundary redistributions.<sup>43</sup> This is in response to recommendations 29 and 30 of the committee's report on the 2010 federal election.

- 1.49 In its submission to the 2010 federal election inquiry the AEC notes:

...the difficulties encountered delivering a redistribution according to the timetable specified in the Commonwealth Electoral Act, in situations where the proposed redistribution formed by the augmented Electoral Commission differs significantly from that proposed by the Redistribution Committee.<sup>44</sup>

- 1.50 The redistribution process is commenced by a body comprising the Electoral Commissioner, the Australian Electoral Officer for the State and the Surveyor-General and Auditor-General for the State; which under subsection 60(2) of the Electoral Act is described as the Redistribution
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41 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 58.

42 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [17].

43 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, pp. [7-8].

44 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 155.



Committee. Under section 70 the redistribution process is concluded by a body comprising the Redistribution Committee with the addition of the Chairperson of the Electoral Commission and another member of the Electoral Commission. This is the 'augmented Electoral Commission'.<sup>45</sup>

- 1.51 The AEC submitted to the 2010 federal election inquiry that the period during which the augmented Electoral Commission is required to consider objections to the Redistribution Committee's proposed redistribution, hold an inquiry into the objections, form its own proposed redistribution and call for further objections, then hold a further inquiry into the further objections and make a final decision, is not sufficient.<sup>46</sup>
- 1.52 The Electoral Act specifies a maximum of 60 days after the period for comments has ended for the augmented Electoral Commission to complete inquiries into initial and further objections to a redistribution.<sup>47</sup> The AEC recommended an increase of 42 days to allow the augmented Electoral Commission to adequately discharge its duties.<sup>48</sup>
- 1.53 Initial objections to the Redistribution Committee proposal will still be considered by the augmented Electoral Commission no later than 60 days after the end of the initial comments period.
- 1.54 Items 1-4 of the Bill amend section 72 of the Electoral Act and provide an additional seven days for further objections to be received by the augmented Electoral Commission if it announces a redistribution proposal (in which initial objections are considered) that is 'significantly different' from that of the Redistribution Committee. An additional 14 day period is then provided for consideration of further objections.<sup>49</sup>
- 1.55 The committee agreed in its 2010 federal election report that '...the timetable should be varied according to circumstances'. However, the committee further stated that it:

... has not formed a firm view about how many days should be provided additional to the sixty day period already specified following the end of the comments period on objections. The Committee therefore does not seek to specify the number of days,

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45 Australian Electoral Commission (AEC), *Submission 3*, p. 13.

46 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 155.

47 Section 72(2) of the *Commonwealth Electoral Act 1918*.

48 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 155.

49 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, pp. [7-8].

preferring that the additional period be the subject of further discussion between the AEC and the responsible Minister.<sup>50</sup>

## Use of taxpayer information

- 1.56 The Bill amends the Taxation Administration Act to allow the Commissioner of Taxation and other taxation officers to provide some forms of taxpayer information to the Australian Electoral Commission for the purposes of administering the Electoral Act and Referendum Act.
- 1.57 In his second reading speech, the Minister said:
- In the 2010 joint standing committee report, the committee made three recommendations related to maintaining the electoral roll. This Bill includes the last of those three measures: a recommendation to allow the Australian Taxation Office to provide enrolment relevant personal information to the Australian Electoral Commission.
- Although it is a small amendment on the face of this Bill, it is another important step in assisting the Australian Electoral Commission to deliver the most inclusive electoral roll and the government is proud to be able to deliver this change.<sup>51</sup>
- 1.58 The last of these measures cited by the Minister, which is implemented by the Bill, is Recommendation 3 (see paragraph 1.5).
- 1.59 Item 53 introduces a new exception to section 355-25 of Schedule 1 to the Taxation Administration Act. Subject to a range of specific exceptions to facilitate efficient and effective government administration and law enforcement, this section makes it an offence for taxation officers to record or disclose protected information.<sup>52</sup>
- 1.60 The new exception ensures that it will not be an offence for a taxation officer to make a record for, or a disclosure to, the Electoral Commissioner if the record or disclosure:
- is of information that the Commissioner of Taxation has obtained since the commencement of this item; and

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50 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 157.

51 The Hon Stephen Smith MP, Minister for Defence and Deputy Leader of the House, *House of Representatives Hansard*, 29 November 2012, p. 6.

52 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [15].

- is for the purpose of administering the Electoral Act or the Referendum Act.<sup>53</sup>
- 1.61 This will allow the ATO to provide otherwise protected information (such as the names and addresses of taxpayers) to the AEC to maintain the veracity of the electoral roll. However, this exception will not apply to information collected by the ATO before this provision comes into effect.
- 1.62 Related to this provision is Recommendation 1 of the 2010 federal election report:
- The Committee recommends that, wherever appropriate, the Commonwealth Electoral Act 1918 should be amended to allow the Australian Electoral Commission (AEC) to directly enrol eligible electors on the basis of data or information provided by an elector or electors to an agency approved by the AEC, as an agency which performs adequate proof of identity checks, where that information is subsequently provided by that agency to the AEC for the purposes of updating the electoral roll. Approval of such agencies by the AEC should be made by disallowable instrument.<sup>54</sup>
- 1.63 Recommendation 1 was implemented by the *Electoral and Referendum Amendment (Protecting Elector Participation) Bill 2012*, which was the subject of inquiry and report by the committee. The recommendation by the committee in that report was that the Bill be passed as proposed.<sup>55</sup>
- 1.64 The *Electoral and Referendum Amendment (Protecting Elector Participation) Bill 2012* thus empowers the AEC to directly enrol eligible electors using information about these individuals from another agency. This ability was dependent on the commencement of the *Electoral and Referendum Amendment (Maintaining Address) Bill 2011*. That Bill enabled the Electoral Commissioner to directly update address details using reliable outside information and was also the subject of inquiry by the committee.<sup>56</sup>
- 1.65 In its report on the 2010 federal election, the committee comments on the maintenance of the electoral roll and notes concerns that enrolment participation rates have declined. This is 'despite ongoing efforts on the

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53 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [15].

54 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 36.

55 Joint Standing Committee on Electoral Matters, *Advisory Report on the Electoral and Referendum Amendment (Improving Electoral Participation) Bill 2012*, March 2012, Recommendation 1, p. 42.

56 Joint Standing Committee on Electoral Matters, *Advisory Report on the Electoral and Referendum Amendment (Maintaining Address) Bill 2011*, February 2012.

part of the AEC to arrest it using measures currently permitted under the Commonwealth Electoral Act'.<sup>57</sup>

- 1.66 Recommendations 1, 2 and 3 of the report on the 2010 federal election addressed enrolment decline. The committee stated:

The majority of the Committee accepts that the Commonwealth should adopt a model that allows direct enrolment of electors on the basis of accurate and reliable data provided to the AEC, and the direct update of enrolment details based on that same data wherever required.<sup>58</sup>

- 1.67 In contrast, Opposition members of the committee have taken the view:

...that the only data that should be truly relied upon is an individual elector's enrolment form when they join the roll or update their details. They felt that relying on any other information would dramatically reduce the integrity of the roll.<sup>59</sup>

- 1.68 In making recommendation 3 in its 2010 federal election report, the committee noted:

...the assistance being provided to the AEC by the ATO in notifying people who have advised the ATO of a change of address that they should also update their enrolment details. The Committee is also aware that cooperation beyond that is limited, as data sharing arrangements between the AEC and the ATO are not currently permissible. The Committee believes that if the ATO were permitted to share enrolment relevant data with the AEC it would provide a genuine and lasting improvement to roll maintenance processes and roll integrity.<sup>60</sup>

## Other amendments

- 1.69 Item 5 amends subsection 185(3)(b) of the Electoral Act. This provides that silent electors under section 104 of the Electoral Act (ie persons whose addresses have been excluded from the roll for personal or family safety reasons) who are registered general postal voters (GPVs) will have their

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57 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 28.

58 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 35.

59 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 35.

60 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 36.

GPV registration automatically carry across with any change of enrolment.<sup>61</sup>

- 1.70 This amendment complements provisions in the previous *Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012* that silent electors who change address will have their registration as a silent elector automatically carried across with their transfer of enrolment.

## **Date of effect**

- 1.71 The measures in Schedule 1 of the Bill will commence on the day after the Act receives Royal Assent. The measures in Schedule 2 will commence on 1 January 2014.

## **Objective and conduct of the inquiry**

- 1.72 The objective of the inquiry is to investigate the adequacy of the Bill in achieving its policy objectives and, where possible, identify any unintended consequences.
- 1.73 Details of the inquiry were placed on the committee's website. On 6 December 2012 the Committee Chair, Daryl Melham MP, issued a media release announcing the inquiry and seeking submissions. The committee received five submissions. These are listed at Appendix A.
- 1.74 A public hearing was held in Canberra on 4 February 2013. A list of the witnesses who appeared at the hearing are available at Appendix B. Submissions and the transcript of evidence are available on the committee's website at: [www.aph.gov.au/em](http://www.aph.gov.au/em).

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61 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [8].



## Issues in the Bill

### Overview

- 2.1 The Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012 (the Bill) introduces a suite of measures in response to seven recommendations of the committee's report *The 2010 Federal Election: Report on the conduct of the election and related matters*.<sup>1</sup>
- 2.2 In brief, the measures introduced by the Bill will:
- set out the procedures to be followed when a ballot-box is opened prematurely (Recommendation 9);
  - remove the requirement for an applicant for a pre-poll ordinary vote to complete and sign a certificate (Recommendation 10);
  - provide that pre-poll voting cannot commence earlier than 4 days after the date fixed for declaration of nominations (Recommendation 11);
  - bring forward the deadline for applications for postal votes by one day (Recommendation 15);
  - provide for further fixed periods of time to complete inquiries into objections against a proposed redistribution of electoral boundaries (Recommendations 29 and 30);
  - allow the Commissioner of Taxation and other taxation officers to provide some forms of taxpayer information to the Australian Electoral Commission with a view to maintaining the veracity of the roll of electors (Recommendation 3); and
  - make a number of related minor and technical amendments.

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<sup>1</sup> Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [3].

- 2.3 During the inquiry into the Bill, issues arose regarding the exclusion of ballots from the poll if a ballot box is opened prematurely, the new pre-poll voting arrangements, and the use of taxpayer information by the AEC to update the roll. These issues are discussed in this chapter.

## Premature opening of a ballot box

### Background

- 2.4 The bill sets out new procedures to be followed if ballot boxes are opened before the close of the poll, other than in accordance with the *Commonwealth Electoral Act 1918* (the Electoral Act). In such a circumstance, the ballots in these boxes will be sealed in a parcel to be given to the Divisional Returning Officer (DRO) and not scrutinised. The bill makes equivalent amendments to the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act) and these new procedures will also apply to polls taken in Antarctica.
- 2.5 The AEC states in its submission to this inquiry that ‘under the Electoral Act, it is lawful to open a ballot box containing declaration votes before the close of polling in certain circumstances.’<sup>2</sup> The AEC stated:
- ...subsection 266(1) of the Electoral Act currently allows a Divisional Returning Officer (DRO) to conduct a preliminary scrutiny of declaration votes in envelopes from the last Monday before the close of poll. It follows that, in order for a DRO to conduct a preliminary scrutiny, the ballot box must be opened.<sup>3</sup>
- 2.6 The AEC further notes in this regard however that ‘because pre-poll ordinary votes do not need to go through preliminary scrutiny processes, there is no requirement for these ballot boxes to be opened until after the close of polling, when the counting (further scrutiny) can commence’.<sup>4</sup>
- 2.7 At the 2010 federal election, ballot boxes containing pre-poll ordinary votes were opened prematurely at pre-poll voting centres (PPVCs) at Oaklands Park in the division of Boothby (SA) and at Blackwater and Emerald in the division of Flynn (Qld).<sup>5</sup>

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2 AEC, *Submission 3*, p. 15.

3 AEC, *Submission 3*, p. 15.

4 AEC, *Submission 3*, p. 15.

5 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 46.



- 2.8 The AEC notes that the term ‘premature’ in this case means:
- for ballot boxes containing any ordinary votes – opened before 6 pm on polling day; and
  - for ballot boxes containing only declaration votes – opened other than in accordance with the DRO’s direction in relation to scrutiny under subsection 266(2) of the Electoral Act, before the Monday prior to polling day.<sup>6</sup>
- 2.9 As specified in part XVA of the Electoral Act, ballot boxes at PPVCs must be sealed at the close of voting each day. AEC handling procedures stipulate that the security seal number must be entered on the ‘record of seals’ page, signed, and countersigned by a witness. If the ballot box is to be used on subsequent days, it must be reactivated using the following steps:
- show the sealed box to all people present;
  - check all seal numbers to see that they match the record of seals page;
  - sign the entry on the record of seals page certifying the number of the seals on the ballot box;
  - ask a person to check the seals and sign as witness;
  - cut and remove the plastic seal from the hinged flap to uncover the slot in the lid; and
  - retain the broken seal to return to the DRO.<sup>7</sup>
- 2.10 The AEC also stipulates in its procedures handbook for the Officer-In-Charge (OIC) that ‘a ballot box is not a secure container; it should not be left unattended in public view at any time, even when sealed.’<sup>8</sup> These procedures further stipulate that:
- If ballot boxes containing votes need to be kept overnight and there are inadequate secure storage facilities on-site, you may be able to obtain permission to use security facilities in establishments such as a bank, post office or police station.<sup>9</sup>
- 2.11 The AEC procedures further stipulate that the OIC of a voting centre that is also conducting the scrutiny after close of polling on election day, ie conducting the scrutiny of pre-poll ordinary votes, must:
- ensure that there are no voters in the polling centre when the ballot box is opened;

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6 AEC, *Submission 3*, p. 16.

7 AEC, *Election Procedures Handbook Pre-poll Officer-in-Charge*, p. 15.

8 AEC, *Election Procedures Handbook Pre-poll Officer-in-Charge*, p. 10.

9 AEC, *Election Procedures Handbook Pre-poll Officer-in-Charge*, p. 10.

- before opening the ballot box must check the seals in the presence of polling officials and scrutineers;
- the OIC and a witness must sign the 'record of ballot boxes' and 'security seals' in the pre-poll voting return; and
- note any discrepancies in the 'report on miscellaneous matters' in the pre-poll voting return.<sup>10</sup>

2.12 The AEC engaged a former Electoral Commissioner, Mr Bill Gray AM, to undertake an urgent examination of the facts surrounding the incidents in Boothby and Flynn and to report his findings and recommendations. The full text of this report is at Appendix C. The AEC advises that 'Mr Gray provided three recommendations, all of which have been implemented'.<sup>11</sup> The AEC stated:

Key elements of the AEC's actions to implement the recommendations are as follows:

- Training materials have been released for all AEC staff that explain the circumstances that led to the votes being excluded, and which detail the correct procedures to be followed when ballot boxes are used at polling.
- Training materials for pre-poll voting staff highlight the importance of ballot boxes remaining sealed until they are legally authorised to be open. To supplement this training, more robust ballot box seals have been bought and labels have been produced to go on pre-poll ballot boxes, to alert staff that the boxes cannot be opened early. Officer-In-Charge Returns have been modified to allow the Divisional Returning Officer (DRO) to more actively monitor how ballot box seals.<sup>12</sup>

2.13 The AEC further notes in relation to the incidents at Boothby and Flynn that 'following receipt of legal advice from the Australian Government Solicitor [included at Appendix D], the ballot papers contained in those ballot boxes were excluded from the count'.<sup>13</sup> The AEC stated:

In its subsequent consideration of the matter the three person Electoral Commission noted that whilst the AEC had external legal advice supporting the exclusion of the ballot papers, following the outcome of a report into the incidents by former Electoral

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10 AEC, *Election Procedures Handbook Pre-poll Officer-in-Charge*, p. 44.

11 AEC, *Submission 3.1*, p. [2].

12 AEC, *Submission 3.1*, pp. [2]-[3].

13 AEC, *Submission 3*, p. 15; a copy of this legal advice is provided as Attachment E to *Submission 3.2* from the AEC.

Commissioner, Mr Bill Gray AM, the legal basis for the exclusion was in need of further clarity.<sup>14</sup>

- 2.14 The AEC submitted previously to the 2010 federal election inquiry that the Electoral Act should be amended to provide that ballot boxes not be opened other than in accordance with the Act. The AEC asserted however that a savings provision should be included if ballot boxes were opened prematurely as a result of an official error, stating that:

...the Commonwealth Electoral Act and the *Referendum (Machinery Provisions) Act 1984* should be amended to specifically provide that a ballot box may not be opened before the close of polling other than in accordance with the provisions of the Commonwealth Electoral Act, and that a savings provision in the event of an official error be included.<sup>15</sup>

- 2.15 The committee recommended in its 2010 federal election report that the Electoral Act be amended, wherever appropriate, to provide that a ballot box may not be opened before the close of polling other than in accordance with the relevant provisions of the Act (Recommendation 9). The committee did not accept in its 2010 report however that a savings provision is necessary stating that '...the AEC must ensure that circumstances such as those that occurred in Boothby and Flynn do not reoccur.'<sup>16</sup> There is no savings provision in the Bill.

## Analysis

- 2.16 The AEC submits that the Bill 'clarifies the legislative ambiguity identified in 2010 [relating to the Boothby and Flynn incidents] to ensure that there is certainty and consistency in the manner in which all votes are handled.'<sup>17</sup> The AEC commented that 'the proposed amendment also reinforces the existing principle that there is a general need to ensure that ballot boxes remain unopened until they are to be opened for a lawful purpose'.<sup>18</sup>
- 2.17 The Electoral Commissioner advised the committee that the external legal advice received in relation to the incidents at Boothby and Flynn was that '... it would be prudent – and that was the phrase that was used – to exclude the ballots'.<sup>19</sup> The Commissioner went on to state however that:

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14 AEC, *Submission 3*, p. 15.

15 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 47.

16 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 49.

17 AEC, *Submission 3*, p. 16.

18 AEC, *Submission 3*, p. 16.

19 Mr Ed Killesteyn, Electoral Commissioner, AEC, *Committee Hansard*, 4 February 2013, p. 2.

...it was not necessarily clear that that was the appropriate action...The commission thought it was important for the law to be clarified rather than simply relying on prudence. In this case the suggestion was that the discretion as to whether the ballots should be included or not should be taken away from the Electoral Commission and made clear in the Act.<sup>20</sup>

2.18 The Commissioner commented further on the issue of the unlawful opening of ballot boxes stating that the Bill 'makes it clear in the Act that the ballot[s] should be excluded'.<sup>21</sup>

2.19 Electoral Reform Australia expressed concerns about the exclusion of ballots under this provision of the Bill asserting that 'the first response to any inappropriate action during the conduct of any election should be to maintain, as far as possible, the fundamental right of the voter to have their vote counted'.<sup>22</sup> Electoral Reform Australia stated:

...a better response to this issue – and one that will have an outcome more consistent with the policy of electoral inclusion – is to grant a discretion to polling officials to accept or exclude ballots from incorrectly opened ballot-boxes.<sup>23</sup>

2.20 Electoral Reform Australia submitted in relation to handling prematurely opened ballot boxes:

The prematurely opened ballot box should be resealed, kept separate and not counted. A report outlining the details of the event should be submitted by the Booth Returning Officer to the District Returning Officer for his or her consideration. Party scrutineers should be asked if they wish to submit supplementary reports and if they do these should also be included with the report to the District Returning Officer. Having assessed the incident, the Returning Officer should make a decision but should start with the presumption that ballot papers should be included rather than excluded.<sup>24</sup>

2.21 During the hearing, Electoral Reform Australia reiterated this view, commenting that 'we believe that it is a fundamental right of citizens to

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20 Mr Killesteyn, AEC, *Committee Hansard*, 4 February 2013, p. 2.

21 Mr Killesteyn, AEC, *Committee Hansard*, 4 February 2013, p. 2.

22 Electoral Reform Australia, *Submission 2*, p. [2].

23 Electoral Reform Australia, *Submission 2*, p. [2].

24 Electoral Reform Australia, *Submission 2*, p. [2].

have their vote counted and we think that the measures proposed are excessive and heavy-handed'.<sup>25</sup> Electoral Reform Australia stated:

We would prefer to see discretion given to the district returning officers to assess the problem and to address it in a manner that enables as many votes as possible to be included in the ballot paper. We think that you should start with the provision that votes should remain included before you start excluding them.<sup>26</sup>

2.22 FamilyVoice Australia also expressed concerns that the automatic exclusion of ballots 'provides an opportunity for some miscreant to exploit that situation and deliberately tamper with a box of votes that the person considers might favour their objective'.<sup>27</sup> FamilyVoice Australia stated:

...certainty is bad because certainty opens an opportunity for fraud. If someone with malicious intent knows that the votes from a particular booth are likely to favour a candidate that they do not want, they can tamper with the box and have the votes in it excluded...If you leave it to the judgment of either the DRO or the Court of Disputed Returns then that does not open a sure-fire method of fraud.<sup>28</sup>

2.23 There was further discussion of this issue at the public hearing in support of this position:

**Mrs BRONWYN BISHOP:**...if you have someone who is unscrupulous and has access to boxes of votes, and they know where a box of votes is coming from and they know that a particular polling place could be advantageous to a particular candidate – and we are in a marginal seat – by opening that box they could knock out all of those votes and totally change the outcome of that particular seat and perhaps the entire election.

That actually encourages someone, if they wish to act in a dishonest way, to tamper with the box and have those votes not counted, which can change the outcome of that seat and of an election. We are not clarifying the law; we are not making it better; we are making it worse.<sup>29</sup>

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25 Mr Stephen Lesslie, Vice President, Electoral Reform Australia, *Committee Hansard*, 4 February 2013, p. 20.

26 Mr Lesslie, Electoral Reform Australia, *Committee Hansard*, 4 February 2013, p. 20.

27 Dr David Phillips, National President, FamilyVoice Australia, *Committee Hansard*, 4 February 2013, p. 20.

28 Dr Phillips, FamilyVoice Australia, *Committee Hansard*, 4 February 2013, p. 22.

29 *Committee Hansard*, 4 February 2013, pp. 6, 8.

- 2.24 The AEC submitted in relation to affected ballot papers under this provision however that it may 'examine the ballot papers to determine whether to refer the matter to the Court of Disputed Returns if the affected votes could have changed the outcome of an election in any House of Representatives seat or a Senate result'.<sup>30</sup>
- 2.25 The Electoral Commissioner also informed the committee that 'even under this provision – if it went through – the votes might be excluded but that would not necessarily exclude further action in the Court of Disputed Returns'.<sup>31</sup>
- 2.26 The AEC notes that 'any savings provision will of necessity have the potential to delay the declaration of the poll in any Division and the associated State/Territory Senate election. The AEC stated:
- As the current practice is that all the State issued Senate writs must be returned prior to the writs to the Governor-General... such action will also delay the return of the writs for both the House of Representatives and the Senate.<sup>32</sup>
- 2.27 The AEC further stated:
- While noting the above potential delays, the AEC notes that the existing processes that are in place for dealing with reserved ballot papers after a recount (see sections 279B and 281 of the Electoral Act) may provide a useful precedent that could be adapted to provide for a savings clause. The reserved ballot papers process includes that decisions made about the formality of ballot papers are made by the relevant Australian Electoral Officer (AEO).<sup>33</sup>
- 2.28 The AEC further commented on processes for a possible savings provision, stating that:
- A possible vote savings measure could include the following elements:
- the polling official is to quarantine any prematurely opened ballot box and secure its contents;
  - the polling official is to provide a report to the DRO about what occurred including the details of any witnesses and any other relevant information;
  - the polling official is to provide the report and the prematurely opened ballot box including its contents to the DRO;

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30 AEC, *Submission 3.1*, p. [3].

31 Mr Killesteyn, AEC, *Committee Hansard*, 4 February 2013, p. 22.

32 AEC, *Submission 3.1*, p. [3].

33 AEC, *Submission 3.1*, p. [3].

- the DRO will examine the ballot box and remove the contents which are to be placed in a parcel which is to be clearly marked so as to be quarantined from other ballot papers;
- the DRO will forward the ballot box and contents to the AEO together with the polling officials report and any other relevant information;
- the AEO will consider the material forwarded by the DRO and make a decision as to whether the ballot papers (or envelopes containing declaration votes as the case may be) can be included in the scrutiny;
- the AEO must include the ballot papers or envelopes containing declaration votes in further scrutiny unless there are facts that indicate that the ballot papers contained in the prematurely opened ballot box have been fraudulently altered or otherwise interfered with so as not to reflect the voters' intentions;
- the AEO will advise all relevant candidates of the outcome of the AEO's consideration of the material forwarded by the DRO prior to the expiration of the time period for the lodging of a petition of the Court of Disputed Returns; and
- the advice of the AEO will include a separate count of the ballot papers contained in the prematurely opened ballot box and the ballot papers will be parcelled and clearly marked to be separate from the other ballot papers that have been included in scrutiny and the count.<sup>34</sup>

2.29 The AEC noted in relation to the last of these measures mentioned above that it may be 'further refined to consist of a process for votes that the AEO determines are to be included in the scrutiny, and one for those votes that are determined to be excluded from the scrutiny'. The AEC also commented that 'a vote savings provision would have to account for the possibility that ballot boxes, in certain circumstances (for example, mobile polling), may contain votes from more than one division'.<sup>35</sup>

2.30 The AEC concluded that:

The above possible savings measure provides a framework which recognises the seriousness of what has taken place by assigning to the relevant AEO the assessment and decision of whether ballots should be included in the count based on a report from the DRO, and the importance of preserving the ballot papers in a manner that is transparent and which can be used by any affected person to lodge a potential petition with the Court of Disputed Returns.<sup>36</sup>

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34 AEC, *Submission 3.1*, pp. [3]-[4].

35 AEC, *Submission 3.1*, p. [4].

36 AEC, *Submission 3.1*, p. [4].

2.31 The penalties for ballot tampering were discussed at the public hearing. The AEC informed the committee regarding the penalties in the Electoral Act for deliberate ballot box tampering that 'if it is an AEC officer, it would be a \$1,000 fine'.<sup>37</sup> The AEC further noted that 'the normal offences for AEC officers are in section 324. There are ones for tampering with votes, that is a separate penalty.'<sup>38</sup>

2.32 The AEC advised the committee that for a citizen tampering with a ballot box:

That is imprisonment for six months. That is section 339. It says:

A person shall not:

- (d) fraudulently put any ballot paper or other paper in the ballot-box; or
- (e) fraudulently take any ballot paper out of any polling booth or counting centre; or
- (g) supply ballot papers without authority; or
- (h) do an act that results in the unlawful destruction of, taking of, opening of, or interference with, ballot-boxes or ballot papers.

Penalty: Imprisonment for 6 months.<sup>39</sup>

2.33 The issue of whether the penalties for ballot box tampering by an AEC official differ from the penalties that a person outside of the AEC would face for this offence was also discussed:

**ACTING CHAIR:** The point I was trying to make was: is it a bigger offence for somebody outside of the commission to tamper with a ballot box compared with if it is by someone in the commission? What would you say – is it more serious?

**Mr Pirani:** That is a question of judgement that I will leave.

**ACTING CHAIR:** Do you have further questions on that, Mrs Bishop?

**Mrs BRONWYN BISHOP:** I do not know – I was just wondering whether you could read section 324:

A person who, being an officer, contravenes:

- (a) a provision of this Act for which no other penalties is provided ...

Well, there is another penalty provided: it is six months in jail.

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37 Mr Paul Pirani, Chief Legal Officer, AEC, *Committee Hansard*, 4 February 2013, p. 13.

38 Mr Pirani, AEC, *Committee Hansard*, 4 February 2013, p. 13.

39 Mr Pirani, AEC, *Committee Hansard*, 4 February 2013, p. 13.



**Mr Pirani:** That is an argument, Mrs Bishop. I certainly would not rule that out. If I was doing this referral to the AFP or to the DPP I would be pleading both. You are right.

**Mrs BRONWYN BISHOP:** So maybe it would be a good idea to amend the act to make it quite clear, wouldn't it?

**Mr Pirani:** To make them both the same?

**Mrs BRONWYN BISHOP:** Yes.

**Mr Pirani:** I will take that on board.<sup>40</sup>

## Conclusion

- 2.34 The Bill will remove discretion from the AEC in relation to the exclusion of ballots from scrutiny if ballot boxes are prematurely opened.
- 2.35 The committee asserted in its 2010 federal election report that there should be no savings provision if ballot boxes are opened unlawfully, whilst recognizing the seriousness of the consequences for voters who would otherwise have had their votes counted. It was the committee's opinion at that time that the focus in future elections must be to prevent such breaches from reoccurring.
- 2.36 Having carefully considered the evidence in this inquiry, the committee is now of the view that the Bill should incorporate a vote savings provision if a ballot box is opened prematurely by an official or otherwise handled unlawfully and there is no evidence of tampering with ballot papers.
- 2.37 The AEC recommended to the 2010 federal election inquiry in relation to prematurely opened ballot boxes that there be a savings provision in the event of an official error.<sup>41</sup> However, this may not prevent tampering with a ballot box in an attempt to exclude votes that may favour a particular candidate.
- 2.38 The vote savings provision in the Bill should therefore apply to the unlawful handling of a ballot box by any person. Votes should only be excluded from scrutiny if there is evidence of tampering such as the altering or removal of genuine ballots, or the addition of fraudulent ballots to a ballot box. The AEC must however reinstate ballots to the count if there is no indication that the ballot papers have been tampered with in any way.
- 2.39 The committee agrees with Electoral Reform Australia that decisions regarding a prematurely opened ballot box should start with the

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40 *Committee Hansard*, 4 February 2013, pp. 13-14.

41 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 47.

presumption that ballot papers be included rather than excluded. Electoral Reform Australia also state that a prematurely opened ballot box should be resealed, kept separate and not counted. However, the committee prefers the possible vote savings measure submitted to this inquiry by the AEC (paragraph 2.28) which provides that the votes will be counted in a separate process by the AEO. This measure will also apply to the unlawful handling of a ballot box by any person and not just an election official.

- 2.40 The elements of the possible vote savings measure proposed by the AEC should be incorporated in the Bill. This will provide an appropriate balance between the need to protect both the enfranchisement of voters and the integrity of the electoral process. The advice of the AEO that forms part of this possible vote savings measure should be provided in a timely manner.
- 2.41 The Electoral Act lacks clarity on whether the penalties faced by an electoral official who deliberately and unlawfully interferes with a ballot box or ballot papers are the same as the penalties that would be imposed on a member of the public for this offence. The Electoral Act should be amended to explicitly state that an electoral official is subject to the same penalty as any member of the public who is found guilty of tampering with a ballot box or ballot papers.

### **Recommendation 1**

- 2.42 **That the House of Representatives and the Senate pass the Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012 after introducing:**
- **a vote savings measure to the procedures to be followed if ballot boxes are opened prematurely. This vote savings measure should incorporate the elements proposed by the AEC to this inquiry and provide that ballot papers that have not been tampered with in any way must be reinstated to the count but otherwise excluded. This savings measure should apply at any stage of the scrutiny to a ballot box that has been unlawfully handled by any person; and**
  - **an amendment to the *Commonwealth Electoral Act 1918* explicitly stipulating that any electoral official who deliberately and unlawfully interferes with a ballot box or ballot papers be subject to the same penalty as any other person who commits this offence.**

## Pre-poll voting arrangements

### Background

- 2.43 The bill provides that applicants for a pre-poll ordinary vote will no longer need to complete and sign a certificate. The bill also provides that pre-poll voting cannot commence earlier than four days after the declaration of nominations for an election or by-election.<sup>42</sup> This will prevent any pre-poll voting from taking place before the Monday, 19 days before polling day.
- 2.44 These provisions implement Recommendations 10 and 11, respectively, of the committee's report on the 2010 federal election.<sup>43</sup>
- 2.45 The AEC submitted to the 2010 federal election inquiry that the practice of requiring electors to complete and sign a declaration when casting ordinary votes was an unnecessary step. The AEC suggested that removing this requirement could potentially speed up the issuing process, noting that written declarations are no longer required in a number of state and territory jurisdictions, with no issues of integrity having been reported.<sup>44</sup>
- 2.46 The AEC also recommended changing the timetable for the commencement of pre-poll voting in its submission to the 2010 federal election inquiry, citing logistical difficulties in distributing more than 43 million ballot papers along with Senate group voting ticket booklets under current arrangements.<sup>45</sup>

### Analysis

- 2.47 The 2010 federal election was the first to have pre-poll ordinary voting. The committee notes in its report on the 2010 election that despite the mishandling of pre-poll votes in Boothby and Flynn, pre-poll ordinary voting proceeded without incident in all other locations.<sup>46</sup>
- 2.48 The AEC continues to support the removal of the requirement for a pre-poll ordinary voter to complete and sign a certificate noting that:

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42 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, pp. [8]-[9].

43 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 50.

44 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 48.

45 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 48.

46 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 48.

... [this] will speed up the vote issuing process and provide efficiencies in polling place management. The AEC is of the view that electoral integrity is not impacted by removing the requirement to sign a pre-poll certificate.<sup>47</sup>

2.49 The AEC further states that 'this proposed amendment would align the Commonwealth with a number of state and territory jurisdictions which require only a verbal declaration of entitlement rather than a signed certificate.'<sup>48</sup>

2.50 FamilyVoice Australia expresses concerns with the provision to remove pre-poll certificates asserting that 'pre-poll ordinary voting has so far only been used at one federal election so it is premature to vary the procedures without good reason.'<sup>49</sup> FamilyVoice Australia stated:

The Australian Electoral Commission's view that requiring a voter to sign a declaration that they are entitled to a pre-poll vote is "unnecessary" is not persuasive. Dispensing with the requirement for pre-poll voters to sign a certificate confirming their entitlement to a pre-poll vote, could encourage other voters to misuse this option for trivial reasons, such as avoiding queues on polling day.<sup>50</sup>

2.51 On the provision of the Bill that moves the commencement date for pre-poll voting back by one day, the AEC comments that this 'provides an appropriate balance between ensuring reasonable timeframes for the logistics of ballot paper production, and providing timely and convenient early voting facilities for qualified electors'.<sup>51</sup> The AEC stated:

...these amendments provide for processes that are both administratively sound and elector-centric in nature, and appropriately accommodate the potential for increasing elector reliance on pre-polling arrangements.<sup>52</sup>

2.52 The Electoral Commissioner informed the committee in relation to this amendment that:

This is simply adding a day before the commencement of the polling period to reflect the fact that we are now in a position where, from the close of nominations on Thursday through to the

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47 AEC, *Submission 3*, p. 9.

48 AEC, *Submission 3*, p. 9.

49 FamilyVoice Australia, *Submission 1*, p. 2.

50 FamilyVoice Australia, *Submission 1*, p. 2.

51 AEC, *Submission 3*, p. 11.

52 AEC, *Submission 3*, pp. 11-12.

first opening of polling, we have to print millions of ballot papers and get them distributed to pre-poll centres. This is simply about giving us that extra day. The number of ballot papers being printed is increasing every election.<sup>53</sup>

- 2.53 FamilyVoice Australia argues however that ‘this timetable is impractical as it does not allow sufficient time for the printing of ballot papers’.<sup>54</sup> FamilyVoice Australia asserts that:

Election timetables can vary such that the period between the declaration of nominations and polling day can be as short as 22 days or as long as 30 days.<sup>55</sup>

The Opposition recommendation that applications for a pre-poll vote open no sooner than 12 days prior to polling day is appropriate.<sup>56</sup>

## Conclusion

- 2.54 The removal of the requirement for a pre-poll ordinary voter to complete and sign a certificate was recommended by the committee in its 2010 federal election report and continues to be supported by the committee. The committee agrees with the AEC that this amendment will improve efficiencies in polling place management and not impact on electoral integrity.
- 2.55 The requirement in the Bill that the earliest time at which pre-poll voting can commence be the Monday, 19 days before polling day, is also an appropriate provision that the AEC supports and was recommended by the committee in its 2010 federal election report.

## Use of taxpayer information

### Background

- 2.56 The Bill amends the Taxation Administration Act to allow the Commissioner of Taxation and other taxation officers to provide some forms of taxpayer information to the Australian Electoral Commission for the purposes of administering the Electoral Act and Referendum Act.

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53 Mr Killesteyn, AEC, *Committee Hansard*, 4 February 2013, p. 14.

54 FamilyVoice Australia, *Submission 1*, p. 2.

55 FamilyVoice Australia, *Submission 1*, p. 2.

56 FamilyVoice Australia, *Submission 1*, p. 3.

- 2.57 Subject to a range of specific exceptions to facilitate efficient and effective government administration and law enforcement, it is an offence for taxation officers to record or disclose protected information.
- 2.58 Item 53 of the Bill introduces an exception that will allow the ATO to provide otherwise protected information (such as the names and addresses of taxpayers) to the AEC to maintain the veracity of the electoral roll. However, this exception will not apply to information collected by the ATO before this provision comes into effect.
- 2.59 The EM states that:
- Item 53 gives effect to recent amendments to the Electoral Act that enable the Electoral Commissioner to directly update or transfer a person's enrolment without claim or notice from the person and to enrol an unenrolled person without claim or notice from the person (sections 103A and 103B).<sup>57</sup>
- 2.60 The committee states in its 2010 federal election report that 'if the ATO were permitted to share enrolment relevant data with the AEC it would provide a genuine and lasting improvement to roll maintenance processes and roll integrity.'<sup>58</sup>

## Analysis

- 2.61 The AEC reiterated in its submission to this inquiry that 'some 1.5 million, or nine per cent, of eligible electors are not enrolled to vote. Approximately one-third of these missing electors are 18 to 25 years of age.'<sup>59</sup> The AEC states that:
- ...the administrative practices used to maintain the roll have evolved over time, as permitted by technology and legislative change.<sup>60</sup>
- The proposed changes to the Taxation Administration Act identified in this Bill at item 53 will simply add the Electoral Commissioner to the list of Commonwealth and State agency heads who are able to receive what would otherwise be protected

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57 Explanatory Memorandum, Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, p. [4].

58 Joint Standing Committee on Electoral Matters, *The 2010 Federal Election: Report on the conduct of the election and related matters*, 2011, p. 36.

59 AEC, *Submission 3*, p. 4.

60 AEC, *Submission 3*, p. 4.

- information, such as the names and addresses of taxpayers, for the purpose of administering the Electoral Act and Referendum Act.<sup>61</sup>
- 2.62 The Electoral Commissioner commented to the committee that the 'AEC is very sensitive to the fact that the tax information and the secrecy provisions have been in place for a significant amount of time, but when you look at the history of the secrecy provisions, you see that over time a number of other agencies have been provided with access to that data.'<sup>62</sup>
- 2.63 The Commissioner further noted that this measure '...is not a novel proposition'<sup>63</sup>, commenting that:
- ... the privacy statement on the tax file number application already lists Centrelink, the Australian Federal Police, the Child Support Agency, the Department of Veterans' Affairs, the Department of Immigration and Citizenship, the Department of Families, Housing, Community Services and Indigenous Affairs and the Department of Education, Employment and Workplace Relations as agencies that are already in receipt of information from the Australian Taxation Office.<sup>64</sup>
- 2.64 The Electoral Commissioner further commented that the taxpayer information that will be utilised by the AEC under this arrangement 'would be limited to information dealing with the identity of the individual, their citizenship, their age and their residential address for the purposes of enrolment'.<sup>65</sup>
- 2.65 The AEC also states in relation to this provision that 'the form of the amendment was discussed in detail and agreed with the ATO and the Treasury'.<sup>66</sup> The AEC asserts that it:
- ...will continue to work with the ATO with a view to being ready to implement the measures proposed in the Bill, and develop further agreements covering the proposed arrangements for agency-specific issues including the collection, use, transfer and storage of personal information.<sup>67</sup>
- 2.66 The Electoral Commissioner noted that 'the arrangements that we are currently discussing with the Tax Office are about...merging the process

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61 AEC, *Submission 3*, p. 6.

62 Mr Killesteyn, AEC, *Committee Hansard*, 4 February 2013, p. 4.

63 Mr Killesteyn, AEC, *Committee Hansard*, 4 February 2013, p. 4.

64 Mr Killesteyn, AEC, *Committee Hansard*, 4 February 2013, p. 18.

65 Mr Killesteyn, AEC, *Committee Hansard*, 4 February 2013, p. 18.

66 AEC, *Submission 3*, p. 6.

67 AEC, *Submission 3*, p. 7.

for tax file applications with the process for applying for enrolment'.<sup>68</sup> The Commissioner stated:

This seems to us to make incredible sense in that you bring together two government processes into a single process and thereby minimise the inconvenience for citizens in the way in which they transact business with government.<sup>69</sup>

2.67 The AEC further submits that:

...using information collected by the ATO for the purposes of maintaining the roll will improve two key integrity elements of the electoral roll, accuracy and completeness, by:

- assisting eligible electors to be on the roll;
- assisting electors to maintain enrolment at a correct address;
- updating enrolment details in a more timely manner; and
- reducing objection action to remove electors from the roll when a new address is known for them.<sup>70</sup>

2.68 FamilyVoice Australia opposes the use of taxpayer information by the AEC stating:

Opposition members in their dissenting report on the 2010 federal election raised several valid concerns about automatic enrolment using data collected by other government agencies for unrelated purposes, including:

- The findings of a 1999 report by the House of Representatives Standing Committee on Economics, Finance and Public Administration: Numbers on the Run – Review of the ANAO Report No.37 1998-99 on the Management of Tax File Numbers, that there were 3.2 million more Tax File Numbers than people in Australia at the last census; there were 185,000 potential duplicate tax records for individuals; and 62 per cent of deceased clients were not recorded as deceased in a sample match.
- The current 'paper trail' that sees electors initiate enrolment with a signed form provides a unique security feature to address any questions regarding roll integrity. The placement of people on the roll automatically will undermine this important element of roll integrity.
- Given the relatively light identification requirements present in the Australian electoral system, removing this security feature

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68 Mr Killesteyn, AEC, *Committee Hansard*, 4 February 2013, p. 4.

69 Mr Killesteyn, AEC, *Committee Hansard*, 4 February 2013, p. 4.

70 AEC, *Submission 3*, p. 7.



only weakens one of the few critical protections for the integrity of the roll and its policing.<sup>71</sup>

2.69 Concerns with this provision were also expressed at the public hearing:

**Mrs BRONWYN BISHOP:**...we in the opposition made clear all the way through that we are absolutely opposed to [access to Australian Tax Office information] which the government has always favoured along with automatic enrolment... we know how wrong the data from the Tax Office can be.

The fact of the matter is that tax records are not accurate, and you are proposing to use material that will come to you to put people onto the roll. I simply reiterate the argument we have used all along: that you are in fact putting the integrity of the roll at risk. If you can't trust the roll, you can't have a properly acting democracy.<sup>72</sup>

2.70 The Electoral Commissioner expressed confidence in the integrity of the taxpayer information that would be used for the purposes of enrolment asserting that:

If you look at the tax file number application, and I will quote here, you need 'three documents, one of which must be a primary document' and then the description of 'primary documents' says that this includes an Australian full birth certificate – a birth certificate extract is not acceptable – or an Australian passport, or an Australian citizenship certificate or extract from the register of citizen by descent – and they are original documents. So the level of identity proof that is being used to establish the identity is higher, as I said, than what we use. It is on that basis that all of the boxes are ticked in terms of a person's entitlement to enrolment.<sup>73</sup>

2.71 The AEC further advised the committee that any direct enrolment involves a 'matching and integrity checking' process:

Data from other government sources with strict evidence of identity requirements [are] matched against the electoral roll to identify potential electors who are not on the roll or whose enrolled address is not accurate. Matching is done using a specialist information technology system, in the main, and in cases where a precise match cannot be made there is intervention by a trained AEC staff member. Under direct enrolment and update, all

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71 FamilyVoice Australia, *Submission 1*, pp. 3-4.

72 *Committee Hansard*, 4 February 2013, pp. 3-4.

73 Mr Killesteyn, AEC, *Committee Hansard*, 4 February 2013, p. 5.

of the standard matching and integrity business rules as used in the AEC's CRU mail review program are applied.<sup>74</sup>

2.72 In addition, the AEC advises in relation to direct enrolment:

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

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

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

- ensuring that the address provided is one contained on the AEC's Address Register, or can be verified and therefore added to the Address Register;
- ensuring that the address for mailing has reliable mail delivery; and
- removing individuals who have features which are incompatible with direct enrolment and address update.<sup>75</sup>

## Conclusion

2.73 The committee maintains the view it expressed in its 2010 federal election report that the ATO should be permitted to provide relevant data to the AEC for the purposes of facilitating enrolment. This is a logical extension of existing continuous roll update processes and direct enrolment using third party information which the committee has supported in previous bill inquiries. In addition, these proposed amendments have been discussed and agreed with the ATO and the Treasury.

2.74 The Electoral Commissioner outlined to the committee that a number of government agencies have access to data from the ATO and provided examples. The list of government entities that can receive protected information from taxation officers for specific purposes (defined in Section 355 of the Taxation Administration Act) includes, but is not limited to:

- the Health Secretary
  - the Education Secretary
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74 AEC, *Submission 3.2*, Answer to Question on Notice, p. 6.

75 AEC, *Submission 3.2*, Answer to Question on Notice, p. 7.

- the Repatriation Commission
- the Child Support Registrar
- the Superannuation Complaints Tribunal
- the Australian Prudential Regulation Authority
- the Australian Securities and Investments Commission
- the Secretary of the Department of the Treasury
- a State taxation officer, or a Territory taxation officer
- the Development Allowance Authority
- the Defence Secretary
- an authority of a State or Territory that administers a workers' compensation law
- the Environment Secretary
- the Clean Energy Regulator
- the Australian Statistician
- the Chief Executive Officer of Customs
- the Immigration Secretary
- the Fair Work Ombudsman
- the Attorney-General of a State or Territory.<sup>76</sup>

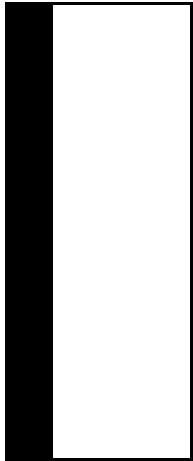
2.75 The addition of the AEC to this list for the specific purpose of maintaining the veracity of the electoral roll is appropriate and will not undermine roll integrity.

**Daryl Melham MP**  
**Chair**  
**26 February 2013**

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<sup>76</sup> *Taxation Administration Act 1953*, s. 355.





**Dissenting report – The Hon Bronwyn Bishop  
MP, The Hon Alex Somlyay MP,  
Senator Scott Ryan and Senator Simon  
Birmingham**

## **Joint Standing Committee on Electoral Matters**

### *Dissenting Report – Advisory Report on the Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012*

#### **Introduction**

The Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012 was introduced by the Government to implement recommendations 3, 9, 10, 11, 15, 29 and 30 of the *The Federal Election 2010: Report on the conduct of the election and other related matters*.

Recommendations 9, 15, 29 and 30 were supported unanimously by both Government and the Opposition members.

Recommendations 3, 10 and 11 were opposed by the Opposition members.

The Selection Committee referred this Bill to the Joint Standing Committee on Electoral Matters (JSCEM) for further scrutiny, following its introduction into the House of Representatives on the 29<sup>th</sup> of November 2012 by the Selection Committee.

**This Bill moves to implement recommendations 3, 10 and 11. The Opposition remains opposed to these measures, as set out below:**

#### **Schedule 1, Part 1, Taxation Administration Act 1953**

This measure is in response to recommendation 3 of the Government Members majority report of the *Federal Election 2010: Report on the conduct on the conduct of the election and other related matters*. It will enact legislative changes to the Taxation Administration Act, which governs the protection of personal data collected by the Australian Taxation Office (ATO). This change will allow the ATO to provide personal information and data to the Australian Electoral Commission (AEC) for the purposes of automatic enrolment.

The Opposition remains strongly opposed and previously voted against automatic enrolment by the AEC and have also raised objections in previous JSCEM inquiries. Furthermore we are opposed to the ATO being able to disclose tax-payers currently protected personal data.

This is consistent with our position in *The Federal Election 2010: Report on the conduct of the election and other related matters – Dissenting Report*.

The Coalition is concerned that this bill will allow the Commissioner of Taxation to provide personal information on individual tax-payers which will allow voters to be added to the electoral roll, with-out any due process.

The ATO have always claimed that it maintains the highest level of confidentiality when it comes to tax-payers personal information. This Bill intends to amend the Tax Act to allow personal data to be given to the AEC for the purposes of automatic enrolment and Coalition believes that this would constitute a breach of faith with the Australian people.

The Coalition has previously stated that Automatic Enrolment Legislation will severely damage and question the integrity of the Electoral Roll. It has always been an elector's individual responsibility to enrol to vote, notify the AEC of any change to address and then to vote at elections. These are not onerous responsibilities and the Opposition believes it should remain with the individual elector, not the Australian Electoral Commission. Coalition Members and Senators have consistently made this point since the JSCEM 2007 Federal Election Inquiry and highlighted this point more recently in the JSCEM inquiry into the Electoral Amendment (Protecting Elector Participation) Bill 2012.

The reliance on external data sources that have been collated and that are utilised for other purposes does not make them fit for use in forming the electoral roll.

As outlined in the previous report into these proposals, a 1999 report by the House of Representatives Standing Committee on Economics, Finance and Public Administration: *Numbers on the Run – Review of the ANAO Report No.37 1998-99 on the Management of Tax File Numbers*, found that:

- There were 3.2 million more Tax File Numbers than people in Australia at the relevant census;
- There were 185,000 potential duplicate tax records for individuals; 62 per cent of deceased clients were not recorded as deceased in a sample match.

Similarly, an ANAO Audit Report (No.24 2004–05 Integrity of Medicare Enrolment Data) stated that ‘ANAO found that up to half a million active Medicare enrolment records were probably for people who are deceased’.<sup>1</sup>

In simple terms, where there are such examples of inconsistency in Commonwealth data, there cannot be sufficient faith in this data being used to automatically add people to the electoral roll.

The potential for error is even greater when using data from state or territory governments, as the Commonwealth cannot determine its accuracy and the relevant agencies are outside the scope of oversight by Commonwealth Parliament or Auditor-General.

The current ‘paper trail’ that sees electors initiate enrolment with a signed form provides a unique security feature to address any questions regarding roll integrity. The placement of people on the roll automatically will undermine this important element of roll integrity.

Given that there is neither consent nor a signature required for automatic enrolment, it is doubtful that someone could be pursued for false enrolment or other aspects of electoral fraud.

Furthermore, given the relatively light identification requirements present in the Australian electoral system, removing this security feature only weakens one of the few critical protections for the integrity of the roll and its policing.

Given that it is not uncommon for individual electorate results to be determined by less than 1000 votes, even a 1 per cent error in the information sourced from the various agencies could have significant ramifications for the outcome of a seat, or even an election.

This is not to suggest that current processes cannot be refined and updated, but a move away from an individual enrolling on his or her own initiative in compliance with electoral legislation to a situation where the state can enrol a person of its own accord represents a drastic and dramatic change in our enrolment processes.

The AEC has previously submitted that the declining enrolment rate is partly due to the out-dated and overly prescriptive enrolment procedures and requirements. If this concern is to be taken at face value, then this is a reason to reconsider some of these practices – it does not justify a movement away from individual registration to automatic enrolment.

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<sup>1</sup> Australian National Audit Office, *Integrity of Medicare Enrolment Data No. 24 2004-05*, p. 12.



Despite the fact that the government majority report recommends that the power to declare data sources as ‘trusted’ be given to the AEC, Opposition Members and Senators do not believe this addresses this problem in its entirety.

We are concerned that the power to deem data sources ‘trusted’ in determining the use of such data in compiling the roll is a risk to the roll.

The inclusion of such data, if erroneous, would be extremely damaging to public faith in our electoral process. Furthermore, the inclusion of such data may well be controversial due to lack of faith in its inclusion or utilisation.

Placing the Electoral Commissioner at the heart of such a potentially politically charged dispute can only damage the standing of the office and the AEC.

The Opposition remains opposed to automatic enrolment and the provision within this Bill which provides for the Australian Taxation Office to release taxpayers personal data for the purpose of automatic enrolment.

### **Schedule 1, Part 1, Amendments – Negate requirement to have a signed certificate for a pre-poll ordinary vote**

This measure aims to implement recommendation 10 of the JSCEM Report into the 2010 election and will remove the requirement under the Electoral Act and Referendum Act for an applicant for a pre-poll ordinary vote to complete and sign a certificate.

The Opposition recommends that electors continue to be required to sign a declaration when casting a pre poll vote. Previously the opposition has highlighted concerns about fraudulent and multiple voting in elections and strongly believes that that it is not an onerous task to provide a signature for a declaration pre-poll vote.

The Coalition strongly believes that there is one election day, that being polling day and that pre-poll only exists to assist those who are unable to vote on polling day due to work or travel commitments or health concerns. It is for that reason pre-poll votes should still require a signed certificate as is presently provided for.

### **Schedule 1, Part 1, Amendments – Opening of pre-polling before election day**

The provision in this Bill will move to adopt recommendation 11 of the government majority JSCEM Report into the 2010 election, which provides that pre-poll voting cannot commence earlier than 4 days after the date fixed for declaration of nominations for any type of election or by-election.

The Opposition recommends that pre-poll voting be open 12 days before the election.

Opposition members believe that pre-poll voting should not open until the Monday 12 days before polling day, as opposed to the Monday 19 days before polling day as recommended by the Government members on the Committee in the Report on *The 2010 Federal Election: Report on the conduct of the election and related matter*. This would ensure that electors are still given ample time to cast a pre-poll vote prior to election day should they need to.

The Opposition members are concerned that allowing pre-poll voting for 19 days prior to Election Day takes the focus of polling day itself, which is where the overwhelming majority of votes should be cast. By having pre-poll 12 days before polling day this will also ensure that the AEC has sufficient time to accept nominations and check all details before printing ballot papers.

Opposition Committee members therefore oppose this measure.

### **Schedule 1, Part 1, Amendments - excluding of votes contained within a prematurely opened ballot box.**

The Bill requires that when ballot boxes are opened prematurely that the box is removed from scrutiny. The Opposition is opposed to this measure as it currently stands. The Coalition does not believe that because a ballot box has been opened it should be automatically assumed that the ballots have been tampered with and therefore excluded from the scrutiny as this provision enacts.

Rather the Opposition recommends the proposal of the *Electoral Reform Australia, The New South Wales Branch of the Proportional Representation*

*Society of Australia*, who provided a written submission for and participated in the public hearing round table of February 4<sup>th</sup> 2013. Their submission states that instead of removing the votes from scrutiny that there should be a discretion given in the following terms

*“To grant discretion to polling officials to accept or exclude ballots from incorrectly opened ballot-boxes.*

*...and*

*Having assessed the incident, the Returning Officer should make a decision but should start with the presumption that ballot papers should be included rather than excluded.”<sup>2</sup>*

During the JSCEM inquiry the Shadow Special Minister of State did enquire as to whether or not the correct training process had taken place in ensuring that all Returning Officers had received appropriate training, the Electoral Commissioner did not have the information readily available and requested to take this question on notice and report back to the Committee.<sup>3</sup> The Commissioner went on to further explain that the recommendations of the Gray Report on the opening of the ballot boxes had been implemented.

It is for that reason the Opposition questions the need for the provision in the Bill to automatically exclude any ballots particularly as the status of pre poll votes had changed in the lead up to the 2010 election, and given that the booth Returning Officers who had mistakenly opened the ballot boxes were experienced but not adequately advised by the AEC as to the change in status of pre poll votes from Declaration votes to Ordinary votes with the consequence that the ballot boxes cannot be opened until after the close of polling.

The Bill also neglects to deal with an instance where ballot boxes are deliberately tampered with, by way of deliberate sabotage, in order to have those votes within those ballot boxes excluded from scrutiny. In some

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<sup>2</sup> Submission 2, JSCEM Inquiry into the Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012 *Electoral Reform Australia The New South Wales Branch of the Proportional Representation Society of Australia*.

<sup>3</sup> Transcript JSCEM Inquiry into the Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012, Monday 4<sup>th</sup> February 2013

instances this may alter the outcome of the electorate result and therefore could affect the outcome of the election.

We note that Government members have recommended that there be a savings provision for ballots contained in a box which is prematurely opened but does not provide adequately for the counting of those ballots.

We believe all ballots must be counted at the preliminary scrutiny in the polling place, even if subsequently excluded from the scrutiny, so as to enable a proper judgement to be made as to whether an appeal to the Court of Disputed Returns is to be properly considered.

It will also allow a correct tally to be made on the night of ballot papers issued and ballot papers cast.

It would also enshrine the principle that citizens have the right to have their vote counted where the error is not theirs.

The AEC in the 2010 Election sought advice from the Australian Government Solicitor as to whether ballots contained in a box of pre poll votes which were opened prematurely should be excluded from the scrutiny. The AGS in its summary of advice stated:

“In the present circumstances, we consider that the better course of action is not to include the ballot papers in the count and to quarantine those papers (although for the reasons we discuss below, it is possible that a court might take a different view).”

The advice further stated that in the case of *Mitchell v Bailey (No2)* (2008) 169 FCR 529 the court had held “a ballot paper must be included in the count if it is a formal vote. For example, Tracey J said (at 537)

If a ballot paper is not informal the office conducting the scrutiny will have no legal basis for rejecting it. An implied obligation to admit such a ballot-paper to the count thereby arises. Once admitted it is to be counted”

They further said

“The validity of the ballot papers can be considered by the Court of Disputed Returns and Part XXII specially envisages that the Court of Disputed Returns will consider errors made by electoral officials in this process (s 365)”

It is to be noted that in the case of Boothby and indeed the seat of Flynn, where a similar incident occurred, that it was known that excluding these ballots would make no difference to the outcome the declaration of the poll.

The Coalition is pleased that agreement was reached with Government Members to express the need to insert into the Electoral Act savings provisions for ballot papers contained in a prematurely opened box. However disagreement remains as to when and how the ballot papers should be counted.

For the reasons set out above, the Coalition believes for the purposes of clarity, amendments should be moved to the Bill in the following terms:

Schedule 1, item 24, page 6 (lines 15 to 27), omit subsections 238B(2) to (4), substitute:

- (2) The most senior officer at the polling place must:
  - (a) separate the ballot-box, and keep it separate, from other ballot-boxes at the place; and
  - (b) as soon as practicable after the closing of the poll, cause a scrutiny of the ballot-papers contained in the ballot-box to be conducted in accordance with subsection (3); and
  - (c) as soon as practicable after that scrutiny:
    - (i) prepare a report setting out the circumstances of the premature opening of the ballot-box and any other matters the officer considers relevant; and
    - (ii) invite any scrutineers undertaking duties at the place to prepare reports about the circumstances of the premature opening and any other matters the scrutineer considers relevant; and
  - (d) as soon as practicable after the reports are prepared, forward the parcels made up in accordance with subsection (3), together with the officer’s report and any scrutineers’ reports, to the Divisional Returning Officer for the Division.
- (3) The scrutiny referred to in paragraph (2)(b) is to be conducted in accordance with subsection 273(2), 273A(2) or 274(2) (whichever applies), with the following modifications:
  - (a) the parcels of ballot-papers are to be labelled in way that clearly shows that this section applies to the ballot-papers in the parcel; and
  - (b) the parcels are to be kept separate from all other parcels at the polling place; and
  - (c) the parcels are to be transmitted to the Divisional Returning Officer only in accordance with subsection (2) of this section.
- (4) The Divisional Returning Officer must consider the reports and decide whether the ballot papers contained in the box are to be excluded from scrutiny under Part XVIII.

- (5) The Divisional Returning Officer is to decide that the ballot papers are not to be excluded unless there are strong reasons to decide otherwise.

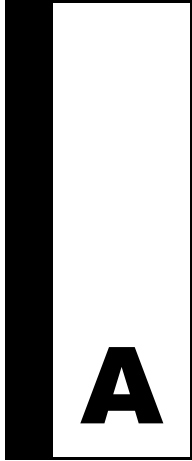
Similar provisions should be inserted to amend the *Referendum (Machinery Provisions) Act 1984*.

**The Hon. Alex Somlyay MP**  
**Deputy Chair**

**The Hon. Bronwyn Bishop MP**

**Senator Scott Ryan**

**Senator Simon Birmingham**



## **Appendix A – Submissions**

### **Submissions**

No.

- 1 FamilyVoice Australia
- 2 Electoral Reform Australia
- 3 Australian Electoral Commission
- 3.1 Australian Electoral Commission
- 3.2 Australian Electoral Commission







## **Appendix B – Hearing and Witnesses**

**Monday, 4 February 2013—Canberra**

**Australian Electoral Commission**

Mr Ed Killesteyn, Electoral Commissioner

Mr Thomas Rogers, Deputy Commissioner

Mr Paul Pirani, Chief Legal Officer

Ms Marie Neilson, Assistant Commissioner, Elections Branch

Mr Andrew Gately, Assistant Commissioner Roll Management

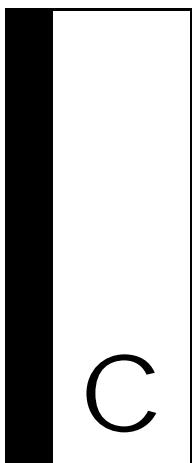
**FamilyVoice Australia**

Dr David Phillips, National President

**Electoral Reform Australia**

Mr Stephen Lesslie, Vice President





## Appendix C – Report on irregularities relating to the opening of ballot boxes at certain Pre-poll Voting Offices in the Divisions of Boothby and Flynn

### Background

On 2 September, 2010, I was formally requested by the Electoral Commissioner, Mr Ed Killesteyn, to undertake an urgent examination into the circumstances that led to the exclusion of pre-poll ordinary votes taken at Pre-Poll Voting Offices (PPVOs) at Oaklands Park in the Division of Boothby in South Australia and at Blackwater in the Division of Flynn in Queensland. The PPVO located at Emerald, also in the Division of Flynn, was added to the list on 6 September, 2010.

I was asked to report to the Electoral Commissioner on three specific matters:

1. To make findings on what factors may have contributed to the handling of the ballot papers and ballot boxes that contained pre-poll ordinary votes;
2. To recommend what changes could be made in the future to reduce the risk of similar incidents occurring in future elections; and
3. To recommend any other actions that I might regard as being necessary or prudent.

### Methodology

I interviewed, on a face to face basis, the Officer in Charge (OIC) of the Oaklands Park PPVO and his staff on Monday 6 September in Adelaide. I also interviewed the Divisional Returning Officer (DRO) for Boothby and other Divisional Office staff, in addition to the Australian Electoral Officer, South Australia and relevant Australian Electoral Commission (AEC) State Office personnel.

I also conducted separate phone interviews with the scrutineers representing the Australian Labor Party (ALP) candidate and the Liberal Party of Australia

(Liberal) candidate who had been present at the Boothby scrutiny centre and observed the count of the House of Representatives ballot papers from the Oaklands Park PPVO.

I interviewed the Australian Electoral Officer, Queensland and relevant staff of the AEC State Office in Brisbane on 9 September.

I interviewed the DRO Flynn along with a temporary officer from the Flynn Divisional Office in Rockhampton on 9 September.

I interviewed on a face to face basis, the OIC of the Emerald PPVO at the Court House in Emerald on Friday 10 September.

I also interviewed on a face to face basis, the OIC of the Blackwater PPVO on Friday 10 September at the Blackwater Court House.

## Legislative Changes

Division 3 of Part XVA of the *Commonwealth Electoral Act 1918* (the Electoral Act) commenced operation on 14 July, 2010 and was inserted by Schedule 1 to the *Electoral and Referendum Amendment (Pre-poll Voting and Other Measures) Act 2010*. These provisions enabled a voter who qualified for a pre-poll vote under Schedule 2 to the Electoral Act, to cast their ballot papers as ordinary votes in their home Division. Ordinary votes are the same as those taken at a static polling place on Polling Day. They are distinct from declaration votes where once the voter has filled out a ballot paper it is inserted into an envelope and the closed envelope is placed in a sealed ballot box. Prior to the amendments, declaration votes were the only votes that could be taken at a PPVO.

The 2010 election was the first time that ordinary votes were taken at PPVOs and the requirements of the Electoral Act in relation to the security and management of the ordinary ballot papers and of the ballot boxes were different to those that applied in relation to PPVOs at previous elections.

## Ballot Boxes containing Ordinary votes

Subdivision C of Division 3 of Part XVA of the Electoral Act sets out the requirements that must be complied with in relation to each ballot box used for pre-poll ordinary voting (pre-poll ordinary ballot boxes).

Section 200DO of the Electoral Act provides for a ballot box used for the first time to be exhibited empty by a voting officer, in the presence of scrutineers, and then for its cover to be securely fastened.

Subsection 200DP(1) requires a ballot box to be closed, fastened and sealed at the close of polling each night.

Importantly, subsection 200DP(2) states that once a ballot box has been closed, fastened and sealed it '**must on no account be opened except as allowed by this Act**'.

Section 200DQ of the Electoral Act provides for a pre-poll ordinary ballot box that is not full to be used on a subsequent day of polling. The ballot box may be made ready to receive ballot papers in the presence of any scrutineers. This provision does not, however, provide an authority for the voting officer to open the ballot box, but only the flap necessary to allow the ballot papers to be inserted in the ballot box.

Section 200DR provides that at the close of the poll, or before on the instruction of the DRO, each sealed pre-poll ordinary ballot box must be forwarded for the purposes of scrutiny.

In summary, while a pre-poll ordinary ballot box that is not full may be used on a subsequent day of polling, the ballot box is only made ready to receive additional votes by the opening of the flap through which ballots can be inserted. There is no provision under the Electoral Act which would authorise the opening of a pre-poll ordinary ballot box at a PPVO before the close of the poll. The wording of subsection 200DP(2) and in particular the words 'on no account' is a strong indication that the Parliament considered compliance with this requirement to be crucial and one that must be observed.

## Oaklands Park PPVO

The Oaklands Park PPVO was open to the public from 2-6 August, 9-14 August and from 16-20 August 2010.

The OIC was an experienced temporary polling official who had participated in a variety of elections at a federal and state level dating back to before 1998.

The OIC stated that two small plastic ballot boxes (one for House of Representatives and one for the Senate) had been provided for the public to use to deposit their ordinary votes on a daily basis at the PPVO.

The OIC confirmed that after the close of polling each day and after all public access was locked at the Marion Council Chambers, he opened the small ballot boxes containing ordinary ballot papers in the presence of at least one of the Oaklands Park pre-poll voting officers. Once the seals were broken and the details recorded and witnessed in the OIC return, the contents of the two smaller ballot boxes containing the House of Representative and Senate ballot papers were amalgamated into two larger plastic ballot boxes, one for the House of Representatives ballot papers and the other for the Senate ballot papers. These larger ballot boxes were located in a secure room within the PPVO. After the

“amalgamation of papers” had taken place, seals were replaced on all the ballot boxes containing ordinary ballot papers and recorded on the OIC return.

The Oaklands Park PPVO *Record of Ballot boxes and security seals* records that the ballot boxes containing ordinary votes for both the House of Representatives and the Senate were opened at the conclusion of each day. The reason given on the Record sheet was “End of day amalgamation of papers”.

On 21 August, 2010, the two large plastic ballot boxes were brought to the Boothby scrutiny centre at the Mitsubishi Canteen in Clovelly Park. These boxes contained all the ordinary ballot papers received at the Oaklands Park PPVO up to 6.00pm on 20 August 2010. One box contained 2,977 House of Representatives ballot papers and the other contained 2,980 Senate ballot papers.

At around 8.15pm on Saturday 21 August, the seals of the large ballot box containing the House of Representatives ballot papers were broken so that the scrutiny of the House Representatives ballot papers could commence. The ballot papers were emptied onto a table, sorted and the House of Representatives count for the Oaklands Park PPVO conducted. This process was observed by at least two scrutineers, one representing the ALP candidate and the other, the Liberal candidate

According to the duly appointed Scrutineer for the ALP candidate, he observed that the House of Representatives ballot papers contained in the large plastic ballot box, which was semi-transparent, were all stacked and flat unlike other ballot boxes where the contents were very disordered and jumbled. He claims to have raised this with the other scrutineer, who was appointed by the Liberal candidate. Both scrutineers were unsure of the import of what they had observed and the matter was not taken any further. They did not challenge the validity of the votes being counted.

According to the ALP scrutineer, he continued to worry about the votes received from the Oaklands Park PPVO and raised the matter with ALP personnel on Monday 23 August, following the count. This in turn led to a representation being made on the same day by the State Secretary of the ALP, to the Australian Electoral Officer (AEO), South Australia, , seeking an explanation.

The AEO sought a report from the DRO Boothby on 24 August which led to the discovery of the irregular opening of the ballot boxes by the OIC of the Oaklands Park PPVO.

The AEO then notified the Electoral Commissioner, who requested urgent legal advising from the Australian Government Solicitor on 25 August, 2010. Based on the legal advice he received, the Electoral Commissioner made a public statement on 31 August indicating that the pre-poll ordinary votes cast for the House of Representatives at the Oaklands Park PPVO would not be included in the count.

In his statement, the Electoral Commissioner confirmed that the exclusion of the votes “does not change the candidate who is currently leading the Two Candidate Preferred (TCP) vote count in Boothby, but serves to reduce his lead by 339 votes.” The statement also indicated that the exclusion of these votes would not affect the progress, or finalisation, of the count in Boothby.

## Contributing factors

The OIC of the Oaklands Park PPVO confirmed that he had initiated the practice of opening the ballot boxes to permit the transfer of ballot papers from the small ballot boxes used by the public and which were full after each day, to the larger ballot boxes stored in a secure room located at the back of the PPVO. The small ballot boxes, once emptied, were then used the following day.

He also indicated that he used the opening of the ballot boxes to conduct a daily reconciliation of ballot papers against the stubs of the ballot papers issued. The OIC maintained a detailed spread sheet of his own design which he said enabled him to provide an ongoing detailed record of the number of ordinary ballot papers and the various categories of declaration votes issued at his PPVO. He described himself as an obsessive compulsive when it came to the reconciliation of ballot papers and prided himself on the systems he had developed to enable detailed reconciliation of all relevant materials, including ballot papers that were under his care.

The OIC claimed to have been unaware that the opening of the pre-poll ordinary vote ballot boxes at a PPVO prior to the close of the poll was prohibited by the Electoral Act. He also claimed to have no recollection of the changes to procedures relating to the taking of ordinary votes at a PPVO which were canvassed in the AEC training materials issued prior to the election. The record held by the DRO Boothby shows that the OIC received the hard copy version of the AEC assessment workbook on Friday 30 July, at a training session he attended. The AEC Checkpoint on line training facility shows that the OIC did not complete all the training modules until 5 August, 3 days after the opening of the PPVO. The record does show, however, that he obtained a rating of 95% on the pre-poll ordinary vote module which he completed on 29 July, 4 days prior to the opening of the PPVO.

The OIC said that he had been shocked when he learnt that the ordinary votes taken at the Oaklands Park PPVO had been excluded from the count. He was remorseful and embarrassed by the outcome and could give no clear explanation for his actions and said he had no excuses. He did suggest, however, that he had been acting on the basis of his understanding of previous practice which he had followed as the OIC of a PPVO during the 2007 election where only declaration votes had been taken.

He also indicated that he had been under some pressure leading into the opening of the PPVO at Oaklands Park and may have been pre-occupied with what he saw to be the inappropriate location of the PPVO in the foyer of the Marion Council Chambers. He was agitated and unhappy with the inadequate size and location of the PPVO and had serious concerns relating to the logistical and administrative difficulties with which he would have to contend.

The OIC also indicated that his pre-occupation with setting up the PPVO had resulted in him missing a portion of a face to face briefing (at which Election 2007 overheads were used) on Friday 30 July, 2010, given by a member of the Kingston Divisional Office for the OICs of PPVOs in the divisions of Hindmarsh, Kingston and Boothby. The Oaklands Park OIC had excused himself from the briefing after about an hour and a half to return to Oaklands Park and thereby missed the discussion on ordinary voting at a PPVO.

The OIC rejected any notion that he or any of his staff had tampered with the ballot papers and no evidence was tendered that tampering had occurred.

## Conclusion

The ballot boxes containing ordinary ballot papers received at the Oaklands Park PPVO were opened in breach of Subsection 200DP(2) of the Electoral Act.

The OIC can give no clear explanation for his actions other than he was following similar practices that he had undertaken when operating a PPVO in the 2007 election. He also cited pressure arising from his concerns with the administration of the Oaklands Park PPVO which he considered to be badly located and caused ongoing difficulties for him and his staff.

Although the opening of the ballot boxes was in breach of the Electoral Act, the OIC diligently recorded the breaking of the seals and opening of the ballot boxes on the *Record of Ballot boxes and security seals*. There was no attempt to cover up the daily practice of opening the boxes and no evidence was tendered that the votes had been tampered with. Other polling officials interviewed from the Oaklands Park PPVO confirmed the OIC version of events. The OIC expressed genuine remorse and regret that his failure to implement proper process had resulted in the disenfranchisement of those electors who cast pre-poll ordinary votes at the Oaklands Park PPVO.

## Blackwater PPVO

The OIC of the Blackwater PPVO was an officer of the Queensland Department of Justice and the Attorney-General. The PPVO was located at the Blackwater Court House.



The OIC was an experienced polling official having participated in 4 previous federal elections, including the 2007 event.

Based on the OIC's statement and the OIC returns, there is no evidence that the ballot boxes containing the ordinary ballot papers were improperly opened on any day prior to the close of the PPVO at 6.00pm on 20 August, 2010.

On Friday, 20 August, following the close of the PPVO, The OIC, in the absence of any instructions dealing with the closing of the PPVO on 20 August, proceeded on the basis of materials found in the materials package forwarded to him by the Divisional Office Flynn. The package contained 4 items relating to the conduct of a count.

1. A notice that read:

**ATTENTION**

OICS PHONE IN RESULTS ON

1300 750 306

Call1 - House of Reprs

Call2 - TCP

Call 3 -Senate.

2. Result sheets for the House of Representative count.

3. Result sheets for the Senate count.

4. An envelope containing TCP count details.

As the materials package was addressed to the OIC of the PPVO, the OIC took the notice to apply to him and that he should conduct a count of ballot papers that night (20 August) and commenced to do so forthwith. He broke open the seals and opened the ballot boxes to gain access to the ballot papers. In doing so he unwittingly breached subsection 200DP(2) of the Electoral Act.

Regrettably, the notice, which had been prepared by the DRO Flynn, should only have been sent to Assistant Returning Officers at Counting Centres within the Division. Instead the notice and results sheets had been included in the package of materials sent to all OICs including those at PPVOs.

Once the OIC had completed the count at around 9.40pm, he rang the 1300 number mentioned in the notice above, which put him in contact with the Temporary Assistant at the Flynn Divisional Office. She transferred him to the DRO Flynn, who immediately registered that the count was not something that should have been undertaken at the PPVO. She asked the OIC about the TCP count and he advised that it had not been done but that he was just phoning in the first count as instructed. While it had been the intention of the OIC to conduct a TCP count he

had noted the direction on the envelope that it should not be opened before 6.00pm on polling night. That, along with the reaction of the DRO, made it apparent that the TCP should not be undertaken. The OIC did not proceed with the TCP count.

The DRO stated that she did not take any figures from the OIC but directed him to place all the ballot papers in the ballot box, seal the ballot box, make a note in the OIC return and take the ballot box to the Blackwater static polling place where he was going to be the OIC on polling day.

At 9.50pm, the DRO phoned the AEC Operations Manager in Brisbane, to report the incident. The Operations Manager reported the incident to the Director Operations Queensland, at around 10.00pm and he confirmed that quarantining and forwarding the ballot box to the DRO was the appropriate course of action. The Operations Manager confirmed the events which had transpired to the Australian Electoral Officer, Queensland, and other members of the State Management Team early on Saturday morning 21 August. The Australian Electoral Officer (AEO), Queensland then notified the Electoral Commissioner of the incident.

The ballot box was returned from Blackwater to the Flynn Divisional Office on Sunday 22 August. The DRO indicated that on inspection of the ballot box, which was semi transparent, she saw that the declaration envelopes had also been placed in the ballot box.

The following day, Monday 23 August, the DRO broke the seals and opened the ballot box to withdraw the envelopes for declaration exchange purposes and then resealed the ballot box which was witnessed by three Divisional staff. The ballot box remained quarantined pending legal advice from the AEC National Office.

Following receipt of legal advice, the Electoral Commissioner made a public statement on 31 August 2010 indicating that 452 early votes cast for the Division of Flynn had been quarantined and would not be included in the count.

## Contributing factors

The OIC of the Blackwater PPVO conducted pre-poll voting in strict compliance with the requirements of the Electoral Act.

It was not until after the close of pre-poll voting at 6.00pm on Friday 20 August that he undertook a count of the ordinary ballot papers that had been taken at the PPVO. In doing so, he breached the provisions of the Electoral Act. The OIC made it clear that he thought he was following the instructions of the DRO Flynn, in that he was given a notice requesting OICs to phone through results to the Divisional Office. The notice made no mention of when the results were to be phoned through and there was no distinction made between the OICs of static polling

places and PPVOs. The DRO Flynn acknowledged that the notice should not have been included in material sent to the OIC of a PPVO and that the notice, along with the result sheets for the House of Representatives and Senate counts, could well have misled the OIC into believing he should undertake a count.

It is also unfortunate that an email sent at 3.34pm on Friday 20 August outlining the protocols for the closing of the PPVOs that day was not seen by the OIC until the following Monday. The email was sent by the Branch Manager of the Magistrates Courts Branch of the Queensland Department of Justice and Attorney-General which contained advice provided by the AEC on what was expected of the OICs of PPVOs operating out of court houses across the state. This advice was in response to a query received by the Branch Manager.

The OIC stated that he was extremely busy in the latter half of Friday afternoon with a bus load of miners wanting to cast pre-poll votes and that, as a consequence, he did not read any emails on Friday afternoon. Had he been able to see the advice contained in the email, the OIC stated that the mishandling of the votes could have been avoided.

## Conclusion

The evidence would indicate that the OIC did everything required of him in the operation of the PPVO at Blackwater.

The OIC was misled by the notice that had been forwarded in error by the Flynn Divisional Office to conduct a count and phone through the results to the Divisional Office. He did not see an email sent on the Friday afternoon, 20 August, sent by his own department, which contained advice from the AEC setting out the steps to be taken in closing the PPVO that night. Had he seen that advice or been given similar advice at an earlier time, the count of the ballot papers at the PPVO could have been avoided.

## Emerald PPVO

The OIC of the PPVO at Emerald was an officer employed by the Queensland Department of Justice and Attorney-General. His experience spanned the previous Federal election in 2007 as a 2IC and the State election as an OIC of a PPVO in 2008. The 2010 election was his first experience as an OIC of a Federal PPVO.

The PPVO was located in the Emerald Court House.

The OIC confirmed that he had on a number of occasions opened the ballot box containing ordinary ballot papers to rearrange the papers and create more space. The *Record of ballot boxes and seals* shows that the ballot boxes containing ordinary votes were opened on 11, 13, and 19 August. The reason given on each instance was "opened to rearrange and fit more votes in."

The OIC said that he did not realise that the opening of the ballot boxes containing pre-poll ordinary ballot papers was in breach of the Electoral Act.

He said that he was surprised that the ballot boxes could not be opened from time to time because he had requested the Flynn Divisional Office to send more security seals in addition to those that he had received in the materials package prior to the opening of the PPVO.

The OIC stated that he had counted some 30 seals in the package that he had received from the DRO Flynn prior to the opening of the PPVO and had calculated that with three ballot boxes being used, there would be a requirement for more seals than had been provided.

His calculation assumed the opening of the ballot boxes from time to time to make more room for ballot papers. The Divisional Office responded by delivering another 25-30 seals, which reinforced the view held by the OIC that the ballot boxes could be opened as circumstances required.

Following the conclusion of voting at the PPVO on 20 August, the ballot box containing House of Representatives and Senate ballot papers was forwarded to the counting centre at the Star of the Sea Parish Hall in Gladstone.

On Monday 23 August at the counting centre in Gladstone, the Emerald PPVO ballot box was opened by the DRO Flynn in the presence of scrutineers.

On opening the ballot box, the DRO noticed that the third seal – the one securing the flap of the box – had not been recorded on the *Record of ballot boxes and security seals*. The DRO drew this to the attention of all present, including the scrutineers, and amended the Record by including the number of the seal on the Record. This was witnessed by an ALP scrutineer who signed the Record.

On completion of the count, both the House of Representatives and Senate ballot papers were placed in the ballot box and kept securely at the Flynn Divisional Office Store Room.

On 3 September 2010, the ALP candidate for Flynn wrote to the DRO Flynn, suggesting that “pre-polling votes from the Emerald Booth may have been mishandled (the seal number on the top of the box had not been recorded) giving rise to the potential of someone being able to access the votes.” He also acknowledged that “this will not ultimately affect the outcome of the result in Flynn but requires further investigation as to whether in all the circumstances the votes should be excluded from the count.” The letter was delivered to the Divisional Office on that same day.

On receiving the letter, the DRO contacted the AEC State Office and faxed the *Record of ballot boxes and security seals* form to the Operations Manager. On her examination of the form, the Operations Manager saw the notations on the Record that indicated that the ballot boxes had been improperly opened for the purposes

of creating more room and asked the DRO Flynn whether she realised that the seals and boxes had been opened as per the Record. The DRO responded by saying that until then, she had not been aware of the opening of the boxes as shown on the Record form.

Shortly after being advised of this incident, the AEO Queensland informed the Electoral Commissioner of the apparent mishandling of ordinary pre-poll votes at the Emerald PPVO and sought advice on action to be taken.

On Monday 6 September, advice was received by the AEO that the 854 ordinary pre-poll votes cast at the Emerald PPVO were to be excluded from the count

On Friday 10 September, the DRO was directed by the AEO, Queensland, to remove the results for the Emerald PPVO from the ELMS system. On that same day, the Electoral Commissioner released a statement indicating that the ordinary votes cast at the Emerald PPVO had been excluded from the count and that this further incident would be included in the examination underway to establish the circumstances surrounding the mishandling of some votes in Flynn.

## Contributing factors

Contributing factors in the mishandling of the ballot papers were the lack of understanding on the part of the OIC as to the way in which ballot boxes containing ordinary ballot papers should be managed and the limited preparation he was given for his task. Training material was not received in a timely way sufficient for the OIC to absorb the important changes regarding the management of the ordinary ballot papers and the ballot box security requirements. The material that was sent arrived at the Emerald PPVO at 12.30pm on 10 August, the day before the PPVO opened and was of a kind that did not clearly highlight the necessity to avoid opening the ballot boxes containing ordinary ballot papers. The OIC did not have the benefit of any face to face training with AEC staff and was not visited by AEC personnel during the time the PPVO was in operation.

The fact that some 55-60 security seals were forwarded by the Flynn Divisional Office to a PPVO operating only 3 ballot boxes, compounded the misunderstanding under which the OIC was operating. If proper procedures were being followed, a maximum of 9 seals would have been required on the first day and 3 seals per operating day thereafter. It begs the question as to why such a quantity of seals was sent to the PPVO by the Divisional Office without inquiry as to why they were needed.

## Conclusion

The OIC operated the PPVO at Emerald with insufficient understanding of the procedures necessary to properly manage the ordinary ballot papers and ballot boxes. This was compounded by the lack of any face to face contact with AEC staff

and the limited time he had to study the content of the training material provided. The training material and procedural manuals did not highlight the new procedures in a way that would have alerted the OIC not to open the ballot boxes containing ordinary votes.

The OIC's misunderstanding regarding the security and management of ballot boxes containing pre-poll ordinary votes was further compounded by the issuing of up to 60 security seals by the Flynn Divisional Office for a 3 ballot box operation at the Emerald PPVO, reinforcing the OIC's view that ballot boxes could be opened as circumstances required.

## **Recommended changes to minimise future mistakes at a PPVO**

### **Training material**

There was a general view that the training materials were not received by the relevant staff of PPVOs in sufficient time for the significant amount of information and procedures to be absorbed and understood. There should also be some attempt to précis the voluminous content of the materials and manuals issued to PPVO staff to highlight and give prominence to the fundamental and most important elements that the OIC of a PPVO must absorb and get right. This would include an emphasis on the necessity to maintain the integrity of the ballot boxes and that the provisions of the Electoral Act are always met.

It would also be useful to highlight the protocols to be followed by the OIC when closing the PPVO on the day immediately before Polling Day.

### **Recommendation 1.**

That the training materials and working manuals for the OIC of a PPVO be reviewed with a view to highlighting the necessity to ensure that all procedures and practices are consistent with the requirements of the Electoral Act. In particular, the need to ensure the integrity of the ballot papers and ballot boxes should be given special prominence in training materials and in working manuals used at a PPVO.

### **Sealing of Ballot Boxes**

There appeared to be a view amongst some of the PPVO staff and within some parts of the AEC, that the ballot boxes could be opened under certain circumstances, so long as this was witnessed by other polling staff and in a secure location. This understanding may have evolved over time as a consequence of managing declaration votes at a PPVO, which were the only kind of votes cast at a PPVO prior to the 2010 event.

Even so, the Electoral Act makes no provision for the opening of ballot boxes containing declaration votes at a PPVO. The DRO can direct the OIC to forward declaration votes in accordance with the Electoral Act. There is no authority within the Electoral Act to open a ballot box to create more space or to facilitate the reconciliation of ballot papers.

This is an area of practice that should be revisited in the light of the incidents that are the subject of this report. There needs to be a clear understanding that whatever procedures and practices are employed by polling staff, the requirements of the Electoral Act must always take precedence over administrative convenience.

In this regard there needs to be a very clear message on each ballot box used in a PPVO that once sealed, the box is not to be opened on any account, other than in accordance with the Electoral Act.

### **Recommendation 2.**

That a highly visible stick-on label be attached to each ballot box used in a PPVO at the time it is first sealed (perhaps adjacent to each side seal), that makes clear that the ballot box is not, **on any account**, to be opened.

### **Record of ballot boxes and security seals.**

The incidents in relation to Oaklands Park and Emerald might well have been minimised had a Divisional office staff member read the *Record of ballot boxes and security seals* form during the operation of the PPVO. In both cases, the OIC diligently and accurately recorded the breaking of the seals and the opening of the ballot boxes on an ongoing basis. Unfortunately, that Record is not read or examined by anyone at a Divisional level until well after the close of polling. It would seem more appropriate and effective if the Record form was periodically checked by a Divisional level staff member as the polling proceeds. This could be done during visits to the PPVO in urban locations or by way of faxing the Report form to the DRO on a regular basis from country locations.

### **Recommendation 3.**

That the *Record of ballot boxes and security seals* form be routinely examined by Divisional staff either when visiting a PPVO or by means of a fax or scanned copy in relation to PPVOs located in country regions. This practice should be included in the operating manuals for DROs and their staff.

### **Conclusion**

On the basis of my inquiry, I am of the view that the OICs at the Oaklands Park, and Emerald PPVOs both made honest mistakes and did not in any way

deliberately seek to disenfranchise those electors who cast early votes at their respective PPVOs. The OIC, Blackwater, was misled by the mistaken delivery of counting instructions by the Flynn Divisional Office to the Blackwater PPVO. No evidence was tendered of any tampering with ballot papers at any of the three PPVOs.

All three OICs recognise the seriousness of the outcome and in particular, regret the disenfranchisement of the 4,283 voters who cast ordinary votes at their respective PPVOs.

In light of these incidents, it would be prudent to again emphasise to all polling officials the fundamental tenet that all administrative practices adopted by polling staff and Divisional staff in the conduct of an election, must be in strict compliance with the provisions of the Electoral Act. This will require a review of current practices and procedures to ensure they are in compliance with the Electoral Act.

It will also require improvements in the training of relevant staff of the AEC and of temporary polling officials employed during the course of an election. Such training will need to highlight the primacy of the Electoral Act and the imperative to secure the integrity of all ballot boxes and ballot papers, along with the need to ensure transparency of all processes, throughout the electoral cycle.

I believe that if the recommendations contained in this report are implemented, the potential for a repeat of these incidents will be minimised.

Bill Gray AM

22 September, 2010



D

## Appendix D – Legal advice from the Australian Government Solicitor



Our ref. 10045064

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30 August 2010

Canberra  
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Melbourne  
Brisbane  
Perth  
Adelaide  
Hobart  
Darwin

Mr Paul Pirani  
Chief Legal Officer  
Australian Electoral Commission  
PO Box 6172  
KINGSTON ACT 2604

Dear Mr Pirani

## Issues with Ballot-Boxes Containing Pre-Poll Ordinary Ballot Papers

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

### Summary of Advice

2. In the present circumstances, we consider that the better course of action is not to include the ballot papers in the count and to quarantine those papers (although for the reasons we discuss below, it is possible that a court might take a different view).

3. If the discarded votes could affect the outcome of the election, we think it would be appropriate for the Australian Electoral Commission (AEC) to file a petition disputing the election in the court of disputed returns as permitted by s 357.

4. We cannot see any other way of correcting the errors and consider that there is real doubt as to whether s 285 is available in the present circumstances.

### Background

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

#### Background

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

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

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

### **The incidents**

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

#### **Oaklands Park Pre-poll Voting Centre – Division of Boothby**

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

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

#### **Blackwater Pre-poll Voting Centre – Division of Flynn**

On Friday 20 August 2010 after 6pm (i.e. the evening before polling day) the Officer in Charge of the Blackwater PPVC broke the seals of the ballot-boxes containing House of Representatives and Senate ballot papers and commenced to count the pre-poll ordinary ballot papers (it is presently understood that this involved 452 House of Representatives ballot papers and the same number of Senate ballot papers). This was not done in the presence of scrutineers. The Officer in Charge was advised by the Divisional Returning Officer to immediately replace these ballot papers into a ballot-box and to place a fresh seal on the ballot-box. The Officer in Charge complied with this request but it was later discovered that he had also placed some pre-poll declaration envelopes into the resealed ballot-box. The pre-poll ballot-box was removed to the AEC Divisional Office. After the close

of polling on 21 August 2010, the Divisional Returning Officer in the presence of other AEC staff broke the seal on the ballot-box and extracted the declaration vote envelopes for the purpose of including these envelopes in the exchange process (in which they are sent to their home Division) and then resealed the ballot-box. The ballot-box was then sealed and has remained under quarantine.

6. You seek our advice as to whether:

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

## Advice

7. In our view, the Act has been contravened at both the Oaklands Park Pre-Poll Voting Centre (Oaklands) and the Blackwater Pre-Poll Voting Centre (Blackwater). Section 200DP(2) provides that 'after a pre-poll ordinary ballot-box has been sealed, it must on no account be opened except as allowed by this Act'. The only situations in which a pre-poll ordinary ballot-box can be opened are to allow the ballot-box to be used again on a later day in accordance with the requirements of s 200DQ or during the scrutiny process provided for in ss 273 and 274. Nothing in the Act:

- permits a pre-poll ordinary ballot-box to be opened for the purpose of counting the ballot papers and transferring those ballot papers to another ballot box as occurred in Oaklands;
- permits a pre-poll ordinary ballot-box to be opened for the purposes of counting the ballot papers prior to the scrutiny (which can only occur at the end of polling day) as occurred in Blackwater.

8. The question that now arises is: what is the effect of non-compliance with the requirements of the Act? There is an issue as to whether non-compliance with the statutory requirements rendered the votes invalid. In *Maloney v McEacharn* (1904) 1 CLR 77, the High Court held that postal votes that were not properly attested were invalid. The court viewed the requirements for attestation to be mandatory.

9. Similarly, a good argument can be made that the requirements of the Act relating to the opening of ballot-boxes are crucial to maintaining the integrity of the votes cast. In the present circumstances, non-observance of those requirements means that it is possible that the ballots could have been tampered with or that information about voting patterns could have been disclosed to electors prior to

polling day. Such action would affect the integrity of the vote. In addition, the wording of s 200DP(2), and particularly the use of the words 'on no account' is a strong indication that Parliament considered compliance with this requirement to be crucial and one that must be observed.

10. Having said this, we do not think it is entirely clear that the ballot papers in question should be excluded from the count.

– The Act does not expressly require or permit electoral officials to exclude ballot papers in the circumstances under consideration.

– Under the Act, the only basis on which an ordinary ballot paper can be rejected is where it is informal. The term informal ballot paper is defined in s 268 and, in our view, the ballot papers in question are not informal within the meaning of s 268.

– In *Mitchell v Bailey (No 2)* (2008) 169 FCR 529 (*Mitchell*), the Federal Court held that a ballot paper must be included in the count if it is a formal vote. For example, Tracey J said (at 537):

If a ballot paper is not informal the officer conducting the scrutiny will have no legal basis for rejecting it. An implied obligation to admit such a ballot-paper to the count thereby arises. Once admitted it is to be counted.

– The validity of the ballot papers can be considered by the Court of Disputed Returns and Part XXII specially envisages that the Court of Disputed Returns will consider errors made by electoral officials in this process (s 365).

– The question of whether non-compliance with formal requirements invalidates an action is one on which minds may differ. We note here that in *Fenlon v Radke* [1996] 2 Qd R 157 the Queensland Court of Disputed Returns held that the failure of polling officials to strictly comply with a requirement to take declaration votes out of their envelopes and put them in a sealed ballot box without unfolding them did not invalidate the votes in question or the election. In that case the court made comments to the effect that it would be an 'bizarre' result if electoral officials could invalidate what would otherwise be valid votes by disregarding statutory requirements.

11. In the present circumstances, we consider that the better course of action is not to include the ballot papers in the count and to quarantine those papers.

– As discussed above, there is High Court authority that votes are invalid where there has been a breach of a provision of the Act that affects the integrity of votes. We think that the current breach is of a similar kind.

– While ss 273 and 274 provide for the scrutiny of ordinary ballot papers, we doubt that that mechanism is intended to exhaust the circumstances in which ballot papers may not be counted. We say this because if the requirements of those sections are observed, officials are required to separately parcel 'formal' and 'informal' papers. Whatever course of action is taken, there would appear to be a risk of the ballot papers in question becoming mixed with other ballot papers such

that they could cease to be identified and considered in proceedings in the Court of Disputed Returns.

– We think that *Mitchell* can reasonably be distinguished on the basis that it concerned the question of whether s 268 of the Act had been properly applied and there was no question that the votes should have been excluded due to wider concerns about their validity.

12. If the discarded votes could affect the outcome of the election, we think it would be appropriate for the AEC to file a petition disputing the election in the Court of Disputed Returns as permitted by s 357. We note that similar action was taken by the AEC in *AEC v Towney* (1994) 51 FCR 250 (although that case involved a situation in which the legislation in question required the ballot papers to be excluded from the count).

13. There is a question here about whether the AEC can count the votes to determine if the outcome of an election would be affected, but we have not considered this issue at this stage. We would be happy to so if this would be helpful.

14. We cannot see any other way of correcting the errors. In particular, we think that there is real doubt as to whether s 285 is available in the present circumstances. We doubt that an error in the keeping of the ballot box or in counting the votes earlier than they should have been can be described as an 'error ... *in the ... transmission or, return of any ... ballot papers*' (emphasis added).

15. Mr Peter Lahy, Deputy General Counsel, has read and agrees with this advice.

Yours sincerely

**Bridget Gilmour-Walsh**  
Senior General Counsel