



Appendix D – Legal advice from the Australian Government Solicitor



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Mr Paul Pirani
Chief Legal Officer
Australian Electoral Commission
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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