

**Electoral Commissioner**

Our Ref: 12/1181

Dr Kilian Perrem  
Inquiry Secretary  
Joint Standing Committee on Electoral Matters  
PO Box 6021  
Parliament House  
CANBERRA ACT 2600

Dear Dr Perrem

**Request for supplementary submission concerning premature opening of ballot boxes**

On Friday 8 February 2013, the Australian Electoral Commission (AEC) was requested by the Joint Standing Committee on Electoral Matters (JSCEM) to urgently consider and provide details of a possible savings regime which could be used to enable ballot papers from a ballot box which has been opened before the close of polling other than in accordance with the requirements of the Act to be included in the scrutiny and therefore the count. The following information is provided in response to that request.

*JSCEM consideration of this issue*

At the public hearing of 4 February 2013, as part of its Inquiry into the Electoral and Referendum Amendment (Improving Electoral Administration) Bill 2012 (the Amendment Bill), the JSCEM heard concerns regarding items 24 and 32 of Schedule 1 to the Amendment Bill. These provisions would have the effect of excluding ballot-papers from the scrutiny (and therefore the count) where the ballot-boxes have been opened before the close of the poll other than in accordance with the requirements of the *Commonwealth Electoral Act 1918* (the Electoral Act) and the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act). The particular concerns related to the impact that such a provision would have on the exercise of the franchise and whether this could also be used by unscrupulous persons to affect the outcome of an election by deliberately tampering with a ballot-box and causing the ballot-papers contained therein to be excluded from scrutiny and the count.

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The AEC notes that in its submission to the JSCEM Inquiry into the conduct of the 2010 Federal election (submission No. 87 at page 113) the following recommendation was made:

**“Recommendation 20:** The AEC recommends the Electoral Act and Referendum Act be amended to specifically provide that a ballot box may not be opened before the close of polling other than in accordance with the provisions of the Electoral Act. However, a savings provision in the event of an official error should be included.”

The JSCEM Report on the conduct of the 2010 election stated at paragraph 4.30 that:

“The Committee shares the view of the AEC that the Commonwealth Electoral and Referendum Acts 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. However, the Committee does not accept that a savings provision is necessary as the AEC must ensure that circumstances such as those that occurred in Boothby and Flynn do not reoccur.”

The Government response to this recommendation, as provided for in the Amendment Bill, accepts the JSCEM findings and recommendations on this issue.

### *Actions taken by the AEC*

The proposed amendment arises from two incidents at the 2010 election where ballot boxes were opened otherwise than in accordance with the Electoral Act. The Electoral Commission obtained legal advice to the effect that it would be prudent to exclude the ballot papers from the count. As a result, 4,274 ballot papers from two divisions were excluded.

As has previously been outlined to the JSCEM, the Electoral Commissioner tasked a former Electoral Commissioner, Mr Bill Gray AM, to examine the circumstances that led to the exclusion of the votes and provide recommendations for the future. Mr Gray’s report is available on the AEC website<sup>1</sup> and is summarised in the AEC’s submission to the JSCEM following the 2010 election. Mr Gray provided three recommendations, all of which have been implemented.

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

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<sup>1</sup> The relevant media release, including links to Mr Gray’s report, is available at: [http://www.aec.gov.au/About\\_AEC/Media\\_releases/e2010/10-01.htm](http://www.aec.gov.au/About_AEC/Media_releases/e2010/10-01.htm).

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are being managed, by having a separate 'seals' page for each ballot box that can be faxed to the DRO on request.

A copy of relevant staff training materials and ballot box seals will be forwarded to the JSCEM separately, in response to a Question on Notice taken at the public hearing of 4 February 2013.

### *The proposed amendments*

The proposed amendment aims to provide certainty about the treatment of ballot papers contained in ballot boxes, in the event that they are opened prematurely at a future election. Attachment A outlines those situations that determine when a ballot box has been opened otherwise than in accordance with the Electoral Act.

The proposed amendment clarifies that all affected ballot papers must be securely parcelled and returned to the DRO without being included in the count. The AEC may, however, 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. The authority to examine the excluded ballot papers is provided by the same provisions that enable the Electoral Commissioner to order that parcels of informal ballot papers (which have also been excluded from the scrutiny) be opened for the purposes of the informal ballot paper survey (subsections 393A(3), (7), (8) and (9) of the Electoral Act refer).

### *A possible savings provision*

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. As the current practice is that all the State issued Senate writs must be returned prior to the writs to the Governor-General (for the purpose of starting the count for 40 day period for the Court of Disputed Returns), such action will also delay the return of the writs for both the House of Representatives and the Senate.

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).

A possible vote savings measure could include the following elements:

- (i) the polling official is to quarantine any prematurely opened ballot box and secure its contents;
- (ii) 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;
- (iii) the polling official is to provide the report and the prematurely opened ballot box including its contents to the DRO;

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- (iii) 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;
- (iv) the DRO will forward the ballot box and contents to the AEO together with the polling officials report and any other relevant information;
- (v) 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;
- (vi) 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;
- (vii) 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;
- (viii) 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.

Note: It may be that paragraph (viii) is 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. In addition, 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.

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.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ed Killesteyn', with a long horizontal flourish extending to the right.

Ed Killesteyn  
Electoral Commissioner

11 February 2012

ATTACHMENT A

**QUICK REFERENCE GUIDE – OPENING OF BALLOT BOXES**

	Election Day before - 5	Election Day - 5 (Monday)	Election Day - 4 (Tuesday)	Election Day - 3 (Wednesday)	Election Day - 2 (Thursday)	Election Day - 1 (Friday)	Election Day before 6.00pm	Election Day after 6.00pm
<b>Ballot Boxes</b>								
Containing <b>ANY</b> ordinary ballot papers <ul style="list-style-type: none"> <li>Ballot box is held in any polling location</li> </ul>	Unable to be opened for any reason							Able to be opened for scrutiny (to conduct the count)
Containing <b>ONLY</b> declaration vote envelopes <ul style="list-style-type: none"> <li>Ballot box is held in a pre-poll voting centre or by a mobile team</li> </ul>	Unable to be opened for any reason							Able to be opened for preliminary scrutiny
Containing <b>ONLY</b> declaration vote envelopes <ul style="list-style-type: none"> <li>Ballot box is held at an overseas post</li> </ul>	Unable to be opened for any reason		Able to be opened for sorting and forwarding of votes in preparation for the overseas exchange					
Containing <b>ONLY</b> declaration vote envelopes <ul style="list-style-type: none"> <li>Ballot box is held by a DRO</li> </ul>	Unable to be opened for any reason		Able to be opened for preliminary scrutiny and for sorting/forwarding of votes to other divisions					Able to be opened for preliminary and further scrutinies