

**Senate Finance and Public Administration Legislation Committee**  
**ANSWERS TO QUESTIONS ON NOTICE**  
**BUDGET ESTIMATES 2013-2014**

**Finance and Deregulation Portfolio**

**Department/Agency:** Australian Electoral Commission

**Outcome/Program:** General

**Topic:** Voter intention

**Senator:** Ryan

**Question reference number:** F66

**Type of question:** Hansard F&PA Committee, Page 63, 30 May 2013

**Date set by the committee for the return of answer:** Friday 12 July 2013

**Number of pages:** 2

**Question:**

How does the AEC interpret the use of “ticks” and “crosses” on Referendum ballot papers?

**Answer:**

The use of “ticks” and “crosses” on Referendum ballot papers was the subject of a decision of the federal Court of Australia in the case of *Benwell v Gray, Electoral Commissioner* [1999] FCA 1532.

This case involves a challenge by Mr Phillip Benwell against instructions that were issued in a document published by the AEC entitled the “Scrutineers Handbook”. Mr Benwell claimed that the only way a voter could validly cast a vote in a Referendum was to use the words “Yes” and “No”. His Honour stated at paragraph 26 that:

*“It cannot be correct to suggest that the effect of s 24 is that a ballot is formal if, and only if, the voter writes either the word “YES” or “NO” on the ballot paper. To take this view would be to deny any effect to the language of s 93(8). Clearly that sub-section is intended to ensure that effect is given to a ballot-paper of a voter according to the voter’s clear intention, even if he or she writes neither the word “YES” nor “NO” on the ballot-paper.”*

The reasoning that was applied by the Court in that case goes back to the general issue of determining the intention of a voter based on what appears on the face of a ballot-paper. The AEC (and its predecessors) have been successfully undertaking this task since the first federal elections held in Australia. The Court cited the High Court decision in *Kane v McClelland* (1962) 111 CLR 518 which set out the how the intention of a voter was to be ascertained. Since that High Court decision, the Court of Disputed Returns in the matter of *Mitchell v Bailey (No. 2)* [2008] FCA 692 has provided additional guidance on the process of determining the intention of a voter.

Accordingly, the approach taken by the AEC where a referendum ballot paper only has a “tick” or “cross” is set out in the examples contained at page 5 of the Federal Court decision.

These examples are also reflected in the current Scrutineers Handbook which appears on the AEC website at the following link: <http://www.aec.gov.au/Elections/candidates/scrutineers-handbook/index.htm>

The AEC notes the following information about the use of “crosses” which appears in the material at page 5 of the Federal Court decision:

*“Crosses are a special case. The use of an ‘X’ as the answer to the question of a referendum ballot paper, without any further clarification, renders the ballot paper informal as the voter’s intention is unclear”.*