

## CHAPTER 12: SCRUTINY OF BALLOTS

This chapter looks at the vote counting process (the scrutiny) at the federal level, draws comparisons with counting processes at the state and territory level, and examines some issues relating to the counting of votes and determination of election results.

### THE CURRENT ARRANGEMENTS

#### *Commonwealth arrangements*

12.1 In election administration, the term ‘scrutiny’ refers to the ‘counting of votes, which leads to the election result’.<sup>997</sup> Ordinary votes are automatically admitted to the scrutiny and counted, whilst declaration votes (absent, pre-poll, postal and provisional votes) are subject to a preliminary verification process before being admitted to the scrutiny if deemed valid.

12.2 The counting of votes at federal elections takes place in a number of different stages. Firstly, on election night, the following processes are undertaken.

- A manual count of all ordinary first preference votes (for both the Senate and House of Representatives) is conducted at polling places immediately after the close of the poll, in the presence of scrutineers. The results are telephoned through to the relevant AEC divisional office, entered into the Virtual Tally Room (VTR) system and immediately made public.
- An indicative ‘two-candidate preferred vote’ count of House of Representatives votes is also conducted, with results again being phoned through to AEC divisional offices, entered into the VTR system and made public.

These two processes have enabled the result<sup>998</sup> of each election since 1993 to be known on election night.

12.3 In the period after the election, a number of additional processes take place.

- A fresh scrutiny of all ordinary votes cast at polling places or secured by mobile polling teams is performed.
- Declaration votes are subjected to a ‘preliminary scrutiny’ process and, if deemed valid, are admitted to the scrutiny and counted.<sup>999</sup>
- Preference distributions are conducted manually by divisional offices for each House of Representatives division, while Senate preference distributions are performed electronically. All Senate ballot papers marked ‘below-the-line’ are manually entered into a computerised Central Senate Scrutiny database by electoral officials.<sup>1000</sup> Once data entry is complete, the computer application performs the complex preference distribution and identifies the elected candidates.

12.4 Each candidate may appoint one scrutineer per polling official employed in the count to observe the counting of the votes.<sup>1001</sup> Scrutineers have the right to be present when the votes are sorted and counted so that they may check any possible irregularities. Scrutineers, who must wear an official identification badge at all times, are able to inspect any ballot paper

<sup>997</sup> AEC, *Scrutineers Handbook*, 2007, p. 75, available at [www.aec.gov.au/pdf/voting/scrutineers/scrutineers.pdf](http://www.aec.gov.au/pdf/voting/scrutineers/scrutineers.pdf).

<sup>998</sup> That is, the answer to the question, which party or coalition will be able to form government.

<sup>999</sup> Note that this process can commence up to five days before polling day, for declaration votes cast prior to that point.

<sup>1000</sup> Electoral Act, op. cit., section 273A.

<sup>1001</sup> *ibid.*, section 264.

during the counting process, but may not touch ballot papers or assist election officials in clearing polling booths or removing material from the polling place.<sup>1002</sup>

- 12.5 There is no statutory requirement for the AEC to publish the results of an election on election night.<sup>1003</sup> As declaration votes can be received up until the thirteenth day after polling day,<sup>1004</sup> in particularly close electoral contests a result may not be known until two weeks after polls closed. However, the AEC has accepted that 'there is a clear community expectation that it will do everything within its power to ensure that election results are known as early as possible'.<sup>1005</sup>

### **State and territory arrangements**

- 12.6 Most Australian states and territories have very similar counting processes to the Commonwealth, though there are some differences. In general, first preference counts and indicative two-party preferred tallies for lower house divisions are still performed on election night, with only first preference counts performed for multi-member legislative council elections. For the two jurisdictions which have lower houses with multi-member constituencies, Tasmania counts first preferences on polling night, and the ACT counts the first preferences of paper ballots by hand, combines them with the first preference results of electronic votes (which can be counted very quickly), and publishes an interim distribution of preferences using electronic votes soon after polls close. At present, different computer systems are used at federal, state and territory elections for tabulating and publicising results on election night.
- 12.7 Electronic vote counting is utilised by various states and territories to differing degrees. Like the Commonwealth, most states use a form of electronic vote counting for their upper house.<sup>1006</sup> These jurisdictions have developed similar computer applications through which paper ballots are manually entered into the computer's database for the calculation of results.<sup>1007</sup>
- 12.8 In the ACT, intelligent character recognition scanning technology was used during the 2008 Legislative Assembly election to count votes electronically. This technology involves feeding ballot papers through an electronic scanner, after which the scanned data is interpreted by intelligent character recognition (ICR) software, which recognises the hand-written numerals placed in boxes alongside candidate names. The computer system displays an image of each scanned ballot paper and the system's conclusions, which are checked by polling officials and scrutineers. Any numerals which the scanner fails to comprehend and any preference orders that do not meet business rules are verified by polling officials and the recorded preference data is updated by the officials as necessary to ensure that the computer has correctly recorded the details on each ballot paper.<sup>1008</sup> Intensive manual checks are used to ensure a very high degree of accuracy.<sup>1009</sup> Elections ACT notes that the vote scanning system 'uses a range of strategies to ensure that preferences are captured with 100% accuracy'.<sup>1010</sup> This data is combined with the electronic voting data and a computer program is used to distribute

<sup>1002</sup> AEC, *Scrutineers Handbook*, op. cit., pp. 25-26.

<sup>1003</sup> AEC, submission no. 16a to JSCEM, *Inquiry into certain aspects of the administration of the Australian Electoral Commission*, 2007, p. 12.

<sup>1004</sup> Electoral Act, op. cit., section 228(5A).

<sup>1005</sup> JSCEM, *Inquiry into certain aspects of the administration of the Australian Electoral Commission*, 2007, p. 43.

<sup>1006</sup> It is used for Legislative Council elections in New South Wales, Victoria, Western Australia and South Australia: Elections ACT, *The 2001 ACT Legislative Assembly Election: Electronic Voting and Counting System Review*, ACT Electoral Commission, 2002, p. 15.

<sup>1007</sup> C Barry, P Dacey, T Pickering, and D Byrne, op. cit., p. 18.

<sup>1008</sup> For more information see Elections ACT, *Scanning of Ballot Papers*, 2008, available at [www.elections.act.gov.au/elections/BallotPaperScanning.html](http://www.elections.act.gov.au/elections/BallotPaperScanning.html).

<sup>1009</sup> Elections ACT, *Electronic Voting and Counting*, op. cit.

<sup>1010</sup> Elections ACT, *Scanning of Ballot Papers*, op. cit.

preferences under the ACT's Hare-Clark electoral system. This enables the ACT to publish interim preference distribution results on its website at the end of each day's counting for the information of scrutineers, candidates, the media and the public.

## CHALLENGES, OPPORTUNITIES AND OPTIONS FOR CHANGE

- 12.9 Current scrutiny processes, and options for future reform, can be considered against a number of the key principles outlined in chapter 2. For example, to promote transparency, it could be argued that the scrutiny process should be open to parties, candidates and accredited observers at every stage. To ensure neutrality, it could be contended that all staff involved in the scrutiny process should be strictly impartial in the performance of their functions, or conversely, it could be argued that the combined effect of the presence of scrutineers appointed by different candidates provides assurance of the neutrality of electoral officials. To maintain integrity, it could be argued that the votes of individual electors should not be discernible at any time and the results must form a true reflection of the voters' choice. Lastly, to promote efficiency, it might be argued that the scrutiny should proceed expeditiously with responsibility for each stage of the scrutiny clearly assigned.
- 12.10 Issues related to the scrutiny which have been the subject of recent debate include:
- the impact of declaration votes on the accuracy of indicative election night counts;
  - the use of electronic vote counting technology;
  - the future of the National Tally Room;
  - application of the rules governing the formality of votes;
  - levels of prescription and complexity of the legislation governing the scrutiny process; and
  - the recounting of votes in close elections.

### *Counting of declaration votes*

- 12.11 As noted above, a number of key conclusions are drawn from the first counts of ordinary votes on election night. These tallies are used both to gain an understanding of the total number of first preference votes cast for each candidate, and to gain a 'two-candidate preferred' result for House of Representatives electoral divisions. Indeed, the election night results (especially the 'two-candidate preferred' count) have generally proved a very reliable indicator of the potential make-up of the Parliament within hours of the polls closing.
- 12.12 Historically, a high proportion of votes were cast by electors voting within their home division on polling day, with those votes counted on polling night. However, the increasing proportion of declaration votes cast poses a challenge to the continued reliability of the election night indicative result. Declaration votes now comprise over 20% of the total votes cast, with the percentage increasing at each election.<sup>1011</sup> This means that polling night results, based only on a count of ordinary votes cast on polling day, reflect an increasingly lower proportion of total votes cast. It can be contended that election night counts are becoming less reliable as an indicator of the eventual result.
- 12.13 It has been argued that allowing some forms of what are currently declaration votes to be cast as ordinary votes would alleviate this problem.<sup>1012</sup> This would result in more votes being counted and included in the indicative two-candidate preferred count on election night. Beyond this, there may be opportunities to examine the possibility for all pre-poll votes to

<sup>1011</sup> AEC, submission no. 169 to JSCEM, *Inquiry into the 2007 Federal Election*, op. cit., pp. 38-39.

<sup>1012</sup> G Newman, *Analysis of Declaration Voting*, op. cit., p. 12.

be cast as ordinary votes (as occurs in the ACT), subject to the development of appropriate integrity safeguards and to developments in technology for checking the roll at polling places and pre-poll voting centres.

- 12.14 The most consistently advocated proposal calls for voters who qualify for a pre-poll vote to be able to cast an ordinary vote, instead of a declaration vote, if they attend a pre-poll centre in their home division prior to polling day.<sup>1013</sup> As those casting a pre-poll vote within their home division are checked against the electoral roll in person by an election official, it can be argued that the process is very similar to being checked against the roll in person by an election official when casting an ordinary vote on election day. Several Australian states and territories (Victoria, Queensland, Tasmania, the ACT and NT) have already taken this step, with no apparent detriment to the integrity of the election process.
- 12.15 At the 2007 federal election around 38% of declaration votes cast were pre-poll votes. Of the pre-poll votes, around 60% (667,625 votes) were issued by divisional returning offices to electors within the relevant divisions.<sup>1014</sup> These votes account for 5% of all votes cast in the 2007 election, which would mean that election night counts could, if this change were adopted, encompass around 85% of available votes.
- 12.16 Such a move would also ease the pressure on electoral administrators in the days after polling day by reducing the administration time and costs involved with the sorting, verifying and counting of declaration votes. Declaration votes are inherently more complex than ordinary votes, as all individual declaration votes have to be subjected to preliminary scrutiny.<sup>1015</sup>
- 12.17 Prior to 2009, JSCEM had rejected such a change, arguing it would lead to an increase in the proportion of votes being cast before polling day.<sup>1016</sup> In response, it has been argued that the change would only affect the administrative arrangements used to count pre-poll votes, and would not affect the existing eligibility criteria for such votes.<sup>1017</sup>
- 12.18 In 2009, JSCEM recommended in favour of counting pre-poll votes cast in an elector's home division as ordinary votes, proposing that electors casting such votes be required to sign a declaration at the time of voting indicating that they are entitled to a pre-poll vote.<sup>1018</sup> JSCEM also recommended that such votes still be counted on polling night 'in the same manner as ordinary votes cast in polling places on polling day'.<sup>1019</sup>
- 12.19 Options for reform might include the following.
- Allow pre-poll votes cast by an elector within their home division to be counted as ordinary votes.
  - Allow all pre-poll votes to be issued as ordinary votes.
  - Where a person is casting a pre-poll vote as a declaration vote outside his or her home division, allow his or her enrolment to be confirmed electronically on the spot at the early voting centre: this could eliminate the need for votes where the enrolment is so confirmed to be subject to preliminary scrutiny post-election.

<sup>1013</sup> AEC, submission no. 169 to JSCEM, *Inquiry into the 2007 Federal Election*, op. cit., p. 43; JSCEM, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto*, op. cit., pp. 195-196.

<sup>1014</sup> *ibid.*

<sup>1015</sup> *ibid.*, p. 40.

<sup>1016</sup> JSCEM, *The 1996 Federal Election: Inquiry into all aspects of the conduct of the 1996 federal election and matters related thereto*, op. cit., p. 54; JSCEM, *The 1993 federal election: Report of the inquiry into the conduct of the 1993 federal election and matters related thereto*, 1994, p. 90.

<sup>1017</sup> G Newman, *Analysis of Declaration Voting*, op. cit., p12.

<sup>1018</sup> JSCEM, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto*, op. cit., p. 196.

<sup>1019</sup> *ibid.*

- Continue to count pre-poll votes as declaration votes, but make additional resources available to verify such votes before polling day so they can be admitted to the scrutiny on election night.<sup>1020</sup>
- Maintain the status quo, with parties, candidates and the general public made aware that indicative results provided on election night may not be as definitive an indication of the final result as they have been in the past.

### *Electronic vote counting*

12.20 Electronic vote counting is a broad term which covers a number of different options. A useful definition of electronic vote counting is as follows:

'Any system where votes are loaded into a computerised counting system, which then tallies the votes and performs subsequent actions required by the particular method of voting being used, such as eliminating unsuccessful candidates and distributing their preferences or striking quotas and transferring the surpluses of successful candidates, thereby determining the successful candidate(s). The loading of votes can be undertaken in a variety of forms, such as keying ballot papers, scanning ballot papers using optical mark recognition (OMR) or optical character recognition (OCR) readers'.<sup>1021</sup>

12.21 As noted above, most jurisdictions currently utilise electronic vote counting through the manual loading of paper ballots into a computerised counting system, which then performs preference distributions and determines which candidates have been elected. Some of the common advantages that have been identified for this form of electronic vote counting are as follows;

- it provides an almost instantaneous calculation of results once all votes are loaded into the system, with no need for a time-consuming manual distribution of preferences;<sup>1022</sup>
- there is less human intervention in the voting and scrutiny process and thus a lower risk of error;<sup>1023</sup> and
- an increased amount of information is available about errors made on paper ballots by electors.<sup>1024</sup>

12.22 As noted at paragraph 12.8, the ACT uses ICR technology to scan ballot papers into a central computer counting system.<sup>1025</sup> Additional advantages of this form of electronic vote counting have been cited as:

- the 'considerable efficiencies and improvements to the speed and accuracy of ballot counts' with all ballot papers read into a computer application;<sup>1026</sup>
- the removal of the time and labour-intensive process of manually entering all votes into the database;<sup>1027</sup>

<sup>1020</sup> In 2009, JSCEM recommended that the AEC should conduct as much of the preliminary scrutiny of pre-poll and postal votes on hand in home divisions as possible prior to polling day, 'in order to increase the number of early votes counted in a timely manner following the close of the polls': JSCEM, *Report of the Conduct of 2007 Federal Election and Matters Related Thereto*, op. cit., p. 198.

<sup>1021</sup> C Barry, P Dacey, T Pickering, and T Evans, *Evolution, Not Revolution*, Electronic Voting Status Report 2, Electoral Council of Australia, 2002, p.3. Another alternative to OCR is intelligent character recognition (ICR) scanning, as is used in the ACT.

<sup>1022</sup> C Barry, P Dacey, T Pickering, and D Byrne, op. cit., p.15.

<sup>1023</sup> Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into Electronic Democracy*, 2005, p. 129.

<sup>1024</sup> Elections ACT, *The 2001 ACT Legislative Assembly Election: Electronic Voting and Counting System Review*, op. cit., pp. 1-2.

<sup>1025</sup> As noted in chapter 11, recent elections in the ACT have utilised electronic voting mechanisms for some votes; these votes are counted electronically without the need for ICR technology.

<sup>1026</sup> C Barry, P Dacey, T Pickering, and D Byrne, op. cit., p.18.

<sup>1027</sup> *ibid.*

- greatly reduced costs involved in counting the votes;<sup>1028</sup> and
- the use of technology which is 'becoming increasingly common in desktop computing environments' and thus is familiar to the public.<sup>1029</sup>

12.23 It has been argued that the next development in the electronic counting process at the federal level would be the introduction of electronic scanning of ballot papers with preference data entered into the computer automatically.<sup>1030</sup> It has been contended that existing optical character recognition technology could be used to 'enable hand-written numbers on ballot papers to be accurately read by a scanner'.<sup>1031</sup>

12.24 Arguments which have been advanced against electronic vote counting in general include:

- electronic counting systems raise security concerns with the potential for hacking and altering of results;<sup>1032</sup>
- as data-entry locations and much of the computer hardware are leased on a short-term basis during the election period, this is argued to pose risks to the integrity of the process;<sup>1033</sup> and
- the cost of purchase, storage, and maintenance of hardware involved in electronic counting systems.<sup>1034</sup>

12.25 The costs of electronic vote counting could possibly be mitigated if uniform counting systems were adopted across multiple jurisdictions. Sharing electronic vote counting software and hardware across jurisdictions could enable significant reductions in the cost of introducing new systems. However, the potential for sharing such systems would depend upon the degree to which a common system could be utilised for the different ballot papers and voting systems applied across jurisdictions. There may also be challenges for jurisdictions that are larger geographically to roll out the necessary technology to all polling places.

12.26 If electronic voting were to be adopted more widely (as discussed in chapter 11), votes may be able to be counted automatically without the need for scanning of ballot papers using technology such as OCR or ICR.

### *National Tally Room*

12.27 The future of the National Tally Room (NTR) has been the subject of recent debate. The NTR in Canberra is organised and funded by the AEC to provide a central point for the display of federal election results on election night. Media representatives from a range of print, radio and television outlets gather in the NTR to broadcast the election results.

12.28 In 2007, the AEC sought stakeholder feedback on the idea of abolishing the NTR in favour of disseminating results entirely via electronic means.<sup>1035</sup> It was argued that the 'significance of the tally board at the NTR as a primary source of information has declined tremendously',<sup>1036</sup> to the

<sup>1028</sup> Elections ACT, Consultation Paper, *Establishment of a scanning solution for hand written ballot papers for the 2008 ACT Legislative Assembly election*, 2006, p. 2.

<sup>1029</sup> Scrutiny of Acts and Regulations Committee, Parliament of Victoria, op. cit., p. 131.

<sup>1030</sup> C Barry, P Dacey, T Pickering, and D Byrne, op. cit., p. 18.

<sup>1031</sup> JSCEM, *2001 Federal Election: Report of the inquiry into the 2001 Federal Election and Matters Related Thereto*, 2003, p. 202.

<sup>1032</sup> *ibid.*, p. 203.

<sup>1033</sup> Scrutiny of Acts and Regulations Committee, Parliament of Victoria, op. cit., p. 129.

<sup>1034</sup> *ibid.*, p. 132; C Barry, P Dacey, T Pickering, and D Byrne, op. cit., p. 15.

<sup>1035</sup> JSCEM, *Inquiry into certain aspects of the administration of the Australian Electoral Commission*, op. cit., pp. 13-14.

<sup>1036</sup> *ibid.*, p. 10.

point that it is no longer an essential avenue through which election results are made known to the general public.<sup>1037</sup>

- 12.29 The development of the internet-based Virtual Tally Room (VTR), which now serves as the 'frontline system for the transparent publication of election results',<sup>1038</sup> has been the key driver behind the push to abolish the NTR. The VTR, accessible to anyone with an internet connection, is updated with election results as votes are telephoned in from polling places on election night and entered into the AEC's electronic election management system.
- 12.30 The VTR is said to be 'significantly quicker and more comprehensive' than the manual tally board progressively updated on the walls of the NTR.<sup>1039</sup> Indeed, the results on the manual tally boards in the NTR are often behind the up-to-date results available on the VTR.<sup>1040</sup>
- 12.31 JSCEM has recommended that the NTR be retained for future elections.<sup>1041</sup> Key reasons for this conclusion were:
- the 'historical place' of the NTR in the culture and tradition of Australian politics and elections;
  - the value and logic in the location of a central tally room in the national capital for the federal election; and
  - the 'visible symbolism of transparency in the election process' provided by the display of results in the NTR on election night.<sup>1042</sup>
- 12.32 Other cited benefits of the NTR have included the following.
- The NTR provides a supportive environment for media coverage. The atmosphere, noise and colour provided by the NTR on election night is said to generate more interesting or 'warmer' television.<sup>1043</sup>
  - By being open to the public, the NTR provides a chance for ordinary citizens to engage in the electoral process.<sup>1044</sup>
- 12.33 It has been pointed out that most media organisations rely on neither the NTR nor the VTR for their election night broadcast. Major media organisations can apply to receive separate raw election results data feeds from the AEC on election night.<sup>1045</sup> The raw data is used to produce graphs and analysis aimed at predicting the outcome of the election, whilst the VTR is only used to disseminate actual election results.<sup>1046</sup>

<sup>1037</sup> Australian Electoral Commission, submission no. 169 to JSCEM, *Inquiry into the 2007 Federal Election*, 2008, p. 25.

<sup>1038</sup> *ibid.*

<sup>1039</sup> JSCEM, *Inquiry into certain aspects of the administration of the Australian Electoral Commission*, *op. cit.*, p. 48.

<sup>1040</sup> AEC, submission no. 169 to JSCEM, *Inquiry into the 2007 Federal Election*, p. 26.

<sup>1041</sup> JSCEM, *Inquiry into certain aspects of the administration of the Australian Electoral Commission*, *op. cit.*, p. 54; JSCEM, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto*, 2009, pp. 272-273.

<sup>1042</sup> JSCEM, *Inquiry into certain aspects of the administration of the Australian Electoral Commission*, *op. cit.*, p. 53.

<sup>1043</sup> G Linnell, 'Bone the Tally Room', *The National Interest – Radio National*, Australian Broadcasting Corporation, 26 July 2007, as cited in JSCEM, *Inquiry into certain aspects of the administration of the Australian Electoral Commission*, *op. cit.*, p. 46.

<sup>1044</sup> J Wright, 'Tally room a raucous shrine to democracy', *The Canberra Times*, 25 November 2007.

<sup>1045</sup> AEC, submission no. 16a to JSCEM, *Inquiry into certain aspects of the administration of the Australian Electoral Commission*, *op. cit.*, p. 3.

<sup>1046</sup> JSCEM, *Inquiry into certain aspects of the administration of the Australian Electoral Commission*, *op. cit.*, p. 49.

12.34 Other arguments against retention of the NTR have included:

- the cost to the taxpayer (over \$1,000,000);<sup>1047</sup>
- the fact that New South Wales and South Australia are planning to abolish their state tally rooms for upcoming state elections;<sup>1048</sup>
- the logistical burden involved in establishing and constructing the NTR within a short time frame;<sup>1049</sup> and
- the fact that public access to the NTR is only available to a limited number of Australians.

12.35 Options for reform include:

- abolishing the NTR;
- continuing the NTR at future elections, but with costs borne by relevant media organisations;<sup>1050</sup>
- continuing the NTR at future elections, with costs still borne by the AEC; or
- allowing sponsorship of the NTR to recoup costs, as adopted by the South African Electoral Commission.

12.36 From a harmonisation perspective, one option for consideration might be to extend the use of the federal VTR system to elections in other jurisdictions. Given the considerable sophistication of the VTR system, there could potentially be benefits in it being made available for use at state and territory elections.

### *Application of formality criteria*

12.37 As discussed in chapter 5, votes may be ruled informal for a range of reasons. The Electoral Act specifies the categories of ballot papers that will be deemed informal by polling officials.<sup>1051</sup> Polling officials and scrutineers are provided with detailed guidance from the AEC on the strict criteria to be applied to determine vote formality.<sup>1052</sup> Issues have arisen with regard to the application of the formality criteria by polling officials, with recent events highlighting the challenges which can arise in applying the rules consistently.

12.38 At the 2007 federal election, the division of McEwen saw one of the closest electoral results ever recorded for a House of Representatives division. The initial count resulted in a majority of just six votes for the Australian Labor Party candidate, before a recount declared a margin of twelve votes for the Liberal Party candidate. Finally, the Court of Disputed Returns upheld the election of the Liberal Party candidate, but with an increased margin of 31 votes.<sup>1053</sup>

<sup>1047</sup> AEC, submission no. 169 to JSCEM, *Inquiry into the 2007 Federal Election*, op. cit., p. 26.

<sup>1048</sup> A Green, *Bits and Pieces*, Antony Green's Elections Blog, Australian Broadcasting Corporation, 22 April 2009, available at [www.blogs.abc.net.au/antonygreen/2009/04/bits-and-pieces.html](http://www.blogs.abc.net.au/antonygreen/2009/04/bits-and-pieces.html). The New South Wales Electoral Commissioner has decided to discontinue the practice of providing a Tally Room for the purpose of providing stakeholders with election night results for NSW state elections, on the basis that the cost of the Tally Room is no longer justified given that the electronic media have access to direct feeds of polling place results from the NSW Electoral Commission, and that the NSW Electoral Commission's Virtual Tally Room contains more information than would be available in a traditional Tally Room. In its *Inquiry into the conduct of the 2006 Victorian state election and matters related thereto*, 2008, the Victorian Parliament Electoral Matters Committee recommended that the state tally room be retained for the 2010 Victorian state election. In its response to this report, the Victorian Government indicated that the tally room would be retained 'provided the major political parties provide a commitment to a significant presence at the tally room on election day'.

<sup>1049</sup> AEC, submission no. 16a to JSCEM, *Inquiry into certain aspects of the administration of the Australian Electoral Commission*, op. cit., p. 17.

<sup>1050</sup> AEC, submission no. 169 to JSCEM, *Inquiry into the 2007 Federal Election*, op. cit., pp. 26-27.

<sup>1051</sup> Electoral Act, op. cit., sections 268 and 269.

<sup>1052</sup> See for instance, AEC, *Scrutineer's Handbook*, op. cit., Chapter 5.

<sup>1053</sup> For further detail, see A Henderson, 'Review of Ballot Paper Formality Guidelines and Recount Policy, 2008, as exhibit to AEC, submission no. 169 to JSCEM, *Inquiry into the 2007 federal election*, op. cit, pp. 2-5.

- 12.39 The key discrepancy highlighted in the counting process related to the determination of the formality of the vote. As only votes ruled formal are admitted to the count, this preliminary decision is of great importance in close electoral contests.
- 12.40 During the recount, 643 votes were withheld for decision by the Australian Electoral Officer of Victoria on the issue of formality. The Court of Disputed Returns later overturned 153, or 24%, of the Officer's decisions as to the formality of the vote. The Chairman of JSCEM, Mr Daryl Melham MP, has expressed concern at the number of decisions overturned by the Court, particularly 'in terms of close ballot results'.<sup>1054</sup>
- 12.41 The Court of Disputed Returns noted that ballot papers may have been completed by voters 'of differing ages, health standards, cultural backgrounds and educations levels to mention but a few of the many variables'.<sup>1055</sup> The Court held that 'doubtful questions of form should be resolved in favour of the franchise where there is no doubt as to the real intention of the voter'.<sup>1056</sup> Other key principles identified by the Court were set out as follows:
- 'When seeking to determine the voter's intention resort must be had, exclusively, to what the voter has written on the ballot-paper.
  - The ballot paper should be read and construed as whole. [sic]
  - A voter's intention will not be expressed with the necessary clarity unless the intention is unmistakable and can be ascertained with certainty'.<sup>1057</sup>
- 12.42 The AEC commissioned a review in August 2008 to examine the implications of the decision by the Court of Disputed Returns on disputed ballots. The final report of the review contained recommendations to 'improve the quality, consistency, transparency and accountability of decision-making by electoral officials on the formality of ballot papers', and identified changes required to 'existing policies, guidelines, procedures, manuals and training produced by the AEC on the formality of ballot papers'.<sup>1058</sup> The majority of these recommendations were subsequently endorsed by JSCEM.<sup>1059</sup>
- 12.43 It is certainly preferable that clear guidelines on the rules governing the formality of the vote are provided to all polling officials, candidates and scrutineers. Updated guidelines, taking into account the decision of the Court of Disputed Returns, could be distributed to all polling officials and made publicly available for viewing by scrutineers and candidates.<sup>1060</sup> Greater consistency and transparency in decision-making regarding the formality of the votes could be argued to lead to greater public confidence in the counting process. Clear guidelines will also mitigate the risk of a greater number of recounts and/or petitions to the Court of Disputed Returns in the future.<sup>1061</sup>
- 12.44 As noted in paragraph 3.6, the provisions in Part XVIII of the Electoral Act which govern the scrutiny of ballots are technical and complex. It could be argued that the details set out in the Electoral Act to govern the scrutiny process are necessary to reassure voters, candidates and scrutineers that administrators are applying the correct vote counting procedures. However, the disputed McEwen election results might suggest that not all the rules relating to the counting of votes are sufficiently clear. If it is seen as necessary to include detailed rules for counting the votes in the Electoral Act, then it might also be argued that it is important that

<sup>1054</sup> JSCEM, *Inquiry into the 2007 Federal Election*, Committee Hansard, 11 August 2008, (Mr D Melham (Chairperson)), p. 22.

<sup>1055</sup> *Mitchell v Bailey (No 2)* [2008] FCA 692 at [51].

<sup>1056</sup> *ibid.*, at [52].

<sup>1057</sup> *ibid.* For further detail, see A Henderson, *op. cit.*, pp. 16-18.

<sup>1058</sup> Australian Electoral Commission, *Tally Board*, No. 5, November 2008, p. 2.

<sup>1059</sup> JSCEM, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto*, *op. cit.*, p. 259.

<sup>1060</sup> A Henderson, *op. cit.*, p. 14.

<sup>1061</sup> *ibid.*, p. 6.

the provisions be drafted in plain English that is understood by all voters, candidates and scrutineers and can be clearly applied by electoral administrators. On the other hand, it could also be argued that now that the ruling of the Court of Disputed Returns has clarified the import of key provisions of the Act, there would be risks involved in recasting them in a form which might give rise to a future need for further judicial constructions.

- 12.45 While there is clear scope for greater harmonisation between Commonwealth, state and territory formality principles, there may be limits to the degree to which harmonisation can be achieved while different voting systems apply across jurisdictions. *Annex 8* sets out the key formality differences for elections to Australian lower houses. Consistent rules for determining the formality of the vote might be argued to be possible only if uniform voting systems are adopted.

### **Automatic Recounts**

- 12.46 The close margin in McEwen also led to calls for automatic recounts of close elections.<sup>1062</sup>
- 12.47 Currently, at any time before the result of an election is formally declared, a candidate may request a recount, the Divisional Returning Officer (DRO) may conduct a recount on their own motion, or the DRO may be directed to perform a recount by the Electoral Commissioner or the Australian Electoral Officer in their state or territory.<sup>1063</sup>
- 12.48 The AEC advises candidates that ‘in the absence of specifically alleged errors’, it is unlikely that a recount will be granted for a House of Representatives election, ‘no matter how close the margins in the scrutiny had been’.<sup>1064</sup> Pointing to the extensive checks and balances in the scrutiny systems for the House of Representatives and the Senate, including the conducting of a fresh scrutiny for all ballots, the AEC states that ‘significant sorting errors are highly unlikely to go undetected’.<sup>1065</sup>
- 12.49 A number of jurisdictions in the United States provide for automatic or ‘mandatory’ recounts in the event of a close election margin, generally defined as a margin less than 0.5% of the total votes cast.<sup>1066</sup> In its report on the conduct of the 2007 federal election, JSCEM agreed with a recommendation of a review commissioned by the AEC that an automatic recount be undertaken for all elections in which the margin of votes on the initial count is less than 100 votes.<sup>1067</sup>
- 12.50 Given the fact that the recount in McEwen resulted in the election result being changed, it could be argued that automatic recounts would allow candidates and the community to have greater confidence in the final declared outcome.<sup>1068</sup> On the other hand, it can be argued that excessive numbers of recounts will place additional pressure on electoral officials, result in increased costs, and could lead to delays in determining the final outcome of an election. The extent to which electronic technologies are adopted for elements of the voting and counting processes will also impact on whether automatic recounts are seen as necessary.

<sup>1062</sup> *ibid.*, pp. 23-28.

<sup>1063</sup> Electoral Act, *op. cit.*, section 279.

<sup>1064</sup> AEC, *Candidate’s Handbook for Federal Elections*, 2007, p. 58.

<sup>1065</sup> *ibid.*

<sup>1066</sup> R Bauer, JC Rylander, P Coie, *A Report of the Task Force on Legal and Constitutional Issues*, National Commission on Federal Election Reform, The Century Foundation, 2001, Chapter XII – Recounts and Contests, p. 2. Note that in some cases, automatic recounts will amount to manual recounting of ballots originally counted manually or electronically.

<sup>1067</sup> JSCEM, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto*, *op. cit.*, pp. 253-255, 259.

<sup>1068</sup> F Bailey, D Wight (Australian Electoral Commission), as cited in M Schubert, ‘Bailey gets recount, ALP cries desperation’, *The Age*, 12 December 2007.

## DISCUSSION POINTS

12.51 Submissions are invited on what aspects (if any) of the counting and scrutiny process might be reformed. In particular, comments are invited on the following questions:

- Are there any measures that could be taken to improve the process by which declaration votes are counted?
  - In particular, should pre-poll votes cast in an elector's home division be treated as ordinary votes for the purposes of the count?
- Should the National Tally Room continue to operate for federal elections?
- Which forms of electronic vote counting should be used at federal elections?
- Are there any additional measures or initiatives that could improve decision-making as to the formality of votes?
- Should recounts be automatically conducted in the case of close election results?