



Electoral Commissioner

Our Ref: 13/946

Senator Louise Pratt
Senator for Western Australia

By email to Katherine.lamont@slatergordon.com.au

Dear Senator Pratt

I refer to the matter of a request for a re-count made to me by Senator Scott Ludlam and Mr Wayne Dropulich of the Senate Election in Western Australia. I note that Hopgood Ganim provided me with submissions on this matter on behalf of Mr Zhenya Wang and Slater and Gordon provided me with submissions on your behalf dated 9 October 2013. I note that the declaration of the Senate poll that was scheduled for Friday 4 October has been deferred pending my decision on this matter.

Decision

I have considered the matter in the light of your submissions and submissions made by Senator Ludlam of the Australian Greens Party, and submissions made on behalf of Mr Zhenya Wang and Mr Wayne Dropulich and have decided to direct a recount of certain Western Australian Senate ballot papers in the manner set out below. I am making this decision under subsection 278(2) of the *Commonwealth Electoral Act 1918* (the Electoral Act). Subsection 278(2) provides:

"If the Australian Electoral Officer refuses a request of a candidate under subsection (1), the candidate may, in writing, appeal to the Electoral Commissioner to direct a re-count of the ballot papers to which the request relates, and the Electoral Commissioner has a discretion either to direct a re-count of the ballot papers or refuse to direct a re-count."

I have carefully examined the reasons for the recount request contained in the various letters and emails and others whose interests are affected and have formed the view that the matters raised do not refer to any specific grounds, errors, incidents or irregularities that would fall within the published recount policy of the Australian Electoral Commission (AEC).

However, I have also considered whether there may be some special circumstances that exist in this particular election of Senators in Western Australia that would lead me to not applying the published policy in this instance.

Given the small margin involved for the critical exclusion, I have caused further evaluations to be undertaken by the AEC on two areas. First, in relation to the verification that AEC policies and practices have been adhered to in this election. Second, that the critical margin after count 139 that impacted on the final election result has not been affected by any error or irregularity.

In considering this matter I note that small margins between various candidates at exclusion points in a Senate distribution of preferences are not unusual. The combination of a close margin and the fact that the exclusion after count 139 was directly critical to the outcome in this Senate election is far more unusual.

While I have no direct evidence in my possession of any error or irregularity that may have materially affected the election results, the criticality of the particular Senate candidate exclusion together with the small margin leads me to conclude that it is prudent to confirm the result in the interests of the electorate's confidence in the outcome.

I have therefore decided that there should be a recount of all the above the line Senate ballot papers together with those informal ballot papers that have been determined as obviously informal by Divisional Returning Officers in accordance with section 273A of the Electoral Act. A recount of all above the line ballot papers is also in the interests of all candidates in the election.

This recount will not include below the line ballots, or above the line and informal ballots that have been classified as such at the Centralised Senate Scrutiny (CSS).

I am of the view that above the line ballots are likely in the circumstances to be the most influential in determining the final outcome. For this reason, I will direct the AEO for Western Australia to conduct a full recount of all above the line Senate ballot papers as outlined above in accordance with section 278 as soon as possible. Mr Kramer will advise you and other candidates of arrangements for the recount shortly.

Please find attached a statement of reasons which addresses each of the matters raised in emails and letters to me requesting that a re-count take place.

Yours sincerely

[Signature redacted.]

Ed Killesteyn

October 2013

Statement of Reasons

I have considered the matter on its merits and in the context of the AEC's published recount policy.

The AEC's published recount policy provides that:

- A recount may take place where there are valid and specific grounds for supposing that it could change the result of the election in the division [*or state or territory for Senate*] or where there are specific grounds for determining the need for a recount of specific ballot papers (such as in response to specific allegations or incidents).
- A request for a recount which does not plead any valid and specific grounds must be refused. A request for a recount needs to identify specific ballot-papers and associated significant counting process errors or irregularities that could change the result of an election within a division [*or state or territory for Senate*].
- Wherever possible, the grounds pleaded by the candidate requesting the recount will be used to narrow down to as small a category as possible the ballot papers that need to be re-examined.
- [*applies to House of Representatives recount requests only*].
- Only one recount of any (set of) ballot papers will occur.
- Requests for recounts will only be considered, and actioned, in the period after the completion of all scrutines and before the declaration of the poll in the division (for House of Representatives ballot papers) or state or territory (for Senate ballot papers).

To assist my decision I have sought an explanation of each of the matters raised in other parties' letters to the AEO for Western Australia and other matters raised directly with me.

1. Shifting tallies for the Shooters and Fishers lead

One party raised a matter as follows: "Our scrutineers identified that there were shifts in the tallies for Shooters and Fishers and the Australian Christians, which were not consistent with trends from the divisions".

That is referring to information derived from viewing the Virtual Tally Room (VTR) figures. The VTR figures are made available at various intervals while the scrutiny is still being conducted and are therefore indicative only and are not final. They are displayed in the interests of transparency. Variations in progressive results

are not unusual and reflect the stages of fresh and further scrutiny of ordinary and declaration votes. The scrutiny is further subject to a final validation exercise to reconcile ballot papers counted. The checks conducted to validate and confirm the accuracy of the vote include verification of formality and checking that votes have been correctly attributed to each candidate.

2. Potential for human error to impact the outcome

One party raised a matter referring to the possibility of "human error in counting". Whilst I have a high degree of confidence in our overall election systems and checking process, it cannot be argued that human error could not occur in the manual processing of over 1.3 million ballot papers. In the absence of a recount, there is no way to relate this possibility of error to a likelihood of altered outcome.

3. Differences between Senate and House of Representatives tallies

One party raised a matter referring to: "There is a considerable difference in the number of votes cast in the House of Representatives and the Senate in each division."

Yes, there is a difference in the number of votes counted in the House of Representatives and the Senate. The main reason for that is that some electors do not update their addresses promptly with the AEC. Subsection 99(1) of the Electoral Act entitles a person who is otherwise eligible to vote to be enrolled "In respect of residence at an address". Therefore a person is entitled to vote for the House of Representatives Division where they live. If an elector seeks to vote but cannot be found on the roll for the Division in which they live the AEC practice is to offer these electors a declaration vote, which comprises a ballot for the House of Representatives Division where they say they are enrolled and a Senate ballot paper for that State or Territory. During the scrutiny the House of Representatives ballot may not be able to be counted because the elector is enrolled in a different House of Representatives Division, but the Senate ballot may be able to be counted. This is because a person is voting for Senators for a State or Territory and their address falls within that State or Territory. In this case the AEC refers to this situation as being a 'partially admitted' vote.

The difference in the number of votes counted for the House of Representatives and the Senate is largely accounted for by 'partially admitted' votes. 11,159 partially admitted votes were included in the Senate count for Western Australia and this accounts for the greater part of the discrepancy, which is not a result of errors in counting or bundling.

Apart from ballots being 'partially admitted' it is also the case that electors can sometimes deposit one or the other, but not both of their ballot papers in a ballot box, or not return both ballot papers in a postal vote certificate envelope.

4. Non-standard ballots

One party referred to there being multiple non-standard ballots. The information you provided has been examined and all examples fall within the scope of s.270 which describes formality savings measures and are not irregularities.

5. Pre-poll discrepancy on 16 September

One party refers to two parcels of pre-poll votes that were added on 16 September:

From the information provided the AEC is unable to replicate these particular results.

In addition to the Perth Pre Poll Voting Centre, 4 other static polling places have 0.64% allocated to the Australian Christians. These are South Perth North, Melville (Tangney), Guilderton and Hamilton Hill South. However no combination of these static polling places and Perth PPVC tally to the quoted 3,222 votes. The absence of specific data means we have been unable to evaluate the issues raised. In any event we have concluded that this issue is not material to the question of a recount.

6. Analysis of AEC time series data

One party referred to several points in time at which the Australian Christians and Australian Sports Party votes decreased.

Divisional Returning Officers (DROs) review data management reports which compare House of Representatives ballot papers counted with Senate ballot paper counts. Discrepancies are investigated and rectified. This activity is undertaken prior to the Senate distribution of preferences being finalised.

Investigations include checking polling place returns, scrutiny input sheets and ballot papers (counted, unused, spoilt and discarded) to determine whether the data entry reasonably reflects expected numbers.

A number of accounting corrections were made with regard to the Division of O'Connor on 1 October. The DRO identified that the data entry for a number of polling places did not physically match the polling place returns or scrutiny input sheets to the actual physical number of votes counted.

As a result the DRO made a number of adjustments to correct obvious data entry errors. These may have changed the percentage quantum of votes as the errors were corrected, however the actual quantum of votes was the same. Depending on timing, the adjustments may have appeared on the VTR as a reduction in the total quantum of votes for some of the parties and then as an additional increase as the VTR was updated.

These adjustments were recorded in the election diary by the Divisional Returning Officer and were a result of the completion of standard validation exercises in the data entry aspect of the election.

7. Analysis of Durack Geraldton – Waggrakine Booth

One party also referred to this booth as containing twice as many informals.

Without a physical examination of the ballot papers we have been unable to conclusively address this issue.

8. Identification of unusual booth trends

One party also described unusual booth trends.

There is nothing to indicate anything irregular about any of these results. The voting trends in each booth are quite credibly a result of localised demographic data. For example, in Ashfield Polling Place there are double the percentage of and quantum of voters who are more supportive of the HEMP party than the Shooters and Fishers Party. Additionally, in some cases the numbers being referred to are small. For example, 'statistically double the percentage vote for the Canning Vale North vote' equates to 3 votes.

9. Unusual total vote count for booths in Durack and Brand

One party also referred to an unusually high proportion of polling booth totals which end in 10.

For the Division of Brand there are 3 polling places out of 41 that tally to a multiple of 10 and for the Division of Durack 12 out of 123 polling places. This is respectively 7.32% and 9.76% of all polling places for those divisions. In comparison the Division of Canning has 5 out of 54 polling places and the Division of O'Connor 13 out of 133 polling places. Respectively these are 9.26% and 9.78%. The distribution of counts ending in 10 is not abnormal.

10. Significant discrepancies between the Australian Christians HOR and Senate vote at particular booths

One party referred to significant discrepancies.

There is not a compelling argument that voters will as a matter of course align their House and Senate votes. Discrepancies such as these are equally likely to be the result of conscious voter choices.

11. Demonstrated problems in vote counting in previous elections

One party also referred to demonstrated problems in previous elections.

While I note these concerns, they are not relevant to the conduct of this election. Attention is paid to the correct counting of ballot papers in staff training materials. For example, an exercise specifically designed to reinforce correct counting of Senate ballot papers was included in the AEC's 2012 'simulated election' exercise. Issues arising from that exercise were raised with all offices.

Conclusions

In the light of the above analysis of the concerns raised, I agree with the AEO for Western Australia that such a request fails to identify specific instances of ballot paper counting or irregularities that could change the outcome of the election. Hence I would be minded to this application for a re-count for those reasons.

However, I have also considered whether there may be some special circumstances that exist in this particular election of Senators in Western Australia that would lead me to not applying the published policy in this instance.

Having regard to the additional matters raised in letters and emails, in particular the criticality of the particular Senate candidate exclusion of concern and the small margin involved, I am of the view that it is prudent to confirm the result in the interests of the electorate's confidence in the outcome.

I have therefore decided that there should be a recount of all above the line Senate ballot papers together with those informal ballot papers that have been determined as obviously informal by Divisional Returning Officers in accordance with section 273A of the Electoral Act. A recount of the above the line ballot papers is also in the interests of all candidates in the election.

This recount will not include below the line ballots, or above the line and informal ballots that have been classified as such at the CSS. Those ballot papers are entered into our computer system twice, and any anomalies are physically checked and adjudicated by CSS staff, discounting significantly the possibility of error being introduced at this stage of the determination of the final Senate positions.

I am of the view that above the line ballots are likely in the circumstances to be the most influential in determining the final outcome. For this reason, I will direct the AEO for Western Australia to conduct a full recount of all above-the-line Senate ballot papers in accordance with section 278 as soon as possible.