

Referendum formality: Vote saving provisions - legal advice

To ensure a voter casts a formal vote the *Referendum (Machinery Provisions) Act 1984* requires voters to write 'Yes' or 'No' in full, in English, in the space provided on the referendum ballot paper. Voting instructions will clearly advise voters to write either 'yes' or 'no' on the ballot paper. This is what the vast majority of Australians have done for federal referendums previously – federal referendums have a much lower informal voting rate than federal elections (0.86% at the 1999 federal referendum).

Below are extracts from legal advice relating to the formality of a tick or cross on a federal referendum ballot paper.

Vote saving provisions have been in referendum legislation for more than 100 years to ensure a vote can be counted if the voter's intention is clear. The two separate pieces of legal advice provided to the AEC are consistent. Relevant extracts are provided below. This has resulted in the same treatment of a tick or cross on a federal referendum ballot paper during at least the six previous federal referendum questions dating back more than 30 years.

Legal advice often includes details of individuals and/or advice surrounding several matters. This is why the AEC is publishing extracts from the advice that are relevant to ticks and crosses only.

1988 legal advice

In 1988, the Attorney-General's Department (now the Australian Government Solicitor) advised the AEC:

6. Deviations from what is prescribed by s.24 will not render the ballot-paper informal if the ballot-paper satisfies the requirements of 2.93(8) by a clear indication of the voter's intention. In relation to analogous provisions concerning Senate elections, the High Court has said that the voter's intention must be expressed or indicated in a way that leaves it indisputable; it must not be left to inference or conjecture (Kane v. McClelland (1962) 111 CLR 518 at p.527).

7. In the first place, I confirm your understanding that ballot-papers marked with ticks only would be formal, the ticks denoting approval in each case. However, ballot-papers marked with crosses only would be informal as there would be no clear indication of the voter's intention. A cross may be used, by itself, variously to denote approval or disapproval.

2023 legal advice

Earlier this year, in 2023, the Australian Government Solicitor confirmed the 1988 advice in advice to the AEC:

24. A referendum ballot paper posing only one question marked with a tick should be treated as formal. This is because it is equivalent to a ballot paper marked 'Yes'. However, a ballot paper posing only one question marked with a cross should be treated as informal because it provides no clear indication of the voter's intention. This is because a cross may be used, by itself, variously to denote approval or disapproval. We note that AGS has advised in the past that a cross will not be informal where used in juxtaposition to a tick on a multi-question ballot paper.