AEC
Australian Electoral Commission

Electoral Commissioner

Dr Andrew Conway and A/Prof Vanessa Teague
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Dear Dr Conway and A/Prof Teague

Senate Counting and Scrutiny

I write regarding your correspondence of 31 August 2021. At the outset, allow me to acknowledge your ongoing interest in the counting and scrutiny processes for Senate elections, and thank you for sharing your detailed report on this complex and important area of our work.

The Australian electoral system is amongst the world's most transparent, and that transparency is designed to reassure citizens that their elections are free, fair, and accurate. As a result, the Australian Electoral Commission (AEC) welcomes all forms of scrutiny.

The AEC has reviewed the recommendations in your report. I note the report yet again validates the accuracy of Senate election outcomes resulting from the AEC's continuing concentration on the integrity of the Senate counting process.

As part of the AEC's response to the report recommendations, the information in this letter provides additional context about our assurance processes and the interpretation and application of the *Commonwealth Electoral Act 1918* (the Electoral Act) – an Act which is both complex and prescriptive. Of course, any changes to the Electoral Act are a matter for Parliament and not the AEC.

The AEC undertakes regular and rigorous assurance processes of the end-to-end Senate solution prior to each electoral event. This is done by both internal AEC staff and external independent specialists. Throughout the election, scrutineers have access to data and ballot papers for every count that is conducted. The data is also published and open to the public via the AEC website (results.aec.gov.au). Data is available for every federal election since 2004.

Your report identified three practices of the AEC that you suggest may be inconsistent with section 273 of the Electoral Act. It is unclear in the report whether your investigations were carried out by reverse-engineering aspects of the code; or whether you have implemented your own counting system based on your interpretation of the Electoral Act and from the public information available about preference distributions at Senate elections. Whilst the AEC is not aware of the methodology used for your report, your report does not acknowledge that the Australian Electoral Officer (AEO) for each state, is given the statutory authority to resolve unbreakable ties by section 273(17), (20)(b) and (31)(b). To address a tie of more than two candidates, the AEC follows the same logic that the legislation reflects for a tie of two candidates. This is a more appropriate interpretation as acknowledged in your paper.

In the case of bulk exclusions, the AEC does not have the discretion on whether to apply bulk exclusion under section 273(13A) of the Electoral Act. Section 273(13) requires that if the criteria for a bulk exclusion is met, the AEC must conduct a bulk exclusion rather than an individual exclusion. Bulk exclusions are needed to expedite the laborious task of manual scrutiny. Whilst any consideration of potential amendments to the Electoral Act are a matter for government, the AEC intends to expand the information available on its website to better clarify processes.

Your report seeks clarity on when section 273(18) applies. It applies when there are a number of candidates equal to the number of vacancies but does not prevent the distribution of a surplus or completion of an exclusion. The AEC does not consider that there is ambiguity in the relationship between sections 273(14) and (17) of the Electoral Act. A Senate scrutiny often ends up with three continuing candidates for two remaining vacancies. When the leading candidate of the three passes the quota, section 273(14) says that the candidate 'shall be elected' and requires, without any intermediate step, that their surplus votes 'shall be transferred'. Only then can the AEC turn to section 273(17) to determine who fills the final vacancy.

The suggested ambiguity arises from section 273(17), which says that 'in respect of the last vacancy for which two continuing candidates remain, the continuing candidate who has the larger number of votes shall be elected notwithstanding that that number is below the quota'. There is no basis in the text of section 273(14) to permit section 273(17) to operate between the election of the leading candidate and the mandatory transfer of their surplus votes.

The 'second possibility' that you have stated unnecessarily reduces the relative value of votes standing to the credit of the elected candidate, by making them unavailable for surplus transfer at a fractional value to one or other of the two continuing candidates to help to decide who is elected to the final vacancy.

I trust this information provides you with some useful further context and the clarity you were seeking regarding the data you have analysed.

Yours sincerely

Tom Rogers

18 October 2021