

LOR: 88/13
DATE: 17.6.88

AEC REF:
AG REF:

SUBJECT: Formality of certain referendum ballot papers (four questions)



ATTORNEY-GENERAL'S DEPARTMENT

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Please Quote: GC/84/16430
Your Ref.: 84/1569

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17 June 1988

The Deputy Electoral Commissioner
Australian Electoral Commission
PO Box E201
Queen Victoria Terrace
ACT 2600

Attention:

s 47F

Referendum (Machinery Provisions) Act 1984 ('the Act'), ss.24, 25 and 93: Formality of certain referendum ballot-papers

I refer to your memorandum dated 14 June 1988 in which you seek advice on the formality of various referendum ballot-papers on which votes are marked using:

- (1) 'Yes' only and ticks and/or crosses;
- (2) 'No' only and ticks and/or crosses;
- (3) 'Yes' and 'No' and ticks or crosses or a tick and a cross.

The examples set out in your memorandum are as follows:

(1)	I	II	III
	Yes	Yes	Yes
	X	✓	X
	✓	✓	X
	X	✓	X

(2)	IV	V	VI
	No	No	No
	X	✓	X
	✓	✓	X
	X	✓	X



(3)	VII	VIII	IX
	Yes	Yes	Yes
	No	No	No
	✓	✓	X
	X	✓	X

Advice

2. In my view, the second, third and fourth votes on the example numbered 'III', the second, third and fourth votes on the example numbered 'VI', and the third and fourth votes on the example numbered 'IX' would be informal. All the other votes would be formal.

Legislation

3. The relevant provisions of the Act are ss.24, 25 and 93. Section 93(1), read together with s.93(6), lists the grounds on which the ballot-paper of an ordinary voter will be rendered informal. Sections 93(1) and (6), so far as relevant, provide:

'93. (1) A ballot-paper of a voter, other than an absent voter's ballot-paper, a postal ballot-paper or a ballot-paper used for voting pursuant to section 37, 38, 39 or 65 is informal if -

...

(b) it has no vote marked on it;

(c) it has more than one vote marked on it;

...

(6) A ballot-paper is not informal for any reason other than a reason specified in this section ...'.

(Sections 37, 38, 39 and 65 are not presently relevant.)

4. Section 25(3) extends the application of the grounds of informality listed in s.93 to the special case where 2 or more ballot-papers are printed on one piece of paper. Section 25(3), so far as relevant, provides:

'25. (3) Where 2 or more ballot-papers are printed on one piece of paper as mentioned in sub-section (2) -

...

(b) the presence of any mark or writing on the piece of paper by which a voter can be identified invalidates all the ballot-papers and all the votes on the piece of paper; and

(c) a ground of informality (other than the ground referred to in paragraph (b)) applies only to the particular ballot-paper and vote to which it relates, and does not affect the validity of any other ballot-paper or vote.'

5. Sections 24 and 93(8), taken together, indicate what constitutes a 'vote' for the purposes of paras (b) and (c) of s.93(1). They provide as follows:

'24. The voting at a referendum shall be by ballot and each elector shall indicate his vote -

- (a) if he approves the proposed law - by writing the word "Yes" in the space provided on the ballot-paper; or
- (b) if he does not approve the proposed law - by writing the word "No" in the space so provided.'

'93. (8) Effect shall be given to a ballot-paper of a voter according to the voter's intention, so far as his intention is clear.'

Reasons

6. In paragraph 7 of this Department's memorandum dated 21 December 1984, to which you refer, you were advised that s.24, notwithstanding its mandatory terms, does not prescribe an exhaustive mode of indicating a vote as it must be read subject to s.93(8). Deviations from what is prescribed by s.24 will not render the ballot-paper informal if the ballot-paper satisfies the requirements of s.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 C.L.R. 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.

8. Further, in paragraph 9 of this Department's earlier memorandum you were advised that votes marked with ticks and crosses were formal. This is because where a tick and a cross are juxtaposed, the tick denotes approval and the cross disapproval.

Examples I, IV and VII

9. The votes marked on examples I, IV and VII are all, in my view, formal. I do not think that the voter's intention of using a tick to denote approval and a cross to denote disapproval is made any less clear by the appearance of other votes using the words 'Yes' and/or 'No' elsewhere on the same piece of paper.

Examples II, V and VIII

10. The votes marked on examples II, V and VIII are all, in my view, formal. I do not think that the appearance of the words 'Yes' and/or 'No' elsewhere on the same piece of paper affects the quality of a tick as indicating approval.

Examples 'III' and 'VI' and 'IX'

11. In my view, the second, third and fourth votes on each of the examples numbered 'III' and 'VI', and the third and fourth votes on the example numbered 'IX' would be informal. This is because in none of these examples does the use of a cross provide a clear indication of a voter's intention. A cross may be used with the intention of indicating approval or disapproval and the voter's intention is not made any clearer when regard is had to the other votes appearing in these examples.

S 47F

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Your reference: GC/84/16430

REFERENDUM (MACHINERY PROVISIONS) ACT 1984, ss 24, 25 AND 93: FORMALITY OF REFERENDUM BALLOT PAPERS

After the 1 December 1984 referendums you provided us with oral and written advice (29 November and 21 December 1984 respectively) on the formality of certain sample referendum ballot papers.

2. On the use of ticks and crosses, your oral advice was to the effect that votes marked with ticks and crosses were formal if a tick and a cross were juxtaposed, since in this circumstance a tick denotes approval and a cross disapproval. You further advised (but this part of your advice was not confirmed in your written advice of 21 December) that ballot papers with ticks only would have been formal (the ticks denoting approval) but that ballot papers with crosses only would have been informal since the voter's intention would not have been clear for either vote.

3. We now seek your advice on the formality of certain ballot papers with 4 votes marked using:

- (i) Yes only and ticks and/or crosses,
- (ii) No only and ticks and/or crosses, and
- (iii) Yes and No, and ticks or crosses or a tick and a cross.

For example:

(i)	I	II	III
	Yes	Yes	Yes
	X	✓	X
	✓	✓	X
	X	✓	X
(ii)	IV	V	VI
	No	No	No
	X	✓	X
	✓	✓	X
	X	✓	X
(iii)	VII	VIII	IX
	Yes	Yes	Yes
	No	No	No
	✓	✓	X
	X	✓	X

4. Also, would you please confirm the oral advice you gave on 29 November 1984, but which was not confirmed in your written advice of 21 December 1984, that all ticks indicate Yes on each vote and are therefore formal but all crosses render the votes informal since the voter's intention is not clear for any vote (see para.2 above).

5. Since we are now embarking on a training program for our DROs for the forthcoming referendum could we please have your advice by c.o.b Friday 17 June.

A C

A CIRULIS
Deputy Electoral Commissioner

14 June 1988