



Electoral Legislation Amendment (Assurance of Senate Counting) Act 2021

No. 135, 2021

**An Act to amend the law relating to Senate
elections in respect of scrutiny**

Note: An electronic version of this Act is available on the Federal Register of Legislation
(<https://www.legislation.gov.au/>)

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No. 135, 2021

An Act to amend the law relating to Senate elections in respect of scrutiny

[Assented to 13 December 2021]

The Parliament of Australia enacts:

1 Short title

This Act is the *Electoral Legislation Amendment (Assurance of Senate Counting) Act 2021*.

No. 135, 2021 *Electoral Legislation Amendment (Assurance of Senate Counting)* 1
Act 2021

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day after this Act receives the Royal Assent.	14 December 2021
2. Schedule 1	The day after this Act receives the Royal Assent.	14 December 2021
3. Schedule 2	1 January 2023.	1 January 2023

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments commencing day after Royal Assent

Part 1—Assurance

Commonwealth Electoral Act 1918

1 After section 273A

Insert:

273AA Assurance of security of computer systems for scrutiny of votes in Senate election

- (1) The Electoral Commissioner must arrange for an independent person or body (the *accredited assessor*) accredited by the Australian Signals Directorate to conduct a risk assessment (a *security risk assessment*) of the security of the computer systems (including the systems for scanning ballot papers and counting votes) used to scrutinise the votes in a Senate election for a particular State or Territory in compliance with section 273A.
- (2) A security risk assessment of the computer systems required by subsection (1) must be conducted before the next Senate election for which the computer systems are to be used.
- (3) After a security risk assessment of the computer systems has been completed, the accredited assessor must give a written report of the assessment to the Electoral Commissioner. The report may include recommendations to reduce or eliminate any risks that could affect the security of the computer systems.
- (4) As soon as practicable after the Electoral Commissioner receives the report of a security risk assessment of the computer systems under subsection (3), the Electoral Commissioner must publish a statement of assurance on the Electoral Commission's website stating that a security risk assessment of the computer systems has been completed as required by subsection (1).

273AC Ballot paper sampling assurance throughout computerised scrutiny of votes in Senate election

- (1) This section applies if the scrutiny of votes in a Senate election for a particular State or Territory is, or is to be, conducted in compliance with section 273A.
- (2) The Electoral Commissioner must arrange for statistically significant samples of ballot papers to be checked throughout the scrutiny of votes for the election to assure that the electronic data used in counting the votes reflects the data recorded on the ballot papers.
- (3) The Electoral Commissioner must ensure that:
 - (a) if the election was held concurrently with a general election for the House of Representatives—at least 5,000 ballot papers in total are checked under subsection (2) throughout the scrutiny of votes for the election and for the other Senate elections that were held concurrently with that general election; or
 - (b) if the election was held alone—at least 1,000 ballot papers are checked under subsection (2) throughout the scrutiny of votes for the election.
- (4) The ballot paper sampling process is not part of the scrutiny in relation to the election.
- (5) The ballot paper sampling process may be inspected by the scrutineers at the counting centre where the scrutiny is being conducted.
- (6) Before the polling day for the election, the Electoral Commissioner must publish on the Electoral Commission's website:
 - (a) the methodology to be used for the ballot paper sampling process; and
 - (b) the process to be used for reconciling preferences.
- (7) Within 14 days after the return of the writ for the election, the Electoral Commissioner must publish on the Electoral Commission's website a statement setting out the outcomes of the ballot paper sampling process.

(8) In this section:

counting centre means the premises where the scrutiny or counting of ballot papers is being conducted.

Part 2—Counting

Commonwealth Electoral Act 1918

2 Subsection 273(17)

Omit “shall have a casting vote but shall not otherwise vote at the election”, substitute “must determine by lot which of those candidates is to be elected”.

3 Paragraph 273(20)(b)

After “shall determine”, insert “by lot”.

4 Subsection 273(22)

After “shall determine”, insert “by lot”.

5 Subsection 273(29)

Insert:

relative order of standing, at a particular time, of 2 continuing candidates with the same number of votes in a Senate election for a State means:

- (a) the relative order of standing of those candidates by reference to the last count at which they had a different number of votes, with the candidate with the greater number of votes at that count having a higher relative order of standing than the other candidate; or
- (b) if those candidates are in an unbreakable tie at that time—the relative order of standing of those candidates by reference to the order of standing determined under subsection (29A) in relation to the unbreakable tie.

unbreakable tie: 2 or more continuing candidates who have the same number of votes in a Senate election at a particular time are in an ***unbreakable tie*** at that time if:

- (a) they had the same number of votes at every count before that time; or
- (b) there was no count before that time.

6 After subsection 273(29)

Insert:

- (29A) If, at a particular time, 2 or more continuing candidates in a Senate election for a State are in an unbreakable tie, the Australian Electoral Officer for the State must determine by lot the order of standing of those candidates relative to each other at that time.

7 Paragraph 273(31)(a)

Omit “paragraph (b)”, substitute “paragraphs (b) and (c)”.

8 Paragraph 273(31)(b)

Repeal the paragraph, substitute:

- (b) if 2 continuing candidates have the same number of votes at that time—those candidates are to stand in the poll in their relative order of standing at that time;
- (c) if 3 or more continuing candidates have the same number of votes at that time—those candidates are to stand in the poll in the order determined in accordance with subsection (31A).

9 After subsection 273(31)

Insert:

- (31A) For the purposes of paragraph (31)(c), if 3 or more continuing candidates (the *tied candidates*) have the same number of votes at a particular time, the tied candidates are to stand in the poll in the order determined by:
- (a) identifying each possible combination of 2 tied candidates; and
 - (b) for each combination of 2 tied candidates identified under paragraph (a), working out the relative order of standing, at that time, of those 2 candidates; and
 - (c) ranking all of the tied candidates such that:
 - (i) the tied candidate who has a higher relative order of standing, at that time, than each other tied candidate stands highest in the poll; and
 - (ii) a tied candidate who has a higher relative order of standing, at that time, than another tied candidate stands higher in the poll than that other candidate; and

- (iii) the tied candidate who does not have a higher relative order of standing, at that time, than any other tied candidate stands lowest in the poll.

10 Subsection 273A(5)

Omit “subsections 273(8) to (32) (inclusive)”, substitute “subsections 273(8) to (13AA) and subsections 273(14) to (32)”.

11 Subsection 273A(9)

Omit “subsections 273(8) to (30) (inclusive)”, substitute “subsections 273(8) to (13AA) and subsections 273(14) to (30)”.

Part 3—Other amendments

Commonwealth Electoral Act 1918

12 Subsection 28(1)

Before “to any of the following”, insert “and sections 273AA and 273AC.”.

13 Subsection 273A(6)

Omit “For”, substitute “Subject to subsections (6AA) and (6AB), for”.

14 After subsection 273A(6)

Insert:

(6AA) A scrutineer who is present at proceedings under section 273 and subsections (4) and (5) of this section may ask the officer conducting the scrutiny for access to an original ballot paper for the purposes of resolving a question about:

- (a) the formality of the original ballot paper; or
- (b) a preference vote being counted in the scrutiny.

(6AB) If, under subsection (6AA), a scrutineer asks an officer for access to an original ballot paper for the purposes of resolving a question of a kind referred to in that subsection:

- (a) the officer must grant the request unless, in the opinion of the Australian Electoral Officer, granting the request would:
 - (i) unreasonably delay the scrutiny; and
 - (ii) put at risk the writ for the election being returned before the start of the term of service of the successful candidates; and
- (b) if the officer grants the request—the question is to be resolved by reference to the original ballot paper.

Note: The Australian Electoral Officer may form the opinion that granting a scrutineer’s request under subsection (6AA) would unreasonably delay the scrutiny because, for example, the scrutineer has made multiple unreasonable, frivolous or vexatious requests under that subsection and the Australian Electoral Officer has warned the

scrutineer that further requests under that subsection may not be granted because they would unreasonably delay the scrutiny.

15 After section 283

Insert:

283A Publication of Senate election data

Within 7 days after the return of the writ for a Senate election for a State or Territory, the Australian Electoral Officer for the State or Territory must publish on the Electoral Commission's website:

- (a) the following identifying information for each formal ballot paper cast in the election:
 - (i) the Division;
 - (ii) the vote collection point;
 - (iii) the batch number and ballot paper number within the batch;
 - (iv) the full set of marked preferences; and
- (b) the distribution of preferences received by each candidate for the State or Territory after each count under section 273 in the election.

Schedule 2—Amendments commencing 1 January 2023

Part 1—Main amendments

Commonwealth Electoral Act 1918

1 After section 273AA

Insert:

273AB Assurance of accuracy of counting software for scrutiny of votes in Senate election

- (1) The Electoral Commissioner must arrange for an independent and appropriately qualified person or body (the *assessor*) to conduct an assessment of whether the software (the *counting software*) to be used by a computer to scrutinise the votes in a Senate election for a particular State or Territory in compliance with section 273A distributes preferences and elects candidates in accordance with the requirements of this Act.
- (2) The assessment of the counting software must be conducted before the next Senate election for which the software is to be used.
- (3) The assessor must give a written report of the assessment to the Electoral Commissioner. The report may include recommendations in relation to the accuracy of the counting software, including in relation to its use or any variations required to improve or ensure its accuracy.
- (4) As soon as practicable after the Electoral Commissioner receives the report under subsection (3), the Electoral Commissioner must publish a statement on the Electoral Commission's website stating:
 - (a) that an assessment of the accuracy of the counting software has been completed as required by subsection (1); and
 - (b) whether the accuracy of the counting software is assured to the appropriate standard.

- (5) Not earlier than 7 days before the Senate election for which the counting software is to be used, the Electoral Commissioner must publish on the Electoral Commission's website a statement verifying that the version of the counting software to be used to scrutinise the votes in the election is the version of the software that was assessed and assured under this section before the election.
- (6) Within 7 days after the return of the writ for the Senate election for which the counting software was used, the Electoral Commissioner must publish on the Electoral Commission's website a statement verifying that the version of the counting software that was used to scrutinise the votes in the election was the version of the software that was assessed and assured under this section before the election.
- (7) If variations of the version of the counting software that was used to scrutinise the votes in the election were made after that version was assessed and assured under this section, the statement under subsection (6) must also include:
 - (a) a description of the variations; and
 - (b) the reasons for the variations.

Part 2—Other amendments

Commonwealth Electoral Act 1918

2 Subsection 28(1)

After “273AA”, insert “, 273AB”.

*[Minister’s second reading speech made in—
House of Representatives on 28 October 2021
Senate on 2 December 2021]*

(157/21)

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2021

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