ELECTIONS AND ADMINISTRATIVE LAW

Paul Pirani*

Role of the AEC

The Australian Electoral Commission ('AEC') conducts elections under a range of legislation. The main role of the AEC is the conduct of federal elections under the *Commonwealth Electoral Act 1918* (Cth) ('*Electoral Act*') and referendums under the *Referendum (Machinery Provisions) Act 1984* (Cth) ('Referendum Act'). However, in addition, the AEC conducts fee for service elections under the authority contained in sections 7A and 7B of the *Electoral Act*, industrial elections under the *Fair Work (Registered Organisations) Act 2009* (Cth), protected action ballots under the *Fair Work Act 2009* (Cth) and elections for the Torres Strait Regional Authority under the *Aboriginal and Torres Strait Regional Authority Act 2005* (Cth).

Status of the AEC

The AEC is not a body corporate. As a matter of law, the AEC is not a legal entity that is separate from the Commonwealth of Australia. This means that the AEC is not a statutory authority and is unable to sue and be sued or to enter into contracts in its own right. This is despite what was stated in 1983 (see second reading speech for the Commonwealth Electoral Legislation Amendment Bill 1983 (Cth)) when a major reform of Australia's electoral laws took place with the amendments to the *Electoral Act*. The AEC does have some standing to appear in court, separately from the Commonwealth, in relation to non-voters (see section 245), the Court of Disputed Returns (see sections 357 and 359) and to seek injunctions to restrain persons from breaching the *Electoral Act* (see section 383). There is a brief discussion of the legal status of the AEC as being separate from the Commonwealth in *Mitchell v Bailey (No 3)* [2008] FCA 1029 (11 July 2008).

The AEC itself only comprises three persons: the Chairperson (the Hon Justice Peter Heerey QC), the non-judicial member (the Chief Statistician, Mr Brian Pink) and the Electoral Commissioner (Mr Ed Killesteyn) (see section 6 of the *Electoral Act*).

The Electoral Commissioner is the chief executive officer of the AEC and 'shall have such other functions, and such powers, as are conferred upon him or her by or under any law of the Commonwealth' (see subsection 18(2) of the *Electoral Act*). The Electoral Commissioner is the Chief Executive of the AEC for the purposes of the *Financial Management and Accountability Act 1997* (Cth) ('*FMA Act*') (see section 5) and an Agency Head for the purposes of the *Public Service Act 1999* (Cth) (see section 7 of the *Public Service Act 1999* and subsection 29(1) of the *Electoral Act*).

The *Electoral Act* provides that the AEC reports to the Minister and provides advice in a non-partisan manner. This is shown in section 7 of the *Electoral Act*, which sets out the functions of the AEC and includes:

> (b) to consider, and report to the Minister on, electoral matters referred to it by the Minister and such other electoral matters as it thinks; and
>
> .....

* *Paul Pirani is Chief Legal Officer, Australian Electoral Commission; Assistant Commissioner for the Legal and Compliance Branch.*

(d) to provide information and advice on electoral matters to the Parliament, the Government, Departments and authorities of the Commonwealth;

The issue of the relationship between the AEC and the Minister responsible for the administration of the *Electoral Act* is complex. This issue is determined by an examination of matters such as the specific powers contained in the *Electoral Act* itself, the Administrative Arrangements Order and the doctrine of ministerial responsibility.

The Administrative Arrangements Order (made by the Governor-General under section 64 of the *Constitution*) and the doctrine of ministerial responsibility to the Parliament (and to voters) results in the Minister being responsible for the policy of the *Electoral Act* (including the actions of the AEC itself). However, this responsibility does not carry with it any legislative power for the Minister to direct the AEC in the performance of its powers and functions under the *Electoral Act*. Indeed, the specific legislative power given to the Minister under the *Electoral Act* is limited to the further collocation of Divisional offices as required by section 38.

The *Electoral Act* deals with a wide range of electoral matters including enrolment, registration of political parties, nominations, voting, scrutiny, election funding and financial disclosure, electoral offences, etc. The exercise of these powers is vested in the AEC, the Electoral Commissioner or individual statutory officers. Nothing in the *Electoral Act* contains any powers for the Minister to exercise or to direct AEC staff in the performance of their powers or functions.

Over time the convention has developed whereby the AEC briefs the responsible Minister in relation to matters involving the exercise of its powers and functions under the *Electoral Act* but operates at 'arms length' from the Executive arm of the Government in relation to the actual exercise of those powers and functions. This 'arms length' approach is entrenched in guidelines and practices on a wide range of matters.

The AEC also reports directly to the Parliament through the Joint Standing Committee on Electoral Matters.

Accordingly, as a decision-maker under an enactment, with the exception of redistribution matters (see section 77 of the *Electoral Act*), decisions made under the *Electoral Act* can be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1975* (Cth) or under section 39B of the *Judiciary Act 1903* (Cth).

Political neutrality

The AEC requires all of its officers and employees to sign a *Political Neutrality* statement. This includes those temporary staff who are engaged under paragraph 35(1)(a) of the *Electoral Act* to perform duties relating to the conduct of an election, such as polling place officials engaged in duties as Officers in Charge of polling booths, Second in Charge, issuing officers and scrutiny assistants. The employment forms contain the following:

> The AEC operates in a politically sensitive environment. Any person who is, and is seen to be, active in political affairs, and intends to publicly carry on this activity, may compromise the strict political neutrality of the AEC and cannot be considered for temporary employment. I have read the *Political Neutrality* statement and am eligible to be considered Yes No

In dealing with this issue, the AEC looks at whether or not a person is active in political affairs and, if the answer to this first issue is Yes, whether the person intends to 'publicly carry on this activity' while working for the AEC. Membership of a political party addresses the first issue. However, the second issue is a question of fact and degree, as to whether the

previous public display of affiliation with a registered political party has the potential to compromise the political neutrality of the AEC in the conduct of a federal election.

Prior to the enactment of the *Public Service Act 1999* (Cth), regulation 71AA of the *Public Service Regulations 1935* contained a specific exemption for the AEC in relation to discrimination in employment based on the grounds of political affiliation. This recognised that under the International Charter of Civil and Political Rights (in particular articles 25 and 26) that appears in Schedule 2 to the *Australian Human Rights Commission Act 1986* (Cth), the following appears:

> *Article 25*
>
> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (*a*) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (*b*) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
> (*c*) To have access, on general terms of equality, to public service in his country.
>
> *Article 26*
>
> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

There are two points to note. First, Article 25 refers to 'unreasonable restrictions'. Second, Article 26 refers to unlawful discrimination on the grounds of political status.

The AEC is of the view that the political neutrality requirements are not in breach of either of these requirements due to the nature of the work that is undertaken by the AEC and its staff in the conduct of an election. Indeed, the specific exemption that was previously required under the *Public Service Act 1922* (Cth) was stated as not being required due to the operation of the new APS Values and the APS Code of Conduct contained in sections 10 and 13 of the *Public Service Act 1999* (Cth).

The full AEC policy, which applies to both temporary staff and APS staff, addresses the concept of political neutrality in the powers and functions exercised by AEC staff in the conduct of elections under the *Electoral Act.*

The principles that underpin the political neutrality requirements of employees include:

- in the Australia Public Service ('APS') Values and Code of Conduct, various requirements about employees being apolitical, impartial and taking reasonable steps to avoid conflicts of interest;
- in the context of the statutory functions given to the AEC in relation to the conduct of elections and referenda, the AEC must be, and be seen to be, impartial and politically neutral;
- the Electoral Commissioner may engage employees subject to their meeting notified conditions relating to the inherent requirements of their employment;
- political neutrality is an inherent requirement of employment in the AEC. The AEC must maintain strict political neutrality and cannot engage as an employee anyone who is, or is seen to be, publicly active in political affairs;

- an employee must at all times behave in a way that upholds both the APS Values and Code of Conduct and the AEC Standard of Conduct;
- prospective employees, either ongoing, non-ongoing or temporarily engaged under the *Electoral Act* are required to comply with these values and code of conduct and, therefore, will be required to complete a pro-forma declaration of non-engagement in political affairs, impartiality and political neutrality. The onus is on the employee to bring any changes to the information in the declaration to the immediate attention of his/her manager;
- section 32 of the *Public Service Act 1999* (Cth) provides for an employee to resign if they intend to contest an election, and to have a right of return if they fail to be elected.

The APS Values contained in section 10 of the *Public Service Act 1999* (Cth) include:

> (1)(a) the APS is apolitical, performing its functions in an impartial and professional manner;
> ……
> (d) the APS has the highest ethical standards;
> (e) the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public;
> (f) the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;
> (g) the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public;

The APS Code of Conduct contained in section 13 of the *Public Service Act 1999* (Cth) includes:

> (7) An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.

The AEC is responsible for providing the Australian people with an independent electoral service capable of meeting their needs, while enhancing their understanding of and participation in the electoral process. It is, therefore, essential that all AEC employees, staff and office-holders are, and are seen to be, politically neutral. Any failure by the AEC to actually be politically neutral, or be seen to be politically neutral, runs the risk that election results could be challenged and the current trust in the services provided by the AEC could be seriously undermined.

This independence is even more important when you consider some of the statutory functions given to the AEC in relation to the conduct of elections, which include the redistribution of electoral boundaries, the registration of political parties, the acceptance and rejection of nominations, determining the formality of ballot-papers and determining ties in Senate elections by having the casting vote (see subsection 273(17) of the *Electoral Act*).

While each person's individual circumstances will be dealt with according to the relevant facts, some examples of activities that could be interpreted as conflicting with political neutrality, and which would preclude employment by the AEC, include:

- recent campaigning for a political party or candidate at either Federal, State or Territory elections eg media statements, handing out how-to-vote material, attributed statements on the Internet;
- recently standing as a candidate at either Federal, State or Territory elections;
- recent active public support for, or opposition to, a particular political party or candidate eg letters to the editor, attending political rallies, other publicly available statements of political views;

- activities which could be interpreted by a reasonable person as publicly supporting or opposing a particular political party or candidate eg regular public appearances with a candidate.

The political neutrality requirement is formally enshrined in the AEC's Standard of Conduct and Conflict of Interest Policies, as varied from time to time. All AEC recruitment advertising, selection criteria and position descriptions include a statement of the political neutrality requirement. All prospective AEC employees, staff and office holders involved in the conduct of elections are required to sign the declaration relating to political neutrality as a condition of engagement. All AEC employees, staff and office holders are required to immediately bring to the attention of their manager any situation which has the potential to impact on the perception of their political neutrality.

The *Public Service Act 1999* (Cth) and Regulations provide for employees who are or plan to be candidates at prescribed elections to resign up to 6 months prior to the closing date for nominations. Such employees have a right of return if they are unsuccessful. The Regulations 3.13 to 3.15 set out in detail the arrangements for return, however in summary:

- a prescribed election is a Commonwealth or State parliamentary election, an ACT or NT legislative assembly election, or a Torres Strait Regional Authority member or zone election under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth);
- for a non-ongoing employee, the term of the employee's original engagement has not expired and the task has not been completed;
- they apply to return to the AEC or some other APS agency no later than 2 months after the results of the election are declared or a final decision is made on the results;
- engagement is on the same basis as when they resigned ie classification, duties, terms and conditions of employment and remuneration, (or if these have changed since the person resigned, the changed terms, conditions and remuneration);
- the resignation period counts as service for the accrual of leave entitlements.

Under the APS Values, the AEC has a responsibility to deal with political neutrality staffing issues in a fair, open and transparent manner. Complex cases in which the political neutrality of either a prospective or actual employee is at issue are required to be brought to the attention of the Electoral Commissioner.

The AEC deals with each case on its merits. The disclosure that an applicant is a member of a political party does not prevent them from being considered for work with the AEC. The issue is the public display of political alliances that could conflict with duties to conduct elections under the *Electoral Act*. The AEC is of the view that the present safeguards are reasonable and comply with existing laws.

Termination of an electoral officer

Subsections 25(1) and (2) of the *Electoral Act* provide that:

> (1) The Governor-General may terminate the appointment of an electoral officer by reason of misbehaviour or physical or mental incapacity.
>
> (2) If an electoral officer:

(a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit;
(b) is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
(c) engages in paid employment outside the duties of his or her office without the approval of the Commission;
the Governor-General shall terminate the appointment of the electoral officer.

It is noted that subsection 25(2) is couched in mandatory terminology by use of the word 'shall'.

The scope of the term 'misbehaviour' of a statutory officer has been considered by the courts in relation to statutory officer holders under a number of different statutes. These cases include such matters as *Clark v Vanstone* [2005] FCAFC 189 in relation to ATSIC appointments. There is no direct case law on the term in the *Electoral Act*.

The view accepted by previous Electoral Commissioners is that the meaning likely to be given to 'misbehaviour' in relation to conduct of an Australian Electoral Officer will depend on whether the conduct has an 'effect … on the capacity of the person to continue to hold the office', in one or both of the following aspects of capacity:

- was the conduct of the person concerned such that it affects directly the person's ability to carry out the office?
- was the conduct such that it may affect the perceptions of others in relation to the office, so that any purported performance of the duties of the office will be perceived widely as corrupt, improper or inimical to the interests of the persons, or the organisation, for whose benefit the functions of the office are performed?
- if the answer to one or both of these questions is in the affirmative, with the result that it is likely that there is 'danger … that the office itself will be brought into disrepute as a result of the conduct of its holder', then 'the conduct is properly characterised as misbehaviour for the purposes of the relevant legislation'. However, it seems clear that mere error of judgement or even negligence would be unlikely in themselves to constitute 'misbehaviour' within the meaning of subsection 25(1) of the *Electoral Act*.

Enrolment issues

As a matter of transparency and accountability in the electoral process, the name and address of who is eligible to vote in an election has always been publicly available. The only exceptions are for silent electors and certain general postal voters who are on operational service overseas, where the name appears but the address is suppressed. Accordingly, if an elector has reasonable grounds for suppressing his/her address details from the electoral roll (due to a risk to the personal safety of themselves or their family), then section 104 of the Electoral Act contains a process that can be relied upon.

The current regime for access to the Commonwealth electoral roll is contained in Part VI of the *Electoral Act* and resulted from concerns raised in the Parliament, particularly about privacy issues and the commercial use of the roll (see the Joint Standing Committee on Electoral Matters 'Report of the Inquiry into the Conduct of the 2001 Federal Election, and Matters Related thereto'). Those concerns led to the measures inserted by the *Electoral and Referendum Amendment (Access to the Electoral Roll and Other Measures) Act 2004* (Cth) ('*Amendment Act'*). Prior to these amendments, copies of the Commonwealth electoral roll could be purchased from the AEC and used for any purpose. However, on 21 July 2004, this ceased to be lawful and the AEC was prohibited from continuing such action.

The Second Reading Speech to the Bill that became the *Amendment Act* (see House of Representatives Hansard of 1 April 2004 page 27929, particularly at page 27930) made it clear the new regime was to cover the field in relation to access to the Commonwealth electoral roll and the then Minister stated that:

> The bill will amend the roll access provisions to improve clarity, remove contradictions and improve privacy protections. Access to roll information will be set out in a tabular form. The tables will include all information that is currently provided for in the Electoral Act. They list who is entitled to roll information, what information they are entitled to and how often they will receive it….

Other safeguards to the Commonwealth electoral roll are contained in sections 390 (immunity from subpoenas), 390A (immunity from search warrants) and section 47A of the *Freedom of Information Act 1982* (Cth) (third party enrolment information is an exempt document). The *Amendment Act* also introduced a range of criminal offences that apply to the use and disclosure of the 'protected information' from the Commonwealth electoral roll where this was not for a permitted purpose. The offence in subsection 91A(1) of the *Electoral Act* for the unauthorised use of roll information carries a penalty of 100 penalty units (ie $11,000) while the offence in subsection 91B(2) of the *Electoral Act* for the unauthorised disclosure of roll information carries a penalty of 1,000 penalty units (ie $110,000). This level of penalties indicates the seriousness with which the Commonwealth Parliament regarded such breaches of the *Electoral Act* and the sensitivities about the 'personal information' held by the AEC as part of the database behind the Commonwealth electoral roll.

Section 90A of the *Electoral Act* provides that any person is lawfully able to attend an office of the AEC to inspect the public version of the Commonwealth electoral roll. Subsection 90B(1) of the *Electoral Act* also provides that the AEC is to provide a registered political party with copy of the Commonwealth electoral roll as soon as practicable after a general election or on request. Candidates in the House of Representatives are able to be provided with a copy of the certified list of voters for the Division in which they are seeking to be elected. This certified list will include the name and address of each elector (excluding the addresses of silent electors and certain general postal voters).

Subsection 91A of the *Electoral Act* provides that the information from the roll that is released is able to be lawfully used 'in connection with an election or referendum'. The term 'election' is further defined in subsection 91B(3) to include a State election or a local government election.

The Australian Law Reform Commission has called for a review of the access regime to the electoral roll and that political parties should be subject to the obligations contained in the *Privacy Act 1988* (Cth) (see Report No. 108 'For Your Information: Australian Privacy Law and Practice' and recommendations 16-3 and 41-1). Recommendation 16-3 states that:

> The Australian Electoral Commission and state and territory electoral commissions, in consultation with the Office of the Privacy Commissioner, state and territory privacy commissioners and agencies with responsibility for privacy regulation, should develop and publish protocols that address the collection, use, storage and destruction of personal information shared for the purposes of the continuous update of the electoral roll.

The Government is in the process of responding to that report. I understand that the Department of the Prime Minister and Cabinet has carriage of that response.

The Australian National Audit Office has also commented on access to the electoral roll in its Audit Report No. 28 2009-10 entitled 'The Australian Electoral Commission's Preparation for and Conduct of the 2007 Federal General Election'. Recommendation No. 1 stated that:

ANAO *recommends* that the Australian Electoral Commission:

(a) engage with the Office of the Privacy Commissioner to develop improved governance arrangements for the collection, processing, data-matching, distribution and management of the personal information of electors and potential electors; and
(b) assess the extent to which broad use of electoral-roll information by non-government entities may be adversely impacting on the willingness of Australians to enrol to vote.

The name under which a person appears on the electoral roll is an issue which has been the subject of a great deal of litigation. Sections 93A(2) and 98A(2) of the *Electoral Act* provide the Electoral Commissioner with the power to refuse to include names on the roll where the name is 'fictitious, frivolous, offensive or obscene'. Decisions on the enrolment of a person are subject to merits review by the Administrative Appeals Tribunal ('AAT') under section 121 of the *Electoral Act*.

There are a number of cases on this issue with the most significant being the AAT decision in *Dent and Daryl Wight as an Australian Electoral Officer* [2007] AATA 1985. Several applications were lodged in the AAT, Federal Court and High Court by Mr Albert Langer against the actions of the Australian Electoral Officer for Victoria in refusing to place Mr Langer on the electoral roll under the name of Arthur Dent. The Federal Court has previously dismissed Mr Langer's claims in four matters. The Full Federal Court dismissed Mr Langer's various appeals in a decision handed down on 21 August 2008 in the case of *Arthur Dent v AEC and Another* [2008] FCAFC 153. Mr Langer also lodged an appeal with the High Court. The Special Leave application to the High Court was dismissed on 27 May 2009 and reported at *Dent v Wight and Another* [2009] HCASL 114. In all of the Federal Court and High Court proceedings, costs orders have been made in favour of the AEC.

Other decisions on the name under which a person is entitled to enrol include *Tonite and Australian Electoral Officer for Queensland* [2002] AATA 514 and *Freemarijuana and Australian Electoral Officer for Queensland* [2001] AATA 917.

Party registration

The AEC is required to maintain a register of political parties. This register lists those parties which are eligible to have the party affiliation of their endorsed candidates printed on ballot papers.

To be eligible for registration a party must be:

- established on the basis of a written Constitution that sets out the aims of the party and; either
- a parliamentary party, which is a political party with at least one member in the Parliament of the Commonwealth; or
- a political party that has at least 500 members who are entitled to be on the electoral roll and are not relied on by any other party.

Applications for registration are made to the AEC's National Office. For parliamentary parties, they may be made by the party secretary or all the parliamentary members. For other political parties, the application must be signed by ten members of the party of who one is the secretary of the party.

The application must set out the name of the party, its abbreviation (if any), its registered officer's name, address and signature and whether the party wishes to receive public election funding. It must be accompanied by a copy of the party's Constitution and, for non-

parliamentary parties, 500 individually signed membership application/declaration forms, a membership list and a statutory declaration confirming party membership of those who signed the forms.

Parliamentary parties must include a Statutory Declaration from the secretary of the party affirming the Parliamentary members as members of the party, and also letters from the Parliamentary members that state that they are members of the party. These letters must be on Parliamentary letterhead.

An application cannot be processed by the AEC in the period between the issue and the return of the writ for a Commonwealth election or by-election. A $500 fee must accompany registration and change of name or abbreviation applications.

When the AEC receives an application for party registration, it publishes a notice in the Commonwealth *Gazette* and major newspapers in each State and Territory. This notice invites objections on the grounds that:

- the application does not meet the legislative requirements;
- the party is not an eligible political party;
- the name (or abbreviation if any) is one which should be refused by the AEC.

Any person or organisation may object to a party being registered on these grounds by submitting reasons in writing to the AEC during the month after the date of notice.

The AEC will refuse to register a party if the name or abbreviation of the party:

- comprises more than six words;
- is obscene;
- is the name or abbreviation of the name of an unrelated recognised party;
- closely resembles the name or abbreviation of an unrelated recognised party;
- comprises the words Independent Party, or contains the word Independent together with the name of an unrelated registered party.

The AEC may de-register a party on the following grounds:

- the party has ceased to exist;
- the original registration was obtained by fraud or misrepresentation;
- a non-parliamentary party has failed to endorse candidates for election for a period of 4 years;
- the registered officer did not comply with a review notice;
- the party has less than 500 members and no Parliamentary members; or
- at the request of the party.

The *Electoral Act* provides for applications for merit review to be made in respect of decisions by the AEC to:

- grant, or refuse, a party's application for registration;
- grant, or refuse, an application to change the Register of Political Parties;

- uphold, or refuse, an objection by a former parent political party to a party's continued use of its name, or abbreviated name;

In certain cases, the decision to deregister a party may also be appealed.

People affected by an appealable decision of a delegate of the AEC may, within 28 days of becoming aware of the decision, apply to the AEC for a review of the decision:

- they must give their name and address, and the reasons they are seeking the review;
- if they are dissatisfied with the outcome of the review, they may be able to apply to the AAT for its review of the decision.

The AEC will provide persons directly affected by an adverse decision with a statement of reasons for that decision. The AEC will publish on its web site the reasons for:

- refusing an application for the registration of a political party;
- refusing an application seeking changes to a party name or abbreviation, or the inclusion of a new abbreviation in the register;
- upholding an objection to the continued use of a party name.

The actions of the AEC in its administration of the party registration provisions are subject to review by the full Commission itself, then the *Administrative Appeals Tribunal Act 1975* (Cth), the *Ombudsman Act 1976* (Cth) and judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Information about the actions of the AEC may also be obtained under the *Freedom of Information Act 1982* (Cth).

The AEC has no role in dealing with the internal disputes of registered political parties. Such disputes are matters to be resolved between individual members and, if necessary, by resort to the Courts (see *McLean v McKinlay and Others* [2004] WASC 2 , *Clarke v Australian Labor Party (SA Branch)* [1999] SASC 36 and *Coleman v Liberal Party of Australia, New South Wales Division (No 2)* [2007] NSWSC 736). While the AEC has no role in determining disputes with registered political parties, the AEC does have a role in ensuring that any action that it takes under the *Electoral Act* pursuant to requests from members of a political party is action that is a result of the provision of probative evidence of a formal decision made in accordance with the constitution and rules of the registered political party.

Being a 'registered officer' under the *Electoral Act* gives rise to a number of rights, including the right to endorse candidates for an election (see subsection 166(1) and section 169B), the right to receive a copy of the electoral roll under section 90B and the right to lodge group voting tickets under section 211. The AEC is aware that the exercise of these rights is significant with a registered political party and is normally exercised by the person who is elected by the members to the position of Federal Secretary of the party. There has been a matter before the AAT involving the Democratic Labor Party and the position of the registered officer (see *Mulholland and Australian Electoral Commission and Zegenhagen (Joined Party)* [2011] AATA 879), which will assist in providing guidance on this issue.

The AEC notes that there is no offence under the *Electoral Act* relating to 'passing off'. In the commercial law area a 'passing off' action is where one person is seeking to prevent another person from using a symbol, colour or logo that is owned or registered for use by another. In the case of registered political parties, there is nothing in the *Electoral Act* that regulates symbols, colours or logos that are used by each registered political party. It is only the party name and abbreviation of its name that is registered under section 133 of the *Electoral Act*.

The registration of a political party under Part XI of the *Electoral Act* only has the legal effect of preserving a party name and abbreviation of that name for use on ballot-papers (see sections 169, 210A and 214 of the *Electoral Act*).

The processes set out in section 129 of the *Electoral Act* only apply at the time of registration. Further, as was made clear by three Federal Court judges sitting as the AAT in the case of *Woollard and the AEC and the Liberal Party* [2001] AATA 166, there is nothing in the *Electoral Act* that locks up the use of a particular word or applies outside its use on a ballot-paper. Paragraphs 40 to 43 of the AAT decision state:

> Political parties in Australia use, and historically have used, in their names generic words such as "Australia", "liberal", "labour", "democrat", "national", "christian", "progressive", "socialist" and the like. Absent clear language to contrary effect, the disqualifying provision is not to be construed so as to lock up generic words as the property of any organisation when it comes to names that can be used on the ballot paper.

The above case went on to state that:

> The presence of s 130 suggests that the confusion contemplated by s 129(d) extends to confusion as to whether some relationship exists between two registered political parties the names of which appear on the ballot paper. Section 130 is not expressly worded so as to override s 129(d), but that must be its intended effect. It provides that the Commission may register an eligible political party notwithstanding that a political party that is related to it has been registered. Unless it were intended to authorise registration of similarly-named parties when a relationship exists between them, the section appears to have no function.

The above case has recently been called into question in a matter that was listed to be heard on 28 June 2011 by a Full Bench of the AAT (comprising 3 Federal Court judges) in the matter of *Re: Community Alliance Party (ACT) & Australian Electoral Commission & Communist Alliance (2010/1457).*

The AEC's decision to register the Australian Fishing and Lifestyle Party was challenged in several applications made to the Federal Court by persons associated with the Fishing Party. The issue in these cases was whether the decision to register the Australian Fishing and Lifestyle Party was in accordance with the requirements of s. 126 and s. 129 of the *Electoral Act*. The Federal Court dismissed all of these legal challenges (see *Sharples v AEC* [2007] FCA 2102, *Sharples v AEC (No. 2)* [2007] FCA 2103 and *Sharples v AEC (No. 3)* [2008] FCA 63).

Mr Robert Smith, the registered officer of the Fishing Party, appealed against the decision of the Court of Disputed Returns ('CDR') claiming that the registration of the Australian Fishing and Lifestyle Party was an illegal practice and that the result of the Senate elections in New South Wales and Queensland were likely to be affected. The original petition was dismissed by the CDR in a decision dated 27 June 2008 in the case of *Smith v Australian Electoral Commission* [2008] FCA 953. The Court found that that the petition was defective and, as a matter of substance, was doomed to failure. Mr Smith subsequently purported to appeal the CDR's decision despite the prohibition contained in s. 368 of the *Electoral Act*. In a decision dated 1 April 2009, the Full Federal Court dismissed the appeal finding that the appeal was incompetent and awarded costs in favour of the AEC.

Candidacy

To nominate for either the Senate or the House of Representatives, a prospective candidate must be:

- at least 18 years old;

- an Australian citizen; and
- an elector entitled to vote, or a person qualified to become such an elector.

The qualifications for nominating as a candidate for the Senate or the House of Representatives are the same. A member of the Senate or the House of Representatives cannot be chosen or sit as a member of the other house of parliament.

A person cannot nominate as a candidate for the Senate or the House of Representatives if they:

- are currently members of a state parliament or a territory legislative assembly and have not resigned before the hour of nomination (12 noon on the day nominations close).
- are disqualified by section 44 of the Constitution and have not remedied that disqualification before nomination.

No candidate may be appointed as an electoral officer of any description either as a permanent officer or as a polling official. If an electoral officer becomes a candidate they must vacate the office.

Nomination by a party

If a candidate is endorsed by a registered political party, the nomination form must include verification of the endorsement by the registered officer of the party. The registered officer and the deputy registered officer of a registered political party have equal powers in relation to the nomination process. If a registered officer nominates a candidate, they may request on the nomination form that the party's registered name or abbreviation be printed on the ballot paper next to the candidate's name.

If a candidate is part of a Senate group, the registered officer may request to have the party name or abbreviation printed next to the above-the-line box. Alternatively, the registered officer may provide these details in writing to the appropriate electoral officer before the close of nominations.

Nomination by fifty electors

If a candidate is not endorsed by a party, the candidate must be nominated by at least 50 electors, that is, 50 people entitled to vote at the election for which the candidate is standing. The names of the 50 electors are recorded on the nomination form.

Nomination deposit

Each nomination for the Senate and the House of Representatives must be accompanied by a deposit paid by legal tender (cash) or a cheque drawn by a bank or other financial institution on itself. Personal cheques cannot be accepted. The deposit required is $1,000 for each Senate candidate and $500 for each House of Representatives candidate.

Review

Electoral officers can reject a nomination if the provisions in the Act relating to:

- the mode of nomination; or
- the person to whom the nomination is made; or

- the requisites for nomination; or
- the form of consent to act has not been complied with.

A nomination will not be rejected simply because of a formal defect or error in the nomination if the officer to whom the nomination is addressed is satisfied that there has been substantial compliance with the requirements of the Act.

Decisions made in relation to the nomination of candidates are subject to judicial review. A recently reported decision on this is the case of *Noah v Campbell* [2007] FMCA 2128 (21 November 2007) which can be found at:

http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FMCA/2007/2128.html

The *Noah* case related to the requirements for a valid nomination of a candidate for the election. Section 166 of the *Electoral Act* requires that an unendorsed candidate must have the nomination form supported by 50 persons entitled to vote at the election in which the candidate is seeking to be nominated. In the case of *Noah v Campbell* [2007] FMCA 2128, Ms Noah attempted to argue that the decision of the divisional returning officer in rejecting her nomination was unlawful. Ms Noah attempted to argue that she is legally able to nominate herself and that she could therefore be one of the 50 persons required by s. 166 to have signed the nomination form. The Court dismissed the claim that the divisional returning officer's decision had been unlawful, indicating that plain reading of the legislation clearly favoured the view that candidates could not nominate themselves, and that there needed to be 51 people named on the nomination form: 50 nominators and one nominee.

The court also awarded costs against Ms Noah and her failure to pay those costs resulted in contempt action in the case of *Noah v Bailey* [2008] FMCA 1426. Ms Noah successfully appealed against the contempt finding in *Clampett v Attorney-General of the Commonwealth of Australia* [2009] FCAFC 151 (28 October 2009).

The voting process

The AEC is concerned at any action that results in an increase in the number of informal votes. However, the AEC also notes that the case law suggests that each elector retains the right to cast an informal vote and that this is often used by electors to indicate their objection to the candidates, the political process and the policies of the political parties.

The AEC has received several complaints about the words of Mr Mark Latham on the *60 Minutes* program that was broadcast on 15 August 2010, he advocated that electors could cast a protest vote by not marking the ballot papers. The complaints have requested that the AEC take action to prosecute Mr Latham for advocating a method of voting that is arguably in breach of the requirements of section 233 of the *Electoral Act*. The AEC has **not** stated that Mr Latham's apparent advocacy of casting a blank ballot paper was legal. In an article written by Mr Nathan Klein of *The Daily Telegraph* on 16 August 2010 the following statement was made which accurately reflects the position of the AEC:

> An AEC spokesman confirmed that the Commonwealth Electoral Act did not contain an explicit provision prohibiting the casting of a blank vote, even though it was "obviously a wasted vote".

The legal requirements that apply to voting in a federal election are contained in the *Electoral Act.* After the elector has his/her name marked-off from the certified list of voters, section 233 of the *Electoral Act* requires that the following procedures must be followed:

> (1) Except as otherwise prescribed the voter upon receipt of the ballot paper shall without delay:

> (a) retire alone to some unoccupied compartment of the booth, and there, in private, mark his or her vote on the ballot paper;
> (b) fold the ballot paper so as to conceal his or her vote and:
>
> (i) if the voter is not an absent voter—deposit it in the ballot-box; or
> (ii) if the voter is an absent voter—return it to the presiding officer; and
>
> (c) quit the booth.

Accordingly, the mere act of attending a polling booth and having the elector's name marked-off from the certified list of voters is not sufficient. The elector must also accept the ballot-papers, retire to a voting booth, mark the ballot-papers, fold the completed ballot-papers and place them in a ballot box.

Whether or not there is a legal requirement to record a valid vote is a rather more complex issue. The AEC notes that there are a number of Court decisions which suggest that each elector retains the right to cast an informal vote and that this is often used by electors to indicate their objection to the candidates, the political process and the policies of the political parties.

The AEC readily acknowledges that the process set out in section 233 of the *Electoral Act* requires that the elector receive a ballot paper, retire to an unoccupied compartment of the polling booth, 'mark his or her vote on the ballot paper', fold the ballot paper to conceal his or her vote, deposit the ballot paper in the ballot-box and quit the booth. However, the practical reality of the above process is that the AEC will never know which elector has chosen not to mark a ballot paper due to the secrecy of the ballot and therefore will not be able to prosecute an individual elector for lodging a blank ballot paper in the ballot-box. This situation was highlighted by Blackburn CJ in *O'Brien v Warden* (1981) 37 ACTR 13.

The comments of Barwick CJ in *Faderson v Bridger* (1971) 126 CLR 271 and Blackburn CJ of the ACT Supreme Court in *O'Brien v Warden* (1981) 37 ACTR 13 were directed to whether a failure to attend a polling place to vote (because none of the candidates on the ballot papers could be preferred) amounted to a valid and sufficient reason for failing to vote. In both decisions the Courts stated that this was not the case. It is noted that Barwick CJ stated at page 272 *'*Of course there is no offence committed by not marking the ballot paper in such a fashion that the elector's vote is in law a valid vote'.

Blackburn CJ at page 16 of the reported decision in *O'Brien v Warden* (1981) 37 ACTR 13 stated that:

> In Lubcke v Little, Crockett J said at page 811: 'To record an informal vote is not an offence. To fail to mark a ballot paper so as to show preferences as shown by section 124 is not an offence.

Blackburn CJ then proceeded to state that a contrary view *'*may be at least arguable'. That is, he did not conclude that there was a legal requirement to mark the ballot paper and any failure to do so was an offence. His Honour merely stated that this was *'*arguable'.

Blackburn CJ went on to state that:

> No doubt, it would be impossible to adduce evidence of this particular kind of failure, because of the provisions for the secrecy of the ballot; but if such failure is an offence, a person could be convicted on confessional evidence. I need say no more than that it seems to me arguable that under the Act the elector's obligation to vote is satisfied not only by his attendance at a polling booth but also by going through the whole of the procedure laid down, including the marking of a ballot paper in a manner which is not informal – i.e. in a manner which appears to express a preference. The other view, which could be called the orthodox one, is that the elector's obligation is to attend at the polling booth, go through the statutory procedure, and drop a ballot paper, irrespective of how it is marked, into the ballot box. Whichever of these views is correct, in my opinion the Act does not oblige the elector to

> make a true expression of his preference among the candidates. On one view he must make an expression of apparent preference; on another he need not express himself intelligibly or at all.

There is an issue about whether or not the actions of Mr Latham could be regarded by a criminal court as being in breach of Division 11.4 of the *Commonwealth Criminal Code Act 1995* (‘*CCC Act’*) which deals with the incitement to commit an offence. However, the AEC notes that penalty for a breach of Division 11.4 of the *CCC Act* depends on the actual level of penalty for the offence which was incited to be breached. In the present case the only apparent offence would be the offence in section 245 of the *Electoral Act* of failing to vote. The penalty for a breach of section 245 of the *Electoral Act* is $50. This would appear to be the only penalty that could be imposed against Mr Latham if a criminal court concluded that failing to mark a ballot paper was an actual offence under the *Electoral Act*.

Polling facilities

An application to the Federal Court sought to challenge the type of voting screens used at polling booths. In the matter of *Horn v AEC* [2007] FCA 1827, the Federal Court dismissed Mr Horn’s claims that the construction and layout of the polling booths used in federal elections did not adequately screen him from observation by others while marking his ballot paper, and that this was in breach of several requirements of the *Electoral Act*. The court awarded costs in favour of the AEC (see *Horn v AEC* [2008] FCA 43).

Mr Horn has been engaged in litigation since August 2006 claiming that the voting compartments provided by the AEC in polling booths should be either fully enclosed or have curtains to maintain the secrecy of the ballot. Mr Horn has argued that the current voting screens are unlawful and breach the requirements of sections 206 and 331 of the *Electoral Act*. At all times Mr Horn has been represented by Counsel on what the AEC understands has been a pro bono basis.

The first legal proceedings brought by Mr Horn in 2006 were rejected by Justice Nicholson on procedural grounds (see *Horn v AEC* [2006] FCA 1778). Mr Horn commenced fresh proceedings in the Federal Court in 2007, which were eventually dismissed by Justice McKerracher making specific findings that the voting compartments were not in breach of the requirements of the *Electoral Act* (see *Horn v AEC* [2007] FCA 1827). In a subsequent decision (*Horn v AEC* [2008] FCA 43) Justice McKerracher awarded costs against Mr Horn, rejecting arguments that there should be no orders as to costs because this was public interest litigation. At paragraph 22 of this decision His Honour concluded that *‘the alleged breach was without substance’*.

Mr Horn was convicted in the Magistrates Court of Western Australia in 2008 for failing to vote, in breach of the requirements of section 245 of the *Electoral Act*. Mr Horn appealed that decision to both the Supreme Court of WA and the WA Supreme Court of Appeal on the basis that his concerns about the voting screens amounted to a ‘valid and sufficient reason’ for his failure to vote at the November 2007 election. Both of these Courts upheld the conviction and rejected Mr Horn’s arguments. The decision of Mr Justice McKerracher was taken into account in the decision of the WA Supreme Court of Appeal which upheld the conviction against Mr Horn’s decision not to cast a vote (*Horn v Butcher* [2010] WASCA 67). The three judges of the Court of Appeal concluded that Mr Horn’s view about the voting compartments not meeting the requirements of the *Electoral Act* was *‘unsound, not well-founded, has no force, weight or cogency, lacks authority and is not sustainable in law’*.

The ballot count

The task in dealing with disputed ballot-papers has three levels.

The first level is the actual count on polling day. Each party and candidate is able to appoint scrutineers who may be present at the checking and counting of the ballot papers after the close of polling. Scrutineers have the right to inspect the condition of and observe the sealing and opening of ballot boxes. Ballot boxes containing votes taken by electoral visitors in hospitals and prisons and by mobile polling teams in remote divisions are either forwarded to the relevant electoral officer or returned to the divisional office. These ballot boxes are opened and the scrutiny conducted in a divisional office or a counting centre.

Scrutineers have the right to observe the counting of ballot papers on election night, including the two-candidate-preferred count conducted after the counting of first preference votes. Scrutineers may also observe the counting of ballot papers following election night, including the fresh scrutiny, the preliminary scrutiny of declaration votes and any recount of ballot papers. During the scrutiny, scrutineers must not:

- handle ballot papers in any way; or
- unreasonably delay or interfere with the counting of votes.

Scrutineers may object to the admission or rejection of any ballot paper. The electoral officer conducting the scrutiny will then decide whether the vote is formal or informal and mark the ballot paper 'admitted' or 'rejected'. The electoral officer may reject a ballot paper as informal even if no scrutineer has objected to it.

The initial scrutiny conducted at the polling place on election night is routinely followed by a 'fresh scrutiny' or recheck of votes conducted by the relevant electoral officer in the days following polling day. The exact time will be advised by each electoral officer to candidates and their scrutineers. At this stage, some ballot papers earlier treated as informal may be admitted to the scrutiny by the electoral officer, and some ballot papers originally treated as formal may be reclassified as informal. Any person approved by the officer conducting the fresh scrutiny may be present, as well as duly appointed scrutineers.

The second level is called a recount. Under the *Electoral Act* candidates may request a recount of ballot papers in an election, although the electoral officer is not automatically obliged to accept the request. The official also has the power to direct a recount at his/her discretion without waiting for a request.

In the absence of specifically alleged errors, it is unlikely that a recount would be required at either a House of Representatives or a Senate election, no matter how close the margins in the scrutiny had been. Given the checks and balances in the scrutiny systems for each type of election, significant sorting errors are highly unlikely to go undetected.

The general guidelines observed in evaluating requests for a recount are as follows:

- 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 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 that does not plead any valid and specific grounds should be refused;

- wherever possible, the grounds pleaded by the candidate requesting the recount should be used to narrow down to as small a category as possible the ballot papers that need to be re-examined;
- there is no minimum number of ballot papers under which a recount will automatically occur;
- only one recount of any set of ballot papers will occur; and
- requests for recounts will only be considered, and actioned, in the period after the completion of all scrutinies and before the declaration of the poll in the division (for House of Representatives ballot papers) or state or territory (for Senate ballot papers).

Electoral officers may initiate a recount, or be directed by the Electoral Commissioner or the Australian Electoral Officers at any time before the declaration of a result of a House of Representatives election to recount all or some of the ballot papers. The electoral officer must notify each candidate of the time and place of any recount. If an electoral officer or an Australian Electoral Officer refuses a request to conduct a recount, then the candidate can appeal to the Electoral Commissioner to review that decision.

The electoral officer conducting a recount has the same powers as if the recount was the original scrutiny, and may reverse any decision in the scrutiny to admit or reject a ballot paper.

The electoral officer may, and at the request of a scrutineer must, reserve any ballot papers for the decision of the Australian Electoral Officer under subsection 279B(5) and section 281 of the *Electoral Act* when engaged in the conduct of a recount. The Australian Electoral Officer ('AEO') must decide whether any ballot paper reserved for their decision is to be admitted or rejected. If a ballot paper is considered admitted by the AEO, then the ballot-paper is remitted to the electoral officer who then determines to whom the first preference has been allocated, if this is unclear.

The Court of Disputed Returns

The final level of review in all matters that affect the outcome of an election is the Court of Disputed Returns. Petitions can be lodged with the High Court of Australia, sitting as the CDR, challenging the result of an election. The Petition must set out the facts relied on to invalidate the election and, if they allege illegal practices, must show how these could have affected the election result. The Court may also consider any ballot paper reserved for the decision of the AEO, but may only order a further recount if it is satisfied that a recount is justified.

His Honour, Mr Justice Tracey in the case of *Mitchell v Bailey (No. 2)* [2008] FCA 692 (see http://www.austlii.edu.au/au/cases/cth/FCA/2008/692.html) described the task for a decision-maker in determining the formality of ballot-papers under the *Electoral Act* as requiring the decision maker to ascertain from the markings on the ballot-paper the *'*real intention of the voter*'*. His Honour (see paragraph 51) stated that in performing this task the decision-maker is:

> ….required to examine ballot-papers which have been completed by people of differing ages, health standards, cultural backgrounds and educational levels to mention but a few of the many variables which obtain. These voters annotate their ballot-papers with such a wide variety of different marks which cause the formality of the ballot-papers to be called into question that it is not possible to frame prescriptive 'rules' to resolve disputes. Value judgments informed by principle are required.

His Honour went on to state in paragraph 52 that the principles to be applied by the decision-maker are:

> In my view the two cardinal principles are those identified by Gummow J in Langer v Commonwealth namely 'that the ballot, being a means of protecting the franchise, should not be made an instrument to defeat it and that, in particular, doubtful questions of form should be resolved in favour of the franchise where there is no doubt as to the real intention of the voter.' These principles are given statutory force by s 268(3) of the Act. Other, subordinate, principles may be identified which assist in giving effect to the two cardinal principles. These are:
>
> - When seeking to determine the voter's intention resort must be had, exclusively, to what the voter has written on the ballot-paper.
> - The ballot-paper should be read and construed as whole.
> - A voter's intention will not be expressed with the necessary clarity unless the intention is unmistakeable and can be ascertained with certainty. A Court of Disputed Returns must not resort to conjecture or the drawing of inferences in order to ascertain a voter's intention.

The clear points made by His Honour can be summarised as follows:

- each ballot-paper is to be examined having regard to the many variables relating to the people who have completed the ballot-papers and requires the decision-maker to exercise 'value judgements' to identify the marks used;
- the real intention of the voter should be ascertained;
- doubtful questions of form should be resolved in favour of the franchise to give effect to the real intention of the voter;
- when determining the voter's intention, resort must be had exclusively to what the voter has written on the ballot-paper;
- the ballot-paper should be read and construed as a whole;
- in a general sense, the voter will have the intention to vote formally, or in some exceptional cases informally (eg lodging a blank or defaced ballot-paper). Normally it is appropriate to assume that the intention of the voter was to vote formally. If the ballot-paper discloses an intention to vote in a manner consistent with the Act then it will be formal;
- the clear intention of the voter is to be discerned from an examination of the ballot-paper and the decision-maker must not substitute his/her own speculative opinion as to what the voter is presumed to have intended;
- variants of numbers written on the ballot-paper are to be considered as long as they are intelligible;
- where a number has been overwritten, then provided that the overwritten number is clearly legible, the overwritten number should be treated as expressing the real intention of the voter;
- the examination of the numbers that appear on the ballot-paper should not be conducted in isolation from the other numbers that appear on the ballot-paper. If the number in question 'bears a reasonable resemblance' to the missing number, then the ballot-paper will be formal;
- if the mark in the box bears no reasonable resemblance to the missing number in the sequence required for a formal vote, then the decision-maker should not assume that it is the missing number;
- initials on a ballot-paper only result in the ballot-paper being informal where a person who is authorised to access the ballot-paper is able to identify the voter; and

- ballot-papers that do not contain the official markings will be informal unless the Divisional Returning Officer has annotated the ballot-paper stating 'I am satisfied that this is an authentic ballot-paper'.

Illegal practice

On 2 July 2008, the Federal Court, sitting as the CDR, handed down a decision on the McEwen petition in the matter of *Mitchell v Bailey (No.2)* [2008] FCA 692. The Court decision affirmed that Ms Bailey was duly elected and returned as the Member for McEwen with a margin of 27 votes. However, in reaching this decision the Court changed the decision of the AEO for Victoria on 154 of the 643 ballot-papers that were reserved for his decision under section 281 of the *Electoral Act*. The Court found that the AEO for Victoria engaged in an 'illegal practice' in relation to the 12 ballot-papers that were wrongly included in the count and the 142 ballot-papers that were wrongly excluded from the count.

This finding was based on the broad definition of an 'illegal practice' contained in subsection 352(1) of the *Electoral Act*, which means 'a contravention of this Act or the regulations'. The contravention of the *Electoral Act* in this case was the mistaken application of the formality requirements contained in section 268 of the *Electoral Act* and which were required to be applied by the AEC under subsection 279B(7) as part of the requirement to 'scrutinize the ballot-papers'. At paragraph 19 the Court stated that if the AEO failed to correctly admit or reject ballot-papers in accordance with section 268 of the *Electoral Act*, this will be a contravention of the Act and would constitute an 'illegal practice'.

At paragraph 20 the Court states, in part, that:

> I stress that any reference to 'illegal practices' on the part of the AEO involved no more than the suggestion that the AEO has **made bona fide but mistaken judgements** about the formality of reserved ballot-papers. [Emphasis added].

Any finding of an 'illegal practice' by the Court carries several specific consequences including:

- that if the Court is satisfied that 'illegal practice' was likely to have affected the outcome of an election, either the election of a named candidate may be declared void and another candidate declared to be elected or the specific election could be declared void and a new election ordered (subsection 362(3) of the *Electoral Act*); and
- that the Court in finding that there has been an 'illegal practice' must 'forthwith report the finding to the Minister' (section 363 of the *Electoral Act*).

The scope of what is an 'illegal practice' under the *Electoral Act* is defined in subsection 352(1) and means 'a contravention of this Act or the regulations'. The argument raised by the Petitioner was that the AEO for Victoria incorrectly applied the requirements of the *Electoral Act* in relation to whether or not each of the reserved ballot-papers should have either been admitted or rejected due to the formality rules contained in section 268 of the Act.

The word 'contravention' was previously considered by the High Court in the case of *Sue v Hill* (1999) CLR 462 and was held to mean 'failure to comply with a provision of the Act'. A similar phrase contained in the legislation that regulated ATSIC elections was held by the Federal Court in the case of *Shaw v Wolf* (1998) 83 FCR 113 to mean 'an act of infringing or transgressing'. However, both of these court decisions make it clear that the term 'illegal practice' does not carry with it any requirement of intent or criminality, or any necessary inference of moral blame or turpitude. Indeed, there is case law (*Bourne v Murphy* (1996) 92

LGERA 329) that suggests that the issue of formality can often be reliant on the experience and judgment of the particular person looking at the ballot-papers and that any differences could merely be based on the particular opinion and judgement of the person examining the ballot-papers.

Any finding of an 'illegal practice' would not necessarily change the results of the election. The Court would need to go the extra step to change the election result (or void the election) by making an actual finding of fact that 'the result of the election was likely to be affected'. However, the mere finding of an 'illegal practice' requires the Court to notify the Minister and the High Court Registry under section 363 of the *Electoral Act* that such a practice has occurred.

Injunction power

The absence of admissible evidence that clearly points to a prima facie 'illegal conduct' in breach of the *Electoral Act* precludes the AEC from being able to initiate any legal proceedings. This is despite the specific power given to the AEC under section 383 of the *Electoral Act*. The reason for this is because of the requirements contained in the *Legal Services Directions 2005* issued by the Attorney-General under the *Judiciary Act 1903* under which the AEC (as an agency covered by the *FMA Act*) is required to operate. This includes the requirement to act as a model litigant.

The material required by the AEC to commence legal proceedings must include evidence that could be admissible in a court in relation to an injunction application. The requirements for an injunction were clearly set out in the case of *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63 in that in order to secure such an injunction the plaintiff must show (1) that there is a serious question to be tried or that the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief; (2) that he will suffer irreparable injury for which damages will not be an adequate compensation unless an injunction is granted; and (3) that the balance of convenience favours the granting of an injunction.

AEC's role in litigation

The AEC has always acted in Court of Disputed Returns matters as though it was subject to the approach as set out by the High Court in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13. This results in it not being appropriate for the AEC to be presenting arguments on such matters as the Constitutional validity of challenged provisions in the *Electoral Act*. The AEC's role in all legal proceedings is to assist the Court. The AEC has since 1983 clearly been accepted by the High Court as appropriately being involved in matters involving arguments about whether facts as pleaded disclose any illegal practice that may have lead to the results of the election being likely to have been affected. This test necessarily involves the Court having regard to expert evidence from the AEC about the election and counting processes. Accordingly, the position taken by the AEC is not inconsistent with the principles in *ex parte Hardiman* irrespective of whether or not the AEC is a 'tribunal'.

Support for this view can be found in the transcript of the High Court in the case of *Roach v Electoral Commissioner* [2007] HCA 43 where a Judge criticised the AEC's Counsel for going too far and entering the dispute as a contradictor. His Honour Justice Kirby in the High Court transcript of 13 June 2007 stated as follows:

> **KIRBY J:** I must say that I took the view that the Commissioner is a neutral officer and, indeed, one of the most important, if not the most important, in the Executive.

MR HANKS: On this basis, your Honour, that there is a presumption of validity and the answers would go to that presumption, only on that basis, your Honour. We do not wish to engage in any of the argument.

KIRBY J: I just want to know what interest the Electoral Commissioner has to disenfranchise many citizens of this country.

MR HANKS: His interest, your Honour, is to administer the law as enacted by the Parliament and to proceed on the assumption that that law is valid. For that reason we support the answers that are proposed by the Commonwealth and for no other reason.

KIRBY J: If a tribunal or a court came here and said that they supported the position of the Executive Government they would be given the rounds of the kitchen. I ask myself is it different in the case of the Electoral Commission? I would have thought with the Auditor-General, the Electoral Commissioner, perhaps the Ombudsman and a few others they are in a position analogous to courts. Anyway, that is just my opinion.

The AEC's role in litigation dealing with the registration of political parties was also the subject of guidance from three Federal Court judges sitting as a Full Bench of the AAT in the case of *Woollard and Australian Electoral Commission and Anor* [2001] AATA 166. At paragraph 20 the AAT stated:

> It is rather the integrity of the electoral process and, associated with that, the interests of electors in making choices unaffected by confusion or mistake that are protected. In this context the role of the Commission as a party to proceedings before the Tribunal is in theory wider than that of a registered political party which will be primarily concerned with its own interests and those of its candidates. The Commission, however, should be at pains not to compromise the reality and appearance of its impartiality in the role it takes in defending its own decision on a question of registration. Where a political party is joined in the proceedings it may well be that it takes the primary role of contradictor, with the Commission assisting the Tribunal as to the construction of the Act and considerations relating to the electoral process generally. Of course, if there is no other contradictor, then the Commission may be left in the position of having to put all arguments to the Tribunal that fairly bear upon the considerations relevant to the decision. It is of particular importance to note that pursuant to s 43, the Tribunal, even though comprising three judges of the Federal Court, is sitting as an administrative body in effect in the place of the Commission. Its task is to make the correct or preferable decision having regard to the provisions of the Act and the factual circumstances. See *Drake v Minister for Immigration and Ethnic Affairs* [1979] AATA 179; (1979) 24 ALR 577, at 589 per Bowen CJ and Smithers J. In the present case, senior counsel appearing for the Commission had filed written submissions going to the merits of the decision. Nevertheless, he accepted that the Commission's role in this case should be limited to addressing the Tribunal on questions of construction and any particular omission or difficulties arising out of the submissions put on behalf of the Liberal Party of WA.

Recent cases

Media reporting

Following the 2008 by-election for the Division of Lyne, Mr Scott-Irving, a candidate in the by-election, lodged a petition with the CDR seeking to have the election voided due to an illegal practice. Mr Scott-Irving argued that the media coverage by the ABC of the candidates leading up to the by-election was not conducted in an equitable manner in accordance with the ABC charter and that the results of the by-election should be voided. The High Court remitted this matter to the Federal Court to determine as the CDR. The petition was dismissed by the CDR in a decision dated 15 May 2009 in the case of *Scott-Irving v Oakeshott and Others* [2009] FCA 487 with the court finding that none of the alleged facts pleaded by Mr Scott-Irving disclosed any breach of the requirements of the *Electoral Act*. The Court also awarded costs in favour of the AEC.

Close of rolls

In the matter of *Rowe v Electoral Commissioner* [2010] HCA 46, the High Court dealt with a legal challenge by Ms Rowe and Mr Thompson (apparently funded by GetUp Limited) seeking a declaration that certain provisions of the *Electoral Act* effecting cut-off dates for consideration of applications for enrolment and transfers of enrolment as an elector were invalid. While the Electoral Commissioner was named as the First Defendant, the AEC took no part in making substantive submissions. This was left to the Commonwealth of Australia as instructed by the Attorney General's Department and the Department of Finance and Deregulation. The Western Australian Attorney-General also intervened.

One of the challenged provisions (subsection 102(4)) prevented the AEC from considering new claims for enrolment lodged after 8pm on the date of the issuing of the writs for an election until after the close of polling. Another challenged provision (subsection 102(4AA)) prevented the AEC from considering claims for the transfer of enrolment from 8pm on the date fixed in the writs for the close of rolls until after the close of polling. A third provision (section 155) was challenged as it provided that the date fixed in the writs for the close of rolls must be on the third working day after the date of the issuing of the writs for an election. All of the challenged provisions were inserted into the *Electoral Act* by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth). This action followed several reports by the Joint Standing Committee on Electoral Matters (including the October 2002 report entitled 'The Integrity of the Electoral Roll' and the October 2004 report on the conduct of the 2004 election) which, despite no actual evidence of inaccuracies on the roll, concluded that the 7 day period of grace provided an opportunity to manipulate the roll at a time when the AEC was unable to check the integrity of all claims. This was despite evidence from the AEC to the contrary.

On 6 August 2010, the High Court ordered that the amendments made by the 2006 Act were invalid and that the previous 7 day close of rolls period was still in force.

To give effect to the High Court decision, just fewer than 100,000 individuals who missed the close of rolls deadlines were now entitled to have their claims considered by the AEC if they had been received prior to 8 pm on 26 July 2010. The AEC concluded the processing of these claims on 13 August 2010 and sought the Governor-General's agreement to issue a Proclamation under section 285 of the Electoral so these 100,000 electors could appear on supplementary certified lists on the same basis as other electors.

Electronic signatures

In the matter of *GetUp Ltd v Electoral Commissioner* [2010] FCA 869 the Federal Court examined the legal status of electronic signatures on enrolment forms that were received by the AEC. The Court held that the particular technology and methodology used by Ms Trevitt (a laptop with access to the internet and with a device known as a digital pen that was used on the laptop's trackpad) met the requirements of the *Electoral Act*. As a result of the Court decision, Ms Trevitt was enrolled.

In the lead up to the hearing the Electoral Commissioner had written to GetUp Limited offering to meet to discuss the technology they were promoting and the issue of balancing of the convenience of electors with the integrity of the voting system (eg matching signatures on enrolment forms with signatures on declaration envelopes at preliminary scrutiny). The GetUp Ltd OzEnrol website went live without any prior notice or discussions with the AEC. It was taken down on 17 July 2010, but apparently remained accessible for GetUp Limited volunteers to use. The original methodology used a mouse track based signature which did

not result in a clear image or the use of similar biomechanical motions to reproduce a signature.

However, the Federal Court proceedings did not involve the use of the mouse track based methodology but rather the use of a digital pen. Since the Federal Court decision, the AEC has met with representatives of GetUp Limited to discuss the implications of the Federal Court's decision and the use of methodologies that comply with both the requirements of the *Electoral Act* and the *ratio decidendi* of the Federal Court's decision.

Party issued Postal Vote Applications

There are a number of sections in the *Electoral Act*, which authorise political parties and candidates to issue Postal Vote Application forms ('PVAs'), to have them returned to their offices and then to forward these to the AEC for the issuing of the resultant postal vote itself. During each election campaign, the AEC receives many complaints about the use of PVAs and whether it is permissible that PVAs be returned to the AEC via a political party.

In the matter of *Peebles v Honourable Tony Burke MP and Others* [2010] FCA 838 (4 August 2010) the Applicant (a Senate candidate in NSW for the Christian Democratic Party (Fred Nile Group)) argued that the sending out of this material by the Hon Tony Burke MP and the Australian Labor Party ('ALP') involved misleading and deceptive conduct. This was because the PVAs failed to clearly state the source of the PVA or that it would be returned to that source before being sent to the AEC. In reasons for decision His Honour stated that there was considerable force in at least some of those contentions. However, the Federal Court dismissed the application referring to the limited scope of section 329 of the *Electoral Act* which deals with publications that are likely to mislead or deceive an elector in relation to the casting of a vote and held that the act of applying for a postal vote did not fall within the scope of this section.

Ms Peebles subsequently lodged an appeal from the Federal Court decision to the Full Federal Court. This appeal was subsequently withdrawn and replaced with action in the CDR following the 21 August 2010 general election, as the orders sought in the appeal included discarding all votes that were received by the AEC as a result of PVAs issued by the ALP in New South Wales. Costs were awarded in favour of the AEC in *Peebles v Honourable Tony Burke (No 2)* [2010] FCA 861.

When is an MP an MP for electoral advertising?

Mr Faulkner has for many years raised concerns about the legal effect of the dissolving of the House of Representatives under section 28 of the *Constitution* and whether this results in it being misleading and deceptive for a candidate who was formerly a Member of the House of Representatives being able to continue to describe themselves as an MP. In the matter of *Faulkner v Elliot and Others* [2010] FCA 884 (17 August 2010), Mr Faulkner (an Independent candidate for the Division of Richmond) sought urgent orders from the Court restraining Ms Justine Elliot from describing herself as a 'Federal Member of Parliament', the 'Member for Richmond', 'MP', 'current Member', 'sitting Member' or 'Incumbent'. Mr Faulkner argued that the use of these descriptions in publications was misleading and deceptive and in breach of section 329 of the *Electoral Act*.

The Federal Court dismissed Mr Faulkner's application finding that the use by a candidate seeking re-election to the House of 'MP' is an appropriate description to present to electors in each Electoral Division. The Court accepted the existence of a protocol that the continued use of 'MP' might avoid confusion and operate as a proper matter of courtesy in all the circumstances. The Court held that a contravention of section 329(1) of the *Electoral Act* required conduct by Ms Elliot that was likely to mislead or deceive an elector in relation to

the 'casting' of a vote as opposed to influencing the 'formation of a judgment' by an elector of for whom to vote. The Court concluded that the use of the phrase 'MP' was not in breach of section 329(1) and dismissed the application.

The CDR petitions

The 40 day period for lodging petitions with the CDR following the return of the last writ for the 21 August 2010 election ended at close of business 27 October 2010. The High Court (which is the CDR) advised that five petitions were filed within the 40 day period, one in the Hobart registry and four at the Sydney registry.

The petition lodged at the Hobart registry involved an allegation that Senator Abetz had not renounced his German citizenship and was disqualified from standing as a candidate for an election under section 44 of the *Constitution.* This petition was subsequently withdrawn in November 2010 without proceeding to a hearing.

The four petitions lodged at the Sydney registry were all lodged by the same firm of solicitors who appeared to be acting on behalf of the Christian Democratic Party (Fred Nile Group). Three of the petitioners were candidates for this Party (Mr Graham Freemantle, Ms Robyn Peebles, and Mr Andrew Green) at the 2010 general election and the final petitioner (Mr Greg Briscoe-Hough) was an elector who previously stood for the Family First Party in NSW. The petitions sought to invalidate the elections for the Divisions of Banks, Lindsay and Robertson in NSW and the Senate election in NSW.

All four petitions focused on issues that were previously raised and dismissed by the Federal Court in the case of *Peebles v Honourable Tony Burke and Others* [2010] FCA 838 where arguments were run that the issuing and return of Postal Vote Applications ('PVAs') by political parties breached several provisions of the *Electoral Act*. The Federal Court held that the issuing/return of PVAs by political parties was not in breach of section 329 of the *Electoral Act* (ie was not misleading or deceptive in relation to an elector marking a ballot paper) and that the declaration used on the forms was consistent with the requirements of sections 183 and 184 of the Act. These arguments were again being used as the basis for the four petitions.

There were several other grounds raised in the initial petition including that the use of parliamentary allowances by Members of Parliament to print and distribute these PVAs was in breach of section 48 and 49 of the *Constitution*.

Only the petitions lodged on behalf of Andrew Green and Graham Freemantle proceeded to a hearing with the petitions lodged on behalf of Robyn Peebles and Greg Briscoe-Hough being withdrawn. The decisions on the two petitions of Green and Freemantle can be found at *Green v Bradbury* [2011] FCA 71 and *Fremantle v O'Neill* [2011] FCA 72. In short the Court held that there were no facts pleaded in the petition that disclosed any illegal practice that could have affected the results of the election. The orders as to the payment of the legal costs in the petitions involving Green, Freemantle and Peebles were resolved in favour of the AEC in *Green v Bradbury (No 2)* [2011] FCA 469.