Chapter Two

Current Issues and Recent Cases on Electoral Law — The Australian Electoral Commission perspective

Paul Pirani

Before turning to an analysis of recent cases dealing with the *Electoral Act* 1918 (Cth) (hereafter: the Electoral Act), I need to give a quick outline of exactly what is the Australian Electoral Commission (AEC) and its role.

What is the Australian Electoral Commission?

The AEC conducts elections under a range of legislation. The main role for the AEC is the conduct of federal elections under the Electoral Act and referendums under the *Referendum (Machinery Provisions) Act* 1984 (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, protected action ballots under the *Fair Work Act* 2009 and elections for the Torres Strait Regional Authority under the *Aboriginal and Torres Strait Regional Authority Act* 2005.

The AEC itself comprises three persons, the Chairperson (the Honourable Peter Heerey, QC), the non-judicial member (the Chief Statistician, Brian Pink) and the Electoral Commissioner (Ed Killesteyn) (see section 6 of the Electoral Act). 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 body corporate and is unable to sue and be sued or to enter into contracts in its own right. This is despite what was stated in the Commonwealth Parliament in 1983 when major reforms to Australia's electoral laws took place with the amendments to the Electoral Act to establish the AEC.

The AEC does have some standing to appear in court separate 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 the case of *Mitchell v Bailey (No 3)* [2008] FCA 1029 because the Court of Disputed Returns has the power to award costs against the Commonwealth in all matters (see subsection 360(4) of the Electoral Act which is contrasted by Justice Simpson from the position in NSW in the case of *Bradbery v Hay (No.2)* [2011] NSWSC 691.

Section 7 of the Electoral Act sets out the functions of the AEC. These include advising the minister and the Parliament on electoral matters. 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 actually to be politically neutral, or 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. Most people are not aware that there is still a provision in the Electoral Act

that prevents each Australian Electoral Officer (there are eight in total – one for each State and one for each of the two Territories) from voting in a Senate election unless it is to have a casting vote to separate two tied candidates for the last vacancy (see subsection 273(17)). By convention the Governor-General does not vote owing to the role of issuing the writs for an election and returning the writs to the Parliament. However, this is not an exception that is contained in the Electoral Act.

The Electoral Act deals with a wide range of electoral matters including determining electoral divisions, the enrolment of voters, registration of political parties, nomination of candidates, the voting process, the scrutiny of votes, election funding and financial disclosure, electoral offences, etc. Exercise of these powers is vested in the AEC, the Electoral Commissioner or individual statutory electoral officers. None of these Parts of the Electoral Act contains any powers for the minister to exercise or to direct AEC staff in the performance of their powers or functions.

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 "arm's length" from the Executive arm of the Government in relation to the actual exercise of those powers and functions. This "arm's length" approach is entrenched in guidelines and practices on a wide range of matters.

The relationship between the AEC and the Executive arm of Government is also regulated by the fact that the precursor for the conduct of a general election involves the dissolution of the House of Representatives under section 32 of the Constitution prior to the issuing of the writs for an election. One of the practical effects of this is that the Government is then in caretaker mode during the whole of the election period, placing the AEC in the position where it is required to comply with the caretaker conventions which "aim to prevent controversies about the role of the public service distracting attention from the substantive issues in the election campaign" (see paragraph 1.4 of the *Guidance on Caretaker Conventions 2010* which can be found at the following link: http://www.dpmc.gov.au/guidelines/docs/caretaker_conventions.pdf).

The role of the AEC 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. Since 1983, the AEC has 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 led 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 (including then Justice French) sitting as a Full Bench of the Administrative Appeals Tribunal (AAT) in the case of *Woollard and Australian Electoral Commission and Anor* [2001] AATA 166. The AAT stated at paragraph 20:

> 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.

High Court of Australia

I readily concur with the view expressed by many learned commentators (for example, Professor Graeme Orr, Professor George Williams) that there are many provisions in the Electoral Act that use obscure phrases and dense language. The legislative history of many of these provisions (particularly those that relate to the Court of Disputed Returns) go back to Western Australian and South Australian electoral legislation that pre-date federation. The Court of Disputed Returns provisions were contained in the original *Commonwealth Electoral Act* 1902 and were substantially revised in 1983.

The High Court has two roles in dealing with matters relating to the conduct of federal elections. The first role is as the Court of Disputed Returns which is the final arbiter of disputes relating to an election. The second role is as the interpreter of the provisions of the Constitution that have an impact on electoral matters. Often the two roles are combined particularly where there are legal challenges to the qualifications of a candidate who may have been elected (e.g. see *Free v Kelly*[1996] HCA 42).

There have been numerous challenges to various provisions in the Electoral Act which are argued as being an infringement of various rights that are stated as arising from the Constitution. Some are stated to flow directly from such provisions as sections 7 and 24 of the Constitution ("directly chosen by the people") while others are argued to impliedly exist (for example, the implied freedom of political communications). The Constitution itself contains a distinction between certain matters that are expressly dealt with by the Constitution itself (for example, disqualification of candidates under section 44), while other matters are left to be determined by the Parliament (for example, the qualification of electors in sections 8 and 30 and the voting system in sections 7, 9, 24, 29 and 31).

This distinction has resulted in a fertile ground for legal challenges particularly where various amendments made to the Electoral Act are regarded as being partisan and political in their nature. I take particular note of the comments made by Justice Dawson in the case of *McGinty v Western Australia* [1996] HCA 48 at paragraph 10 where he refers to the various provisions of the Constitution which he describes as providing for the "minimum requirements of representative government but do not purport to go significantly further". He goes on in the same paragraph to conclude that:

> In providing for those matters which are confided to it, parliament is required to determine questions of a political nature about which opinions may vary considerably. For example, the qualifications of electors are to be provided for by parliament under ss *8* and *30* and may amount to less than universal suffrage, however politically unacceptable that may be today. Thus, it may be seen that the form of representative government, including the type of electoral system, the adoption and size of electoral divisions, and the franchise are all left to parliament by the *Constitution*.

So we are left with a conundrum. Given the nature of the Parliament, how are the democratic rights of Australians to representative government to be safeguarded?

It has been stated by Professor Orr that one of the cornerstones of voting rights was the 1975 High Court decision in *Ex rel McKinley v Commonwealth* [1975] HCA 53. Although the High Court in this case rejected the argument mandating one-vote one-value that applies in the United States, the joint judgment of Justices McTiernan and Jacobs at paragraph 6 stated that:

> The words 'chosen by the people of the Commonwealth' fall to be applied to different circumstances at different times and at any particular time the facts and circumstances may show that some or all members are not, or would not in the event of an election, be chosen by the people within the meaning of these words in s. 24. At some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of degree. It cannot be determined in the abstract. It depends in part upon the common understanding of the time on those who must be eligible to vote before a member can be described as chosen by the people of the Commonwealth. For instance, the long established universal adult suffrage may now be recognized as a fact and as a result it is doubtful whether, subject to the particular provision in s. 30, anything less than this could be described as a choice by the people. (at p36)

The majority of the High Court in the prisoner voting case of *Roach v Electoral Commissioner*[2007] HCA 43 adopted and applied the above statement although it appears to be limited to adult Australian citizens and is subject to the exception that the Parliament can enact legislation that limits universal adult suffrage in circumstances that are proportionate to and reasonably consistent with representative government.

In researching this paper I also came across an article written by Jerome Davidson of the Law and Bills Digests Section in the Parliamentary Library. This article was published on 24 May 2004 when the prisoner voting measures were still before the Parliament as contained in the *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill* 2004. It was the resultant Act that was only passed by the Parliament in 2006 that was before the High Court in the *Roach* case. The article contains a detailed analysis of the law and international experience on the denial of civil rights for convicted felons. (The full article can be found at the following link: (http://www.aph.gov.au/library/pubs/cib/2003-04/04cib12.pdf). The article concluded with the following:

> The requirements of the Australian Constitution for representative government are open to be interpreted so as to protect the right of Australians to vote in federal elections. The proposed provision to remove the right to vote from all prisoners serving a full time sentence of imprisonment arguably conflicts with the Constitutional requirement, and accordingly would be liable to be held invalid if challenged in the High Court.

The contents of this article were subsequently proved to be accurate. On 30 August 2007 the High Court held that the amendments made by the above Bill were invalid because they are contrary to ss 7 and 24 of the Commonwealth Constitution.

Both the *Roach* case and the earlier *Australian Capital Television* case (see *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45) were notable as the High Court had generally deferred to the Commonwealth in such cases involving the measures in the Electoral Act displaying the traditional reluctance of all courts to interfere with the parliamentary process.

What remedy?

One of the interesting factors that is often overlooked by commentators when examining electoral challenges that are dealt with by the courts is the particular relief that was being sought in each case. The courts are being asked to issue prerogative relief by way of writs of mandamus, certiorari, prohibition or an injunction. It is the effect of the orders sought on third parties (that is, persons other than Applicant themselves or the AEC) that will affect whether a court will grant the prerogative relief that is being sought. The "balance of convenience" test that is applied to all injunctive relief applications will of itself apply to exclude the grant of the particular relief being sought in many of these applications.

However, the timing issue is one that has only been glossed over in most of the literature that I have examined. Let me explain by way of example.

In the matter of *Rowe v Electoral Commissioner* [2010] HCA 46, there was no doubt that the proceedings attracted the original jurisdiction of the High Court under section 75 of the Constitution. The matter first came before Justice Hayne on 29 July 2010. Because the writs for the 2010 general election had already been issued, on 19 July 2010, concerns were raised about whether the relief being sought was able to be accommodated by the AEC without risking the whole election. It should be remembered that the costs of the 2010 general election were in the order of $110M, with the AEC engaging nearly 67,000 staff and having either a lease or licence of nearly 7,800 premises that were used to house polling booths.

The affidavit of Paul Dacey, the Deputy Electoral Commissioner, set out the timetable that is

in the Electoral Act for the conduct of an election and indicated that if a decision was made that the previous close of rolls period applied, then this could be achieved by the AEC if the Court's decision was handed down by 6 August 2010. Any decision later than this risked electors being disenfranchised and key electoral processes (for example, the nomination of candidates) also being placed at risk. A copy of Paul Dacey's affidavit can be found at *http://www.aph.gov.au/library/intguide/LAW/docs/RowevElectoralCommissionersubmissions.pdf*

Dacey's evidence was specifically referred to at paragraphs 69 and 70 of the judgment of the Chief Justice and reflected in all other judgments.

Accordingly, the High Court was clearly aware that, unless a decision was handed down by 6 August 2010, the whole election would be threatened. Exhibit PD 1 to the affidavit sets out the interrelationship between the requirements of the Electoral Act and each stage of the electoral process that occurs after the announcement by a prime minister of an impending election.

Key times are set out in election writs that are issued by the Governor-General (House of Representative and ACT and NT senators) and the State governors (for senators in each State). The election writs include the dates for the Close of Rolls, the nomination of candidates, polling day and the returns of the writs. The Electoral Act contains a whole raft of requirements and deadlines that flow from each of the above dates. These include such matters as applications for postal votes, the opening and closing dates in which a candidate can lodge a nomination, the finalisation and distribution of the certified lists of voters, the starting of early voting, etc. Any failure by the AEC to comply with those requirements and deadlines invariably results in the electoral process being at risk and an "illegal practice" arising which attracts the jurisdiction of the Court of Disputed Returns.

Many learned authors have argued that the courts are able to deal with urgent interlocutory applications involving challenges to administrative decisions in a timely manner and that this could not affect the "validity of an election".

The current minimum timetable given to the AEC to conduct an election is 33 days from the issuing of the election writs to polling day. A person can only legally nominate to be a candidate after the issuing of the election writs and until the hour of nomination. The hour of the nomination currently occurs at day 10 in the election timeline. The day after the hour of nomination is the declaration time which is immediately followed by the drawing of the positions on the ballot paper under section 213 of the Electoral Act. The Electoral Act then gives the AEC two days to print and distribute the ballot papers and the certified lists of voters so that the early voting can commence (see sections 200D and 208(3) of the Electoral Act). Again, any failure by the AEC to comply with these deadlines gives rise to an "illegal practice" under section 352 of the Electoral Act and therefore attracts the jurisdiction of the Court of Disputed Returns.

Accordingly, anything that could affect the above processes and the required timelines that are set out in the Electoral Act give rise to the potential to affect the results of the election and their validity. Adding a candidate's name to a ballot paper after early voting is required to commence means some electors who have already cast their vote will run the risk of having that vote excluded and not being able to exercise the franchise fully. This is particularly problematical with postal voting which also commences at the same time. Further, how is the order of candidates on the ballot paper now to be determined given that the process in section 213 for the order of candidates has already been concluded? It is clear that the rights of persons other than the prospective candidate would be adversely affected unless this issue can be urgently resolved prior to the declaration time (which is day 11 of the election timeline).

The injunction power

Section 383 of the Electoral Act gives to the AEC the power to commence action for an injunction where any person has engaged in conduct that would constitute a contravention of the Electoral Act. It should be noted that the Electoral Act itself contains a range of offences that apply specifically to

AEC staff and electoral officials (for example, section 103, failing to process claims for enrolment; section 325, improperly influences voting; section 323, identifying electors; and the catch-all in section 324 where an AEC officer contravenes any provision of the Act). The power and duty contained in section 383 is for the AEC to institute proceedings where it is aware of a contravention of the Electoral Act. This is an extraordinarily wide duty that is imposed on the AEC including that the AEC should be taking action against itself where it is aware of some contravention. Indeed, the AEC continues to operate on the basis that it also has a duty to lodge a petition in the Court of Disputed Returns if it becomes aware of any actions by its own staff that have affected the results of an election.

The section 383 injunction power was inserted into the Act following a recommendation from the then Joint Select Committee on Electoral Reform in its First Report to the Parliament dated September 1983 at paragraph 6.43 (recommendations 84 and 85). These recommendations stated, in part, that:

> The Committee recommends that the onus rests on the Electoral Commission to ensure that elections at every stage are conducted in accordance with the laws, and it should have the responsibility to initiate action on any occasion when in its opinion sufficient reason is demonstrated. (This would include seeking injunctive relief in situations where information available to the Commission indicated that a breach of the law was probable).

The challenges faced by the AEC in conducting an election are well documented. The Court of Disputed Returns processes are also well documented and have been of a longstanding nature. The AEC is acutely aware of its role as the independent electoral body charged with the conduct of elections and its role as a model litigant in legal proceedings. The AEC would hope that its conduct is at all times of the highest standards and that the existing review rights meet the relevant Australian and international standards that apply to electoral bodies and the application of the rule of law.

Recent cases

Close of Rolls

In the matter of *Rowe v Electoral Commissioner* [2010] HCA 46, the High Court dealt with a 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 Attorney-General of Western Australia 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 the provision (subsection 102(4AA)) which 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, *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 where the AEC was unable to check the integrity of all claims. This was despite evidence from the AEC to the contrary.

In retrospect, the lodging of this application to the High Court should not have been a surprise. The ALP's *National Platform and Constitution 2007* contained a number of commitments to reform electoral legislation. One of those commitments was to replace the close of Rolls provisions enacted in 2006. Legislation had been before the Parliament since 11 February 2010 (see the *Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill* 2010) containing measures that included reinstating the previous seven-days close of Rolls provisions that applied until the 2007 federal election. This Bill did not progress and was replaced on 2 June 2010 with a revised Bill that included only two measures that were regarded as being controversial. When the House of Representatives was dissolved on 19 July 2010, the Bill lapsed.

On 6 August 2010, the High Court ordered that the amendments made by the 2006 Act were invalid and that the previous seven-days close of Rolls period was still in force. The majority judges all appeared to draw their conclusions from what could be categorised as a practice that had evolved in Australia since federation to give electors a reasonable time either to enrol or to update their enrolment details after an election is announced.

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 Act 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 (for example, 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 only 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.

Postal vote applications issued by political parties

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 can 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 Honourable Tony Burke MP and the Australian Labor Party (ALP) involved misleading and deceptive conduct. This was because the PVAs failed to state clearly 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 against the Federal Court decision with the Full Federal Court. This appeal was subsequently withdrawn and replaced with action in the Court of Disputed Returns 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.

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 candidates who were formerly Members 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 of a candidate seeking re-election to the House as "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 petitions to the Court of Disputed Returns

The 40-day period for lodging petitions with the Court of Disputed Returns (CDR) following the return of the last writ for the 21 August 2010 election ended at close of business on 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 (that is, 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 sections 48 and 49 of the Constitution.

Only the petitions lodged on behalf of Andrew Green and Graham Freemantle proceeded to a hearing. The petitions lodged on behalf of Robyn Peebles and Greg Briscoe-Hough were withdrawn. The decisions on the two petitions of Green and Freemantle can be found at *Green v Bradbury* [2011] FCA 71 and *Freemantle 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.

What of the future?

There are already a number of matters that have been announced that could lead to amendments to the Electoral Act and which will almost certainly involve a risk of a constitutional challenge.

The Agreement between the Prime Minister, the Honourable Julia Gillard, MP, and both the Greens and the Independents all refer to electoral reform. One particular area that is proposed to be reformed relates to political donations and campaign financing. As has been shown in the United States of America, Canada and New Zealand, such reforms have proven to be a fertile ground for legal challenge. The existence of the implied freedom of political communication in Australia will no doubt lead to similar constitutional challenges being launched here irrespective of what particular model results. However, as was shown in the decision of the Supreme Court of Canada in *Harper v Canada* (2004) 239 DLR (4th) 193, a balanced approach may well be upheld if it can be shown that the effect of the legislation results in a level playing field that encourages political communications and removes any negative influences on representative government.

There are often calls for changes to be made to the current system in Australia of compulsory enrolment and compulsory voting. Compulsory enrolment has existed in the federal jurisdiction since 1912 – compulsory voting since 1924. If any changes are made to the Electoral Act that have a significant effect on the participation of eligible Australians to exercise the franchise, the issue will no doubt give rise to a challenge based on the words, "directly chosen by the people", contained in sections 7 and 24 of the Constitution.

Would such a challenge by successful?