

## CHAPTER 6: ELECTORAL MANAGEMENT BODIES – STRUCTURE, FUNCTIONS AND INDEPENDENCE

This chapter considers the functions and structure of electoral management bodies, and the scope for reform. In particular, this chapter considers the independence, structure and functions of Australia's federal electoral management body.

### THE CURRENT ARRANGEMENTS

#### *Commonwealth arrangements*

- 6.1 The establishment of the Australian Electoral Commission on 21 February 1984 was a major feature of the 1983 electoral law reforms. The AEC replaced a statutory body, the Australian Electoral Office, which had existed from 1973 to 1984 and was headed by a Chief Electoral Officer. From 1902 to 1973, electoral administration was undertaken by the Commonwealth Electoral Office, which was part of a department of state.
- 6.2 An important aim of establishing the AEC was to increase the independence of federal electoral administration, to 'ensure...an electoral process which is modern and free from any allegations or even possibilities of corruption or political pressure'.<sup>301</sup> The AEC was established with bipartisan support, on the unanimous recommendation of JSCER, which stated that:
- 'The Committee sees great merit in the existence of an Australian Electoral Commission with a statutory basis and which is seen to operate independent of political influence. Accordingly, the Committee recommends the establishment of an Australian Electoral Commission as an independent statutory authority'.<sup>302</sup>
- 6.3 A special feature of the AEC as a statutory authority is its role in publicly expressing views about policies reflected in legislation. While the AEC is subject to the general protocols regarding confidentiality of agencies' advice to ministers, it balances these with its function of providing 'information and advice'<sup>303</sup> to the Parliament, in particular JSCER. It is well established that the AEC will provide its views to JSCER when the committee is conducting an inquiry or considering a bill that is before the Parliament; it appears that this aspect of the AEC's role has had bipartisan support.
- 6.4 The AEC is a statutory commission established by section 6 of the Electoral Act. The AEC is subject to the *Financial Management and Accountability Act 1997* (the FMA Act) and the *Public Service Act 1999* (the PS Act). As such the AEC receives appropriations in its own right and must prepare reports and financial statements in accordance with the Electoral Act, the FMA Act and the PS Act.

#### *Functions of the AEC*

- 6.5 The Electoral Act sets out the following functions for the AEC:
- to manage the Commonwealth electoral roll which is used by all levels of government;<sup>304</sup>

<sup>301</sup> The Hon K Beazley MP (Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence), *Second Reading Speech, Commonwealth Electoral Legislation Amendment Bill 1983*, House of Representatives, *Debates*, 2 November 1983, p. 2216.

<sup>302</sup> JSCER, *First Report*, op. cit., p. 39.

<sup>303</sup> Electoral Act, op. cit., paragraph 7(1)(d).

<sup>304</sup> *ibid.*, paragraph 7(1)(a) and Parts VI to X.

- to support electoral redistributions;<sup>305</sup>
- to register political parties;<sup>306</sup>
- to conduct elections and referendums, including fee for service and industrial elections;<sup>307</sup>
- to administer election funding and financial disclosure requirements;<sup>308</sup>
- to educate and inform the community about participating in the electoral process;<sup>309</sup>
- to undertake research, provide information, publish material, and provide reports on electoral matters;<sup>310</sup> and
- where approved by the Minister for Foreign Affairs, to provide assistance in overseas elections and referendums.<sup>311</sup>

6.6 The establishment of the AEC was intended to ensure that these functions would be exercised by an independent statutory authority, without the need for ministerial involvement or scope for ministerial direction.<sup>312</sup> Prior to 1983, the Electoral Act provided for the responsible minister to be involved in decision-making on electoral matters such as redistributions, appointment of 'electoral registrars',<sup>313</sup> appointment of polling places, and printing of the electoral roll.

#### *Organisational Structure of the AEC*

- 6.7 The work of the AEC is overseen by a three-person body (also known as the Electoral Commission), which consists of the Electoral Commissioner and two other part-time Commissioners.<sup>314</sup> All three Commissioners are appointed by the Governor-General for periods not exceeding seven years.<sup>315</sup>
- 6.8 The Electoral Commissioner is the chief executive of the AEC. The Electoral Commissioner is responsible for the management and strategic leadership of the AEC and may give written directions to AEC officials with respect to the performance of their functions.<sup>316</sup> The Electoral Commissioner serves full time and is appointed in accordance with the Government's appointments policy, *Merit and Transparency: Merit-based selection of APS agency heads and APS statutory office holders*.<sup>317</sup>
- 6.9 The Electoral Act sets out a process for appointing the two part-time Commissioners, the Chairperson and the 'non-judicial appointee'. The Chairperson must be chosen from a list of the names of three 'eligible Judges' provided by the Chief Judge of the Federal Court of Australia.<sup>318</sup> An 'eligible Judge' is a Judge of the Federal Court of Australia, other than the Chief Judge, who is, or was, a Judge of that Court, for a period of at least three years.

<sup>305</sup> *ibid.*, paragraph 7(1)(a) and Part IV.

<sup>306</sup> *ibid.*, paragraph 7(1)(a) and Part XI.

<sup>307</sup> *ibid.*, paragraphs 7(1)(a) and (g), and Parts XIII to XIX.

<sup>308</sup> *ibid.*, paragraph 7(1)(a) and Part XX.

<sup>309</sup> *ibid.*, paragraph 7(1)(c).

<sup>310</sup> *ibid.*, paragraphs 7(1)(b), (d), (e) and (f).

<sup>311</sup> *ibid.*, paragraph 7(1)(fa).

<sup>312</sup> There are some aspects of the AEC's activities that are subject to ministerial approval or to broader government legislative or policy requirements; as discussed at paragraphs 6.24 and 6.25, this may have implications for the degree to which the AEC is free to exercise its functions completely at arm's length from the government of the day, without the need for ministerial involvement or scope for ministerial direction.

<sup>313</sup> Registrars in the past performed roll maintenance functions at the local level; their duties were long ago subsumed into those of Divisional Returning Officers.

<sup>314</sup> Electoral Act, *op. cit.*, subsections 6(2) and (3).

<sup>315</sup> *ibid.*, subsections 6(3), 8(1) and section 21.

<sup>316</sup> *ibid.*, section 18.

<sup>317</sup> The policy is available at [www.apsc.gov.au/publications08/meritandtransparency.htm](http://www.apsc.gov.au/publications08/meritandtransparency.htm).

<sup>318</sup> Electoral Act, *op. cit.*, section 5 and subsection 6(4).

The Chairperson has generally been a retired judge. The non-judicial appointee must be an agency head (or equivalent status) within the meaning of the *Public Service Act 1999*. Since 1984, the Australian Statistician has been chosen as the non-judicial appointee; although there is no statutory requirement for this, it has been viewed as beneficial because one of the core functions of the two part-time Commissioners is to participate in redistributions, and because the Australian Statistician has been recognised as an officer whose work involves a high degree of operational independence and political neutrality.

- 6.10 Remuneration for the Electoral Commissioner and the Chairperson is determined by the Remuneration Tribunal.<sup>319</sup> The Electoral Commissioner and the non-judicial Commissioner can only be removed from their positions in limited circumstances.<sup>320</sup> The Electoral Act does not allow for the removal of the Chairperson.
- 6.11 The Electoral Act also provides for the appointment of a Deputy Electoral Commissioner,<sup>321</sup> an Australian Electoral Officer (AEO) for each state and the NT,<sup>322</sup> and a Divisional Returning Officer (DRO)<sup>323</sup> for each division. AEOs are responsible for managing the federal electoral activities within each state or territory. Within each division, DROs undertake roll management and public awareness activities and deliver election services.
- 6.12 All permanent staff of the AEC are employed under the *Public Service Act 1999*.<sup>324</sup> In addition, the Electoral Act enables the Electoral Commissioner to appoint senior executive staff and such other officers or temporary staff as are needed to conduct elections or perform the AEC's other functions.<sup>325</sup>
- 6.13 The AEC has its National Office in Canberra, state offices in each state capital and its NT office in Darwin. The AEC is also required to have a divisional office in each division.<sup>326</sup>

#### *Cooperation with electoral management bodies in the states and territories*

- 6.14 Each state and territory has its own electoral commission with responsibility for electoral management in the state or territory.<sup>327</sup> In many respects, the state and territory electoral management bodies are similar to the AEC and the various electoral commissions generally perform similar functions. However, the structures and procedures of electoral commissions in other jurisdictions differ as a result of different electoral legislation, systems and traditions. For example, New South Wales, Victoria, South Australia and Tasmania have conferred the redistribution function on separate tribunals or commissions.<sup>328</sup> No state or territory has

<sup>319</sup> *ibid.*, sections 14A and 22. The non-judicial appointee is already an agency head (or equivalent), and does not receive additional remuneration for being a part time Commissioner.

<sup>320</sup> *ibid.*, subsections 8(3) and (4), and sections 12 and 25.

<sup>321</sup> *ibid.*, *op. cit.*, section 19.

<sup>322</sup> *ibid.*, section 20. An AEO for the ACT is also appointed for the duration of the federal election period: *ibid.*, section 30.

<sup>323</sup> *ibid.*, section 32.

<sup>324</sup> *ibid.*, subsection 29(1).

<sup>325</sup> Under the Electoral Act, the Electoral Commissioner may appoint: Assistant Returning Officers (section 33); Assistant Divisional Returning Officers (section 34); and such other temporary staff as are necessary to perform its functions (section 35).

<sup>326</sup> *ibid.*, subsection 38(1). The Special Minister of State may approve the location of a divisional office outside the division. As of 1 February 2009, divisional offices were spread over 121 separate locations.

<sup>327</sup> South Australia established its Electoral Commission in early 2009, previously it was the State Electoral Office.

<sup>328</sup> Like the Commonwealth, all four of these jurisdictions provide for the membership of the separate redistribution body to include the Electoral Commissioner for that jurisdiction: *Parliamentary Electorates and Elections Act 1912* (NSW), section 6; *Electoral Boundaries Commission Act 1982* (Vic), section 3; *Constitution Act 1934* (SA), section 78; *Legislative Council Electoral Boundaries Commission Act 1995* (Tas), section 6.

permanent DROs; instead, staff to undertake these roles are appointed on a temporary basis for each election,<sup>329</sup> or the roles are carried out by central office staff as required.<sup>330</sup>

- 6.15 In 1992, JSCEM undertook a review of the relationship between the AEC and the state and territory electoral bodies.<sup>331</sup> The terms of reference for the review focused on the cost of running elections, maintaining the electoral roll, and opportunities for resource sharing between federal and state electoral bodies. One aspect of the inquiry was the examination of the establishment of a single national electoral administration body. Following criticism from the states and the major political parties, JSCEM concluded that the establishment of a single electoral body would not be possible; however, JSCEM made over 50 other recommendations. Since the 1992 inquiry, there has been increased cooperation between jurisdictions in relation to joint roll management, the standardisation of polling places for state and federal elections, and the exchange of information about polling officials.
- 6.16 Ongoing consultation between the jurisdictions can be conducted through the ECA, which (as outlined in chapter 1) is a consultative council of Electoral Commissioners from the electoral authorities of the Commonwealth, states and territories. The ECA may consider any electoral administration matter that has implications for the various electoral bodies. Despite the existence of the ECA, even in areas of close cooperation such as roll management there are no national arrangements in place; there are a series of bilateral agreements between the AEC and its state and territory counterparts. Specific opportunities for greater cooperation and harmonisation in electoral administration are discussed in relevant future chapters.

## CHALLENGES, OPPORTUNITIES AND OPTIONS FOR CHANGE

### *Key elements of international electoral management bodies*

- 6.17 It may be useful to consider key elements of electoral management bodies internationally, before examining those elements as they apply to the independence, structure and functions of the AEC.
- 6.18 Around the world, there is considerable variation in the bodies that have been established for administering elections. The model that is appropriate for each country depends on its political history and administrative traditions. Because of the diversity of election administration functions, some countries have more than one administrative body. A study sponsored by the United Nations Development Program and the International Foundation for Electoral Systems highlights not just the operational functions of electoral management bodies, but also their broader role in underpinning the quality of a country's democracy.<sup>332</sup>
- 6.19 The International Institute for Democracy and Electoral Assistance (International IDEA), an intergovernmental democracy and electoral think-tank of which Australia was a founding member,<sup>333</sup> has considered different approaches to the structure of electoral management bodies, ranging from independent electoral bodies to government controlled electoral bodies.

<sup>329</sup> In Tasmania, it has long been the case that the federal DROs serve as state returning officers at House of Assembly elections.

<sup>330</sup> The ACT does not have returning officers: the Electoral Commissioner effectively takes on the role of returning officer for all electorates, and tasks are carried out by central office staff as required.

<sup>331</sup> JSCEM, *The Conduct of Elections: New Boundaries for Cooperation*, 1992.

<sup>332</sup> 'Independent electoral bodies have made a significant contribution to democracy and the rule of law... Although independence and permanence in themselves are not sufficient conditions to guarantee free and fair elections, they provide significant opportunities for enhancing transparency and public confidence and hence for safeguarding the franchise in the early stages of democratization and well beyond.' (R López-Pintor, *Electoral Management Bodies as Institutions of Governance*, Bureau for Development Policy, United Nations Development Programme, 2000, p. 123, available at [www.undp.org/governance/docs/Elections-Pub-EMBbook.pdf](http://www.undp.org/governance/docs/Elections-Pub-EMBbook.pdf).)

<sup>333</sup> Further information is available at [www.idea.int/about/members/australia.cfm](http://www.idea.int/about/members/australia.cfm).

The following table summarises the key elements of independent and governmental electoral management bodies that International IDEA identified:

**Table 6.1: Key elements of electoral management bodies<sup>334</sup>**

Aspect of the Model	Independent Model	Governmental Model
Institutional arrangement	Is institutionally independent from the executive branch of government	Is located within or under the direction of a department of state and/or local government
Powers	Has powers to develop the electoral regulatory framework independently under the law Exercises full responsibility for implementation	Powers are limited to implementation which is subject to executive branch of government direction
Budget	Has and manages its own budget independently of day-to-day governmental control	Budget is a component of a government ministry's budget or local budget authorities
Formal accountability	Does not report to executive branch of government but with very few exceptions is formally accountable to the legislature, judiciary or head of state	Fully accountable to executive branch of government
Officers	Is composed of members who are outside the executive branch while in the electoral management body office	Is led by a minister or public servant. With very few exceptions has no 'members', only a secretariat
Terms of office	Offers security of tenure, but not necessarily fixed term of office	Usually no members, so N/A. Secretariat staff are civil servants whose tenure is not secured
International IDEA examples	Canada – Elections Canada South Africa – Independent Electoral Commission	UK – Electoral Commission <sup>335</sup> Germany – Federal Returning Officer Sweden – Electoral Authority

6.20 Following a 2006 survey of electoral management in 214 countries and territories, International IDEA categorised 55% as following the independent model, 26% the governmental model and 15% the mixed model.<sup>336</sup> International IDEA considers the AEC to be an independent electoral management body.<sup>337</sup> It is apparent from the criteria in Table 6.1, and from the following discussion, that there are degrees of independence, and that the AEC draws upon elements from both types of electoral management models.

<sup>334</sup> International IDEA, *Electoral Management Design: The International IDEA Handbook*, Stockholm, 2006, p. 9.

<sup>335</sup> The UK Electoral Commission may be better described as a hybrid model, as its electoral commission is an independent body.

<sup>336</sup> International IDEA, *op. cit.*, p. 8; the remaining 4% corresponds to countries that do not hold national-level elections.

<sup>337</sup> *ibid.*, p. 7.

## Independence, structure and functions of the AEC

### Institutional arrangement

- 6.21 The concept of 'independence' in electoral administration can have different connotations. An expectation of *behavioural independence* may require that an electoral administration body operate neutrally and refrain from favouring one party or side more than another. In contrast, an expectation of *institutional independence* may require the architecture establishing an electoral administration body to ensure that its decisions on electoral matters are made autonomously and free from the control of the government of the day.
- 6.22 The legislation that establishes a statutory body determines the nature and degree of its independence.<sup>338</sup> While the AEC is technically part of the executive, the Commission is an independent statutory authority.<sup>339</sup> The Electoral Act does not contain an express provision that requires the AEC to act independently and impartially when performing its functions and duties. Conversely, there are only very limited powers in the Electoral Act for the executive to direct the AEC.<sup>340</sup> Alternative approaches adopted in other jurisdictions include:
- some countries, such as New Zealand<sup>341</sup> and South Africa,<sup>342</sup> specify the independence of their electoral management bodies in legislation; and
  - Tasmanian legislation states that the Tasmanian Electoral Commission 'is not subject to the direction or control of the Minister in respect of the performance or exercise of its functions or powers'.<sup>343</sup>
- 6.23 It has been commented that during the 82 years when federal electoral matters were managed by government bodies that did not have independent status, there were 'very few occasions when improper interference was alleged to have been attempted and the allegation publicly investigated'.<sup>344</sup> It might therefore be argued that JSCER's recommendation to establish the AEC was not motivated by a public concern that the AEC's predecessors had lacked impartiality, but was designed to clarify that the federal electoral management body operates independently of political influence,<sup>345</sup> an especially important issue in light of the expanded functions which the JSCER was proposing for that body.

<sup>338</sup> Department of Finance and Deregulation, *Governance Arrangements for Australian Government Bodies*, Financial Management Reference Material No. 2, 2005, p. 41, available at [www.finance.gov.au/financial-framework/governance/governance-arrangements-for-australian-government-bodies.html](http://www.finance.gov.au/financial-framework/governance/governance-arrangements-for-australian-government-bodies.html).

<sup>339</sup> In his Second Reading Speech in support of the Commonwealth Electoral Legislation Amendment Bill 1983, the Hon K Beazley MP (then Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence) stated that, 'The Bill provides for the establishment of a truly independent Electoral Commission'. See House of Representatives, *Debates*, 2 November 1983, p. 2214.

<sup>340</sup> Paragraph 7(1)(fa) of the Electoral Act requires the AEC to obtain the approval of the Minister for Foreign Affairs to provide international electoral assistance. Subsection 38(1) requires the AEC to obtain the approval of the Special Minister of State to co-locate divisional offices. Sections 202AF and 202AM enable the Special Minister of State to decide not to proceed with an electronic voting trial.

<sup>341</sup> *Electoral Act 1993* (NZ), section 7.

<sup>342</sup> *Constitution of the Republic of South Africa Act 1996* (SA), section 181.

<sup>343</sup> *Electoral Act 2004* (Tas), section 10.

<sup>344</sup> C Hughes, 'The Independence of the Commissions: The Legislative Framework and the Bureaucratic Reality' in G Orr, B Mercurio and G Williams (eds.), *op. cit.*, p. 206. On one prominent occasion, it was alleged in 1977 that 'Distribution Commissioners had been subject to illegal or improper pressure... in carrying out their duties and had acquiesced in or yielded to that pressure' in the re-naming of divisions on the Gold Coast. A subsequent royal commission found no breaches of the law, but that there had been a breach of propriety by the then administrative services minister in contacting the Chief Australian Electoral Officer to discuss the names of the divisions (Royal Commission of Inquiry, *Matters in Relation to Election Redistribution: Queensland 1977, 1978*, pp. x and 243).

<sup>345</sup> JSCER, *First Report*, *op. cit.*, p. 39.

### Powers

6.24 The AEC is responsible for the performance of its functions under the Electoral Act.<sup>346</sup> While the legal framework for federal elections is developed by the Parliament, the AEC may determine, in some respects, how it will perform its functions;<sup>347</sup> as noted above, the Electoral Act contains no powers for ministerial or governmental directions or approvals in relation to the exercise of these functions, except in very limited circumstances relating to international electoral assistance, location of divisional offices outside division boundaries, and electronic voting trials. Further, the AEC (or the Electoral Commission):

- may seek leave of the Court of Disputed Returns, as a party separate from the Commonwealth, to enter an appearance in any proceedings in which the validity of any election or return is disputed,<sup>348</sup>
- has standing, distinct from that of the Commonwealth, to seek injunctions restraining breaches or anticipated breaches of the law, and to lodge petitions with the Court of Disputed Returns challenging an election,<sup>349</sup>
- may initiate investigations relating to the funding and disclosure provisions of Part XX of the Electoral Act;<sup>350</sup> and
- has its own permanent staff, and employs senior executive staff and polling officials under the Electoral Act, with no requirement for external approval.<sup>351</sup>

### Limits on the powers of the AEC

6.25 Despite being empowered to perform its functions, there are some areas where the AEC's powers may be limited.

- The AEC is not a body corporate, and as such, does not have a corporate seal which enables it to enter contracts in its own name. However, the Electoral Commissioner, as the chief executive of the AEC, may exercise the executive power of the Commonwealth to enter into contracts on behalf of the AEC.<sup>352</sup>
- The Electoral Act is silent as to whether the AEC can sue or be sued in its own right. While the Electoral Act provides for the AEC to be a party to actions in the Court of Disputed Returns, for other electoral litigation it is uncertain whether the Electoral Commission or the Electoral Commissioner should be named as the party to the action.<sup>353</sup> This may be something that could be clarified in the Electoral Act.
- There are some areas in which the AEC's scope to exercise its powers and functions may be affected by broader arrangements that apply to the AEC in common with other FMA Act agencies.
  - For litigation, the AEC is subject to the *Legal Services Directions 2005* and must comply with any instructions given by the Attorney-General about the handling of claims or the conduct of litigation.

<sup>346</sup> Electoral Act, op. cit., paragraph 7(1)(a).

<sup>347</sup> The prescriptive nature of the Electoral Act and its consequences are discussed in paragraphs 3.6-3.9.

<sup>348</sup> Electoral Act, op. cit., section 359.

<sup>349</sup> *ibid.*, section 383.

<sup>350</sup> *ibid.*, section 316.

<sup>351</sup> *ibid.*, section 29.

<sup>352</sup> FMA Act, section 44. Section 7A of the Electoral Act also enables the Commission to make arrangements for the supply of certain goods or services.

<sup>353</sup> For example, in *Roach v Electoral Commissioner* (2007) 233 CLR 162, litigation challenging the validity of electoral laws prohibiting prisoners from voting, the Electoral Commissioner was the party to the case, rather than the AEC.

- It has been suggested that the obligations of AEC staff engaged under the PS Act may conflict with the independent performance of their electoral functions. For example, paragraph 10(1)(f) of the PS Act requires that:
  - '(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'
- Against this, it has been noted that an independent statutory office holder is only required to comply with government policy to the extent that those policies do not conflict with the exercise of the statutory function provided to them by the Parliament.<sup>354</sup>
- Paragraph 44A(1)(a) of the FMA Act, which is a codification of the executive power in the Constitution, states that a Chief Executive of an FMA Act agency must 'give the Minister responsible for the Agency such reports, documents and information in relation to the operations of the Agency as that Minister requires'. It might be argued that in the absence of an explicit provision in the Electoral Act to protect the AEC's independent exercise of its functions, this provision could allow a minister to request information from the AEC that could afford him or her inappropriate political benefit.

6.26 As outlined at Table 6.1, International IDEA has suggested that an independent electoral management body may have the power to develop the electoral regulatory framework independently under the law. As noted above, this is not the case for the AEC, as federal electoral laws are developed by the Parliament. Because the Electoral Act is highly detailed and prescriptive, the AEC is limited in its ability to develop or change electoral policy. However, as noted in paragraph 6.3, the AEC can influence the development of electoral laws and policies through its advice to the government and to JSCEM.

### *Splitting functions of electoral management bodies*

#### *Splitting functions between jurisdictions*

- 6.27 Some countries divide the electoral functions between two or more jurisdictions. For example, in the United Kingdom, Germany and Sweden, the polling process is run by the states, provinces or local government authorities under the overall direction of a central electoral agency. In the United Kingdom, local government authorities appoint returning officers to conduct polling. The UK Electoral Commission has a 'watchdog' role over elections, and is responsible for other electoral functions including party registration, funding and disclosure, and the management of electoral policy.
- 6.28 It might be argued that Australia's federal system could enable a similar arrangement to be implemented here. Rather than have the AEC and the state and territory electoral commissions running elections, one level of government could accept the responsibility of performing this function. While constitutional issues associated with such a scheme would require careful consideration, arrangements may be able to be entered into which could enable:
- state and territory electoral commissions to set up, staff and supervise polling booths, and count the votes for state, territory and federal elections; or
  - the AEC to undertake these functions for state, territory and federal elections.

A potential advantage of such arrangements is that they could encourage the jurisdictions to work together more closely to iron out differences in franchises or voting methods.

<sup>354</sup> Section 44 of the FMA Act requires a Chief Executive of an FMA Act agency to manage the resources for which they are responsible in a way that promotes 'proper use' of those resources; 'proper use' is defined as 'efficient, effective and ethical use that is not inconsistent with the policies of the Commonwealth.' Paragraph 71 of the Explanatory Memorandum to the Financial Framework Legislation Amendment Bill 2008 notes that this requirement 'does not reduce the position or decision-making of independent statutory office holders, whose position has been set out in legislation, when they make decisions that implement the statutory function provided to them by the Parliament. This is because, in all cases, policy is subservient to the law'.

- 6.29 If state and territory commissions were to deliver services for federal elections, the AEC, as the national electoral management body, could potentially take a greater role in promoting cooperation and seeking ways to establish consistent national electoral policies. However, against this proposal, it could be argued that the effectiveness of Commonwealth electoral services might be hampered if their delivery was dependent on eight state and territory authorities, particularly given that such an arrangement would require consistent and ongoing high levels of impartial and transparent cooperation across all jurisdictions. It would also be necessary to develop appropriate governance arrangements, and to overcome the different procedures, staffing arrangements, information technology systems and resourcing that currently exist across jurisdictions. If part-time or temporary returning officers were retained in the states, many of the AEC's current systems (designed for use by permanent full-time returning officers) would need to be redesigned, with implications for the quality, accountability and cost-effectiveness of elections. In addition, there would be a risk that one government may change its electoral administration arrangements in a way that is inconsistent, or be unable to change its electoral laws in a way that is consistent, with the other jurisdictions.
- 6.30 If the AEC were to undertake functions for state and territory elections, it could potentially bring a national perspective to the delivery of such functions, which may ensure greater consistency in the conduct of elections across Australia. However, if current differences between jurisdictions' electoral arrangements remained, this system could be onerous for the AEC to administer. Appropriate resourcing arrangements would also need to be agreed upon. Again, it would be necessary to develop appropriate governance arrangements.

*Splitting functions between different bodies*

- 6.31 New Zealand has split the delivery of electoral functions in a different way. While all functions are delivered at a national level, they are divided among four different bodies:
- New Zealand Post maintains the electoral register or roll;
  - the Chief Electoral Office in the Ministry of Justice conducts elections, by-elections and referendums;
  - the Electoral Commission registers political parties, conducts voter education and administers certain legal provisions governing political party resources; and
  - the Representation Commission is established intermittently to determine constituency boundaries.
- 6.32 An alternate division of functions which has been suggested federally in Australia is:<sup>355</sup>
- a national enrolment authority to manage the electoral roll;
  - a national election commission to conduct elections, undertake redistributions of electoral boundaries, and engage in electoral research and electoral education; and
  - a national campaign authority to administer and regulate funding and disclosure arrangements.
- 6.33 In support of this approach, it might be argued that separating certain 'politically sensitive' tasks (such as political party registration or electoral redistribution) into different bodies could insulate the main electoral body from criticism. Other advantages might be that it could allow the main electoral body to concentrate on core functions or to access particular technical skills that it does not possess. For some functions, it might be argued that there could be particular benefits in establishing a separate national body: for example, a national roll management body, managed and funded by all jurisdictions, could potentially ensure:

<sup>355</sup> Democratic Audit of Australia, submission number 45 to JSCEM, *Inquiry into the 2007 Federal Election*, p. 13.

- greater consultation between jurisdictions on roll management activities; and
- that roll management activities were concentrated on maximising the accuracy and completeness of the electoral roll for the needs of all jurisdictions.

6.34 On the other hand, arguments against this approach may include:

- use of technology in delivering electoral services means that different functional aspects (such as enrolment and polling systems) are increasingly integrated. As a consequence, there may be a risk that effectiveness of electoral services could be reduced if their delivery was dependent upon different agencies working together;
- having several institutions sharing various parts of the electoral process could result in a lack of coordination or shared goals, an issue that was raised by the Electoral Commission of New Zealand in a submission to an inquiry into the 2005 New Zealand election;<sup>356</sup>
- a single integrated body may have greater credibility to deliver services in an impartial manner than new institutions;
- a number of the governance issues noted at paragraphs 6.29 and 6.30 above would apply to the establishment of a national body to undertake a particular function for all jurisdictions;
- it might be argued that the current arrangements have been successful in delivering electoral functions through an integrated body, and that there is no evidence basis for pursuing a radical change such as this one;
- there are existing mechanisms for promoting cooperation between jurisdictions – for example, through the ECA, the AEC invited states and territories to participate in a national roll management group; and
- one body with an expert perspective on all elements of the electoral process may be better equipped to advise governments and Parliaments on the feasibility or desirability of particular legislative amendments.

### *Budget*

6.35 The AEC receives its annual funding through the Finance and Deregulation portfolio of the federal budget. Additional funding is also available to:

- conduct elections;
- conduct electoral roll reviews in the years between elections;<sup>357</sup> and
- make payments to certain political parties in reimbursement of their election campaign expenditures.<sup>358</sup>

6.36 While the AEC is free to manage its budget and to carry out its functions within that budget as it sees fit (subject to compliance with broader legislation such as the FMA Act), budgetary constraints can be imposed on the AEC.<sup>359</sup> For example, the 1996 federal budget withdrew \$2 million for the Aboriginal and Torres Strait Islander Electoral Information Service, which had a direct impact on the program delivery services of the AEC.<sup>360</sup>

<sup>356</sup> Elections New Zealand, submission to the New Zealand Parliament's Justice and Electoral Committee, *Inquiry into the 2005 general election*, 10 March 2006, p. 23, available at [www.elections.org.nz/files/initial\\_report\\_to\\_jec\\_on\\_2005\\_election.pdf](http://www.elections.org.nz/files/initial_report_to_jec_on_2005_election.pdf).

<sup>357</sup> Electoral Act, op. cit., section 92 contains a 'standing appropriation' which enables these recurrent activities to be funded without need for further approval by Parliament.

<sup>358</sup> Electoral Act, op. cit., section 302 also contains a standing appropriation.

<sup>359</sup> JSCEM, *Report in the Conduct of the 2007 Federal Election and Matters Related Thereto*, op. cit., p. 268, recommended that the AEC 'be resourced appropriately in order that it continue to provide high quality electoral services to the Australian population and to do so in a manner that does not compromise the integrity of the electoral system'.

<sup>360</sup> As discussed in chapter 9, the Australian Government announced in the 2009-10 Budget that it will provide funding of \$13 million over four years for an Indigenous Electoral Participation Program.

6.37 One option could be to allow JSCEM to report to Parliament on draft budget estimates for the AEC, along the lines of the arrangements which allow the Joint Committee of Public Accounts and Audit to make recommendations to Parliament after considering draft budget estimates for the Australian National Audit Office.<sup>361</sup> This option may allow for greater scrutiny of the government's proposed budget allocation for the AEC, however the government would retain the discretion to determine the final budget allocation which was proposed to Parliament.<sup>362</sup>

### Accountability

- 6.38 Different institutional arrangements may have implications for the accountability and transparency requirements that should apply to an agency's operations. For example, it might be argued that an agency that is subject to little formal control by a Minister should be subject to greater accountability and transparency requirements to ensure public confidence that it is acting appropriately and neutrally.
- 6.39 Under the system of responsible government, statutory authorities such as the AEC are required to report to the Minister so that the Minister can fulfil his or her responsibilities to Parliament.<sup>363</sup> The AEC reports to the Special Minister of State.<sup>364</sup> The AEC must also comply with orders made by either House of the Parliament in exercise of its privileges. In particular, AEC witnesses must cooperate with parliamentary committees such as Senate Estimates Committees and the JSCEM. Under its resolution of appointment, JSCEM has the power to send for persons, papers and records; however, the Committee does not have the power to direct the AEC on how it should perform its functions.
- 6.40 The decisions of the AEC, and its overall conduct of elections, are subject to legal review either by the High Court of Australia sitting as the Court of Disputed Returns, or in other forums such as the Federal Court of Australia and the Administrative Appeals Tribunal. The Court of Disputed Returns serves to protect against administrative errors or irregularities that may occur in the conduct of an election.<sup>365</sup>
- 6.41 The AEC is also subject to a range of other accountability and transparency mechanisms, including:
- its financial management is subject to oversight by the Auditor-General;
  - documents held by the AEC are subject to the *Freedom of Information Act 1982*; and
  - the AEC is subject to the *Privacy Act 1988* and the *Ombudsman Act 1976*.
- 6.42 Further, the Electoral Act imposes obligations on AEC officials and includes penalties for failure to comply with those obligations:
- a \$1,000 penalty for any officer who without just excuse 'fails to do everything necessary on his or her part to be done to secure the enrolment of the claimant';<sup>366</sup> and
  - a \$1,000 penalty or six months imprisonment, or both, for any officer who reveals information in respect of the vote of an elector.<sup>367</sup>

<sup>361</sup> *Public Accounts and Audit Committee Act 1951*, paragraph 8(1)(l).

<sup>362</sup> Section 56 of the Australian Constitution requires appropriation bills to be recommended to the Parliament by a message of the Governor-General; as the Governor-General acts on government advice, this section effectively ensures that appropriations proposed to the Parliament have government approval.

<sup>363</sup> FMA Act, op. cit., sections 44A, 48, 49 and 50. See also Department of Finance and Deregulation, op. cit.

<sup>364</sup> Electoral Act, op. cit., section 17.

<sup>365</sup> For example, in *Mitchell v Bailey (No 2)* [2008] FCA 692 the Court of Disputed Returns changed the decision of the Australian Electoral Officer for Victoria on 153 ballot-papers in the division of McEwen (though not the outcome of the election).

<sup>366</sup> Electoral Act, op. cit., section 103. Actions required to be taken by AEC officials in respect of claims for enrolment can be found in section 102.

<sup>367</sup> Electoral Act, op. cit., section 323.

*Officers and terms of office*

- 6.43 As noted in paragraph 6.7 above, the Australian Electoral Commission consists of three Electoral Commissioners. In contrast, only two other state or territory electoral commissions (Tasmania and the ACT) consist of three commissioners. The other states and the NT operate with a single commissioner appointed in a full-time capacity as the chief executive officer, and appoint other commissioners when there is a need to conduct a redistribution of electorate boundaries.<sup>368</sup> One issue for consideration is whether more than one Electoral Commissioner is necessary. Should a single-commissioner model be adopted, experts such as the Australian Statistician could still assist with tasks such as redistributions, for example through specifying their role in redistribution rules.<sup>369</sup> On the other hand, it might be argued that the collective decision-making of three commissioners is appropriate, given the politically sensitive nature of some of the Electoral Commission's decisions, and that the inclusion of a senior current or retired judicial officer as Chair of the AEC can contribute to the credibility of, and public trust in, the organisation and its work.
- 6.44 An alternate commission model applies in the United Kingdom Electoral Commission, in which each of the six commissioners has a distinct area of responsibility:
- four commissioners represent the geographical areas of England, Scotland, Wales and Northern Ireland;
  - one commissioner is the Chair of the Boundaries Committee; and
  - one commissioner is the Chair of the commission itself.
- 6.45 While the Electoral Act provides for the Governor-General to appoint the three Electoral Commissioners and outlines qualifications for appointments to the two part-time commissioner positions, the Executive manages the selection process and recommends the appointments to the Governor-General. The following approaches have been adopted in different jurisdictions to prevent, or discourage, partisan commissioner appointments:<sup>370</sup>
- NSW, Victoria, Tasmania and the ACT prevent people who have been members of a political party within the previous five years from being appointed;
  - Western Australia, Tasmania, ACT and the NT restrict current and previous members of Parliament from being appointed;
  - all states and territories except NSW and Victoria require cross-party consultation for commissioner appointments;
  - Queensland and South Australia require consultation with a parliamentary committee prior to making an appointment;
  - South Australia requires a resolution of both houses of parliament before the Governor can make an appointment; and
  - in the ACT, appointment is by a disallowable instrument, so the ACT Legislative Assembly could disallow the appointment of any member of the Electoral Commission.
- 6.46 These alternate methods of appointment may provide a greater perception of independence, and may thereby help support community confidence in appointees. An international model that might also be considered is that in the United Kingdom, where the Speaker of the House of Commons has authority for and oversight of the appointment process for Electoral

<sup>368</sup> N Kelly, 'Australia's Electoral Management Bodies – Degrees of Independence', Paper presented at the Australasian Political Studies Association conference, Monash University, Melbourne, 24-26 September 2007, p. 6, available at [www.arts.monash.edu.au/psi/news-and-events/apsa/refereed-papers/au-nz-politics/nkelly.pdf](http://www.arts.monash.edu.au/psi/news-and-events/apsa/refereed-papers/au-nz-politics/nkelly.pdf).

<sup>369</sup> Electoral Act, op. cit., Part IV.

<sup>370</sup> N Kelly, op. cit., p. 7.

Commissioners.<sup>371</sup> Preliminary selection processes are conducted by a panel appointed by the Speaker following discussion with a cross-party committee, and an appointment can only be made after consultation with the leaders of registered parties who have at least two members in the House of Commons.<sup>372</sup> Commissioners cannot have been a member, officer or employee of a registered political party within the previous ten years, and can be appointed for a period of up to ten years.

- 6.47 The practice since 1984 has been to appoint the Electoral Commissioners and the AEOs for five years. An advantage of limiting the term of the Electoral Commissioners and AEOs is that it may promote the constant generation of new ideas through new appointments. On the other hand, such a practice may undermine institutional experience at the AEC, especially if a Commissioner's term coincides with a single electoral cycle. In addition to maintaining experience, it might be argued that longer term appointments could encourage independence and the ability to act without fear or favour.<sup>373</sup> As alternate models, NSW and Victoria appoint Commissioners for up to ten years;<sup>374</sup> South Australia and Canada appoint electoral officers until they resign, reach a retirement age of 65 or are otherwise removed for cause.<sup>375</sup>
- 6.48 The Electoral Act permits the Governor-General to remove the Electoral Commissioner or the electoral officers on the grounds of misbehaviour, physical or mental incapacity, bankruptcy, extended absence, engaging in paid employment without the approval of the Electoral Commission, or (in the case of the Electoral Commissioner or acting Electoral Commissioner) failure to disclose a direct or indirect pecuniary interest in a matter being considered by the Commission.<sup>376</sup> The Governor-General may remove the non-judicial appointee if he or she is absent without leave without the approval of the Commission, or fails to disclose a direct or indirect pecuniary interest in a matter being considered by the Commission.<sup>377</sup> In contrast, with the exception of Queensland, all the state and territory electoral commissioners may only be removed by a resolution passed by each house of parliament.
- 6.49 The AEC has 150 Divisional Returning Officers spread across Australia. For the first half of the twentieth century, given the size of Australia and the difficulties in transportation and communication, having an electoral officer in every division increased the efficiency and accuracy of administration. However, in the modern context it is possible that the previous advantages of having officers 'on the ground' in every division have been eroded by advances in communications technology and transport infrastructure and an increase in the centralisation of services. It has been regularly suggested since 1974 that having so many individual offices is inefficient and costly.<sup>378</sup> The AEC has attempted to rationalise, co-locate or amalgamate divisional offices, however it has been prevented from doing so by Parliament.

<sup>371</sup> The appointment process for Electoral Commissioners is provided for under subsection 1(4) and section 3 of the *Political Parties, Elections and Referendums Act 2000* (UK).

<sup>372</sup> A report on the appointment process for the current Chair of the UK Electoral Commission is available at [www.publications.parliament.uk/pa/cm200708/cmselect/cmspeak/961/961.pdf](http://www.publications.parliament.uk/pa/cm200708/cmselect/cmspeak/961/961.pdf). The UK also has an independent Commissioner for Public Appointments which produces a code of practice for public appointments and monitors compliance with that code: [www.publicappointmentscommissioner.org](http://www.publicappointmentscommissioner.org). In relation to the appointment of UK Electoral Commissioners, although the Speaker is not bound by the code of practice in appointing an Electoral Commissioner, a representative of the Commissioner for Public Appointments has been on previous selection panels established by the Speaker.

<sup>373</sup> N Kelly, *op. cit.*, pp. 10-11.

<sup>374</sup> *Parliamentary Electorates and Elections Act 1912* (NSW), subsection 21AB(1) and *Electoral Act 2002* (Vic), subsection 12(2).

<sup>375</sup> *Electoral Act 1985* (SA), section 7 and *Canada Elections Act*, section 13.

<sup>376</sup> *Electoral Act*, *op. cit.*, section 25.

<sup>377</sup> *ibid.*, section 12.

<sup>378</sup> P Brent, *Hereditary Relics Holding Back the AEC*, Democratic Audit of Australia, Discussion Paper 5/08, 2008, pp. 2-3, accessible at [arts.anu.edu.au/democraticaudit/categories/electoralfrm.htm](http://arts.anu.edu.au/democraticaudit/categories/electoralfrm.htm), refers to the 1974 W.D Scott & Co Report *Review of the Structure, Systems and Facilities of the Australian Electoral Office*. More recently, see AEC, submission no. 16 to JSCEM, *Inquiry into certain aspects of the administration of the AEC*, 2007, p. 5.

Since 2006, the AEC has been permitted to locate a divisional office outside a division, but only with permission from the Special Minister of State.<sup>379</sup> JSCEM recently recommended that while it considered the current divisional office structure to be 'a significant asset to the AEC', the Electoral Act should be amended to enable the AEC to 'manage its workloads in non-election periods by allowing enrolment transactions to be processed outside the division for which the person is enrolling'.<sup>380</sup> JSCEM noted that this arrangement would 'lead to a more effective use of resources within the AEC'.<sup>381</sup>

## DISCUSSION POINTS

6.50 This chapter has discussed issues relating to the functions and structure of the AEC. Comments are invited on issues arising from this chapter, in particular:

- Is the AEC sufficiently independent and transparent in its operations?
- Do the general administrative, oversight and accountability arrangements that apply to the AEC in common with other statutory agencies have practical implications for the effective independence of its electoral administration activities?
- Are there functions that the AEC should be performing, which it is not?
- Is the AEC performing functions that should be performed by another body?
  - If so, should any particular function be split between jurisdictions or carried out by a separate body?
- Is there a more effective organisational structure of the AEC?
- Are the accountability mechanisms that apply to the AEC sufficient to ensure that decisions relating to elections and electoral matters are independent and impartial?
- Are there any aspects of existing accountability mechanisms that might operate so as to be contrary to the objective of an independent electoral administration?
  - Should the Electoral Act include a provision specifying the independence of the AEC, such as section 10 of the Tasmanian *Electoral Act 2004*?
  - Should the Electoral Act include a provision allowing JSCEM to scrutinise the proposed budgetary allocation for the AEC, similar to the arrangements in place for the Australian National Audit Office?
- In what ways could the AEC work more closely with state and territory electoral bodies to improve cooperation and enhance processes?

<sup>379</sup> Electoral Act, op. cit., subsection 38(1).

<sup>380</sup> JSCEM, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto*, op. cit., p. 277. The recommendation provided that enrolment transactions should be processed by a division that is within the same state or territory as the division for which the person is enrolling.

<sup>381</sup> *ibid.*, p. 276.