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**The Constitutional Role of Electoral  
Management Bodies: The Case of  
the Australian Electoral Commission**

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# The Constitutional Role of Electoral Management Bodies: The Case of the Australian Electoral Commission

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## Abstract

Electoral management bodies are increasingly being recognised as ‘fourth branch’ institutions that have a role to play in safeguarding electoral democracy against government attempts to undermine the fairness of the electoral process. This article explores the extent to which the Australian Electoral Commission fulfils that constitutional function by facilitating and protecting electoral democracy. It demonstrates that independence, impartiality and a supportive legislative framework help the Australian Electoral Commission to be effective in performing these roles, but that inadequate powers, lack of budgetary autonomy and answerability to political actors operate as constraints. More generally, the analysis presented shows the value of expanding our understanding of the role of fourth branch institutions so that we take account of their activities in both fostering *and* safeguarding key democratic values.

## I Introduction

Electoral management bodies (‘EMBs’) are increasingly being recognised as ‘fourth branch’ institutions that have a role to play in safeguarding electoral democracy against government attempts to undermine the fairness of the electoral process.<sup>1</sup> That role is more traditionally associated with the judiciary but there is growing awareness that EMBs, as bodies that enjoy some independence from the political branches, may also be equipped to defend democracy ‘outside the courts’. This article explores the extent to which the body responsible for managing Australian federal elections, the Australian Electoral Commission (‘AEC’), fulfils that constitutional function by facilitating and protecting electoral democracy. It finds that the AEC makes significant contributions in both areas and is pivotal to the implementation of the constitutional mandate that members of Parliament be ‘directly chosen by the people’.<sup>2</sup> The Commission nonetheless faces constraints, among them its statutory mandate, lack of budgetary independence, and its answerability to political parties, which limit the extent to which it can safeguard Australia’s electoral democracy.

## II Electoral Management Bodies as Fourth Branch Institutions

Much has been written on the idea that the traditional understanding of government as comprising three branches – the legislature, the executive and the judiciary – does not reflect the operation of the modern administrative state.<sup>3</sup> It is argued that the state is better understood as comprising four (or more) branches as this enables us to account for the emergence of various institutions that, while technically housed in the executive arm, operate

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<sup>1</sup> Mark Tushnet, *Comparative Constitutional Law* (Edward Elgar, 2<sup>nd</sup> ed, 2018) ch 5; Michael Pal, ‘Electoral Management Bodies as a Fourth Branch of Government’ (2016) 21 *Review of Constitutional Studies* 85.

<sup>2</sup> *Commonwealth Constitution* ss 7, 24.

<sup>3</sup> Bruce Ackerman, ‘The New Separation of Powers’ (2000) 113(3) *Harvard Law Review* 633; Tushnet (n 1); James Spigelman, ‘The Integrity Branch of Government’ (2004) 78(11) *Australian Law Journal* 724.

with a degree of independence from government and work to hold officeholders to account for their exercise of public power. Among the bodies commonly recognised as part of the 'fourth branch' are ombudsmen, administrative tribunals, auditors-general and anti-corruption commissioners and, the focus of this article, electoral management bodies (EMBs).<sup>4</sup> On one view, an institution must be entrenched in the constitution for it to qualify for 'fourth branch' status.<sup>5</sup> The South African constitution, for instance, entrenches several such bodies, including the electoral commission which is recognised in Chapter 9 as a 'state institution supporting democracy'.<sup>6</sup> Another interpretation, prominent among Australian scholars and adopted in this article, places less emphasis on legal status. It instead views the 'fourth branch' as comprising (mostly statutory) agencies whose oversight functions and relative independence distinguish them from other executive bodies and make them deserving of their own separate classification.<sup>7</sup>

The fourth branch of government is sometimes referred to as an 'integrity branch'.<sup>8</sup> While EMBs fit naturally within that, given their commitment to electoral integrity, their membership of such a branch is better accommodated if we expand its scope to encompass the health of electoral democracy. This conception aligns with that of Ackerman and Tushnet, who argue that the modern state requires a branch devoted to the protection of democracy and that EMBs should be central actors within it.<sup>9</sup>

Both authors view a fourth branch as important to addressing matters in which the executive and/or legislature have a conflict of interest and therefore cannot be trusted to perform their democratic functions in the public interest.<sup>10</sup> The fairness of the electoral process is said to be one area particularly susceptible to partisan interference, given the temptation for incumbents to manipulate electoral laws and procedures to their advantage.<sup>11</sup> Ackerman, for instance, cites the potential for a lawmaking majority to 'insulate itself' from electoral competition by suspending elections, limiting free speech or manipulating electoral laws.<sup>12</sup> The pursuit of political 'self-interest' here can take on different forms: individual legislators might wish to alter electoral rules to assist with their re-election; political parties might want to do the same to expand their share of seats in the legislature; and major parties may have an interest in changing the rules to shut out minor party challengers.<sup>13</sup> The courts will sometimes be asked to step in to review such behaviour but the judicial branch may not always be well-suited to this role. The task of protecting democracy will often require a type of expertise that is not found on the judicial bench, and is prone to entangle the courts in high-stakes political matters

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<sup>4</sup> Pal (n 1); John McMillan, 'Re-thinking the Separation of Powers' (2010) 38(3) *Federal Law Review* 423, 440.

<sup>5</sup> See, eg, Pal's notion of a 'fourth branch' model: above n 1.

<sup>6</sup> Heinz Klug, 'Accountability and the Role of Independent Constitutional Institutions in South Africa's Post-Apartheid Constitutions' (2015-16) 60 *New York Law School Law Review* 153. Globally, constitutional recognition of electoral commissions is becoming more common: Svitlana Chernykh et al, 'Constitutions and Election Management' in Pippa Norris, Richard W. Frank and Ferran Martinez i Coma (eds), *Advancing Electoral Integrity* (Oxford University Press, 2014) 94, 102.

<sup>7</sup> McMillan (n 4).

<sup>8</sup> Spigelman (n 3).

<sup>9</sup> Tushnet (n 1); Ackerman (n 3).

<sup>10</sup> Tushnet (n 1) 109; Mark Tushnet, 'Institutions Protecting Democracy: A Preliminary Inquiry' (2018) 12(2) *Law & Ethics of Human Rights* 181, 183.

<sup>11</sup> Tushnet (n 1) 109; Tushnet, 'Institutions Protecting Democracy' (n 10) 183.

<sup>12</sup> Ackerman (n 3) 716.

<sup>13</sup> Dennis F. Thompson, *Just Elections: Creating a Fair Electoral Process in the United States* (University of Chicago Press) 2002, 175.

that could expose them to accusations of bias.<sup>14</sup> Fourth branch institutions, such as EMBs, are therefore required if democracy is to be protected. Among the 'protective' functions that an EMB might perform are the resolution of electoral disputes and the drawing of electorate boundaries.<sup>15</sup>

This account of a fourth branch devoted to democracy is a useful starting point, but it warrants expansion in two ways. First, it should be broadened to encompass threats to electoral democracy that emerge from sources other than political self-interest. In recent years there has been renewed attention on conduct by candidates and parties that undermines the capacity of voters to exercise a free choice at the ballot box. Particular concern has been expressed about the influence of money in politics, including the sale of access to politicians, and the spread of misinformation during election campaigns.<sup>16</sup> Further, there is ongoing concern about conduct that weakens electoral integrity, such as foreign interference in elections. These are matters that should be part of the brief for a fourth branch that is concerned with protecting electoral democracy.

Second, in thinking about the role of fourth branch institutions, we should reflect not only on their capacity to *protect* but also to *facilitate* certain values. Even if we naturally focus on the protective role given the notion that a fourth branch may help guard against encroachments from the political arms of government, we should not lose sight of the way in which that branch promotes as well as defends integrity, democracy or some other value. The Australian Human Rights Commission, for instance, oversees legislation and policy for consistency with human rights (protective), but also reports to the minister on actions that would promote rights and undertakes public education initiatives (facilitative).<sup>17</sup> And the Solicitor-General provides legal advice so as to facilitate government compliance with the *Constitution*.<sup>18</sup> Any discussion of a branch dedicated to democracy should therefore pay attention to the ways in which its member agencies facilitate electoral democracy. The facilitative work of EMBs has been recognised by others, even if that particular language is not used: Tham views EMBs as the 'custodians' of electoral democracy, while Pal sees them as 'breath[ing] life' into democratic rights.<sup>19</sup> The line between 'facilitation' and 'protection' will not always be clear, as some functions (such as educating candidates on their legal rights and obligations) arguably fall into both categories, but the distinction is nonetheless valuable as it highlights the dual roles of fourth branch institutions.

This section has so far situated EMBs within the fourth branch literature and suggested a framework for thinking about their role. Before proceeding to examine how the AEC fits within that framework, it is important to engage more with what scholars have said about the nature of fourth branch institutions and the challenges they face. This will help us develop a

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<sup>14</sup> Tushnet (n 1) 112.

<sup>15</sup> Ibid 115–117; Ackerman (n 3) 718.

<sup>16</sup> Graeme Orr, *The Law of Politics* (Federation Press, 2<sup>nd</sup> ed, 2019) 13; Nic Cheeseman and Brian Klaas, *How to Rig an Election* (Yale University Press, 2018).

<sup>17</sup> Gabrielle Appleby, 'Horizontal Accountability: The Rights-protective Promise and Fragility of Executive Integrity Institutions' (2017) 23(2) *Australian Journal of Human Rights* 168, 175 ('*Horizontal Accountability*').

<sup>18</sup> Gabrielle Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart, 2016) 6.

<sup>19</sup> Joo-Cheong Tham, 'Deliberative Democracy and Electoral Management Bodies: The Case of Australian Electoral Commissions' (2013) 12(4) *Election Law Journal* 386, 398; Pal (n 1) 96.

series of questions to apply to the Australian experience. I focus on three themes: independence, accountability and vulnerability.

Independence has been described as the hallmark of fourth branch institutions.<sup>20</sup> Those bodies require a strong degree of independence from government if they are to perform their roles effectively. This has special resonance in the electoral sphere, where the independence of EMBs from both government and political parties is viewed as essential to ensure free and fair elections.<sup>21</sup> The markers of a body's institutional independence include establishment as a statutory body, insulation from ministerial direction, financial autonomy, and security of tenure and remuneration for senior officers.<sup>22</sup> Also important is an agency's decisional independence; that is, its capacity to bring a 'personal independence of mind' to decisions such that they are made 'free from improper influence'.<sup>23</sup>

The flipside of independence is accountability. Fourth branch institutions often possess significant powers and conduct high-profile inquiries and investigations that impact professional reputations. It is therefore essential that their own work is subject to appropriate oversight.<sup>24</sup> This will vary across institutions but it typically involves being answerable to government and/or parliamentary actors in some way.<sup>25</sup>

The effectiveness of a fourth branch institution will depend on a range of factors, including the extent to which its independence is legally protected, the adequacy of the powers conferred up on it, and the degree of acceptance it enjoys among political elites and the general public.<sup>26</sup> Each of these areas is a potential source of vulnerability for an agency in the event that it encounters a government determined to weaken it. A government may seek to make partisan appointments, or reduce the institution's funding and resourcing, in the hope that this will result in a lesser standard of scrutiny.<sup>27</sup> Alternatively, a government might simply choose to ignore the agency, or even abolish it altogether. Another means by which governments and legislatures can influence an agency's effectiveness is by ensuring that it is created with inadequate investigative and enforcement powers and/or refusing to strengthen its powers when it becomes clear that they are insufficient for the agency to discharge its responsibilities. Conversely, a government may attempt to reduce a body's powers if its oversight results in damaging findings.<sup>28</sup> Ackerman recommends the constitutional entrenchment of fourth branch institutions, including their powers and budgets, to protect against these kinds of political interference.<sup>29</sup> Others suggest that entrenchment alone is insufficient to guard against attacks on independence.<sup>30</sup>

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<sup>20</sup> A J Brown, 'The Integrity Branch: A "System", an "Industry", or a Sensible Emerging Fourth Arm of Government?' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 301, 303.

<sup>21</sup> Helena Catt et al, *Electoral Management Design* (International IDEA, 2014) 21.

<sup>22</sup> Appleby, *Horizontal Accountability* (n 16) 171.

<sup>23</sup> *Ibid* 172.

<sup>24</sup> Tushnet (n 1) 111; Ackerman (n 3) 694.

<sup>25</sup> Appleby, *Horizontal Accountability* (n 16) 172.

<sup>26</sup> *Ibid* 182; Tushnet (n 1) 122.

<sup>27</sup> Appleby, *Horizontal Accountability* (n 16) 175-179; Tushnet (n 1) 122-123; Pal (n 1) 107.

<sup>28</sup> Appleby, *Horizontal Accountability* (n 16) 182; Tushnet (n 1).

<sup>29</sup> Ackerman (n 3) 694.

<sup>30</sup> Klug (n 6) 161-168, Pal (n 1) 106-107.

All oversight bodies, whether established by statute or the constitution, need to retain the support of the public and political elites if they are to be effective.<sup>31</sup> In the absence of such support an agency's decisions and recommendations, particularly on contentious matters, will be more prone to being ignored, and its financial situation will be more precarious.<sup>32</sup> The incentive to retain a functioning working relationship with government is therefore strong, and carries a risk that on some matters an agency will be overly cautious or unwilling to exercise available powers.<sup>33</sup> Hindess writes that institutions may be tempted to settle for 'peaceful co-existence', a condition in which 'the regulatory body serves to curb various excess, and thus to reassure the public, but takes care not to push its inquiries too hard in politically sensitive areas'.<sup>34</sup>

The remainder of this article examines the experience of the AEC as a fourth branch institution. Guided by the literature summarised above, it sets out to answer two questions: how does the AEC facilitate and protect electoral democracy in Australia; and, in performing these roles, to what extent does the AEC's institutional design, statutory mandate and relationships with political elites and the public support or impede its effectiveness in these roles?

### III The Australian Electoral Commission as a Fourth Branch Institution

At the outset it is useful to set out some basic information about the AEC, including the nature of its independence, its powers and functions, and the mechanisms by which it is held to account.

The AEC was established in 1984 as part of a suite of electoral reforms introduced by the Hawke Labor government. Prior to this date, federal elections were administered by a branch of a government department (1902–1973) and a statutory office responsible to a minister (1973–1984).<sup>35</sup> Both precursor bodies had a reputation for decisional independence.<sup>36</sup> With the creation of the AEC, the institutional separation between electoral officials and government was strengthened. That independence continues to be valued, alongside a commitment to impartiality.<sup>37</sup> Electoral commissions have also been established, by statute, in all states and territories.

The AEC is a statutory authority and takes the form of a three-member Commission comprising a Chairperson (who must be a judicial officer), the Electoral Commissioner and a non-judicial appointee.<sup>38</sup> All three members are appointed by the government for renewable terms not exceeding seven years and may only be removed on specified grounds.<sup>39</sup> There is no requirement, such as exists in several states and territories, that the government consult

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<sup>31</sup> Tushnet (n 1) 117; Appleby, *Horizontal Accountability* (n 16) 175–179.

<sup>32</sup> Tushnet (n 1) 117, 119.

<sup>33</sup> Klug (n 6) 161–162.

<sup>34</sup> Barry Hindess, *Corruption and Democracy in Australia* (Democratic Audit of Australia, Report No 3, 2004) 17.

<sup>35</sup> Marian Sawer, 'Pacemakers for the World?' in Marian Sawer (ed), *Elections: Full, Free and Fair* (Federation Press, 2001) 1, 15–16.

<sup>36</sup> Colin Hughes, 'Institutionalising Electoral Integrity' in Marian Sawer (ed), *Elections: Full, Free and Fair* (Federation Press, 2001) 142, 156.

<sup>37</sup> Tham (n 18); Graeme Orr, Bryan Mercurio and George Williams, 'Australian Electoral Law: A Stocktake' (2003) 2(3) *Election Law Journal* 383, 399.

<sup>38</sup> *Commonwealth Electoral Act 1918* (Cth) s 6(1), (2) ('*Commonwealth Electoral Act*').

<sup>39</sup> *Ibid* ss 6(3), 8(1), 21, 25.

with other parties before appointing the Electoral Commissioner.<sup>40</sup> The law further insulates the AEC from political influence by providing that it exercises its functions free from government or ministerial direction except on a limited set of matters, such as the provision of international electoral assistance.<sup>41</sup> The Commission does not, however, enjoy financial autonomy; like its state and territory counterparts, it depends on government for its budgetary allocation.<sup>42</sup>

Under the *Commonwealth Electoral Act 1918* (Cth) ('Electoral Act') the AEC is to perform a range of functions including conducting elections and referendums, enrolling voters and maintaining the electoral roll, registering political parties, conducting public education programs, providing advice to Parliament and government, and conducting and promoting research.<sup>43</sup> For its performance in these areas the AEC is accountable primarily to the Parliament, including through the Joint Standing Committee on Electoral Matters ('JSCEM') which runs inquiries into the conduct of each federal election and electoral policy generally. The Commission makes detailed submissions to that committee and answers questions from its members; separately, it provides an annual report which is tabled in Parliament.<sup>44</sup> The AEC is also directly accountable to the public, including via social media accounts that attract questions and, on occasion, criticism about its administration of elections.

### A *Facilitating Electoral Democracy*

Much of the work of the AEC can be classified as 'facilitating' electoral democracy. Here I will focus on two areas: the conduct of polling, and supporting the electoral participation of voters and candidates.

The conduct of polling is at the core of the AEC's facilitation role. It is a huge organisational challenge: polling places must be found and booked, ballot boxes delivered, staff recruited and trained. The Commission's workforce swells from around 800 staff to more than 87,000 workers during polling.<sup>45</sup> And, in a system of compulsory voting, there are legitimate expectations that voting should be a relatively easy experience. The Electoral Act provides for—and the AEC delivers—numerous voting options, including ordinary voting, absent voting, interstate voting and postal voting. In addition, the AEC runs mobile polling booths which visit hospitals, nursing homes, prisons and remote regions in the lead-up to polling day. Special voting arrangements are made for overseas voters, Antarctic voters, deployed Defence Force Personnel and electors who are blind or have low vision. The execution of such a highly complex task inevitably results in errors, ranging from the relatively minor (failure to correctly record that an elector has attended a polling place) to the more serious (such as the loss of 1370 ballot papers at Western Australia's 2013 half-Senate election). In close contests these errors may be the subject of petitions to the Court of Disputed Returns;

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<sup>40</sup> Norm Kelly, *Directions in Australian Electoral Reform: Professionalism and Partisanship in Electoral Management* (ANU E-Press, 2011) 36-37 ('Directions'). Notably, the ACT makes appointment of the Electoral Commissioner subject to disallowance: *Electoral Act 1992* (ACT) s 12(5).

<sup>41</sup> *Commonwealth Electoral Act* (n 37) ss 7(1)(fa), 38(1).

<sup>42</sup> The same applies for state and territory electoral commissions. See Kelly, *Directions* (n 39) 45.

<sup>43</sup> *Commonwealth Electoral Act* (n 37) s 7.

<sup>44</sup> *Ibid* s 17(1).

<sup>45</sup> AEC, Submission No 120 to the Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into and Report on All Aspects of the Conduct of the 2019 Federal Election and Matters Related Thereto* (2019) 38.

otherwise, the AEC is accountable for electoral maladministration to the parliament and the public.

The AEC supports the electoral participation of voters by working to ensure that they are equipped to exercise their voting rights. The Commission produces a range of text, image and video resources in discharging its responsibility to educate Australians on how to enrol and to vote.<sup>46</sup> The AEC also maintains the electoral roll, an instrument that is ‘pivotal to the electoral system’ as it provides a definitive statement of who is and is not entitled to cast a vote.<sup>47</sup> To help foster electoral inclusion the Commission develops specific resources for people from culturally and linguistically diverse backgrounds, Aboriginal and Torres Strait Islander peoples, people with disability, homeless people and young people.<sup>48</sup> When it comes to supporting candidates, the AEC receives candidate nominations and publishes detailed guides to help participants navigate the nominating process<sup>49</sup> and learn about the rules on constitutional disqualification.<sup>50</sup> Since 2018 the AEC has administered a scheme whereby candidates are asked to furnish information about their citizenship status so as to demonstrate their eligibility to be chosen as a member of Parliament.<sup>51</sup> The scheme was introduced following a series of High Court decisions that ruled several sitting MPs ineligible due to dual citizenship but failed to resolve uncertainty about the operation of the *Constitution’s* disqualification rules. It fell to the AEC—‘outside the courts’—to foster transparency and compliance by implementing this administrative measure.<sup>52</sup>

The capacity of the AEC to facilitate electoral democracy depends on the powers and functions conferred on it under the Electoral Act. The statutory framework is largely supportive, as shown by the emphasis on providing multiple voting options, but it also presents challenges. The AEC has identified the highly prescriptive nature of the Electoral Act as an impediment to innovation and the efficient delivery of services.<sup>53</sup> While the Act’s many detailed statutory provisions protect the Commission by limiting discretion and providing clear (even painstaking) guidance on how functions are to be performed,<sup>54</sup> they also limit the AEC’s ability to improve electoral processes as they channel even technical procedural changes through the legislative process.<sup>55</sup> The lack of financial autonomy is another factor as it restricts the Commission’s ability to expand electoral participation and trial new initiatives. These legal and budgetary constraints do not prevent innovation entirely, as shown by the AEC’s recent experiments with queuing practices and electronic certified lists.<sup>56</sup>

The work of the AEC in conducting polling and supporting electoral participation demonstrates its critical role in the practical realisation of electoral democracy. Notwithstanding the legislative and budgetary challenges that the Commission faces in this role, it retains the trust of the Australian public and an international reputation for

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<sup>46</sup> *Commonwealth Electoral Act* (n 37) s 7(1)(c), (d).

<sup>47</sup> *Muldoney v Australian Electoral Commission* (1993) 178 CLR 34, 39 (Brennan ACJ).

<sup>48</sup> AEC, Submission No 120 (n 44) 37.

<sup>49</sup> AEC, *Nomination Guide for Candidates* (Version 05, 26 May 2020); AEC, *Candidates Handbook* (Version 07, 26 May 2020).

<sup>50</sup> AEC, *Electoral Backgrounder: Constitutional Disqualification and Intending Candidates* (2019).

<sup>51</sup> *Commonwealth Electoral Act* (n 37) s 170B.

<sup>52</sup> For a critique of the Court’s jurisprudence on section 44 see Orr (n 15) 110–111.

<sup>53</sup> AEC, Submission No 120 (n 39) 4.

<sup>54</sup> Eg, *Commonwealth Electoral Act* (n 39) s 219.

<sup>55</sup> Michael Maley and Graeme Orr, ‘Developing a Legislative Framework for a Complex and Dynamic Electoral Environment’ (ERRN Discussion Paper, November 2019).

<sup>56</sup> AEC, Submission No 120 (n 44).



professional, non-partisan and independent performance.<sup>57</sup> As we will see, however, the AEC's capacity to protect electoral democracy faces more significant challenges.

## **B Protecting Electoral Democracy**

Any assessment of the AEC's part in protecting electoral democracy must begin with an acknowledgment that it does not perform this role alone. Multiple institutions are involved, including JSCEM and the courts; in other jurisdictions, anti-corruption bodies also play a part. As for the AEC's contribution, it helps to safeguard the fairness and integrity of the electoral process in numerous ways, including through the select functions that I focus on here: participation in the redrawing of electoral boundaries ('redistributions'), the counting of votes, the administration of the financial disclosure scheme and rules on political communication, and engagement in judicial proceedings and law reform. In what follows I emphasise the ways in which the Commission plays an effective protective role and some of the factors that support that. I also draw attention to the challenges it faces, and these echo concerns expressed in the wider literature: namely, adequacy of powers, lack of budgetary independence, and enforcement difficulties.

The drawing of electoral boundaries is, as Ackerman and Tushnet recognise, an activity where incumbents have an obvious interest: the location of a boundary may not only affect a candidate's share of the vote but could also serve to shelter them from meaningful competition into the future.<sup>58</sup> It is therefore a classic example of a function that should arguably be exercised by a 'fourth branch' institution that is appropriately insulated from political interference. In Australia, federal redistributions have always been undertaken by an independent commission but for many decades remained vulnerable to partisan interventions. The government retained an ability to decide when to initiate a redistribution process, while the Parliament could refuse to adopt proposed boundary changes.<sup>59</sup> Over time, however, the capacity for such interventions was removed and what was once a highly partisan exercise is now an independent, bureaucratic affair that enjoys cross-party support.<sup>60</sup> The long and detailed process sees a four-member redistribution committee (comprising the Electoral Commissioner, the State Australian Electoral Officer and two senior public servants), and later an 'augmented' body (the initial committee plus the Chairperson of the AEC and a senior federal official), develop a proposal for revising the state's electorate boundaries.<sup>61</sup> The Act prescribes guiding criteria and establishes rough equality of enrolments in each electorate as the primary consideration. Political parties may make submissions throughout the process but the final determination is made by the augmented body. Its decision is conclusive and may not be challenged before a court.<sup>62</sup> In this sense a redistribution is very much a function that is performed 'outside the courts'.

The counting of votes is another function that arguably belongs in the hands of an independent 'fourth branch' institution given the conflict of interest that other actors, such as government party officials, would bring to the task. At federal elections, AEC officials conduct

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<sup>57</sup> Norm Kelly, 'The Independence of Electoral Management Bodies: The Australian Experience' (2007) 59(2) *Political Science* 17, 18.

<sup>58</sup> Thompson (n 12) 177.

<sup>59</sup> Colin Hughes, 'The Importance of Boundaries' (Democratic Audit of Australia, Research Paper No 1, 2007) 3-5.

<sup>60</sup> Orr (n 15) 31-32; Jenni Newton-Farrelly, *Fairness and Equality in Electoral Redistributions in Australia* (PhD Thesis, Swinburne University of Technology, January 2013) 28.

<sup>61</sup> *Commonwealth Electoral Act* (n 37) Pt IV.

<sup>62</sup> *Ibid* s 77.

the 'scrutiny' in accordance with detailed statutory provisions and in the presence of scrutineers representing the candidates' interests.<sup>63</sup> The most sensitive scrutiny function is the determination of the formality of ballot papers.<sup>64</sup> Counting officers follow the Electoral Act's formality rules, as interpreted by the courts and summarised in AEC manuals,<sup>65</sup> and in more complicated cases may seek assistance from senior management or legal counsel.<sup>66</sup> An official's decisions to admit or exclude ballot papers from the count may, in a close race, become the subject of a petition to the Court of Disputed Returns.<sup>67</sup> The possibility of court review is reassuring from an accountability perspective, but the superior counting experience of officials, combined with the political sensitivity of the task, render it appropriate that formality determinations are mostly made 'outside the courts'.<sup>68</sup>

As we have seen, one of the concerns with 'fourth branch' institutions is that they are vulnerable to government manoeuvres that weaken their independence and effectiveness. We might expect such institutions to be particularly exposed where they make decisions that directly affect the fortunes of political parties. It is striking, therefore, that electoral official determinations on redistributions and vote counting are typically accepted by politicians without complaint. What might explain this? Several factors are at play. First, Australia has a long history of professional, non-partisan election administration. Second, the AEC itself bears important markers of institutional independence and owns a reputation for impartiality.<sup>69</sup> Maley singles out the requirement that the Commission be chaired by a judge or former judge, the appointment of respected, senior public servants to the other commissioner positions, and the absence of political party representation on the Commission.<sup>70</sup> Third, the AEC enjoys high levels of public confidence. This has been fostered by rigorous and open scrutiny of the AEC's work through JSCEM, and the Commission's commitment to conducting its functions in a transparent manner.<sup>71</sup> Finally, the prescriptive nature of the Electoral Act is helpful: discretion is exercised within clear parameters, rendering officials less vulnerable to allegations of bias.

The example of the AEC demonstrates that an electoral commission can perform an effective 'protective' role even in the absence of the constitutional entrenchment envisaged by Ackerman.<sup>72</sup> It suggests that, just as we should not expect that entrenched commissions will be immune from political attacks, nor should we assume that statutory bodies necessarily face an erosion of their functions and influence. In fact, the Commission's public standing is such that any attempt by legislators to alter redistribution arrangements to their own advantage would likely meet with popular disapproval.<sup>73</sup>

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<sup>63</sup> Ibid Pt XVIII.

<sup>64</sup> Ibid s 267.

<sup>65</sup> Ibid ss 268, 268A, 269; AEC, *Ballot Paper Formality Guidelines: Federal Elections, By-Elections, Referendums* (Version 1.1, 16 May 2019) ('*Formality Guidelines*').

<sup>66</sup> AEC, *Formality Guidelines* (n 64) 1.

<sup>67</sup> Eg, *Mitchell v Bailey (No 2)* (2008) 169 FCR 529.

<sup>68</sup> Orr (n 16) 201-202.

<sup>69</sup> Paul Pirani, 'Elections and Administrative Law' (2012) 68 *Australian Institute of Administrative Law Forum* 19, 22.

<sup>70</sup> Michael Maley, 'The Australian Electoral Commission: Balancing Independence and Accountability' (2001) 38(1) *Representation* 25, 27.

<sup>71</sup> Ibid 28.

<sup>72</sup> Ackerman (n 3).

<sup>73</sup> Kelly, *Directions* (n 40) 156.

In other areas, however, the AEC's capacity to safeguard electoral democracy is hampered by inadequate powers and a lack of financial autonomy. This is apparent with respect to the Commission's work in administering rules on funding and disclosure and political communications. My analysis suggests that fourth branch institutions are in many ways only as effective as the laws they are charged with enforcing, and reinforces concerns expressed in the literature that a lack of budgetary independence may affect how an agency exercises their powers.

The AEC administers the funding and disclosure scheme set out in the Electoral Act.<sup>74</sup> Political parties are required to lodge annual financial disclosure returns that show the details of donations received that exceed the disclosure threshold of \$14,000 (2019-2020). The AEC then publishes this information on its website. The Commission also conducts compliance reviews in which the accuracy and completeness of selected annual returns is verified. Where a mistake is found the AEC asks the entity to amend their return and, if they fail to do so, the Commission can investigate and if appropriate refer the matter to the Commonwealth DPP.

Turning to political communications, the AEC administers rules on the authorisation of electoral material, and misleading content. The authorisation rules require candidates, parties and others to attach identifying details—such as names and addresses—to advertisements and other materials.<sup>75</sup> Where authorisation is lacking, the Commission can take a range of actions, from issuing a warning (requesting that the offending material be rectified or removed) to seeking an injunction, pursuing a civil penalty, or making a referral to the police. The Commission can take similar actions in the event that it discovers content that 'is likely to mislead or deceive an elector in relation to the casting of a vote'.<sup>76</sup> This prohibition applies only to statements that might mislead a voter about the process of casting a vote, but not to claims that might influence the formation of a voter's preference.<sup>77</sup>

By administering these two sets of rules the AEC plays some role in protecting electoral democracy. In overseeing financial disclosure, the Commission fosters transparency. This may help combat corruption by discouraging donors from giving money for corrupt reasons, and by enabling the public to monitor possible connections between donations and policy outcomes.<sup>78</sup> The AEC's administration of authorisation rules similarly fosters both transparency and accountability, while its policing of misleading content helps shield electors from attempts to deceive them about the voting process.

However, the AEC's protective role in both areas is modest. In many respects it fails to address the potential threat to electoral democracy posed by money (such as the sale of access to politicians) and misinformation. Two factors operate to limit the AEC's protective role here: adequacy of powers and resources; and reluctance to use existing powers.

The 'lackadaisical' laws governing federal political finance impose firm constraints on what the AEC can do in the service of protecting electoral democracy.<sup>79</sup> The disclosure thresholds are so high that parties are able to receive substantial amounts in anonymous donations, and disclosures are not timely, in some cases coming 19 months after the money was received.<sup>80</sup>

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<sup>74</sup> *Commonwealth Electoral Act* (n 39) Pt XX.

<sup>75</sup> *Ibid* Pt XXA.

<sup>76</sup> *Ibid* s 329.

<sup>77</sup> *Evans v Crichton-Browne* (1981) 147 CLR 169, 204–208.

<sup>78</sup> Keith Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Hart, 2007) 44.

<sup>79</sup> Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (UNSW Press, 2010) 44.

<sup>80</sup> *Ibid*; Orr (n 15) ch 11.

The Commission lacks sufficient investigative powers and resources in this area, rendering it unable to take strong action when parties prove unwilling to comply with disclosure rules.<sup>81</sup> The AEC can refer the most serious cases to the police for investigation, but prosecutions are extremely rare, slow moving and penalties are small. Similar challenges are faced with political communications. The AEC is powerless to act against election material that misleads voters about a party's policy positions or intentions, as the 'Mediscare' and 'death tax' messaging did during recent federal elections. Further, social media content presents special compliance challenges, both in terms of identifying the source of offending material and in working with companies to take it down.<sup>82</sup>

Some state laws point to the possibility of a bigger role for electoral commissions in these areas. Electoral law in NSW imposes stronger limits on donations and expenditure,<sup>83</sup> prescribes higher penalties, and grants the NSW Electoral Commission more extensive enforcement powers including the ability to withhold public funding where a party has failed to meet its disclosure obligations.<sup>84</sup> South Australian law, meanwhile, provides for oversight of the content of political communications: the state's Electoral Commissioner may request that an advertiser withdraw an election advertisement and/or publish a retraction where, in the Commissioner's view, the advertisement contains 'a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent'.<sup>85</sup>

The conferral of similar powers on the AEC would enable it to play a stronger 'protective' role. However, it could also expose the Commission to partisan attacks and weaken its reputation for independence and impartiality. This is particularly the case regarding the power to police the content of election advertisements: the Australian Electoral Commissioner recently argued that such a power would 'involve us making value judgements about candidates' and parties' material, and it could lead to accusations of bias by the AEC'.<sup>86</sup> As noted earlier, the Commission is trusted to make decisions on politically sensitive matters in part due to its longstanding reputation for professionalism and non-partisanship. Were that reputation to be weakened we could see partisan political actors begin to challenge the fairness of electoral administration across the board. Perhaps alert to this risk, the AEC has so far preferred to work within its existing set of powers to address concerns with political advertising, including by developing a 'Stop and Consider' advertising campaign urging voters to check whether information is reliable, current and safe.

The second challenge concerns the AEC's willingness, or lack thereof, to use the full powers available to it in addressing disclosure and communications breaches. The infrequency of prosecutions for breach of disclosure requirements has already been noted. The Commission has a range of powers available to address authorisation breaches, but in practice it handles most cases by issuing a warning.<sup>87</sup> And the AEC drew criticism on polling day in 2019 for refusing to remove, or seek an injunction against, Liberal Party signs that appeared to mislead voters as to how to cast their vote. Those signs, displayed at polling booths in two electorates, bore AEC colours (purple and white) and told voters in Mandarin that the 'correct' way to

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<sup>81</sup> Tham, *Money and Politics* (n 77).

<sup>82</sup> Pat McGrath, 'Facebook Probed by Australian Electoral Commission Over Mysterious Political Ads', *ABC News Online*, 26 February 2019 <<https://www.abc.net.au/news/2019-02-26/facebook-electoral-commission-emails-reveal-political-ad-concern/10834736>>.

<sup>83</sup> Orr (n 15) ch 11.

<sup>84</sup> *Electoral Funding Act 2018* (NSW) ss 78, 96.

<sup>85</sup> *Electoral Act 1985* (SA) s 113.

<sup>86</sup> Evidence to JSCEM, Parliament of Australia, Canberra, 6 December 2019, 3 (Tom Rogers).

<sup>87</sup> AEC, Submission No 120 (n 44) 33-34.

vote was to record a first preference for the Liberal Party.<sup>88</sup> The AEC determined on the day that the signs did not breach the relevant provision (section 329) as it had been judicially interpreted; a unanimous decision of the Court of Disputed Returns later found the opposite.<sup>89</sup>

The 'fourth branch' literature notes the risk that oversight agencies will be overly cautious in the use of their available powers for fear of destabilising their relationship with government. While there are many reasons why the AEC might not use certain powers, its institutional setting makes it vulnerable to this kind of 'regulatory capture'.<sup>90</sup> It is in the difficult position of overseeing the conduct of parties that it ultimately reports to through the JSCEM process and depends upon for its funding. The dependence of the AEC on the parties has the clear potential to inhibit the Commission's willingness to exercise its full enforcement powers. This is especially the case at high stakes moments, such as during election campaigns and on polling day, where Commission intervention could affect the reputations or even electoral fortunes of candidates and parties. One option here, as envisaged by some 'fourth branch' scholars, is to enhance the Commission's budgetary independence by entrenching its funding arrangements.<sup>91</sup> Another option is to engage a parliamentary committee or independent review body to oversee resourcing and make recommendations about it.<sup>92</sup>

The AEC also faces practical challenges in utilising its full set powers. When complaints about political communications are received during an election campaign, or on polling day itself, it is important that they be addressed quickly and efficiently and this points to non-judicial avenues. As the AEC has said in defence of its approach during the 2019 campaign, it is 'fully prepared, willing and able' to use all of the powers available to it, but that 'in almost all cases, a faster way to obtain compliance' is by issuing warnings without having to resort to the courts.<sup>93</sup> Meanwhile, the Commission's failure to remove the misleading signs that imitated AEC colours should be placed in context, namely, the difficulty of encountering a novel set of circumstances on polling day and needing to make a rapid determination as to whether a breach has occurred. Of course, against these considerations should be weighed the possibility that a greater willingness to seek court injunctions and refer matters to the police could help to deter future attempts by parties to push the law to its limits.

Moving away from administration matters, the AEC has the potential to protect electoral democracy through its engagement in judicial proceedings. The Commission's commitment to neutrality, however, limits its contribution here. The AEC proceeds on the assumption that the electoral laws it is charged with administering are valid and does not view it as appropriate to present arguments on constitutional validity where those laws are challenged in the courts.<sup>94</sup> This position is taken even where the challenged laws limit the franchise<sup>95</sup> or potentially advance partisan self-interest. In court proceedings the AEC typically confines

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<sup>88</sup> *Garbett v Liu* [2019] FCAFC 241 [3].

<sup>89</sup> *Ibid* [132]–[135].

<sup>90</sup> Kelly, *Directions* (n 39) 107–108.

<sup>91</sup> See above n 28.

<sup>92</sup> Appleby, *Horizontal Accountability* (n 16) 183.

<sup>93</sup> Christopher Knaus and Paul Karp, 'Australian Electoral Commission finds 87 cases of election ads breaching law', *The Guardian* (online, 22 May 2019) <<https://www.theguardian.com/australia-news/2019/may/22/australian-electoral-commission-finds-87-cases-of-election-ads-breaching-law>>.

<sup>94</sup> Pirani (n 68) 38–39.

<sup>95</sup> *Ibid*.

itself to giving expert evidence about electoral processes and addressing questions of statutory construction.<sup>96</sup>

The AEC plays a larger protective role through its engagement in law reform, most prominently through its contributions to JSCEM. But, again, there are firm limits to the impact it can have. The Commission is ultimately not able to guard against the enactment of laws that undermine the fairness and integrity of the electoral process. On the contrary, it is bound to administer them. The most that the AEC can do is argue against problematic proposals, although in practice it tends to steer away from taking positions on electoral policy. For instance, when the Howard government proposed an early closure of the rolls with the potential to affect electoral participation, the Commission provided analysis of the number of voters this policy might impact but did not mount arguments for or against it.<sup>97</sup> That proposal became law and was subsequently struck down by the High Court.<sup>98</sup> On political finance, the Commission views the task of reconciling divergent views as ‘a matter for Parliament’ and avoids offering advice on ‘best practice’ as it ‘may create the impression that the AEC has entered into partisan debate’.<sup>99</sup> This approach aligns with the AEC’s perception of itself as an administrator rather than a rule-maker.

There is scope for the Commission to play a stronger ‘protective’ role through the law reform process. Tham suggests that legislators could confer a statutory duty on electoral commissions ‘to provide public advice on the impact of electoral rules (whether current or proposed) on new candidates and parties as well as minor parties’ – a brief that could be extended to electoral fairness and integrity more broadly.<sup>100</sup> However, even with such a mechanism in place, the Commission would be powerless to prevent lawmakers from enacting unfair electoral rules.

#### IV Conclusion

The AEC plays a pivotal role in delivering on the constitutional promise of electoral democracy in Australia. This article has examined some of the ways in which the Commission facilitates and protects democracy, noting how it both ‘breathes life’ into democratic rights and helps guard against threats to the fairness and integrity of the electoral process. The analysis presented demonstrates the value of expanding our understanding of the role of fourth branch institutions so that we take account of their activities in both fostering *and* safeguarding key values. To ignore the former will, for some institutions, risk overlooking the full contribution they make to the governance of the political community. The article further demonstrates that statutory electoral commissions can, given the right settings, be effective in facilitating and protecting electoral democracy. In the case of the AEC, a long history of professional and non-partisan electoral administration, combined with institutional independence and high public confidence in its performance, have contributed to its success. At the same time, my study suggests that oversight bodies like the AEC are only as effective as the laws they are charged with enforcing, and that inadequate powers, lack of budgetary

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<sup>96</sup> *Ibid.*

<sup>97</sup> JSCEM, *The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Thereto* (2005) 29–37.

<sup>98</sup> *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

<sup>99</sup> AEC, Submission No 66.11 to JSCEM, Parliament of Australia, *Inquiry into and Report on All Aspects of the Conduct of the 2016 Federal Election and Matters Related Thereto* (February 2017) 6.

<sup>100</sup> Tham, ‘Deliberative Democracy’ (n 18) 398.

autonomy and answerability to political actors can operate as real constraints on their effectiveness.