

ELECTORAL backgrounder No. 15

ELECTORAL ADVERTISING

Introduction

1. Electoral Backgrounders are published by the Australian Electoral Commission (AEC) to provide a basic introduction to electoral law, policy and procedures for the information and guidance of all interested parties.

2. This Electoral Backgrounder provides a basic introduction to electoral advertising and so its contents are a guide only. Individual matters are assessed on a case by case basis and ultimately it is for the courts to decide upon the interpretation of the law in any particular case. Accordingly, if you are in doubt about the interpretation of the law in particular circumstances you should seek your own independent legal advice.

3. This Electoral Backgrounder discusses:

- Intent of the Law
- Authorisation of Electoral Advertising
- Headings to Electoral Advertisements
- Electoral Advertising - Internet
- Misleading and Deceptive Electoral Advertisements
- Second Preference How-To-Vote Cards
- Truth in Political Advertising
- Defamation of Candidates
- Electronic Media Blackout

- Political Advertising Bans

- Non-compliance – Electoral Advertising Offences, and

- Complaints.

4. The *Commonwealth Electoral Act 1918* (the Electoral Act) is available on the AEC website at www.aec.gov.au. Unless otherwise specified, all references to sections are to sections of the Electoral Act.

Intent of the law

5. Federal elections are conducted by the AEC under the provisions of the Electoral Act.

6. The Federal Parliament has determined that the Electoral Act should not regulate the content of political messages contained in electoral advertising, rather, the intent of the Electoral Act is to ensure electors are informed about the source of political advertising, and to ensure that political advertising does not mislead or deceive electors about the way in which a vote must be cast.

7. Accordingly, the AEC has no role or responsibility in deciding whether political messages published or broadcast in relation to a federal election are true or untrue. However, the AEC does have a role in ensuring, to the extent possible, that electoral advertisements are properly authorised so that electors can know who is responsible for the statements contained in them.

Electoral Backgrounders are published for the general information of AEC staff and people interested in electoral issues. Electoral Backgrounders present and analyse the issues on various topics, but do not promote a particular position or represent legal advice, and should not be relied upon as such. Anyone requiring legal advice should consult their own legal advisers.

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Authorisation of Electoral Advertisements

8. In relation to printed matter, s 328(1) section 328(1A) requires that all electoral video recordings contain the name and address of the person authorising the video recording at the end of the recording. The Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth) introduced a new provision (s 328A) into the Electoral Act to regulate electoral advertising on the Internet (see discussion below).

9. It is important to note that electoral advertisements must be authorised at all times – not just during an election period.

Electoral advertising – printed matter

10. An ‘electoral advertisement’ is defined in s 328(5) as follows:

electoral advertisement, handbill, pamphlet, poster or notice means an advertisement, handbill, pamphlet, poster or notice that contains electoral matter, but does not include an advertisement in a newspaper announcing the holding of a meeting.

11. ‘Electoral matter’ is defined in s 4(1) and s 4(9). In s 4(1) ‘electoral matter’ is defined as matter ‘intended or likely to affect voting in an election’. Section 4(9) further provides that matter shall be taken to be intended or likely to affect voting in an election if it contains an express or implicit reference to, or comment on:

- (a) the election
- (b) the Government, the Opposition, a previous Government or a previous Opposition
- (c) the Government or Opposition, or a previous Government or Opposition, of a State or Territory
- (d) a member or former member of the Parliament of the Commonwealth or a State or of the legislature of a Territory
- (e) a political party, a branch or division of

a political party or a candidate or group of candidates in the election, or

(f) any issue submitted to, or otherwise before, the electors in connection with the election.

12. It should be noted, however, that despite the words ‘shall be taken to be’, s 4(9) must be read in light of the limits on the Commonwealth’s constitutional power to regulate electoral matters. That is, the Commonwealth may not regulate electoral advertising that contains no connection with the Commonwealth.

The tests applied by the AEC

13. In the AEC’s view, there are two broad approaches for determining whether a particular electoral advertisement requires authorisation under s 328. The first applies to material that falls within paragraphs 4(9)(a), (e) and (f). The second applies to material that falls within paragraphs 4(9)(b), (c) and (d).

Material that falls within paragraphs 4(9)(a), (e) or (f)

14. In determining whether material which makes reference to paragraphs 4(9)(a), (e) and (f), and therefore whether the material falls within s 328, the AEC applies the following:

Is the reference in the material to ‘the election’ a reference to the federal election? If the answer is “yes”, the advertisement contains electoral matter and requires authorisation under s 328.

Material that falls within paragraphs 4(9)(b), (c) and (d)

15. With respect to paragraphs 4(9)(b), (c) and (d), the AEC’s view is that these provisions may operate differently depending on the proximity of the electoral advertisement to a federal election period. Generally speaking, outside federal election periods, it is less likely that the AEC will be required to take action in relation to the non-authorisation of advertisements because it will be less likely to have a sufficient connection

to a federal election.

16. The AEC takes the view that the election period for these purposes will - at minimum - be the period from the announcement of the election or the issue of the writs (whichever is the earlier) to the close of polling on election day. However, in circumstances where there is a considerable speculation surrounding a possible election, the AEC may consider that the election period has commenced, notwithstanding that there has been no announcement or issuing of the writs.

17. Accordingly, in determining whether material which makes reference to paragraphs 4(9)(b), (c) and (d) and therefore whether the material falls within s 328, the AEC applies the following:

During a federal election period

Where an advertisement falls within a federal election period, s 4(9) will deem an advertisement making an express or implicit reference to one of the people or bodies politic in paragraphs (b), (c) and (d) to contain electoral matter. Accordingly, the advertisement requires authorisation for the purposes of s 328.

Outside a federal election period

Where the advertisement falls outside a federal election period, the issues is whether there is some connection between the reference to a person or institution prescribed in s 4(9) paragraph (b), (c) or (d) and a federal election. If the answer is 'Yes', for example, if the reference is intended or likely to affect voting in a federal election, the advertisement requires authorisation for the purposes of s 328. Importantly, this requires an assessment of the intention or effect of the advertisement.

18. Of course, where material falls outside of the deeming provision in s 4(9), it will only require authorisation if it otherwise contains "electoral matter" in s 4(1) – i.e. if it is intended or likely to affect voting in an election. This will require an assessment of the intention or effect of the advertisement.

Details of the person who authorised the advertisement

19. Section 328(1) requires electoral advertisements to include the name and full street address of the person who authorised the advertisement at the end of the advertisement, and the word 'Advertisement' in print no smaller than 10 point at the headline of the advertisement. This ensures that anonymity does not become a protective shield for irresponsible or defamatory statements.

Advertisements printed otherwise than in a newspaper

20. These advertisements require the name and full street address of the person who authorised the advertisement as well as the name and place of business of the printer of the advertisement. The address requirements prohibit the use of a post office box and require a full street address and suburb or locality at which the person can usually be contacted during the day. The address does not have to be a residential address.

Advertisements published in newspapers, magazines, and other periodicals

21. With respect to newspaper advertising, although s 328(1)(a) requires electoral advertisements in newspapers to contain the name and address of the person who authorised the electoral advertisement, s 328(1)(b) makes it clear that the name and place of business of the printer is not required at the end of an advertisement in a newspaper. Sections 328(1AB) and (1AC) make it an offence to print, publish or distribute, or cause, permit or authorise the printing, publication and distribution, of electoral advertisements that take up the whole or part of each of two opposing pages of a newspaper, without including the name and address (not being a post office box number) of the person who authorised the electoral advertisement at the end of both pages, except in specific circumstances relating to the layout of the advertisement.

22. Section 328(2) provides that the maximum penalty for a contravention of s 328(1), (1A) or (1AB) is a fine not exceeding \$1,000 for a person, or a fine not exceeding \$5,000 for a body corporate.

What does not require authorisation?

23. Sections 328(3) and (5) provide certain exceptions to the usual authorisation requirements. The following electoral advertisements do not require an authorisation and printer details: electoral advertisements in newspapers announcing the holding of a meeting; electoral advertisements on T-shirts, lapel buttons and badges, pens, pencils, and balloons; and business cards that promote a candidate, or letters and cards that already bear the name and address of the sender (and do not contain a representation of a ballot-paper).

This means that, for example, letters to constituents from Members of Parliament or business cards from candidates do not require the person who authorised and printer details if they already contain the name and address of the person responsible. On the other hand, other publications such as stickers, fridge magnets, wine bottle labels, and cinema slides, for example, that contain electoral advertisements, do require the name and address of the person who authorised them and the name and place of business of the printer to be included.

What do you do if the material has already been produced and you have omitted to authorise it?

24. In those circumstances where material has already been produced without the appropriate authorising information, and it would be expensive to discard the production run, the AEC recommends that additional material, containing the authorising information, be printed and attached to render the advertisement legal (eg stickers containing the authorisation).

Heading to Electoral Advertisements

25. Electoral advertisements in newspapers, magazines and other periodicals, whether published for sale or for distribution without charge, must contain an identifying heading. Section 331 requires the proprietor of a journal to cause the word 'advertisement' to be printed as a headline to the advertisement, in letters not smaller than 10 point. Other special requirements apply to large advertisements spread across two opposing pages of a journal (see paragraphs 21 and 22 above).

26. There is no requirement for the identification of the authors of 'letters to the editor' in newspapers and journals. Similarly, there is no law requiring the identification of talkback radio callers during an election period.

27. The maximum penalty for a contravention is five penalty units. (A single penalty unit is equivalent to \$110 under s 4AA of the *Crimes Act* 1914.)

28. It is important to note that s331 applies at all times, not just during an election period.

Electoral advertising - Internet

29. Section 328A applies to:

- electoral advertisements
- intended to affect voting in a federal election
- where a person has paid for the advertisement to appear on the Internet.

30. It is important to distinguish the reference to electoral advertisement as it applies to advertising on the Internet (s 328A) from the reference to *electoral advertisement* that applies to printed matter (s 328). Section 328A does not define electoral advertisements by reference to the term *electoral matter*. The AEC is of the view that the ordinary natural meaning of *advertisement* applies. The *Macquarie Dictionary* defines 'advertisement' as "any device or public announcement, as a printed notice in a newspaper, a commercial film on television, a neon sign, etc., designed to attract

public attention, bring in custom, etc”.

31. Accordingly, any announcement designed to attract public attention which was intended to affect voting in a federal election would appear, on its face, to attract the operation of s 328A(1).

32. It is important to note that s 328A(2) provides a defence to a contravention of s 328A(1) if the matter published forms part of a general commentary on a website.

33. The maximum penalty for a contravention is five penalty units. (A single penalty unit is equivalent to \$110 under s 4AA of the *Crimes Act* 1914.).

34. It is important to note that s331 applies at all times, not just during an election period.

Misleading or Deceptive Electoral Advertisements

35. At election time, electors generally rely on official AEC publications and broadcasts for information on when and where to vote, and for guidance on how to fill out their ballot papers correctly, so as to cast a formal vote. AEC publications and broadcasts also provide advice on how to cast a full preferential vote, by numbering all the squares on the House of Representatives ballot paper, and by either ‘below the line’ on the Senate ballot paper, or by casting a group ticket vote “above the line” for the Senate.

36. Political parties and candidates, and other interested individuals and organisations also produce electoral advertising during an election campaign to assist voters in choosing their preferred candidates when casting a vote. The print versions of such electoral advertising will usually take the form of how-to-vote (HTV) cards, which demonstrate how voters should number their preferences against each candidate on the ballot paper so as to ensure the election of the most favoured candidate or group of candidates.

37. Voters are not required to follow HTV cards. The order in which preferences are placed against candidates on the ballot paper is a decision for

the voter alone, in the privacy of the voting compartment, in accordance with the principle of the secret ballot.

38. Although the AEC has no role in regulating the political content of electoral advertising, the AEC is responsible for ensuring, as far as possible, that electoral advertising does not mislead or deceive voters about the way in which they must cast their vote. For example, HTV cards should not advocate optional preferential voting, because, with limited exceptions, the Electoral Act clearly requires full preferential voting, and ballot papers marked incompletely are informal and unable to be counted.

39. Section 329(1) makes it an offence to print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing that is likely to mislead or deceive an elector in relation to the casting of a vote. Section 329 applies not only to printed matter but also to electoral advertisements broadcast on radio or television. Section 329(5) provides that in a prosecution of an offender it is a defence if it is proved that the person did not know, and could not reasonably be expected to have known, that the matter or thing was likely to mislead an elector in relation to the casting of a vote.

40. Unlike sections 328, 328A and 331, which apply at all times, s 329(1) is in force only during the formal election campaign, that is the ‘relevant period’ which is defined in s 322 as the period commencing on the issue of the writ for the election and expiring at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election.

41. The maximum penalty for a contravention of s 329(1) is a fine not exceeding \$1,000 or imprisonment for a period not exceeding six months, or both, for a person; or a fine not exceeding \$5,000 for a body corporate.

42. The intention of s 329(1) is not to regulate the content of political messages directed at influencing the choice of preferred candidates or political parties by voters, but to regulate publications and broadcasts that are directed at influencing the way

in which the ballot paper is actually marked. This distinction was upheld by the High Court in *Evans v Crichton-Browne* (1981) 147 CLR 169, the

leading case on s 329(1).

43. In this case, the provision in question was s 161, the relevant part of which is now contained in s 329(1), so that the following conclusion of the court is equally applicable to s 329(1) as it stands today:

the words in s. 161(e) “in or in relation to the casting of his vote” refer to the act of recording or expressing the elector’s political judgement, eg in obtaining and marking a ballot paper and depositing it in the ballot box, and not to the formation of that judgement.

44. This means that the AEC has no role or responsibility in handling complaints about allegedly untrue statements in published or broadcast electoral advertisements that are intended to influence the judgement of voters about who they should vote for. Complaints that do fall within the scope of s 329(1) are those that relate to electoral publications and broadcasts that are likely to mislead or deceive an elector in relation to the way the ballot paper is marked.

45. In coming to its conclusion in *Evans v Crichton Browne*, the High Court indicated that it will be reluctant to find that the offence provisions of the Electoral Act infringe on conduct that is more appropriately covered by the political process:

But even if the paragraph were thought to apply only to those statements affecting a voter’s choice of candidate which appear to be statements of fact, that construction would require an election campaign to be conducted in anticipation of proceedings brought to test the truth or correctness of any statement made in the campaign. Indeed any person who published an electoral advertisement containing an incorrect statement of fact might be exposed to criminal proceedings. In a campaign ranging over a wide variety of matters, many of the issues canvassed are likely to be unsuited to resolution in legal

proceedings; and a court should not attribute to the Parliament an intention to expose election issues to the potential requirement of legal proof in the absence of clear words.

46. Section 329 also extends to radio and television advertising also. The application of s 329 to the electronic publication of electoral advertising on the Internet has not yet been considered by the courts. However, the AEC considers that s 329 does apply to electoral advertising on the Internet.

Second Preference How-to-Vote Cards

47. ‘Second preference’ HTV cards are those in which a party (usually a major party) recommends a first preference vote for a candidate of another party (usually a minor party) while recommending its own candidate as the second preference (or at least a preference higher than other major parties). These HTV cards are actually authorised by the originating (usually major) political party, although they sometimes appear, due to their heading, colour and general layout, similar to the ‘official’ HTV card of the party endorsing the candidate recommended as the first preference. A party which puts out a second preference HTV card may also put out its own ‘official’ HTV card recommending a first preference vote for its own endorsed candidate.

48. The political strategy involved in major political parties issuing “second preference” HTV cards is to capture the second or later preferences ahead of other major political parties after the minor political party candidate or independent candidate is eliminated from the count. The concern is that voters might be misled into believing that these “second preference” HTV cards are the official HTV cards for the minor political party or independent candidate shown as the first preference.

49. On the basis of relevant decisions handed down by the courts over the years, second preference HTV cards would probably be held by a court to be in contravention of s 329(1), if they were very similar in appearance to the official HTV card for another political party or independent candidate. This might mislead a

voter into thinking it is the official HTV card and thereby mislead the voter in casting a vote.

50. As noted above, in *Evans v Crichton-Browne*, the High Court held that the words ‘in or in relation to the casting of his vote’ in the then s 161(e) (now s 329) refer to influencing the way the ballot paper is marked. Accordingly, an erroneous statement about the operating hours of the polling booth so that an elector missed out on the opportunity to vote would be a misleading statement in or in relation to the casting of an elector’s vote. Misleading political advertising aimed at persuading an elector to form a judgement to vote for a particular candidate or party would not fall within s 329 because it would not mislead in relation to the actual casting of a vote. However, a statement that a person who wished to support a particular party should vote for a particular candidate, when that candidate in fact belonged to a rival party, might mislead or interfere with an elector in the casting of his vote.

51. In *Bray v Walsh* (1976) 15 SASR 293 Mr Bray was prosecuted in 1976 for an offence similar to the offence that now exists under s 329(1). The Liberal Movement had printed and distributed HTV cards, which gave first preference to the Liberal Movement and second preference to candidate ‘X’. Mr Bray printed and distributed HTV cards that stated ‘How to vote L M Liberal Movement in Sturt - keep Fraser out’ which gave the first preference to the Liberal Movement and the second preference to candidate ‘Y’. Mr Bray’s HTV cards looked very similar to the official Liberal Movement HTV cards. Both HTV cards were printed in similar colours and the letters ‘LM’ were in the same distinctive and unusual print. The words ‘How to vote LM Liberal Movement in Sturt’ appeared on both cards.

52. Justice Mitchell of the South Australian Supreme Court concluded that a person who had already seen an official Liberal Movement HTV card might well have been sufficiently influenced by the similarity of the cards to believe that Mr Bray’s HTV card was produced by the Liberal Movement. An elector might be misled into

voting preferentially along the lines advocated by the Bray HTV card. Accordingly, Mr Bray was convicted under the then s 161(d) (now s 329) of printing, publishing and distributing a handbill ‘having thereon any directions intended or likely to mislead an elector in relation to the casting of his vote.’

53. In *Webster v Deahm* (1993) 116 ALR 222 *Webster v Deahm* in 1993, Justice Gaudron of the High Court, sitting as the Court of Disputed Returns, heard a petition by the unsuccessful Liberal Party candidate, Mr Webster, disputing the election of Ms Deahm of the ALP to the House of Representatives Division of Macquarie in the March 1993 federal election. Mr Webster argued that a document entitled ‘Thinking of Voting Democrat?...Vote Maggie Deahm’ breached s 329(1). Mr Webster alleged that the size and colour of the document was the same as the Democrat’s HTV card and as a result voters were likely to vote for Ms Deahm, thinking they were voting for the Democrat candidate. The HTV card appeared as follows:

THINKING OF VOTING DEMOCRAT?

If you’re casting your No 1 Vote for the Democrat candidate, be sure to give your No 2 Vote to the Labor Candidate, Maggie Deahm.

Number all squares.

Your preferences will count.

Maggie Deahm will stop the GST

54. Justice Gaudron dismissed the argument. Her Honour observed:

When read as a whole, the document clearly could only influence the formation of a judgment as to the candidate who should receive the elector’s second vote. ...even if given only a cursory glance, the document could not have been mistaken for a how-to-vote card, whether for the Democrat candidate or anyone else. Thus ...[it] could not have affected the casting of a vote in any manner amounting to a contravention of s 329(1) of the Act.

55. Justice Gaudron followed the principle laid down in the *Evans v Crichton-Browne* case. It appears, that, on the facts, Justice Gaudron considered that the Deahm document was electoral advertising aimed at persuading an elector to vote for Deahm and did not breach s 329(1) because it did not mislead in relation to the actual casting of the vote, by, for example, suggesting that the Australian Democrats Party recommended that its supporters give Ms Deahm their second preference.

56. In *Re Carroll v Electoral Commission of Qld* [1998] QSC 190, Justice Mackenzie of the Queensland Supreme Court decided that under the terms of the Electoral Act 1992 (Qld), the distribution of second preference ALP HTV cards headed 'Thinking of voting One Nation...?' did not of itself mislead or deceive voters. Further, Justice Mackenzie decided that, even though in a number of instances there were deliberate attempts by polling booth workers to represent the ALP second preference HTV cards as the official One Nation HTV card, this still did not contravene the principle laid down by the High Court in *Evans v Crichton-Browne*, because there was no evidence that these HTV cards had actually misled voters in marking their ballot papers.

57. It should be noted that s 351, which relates to the publication of matter regarding candidates, might also apply to first preference recommendations for one political party candidate in second preference HTV cards issued by another political party.

Truth in Political Advertising

58. Although the Electoral Act previously contained a prohibition on 'untrue' advertising (see former s161(2)), this was repealed in 1984. Subsequent JSCEM reports have made various recommendations about re-instating it. Successive governments have not supported these recommendations. For example, in the government's response to the 1997 JSCEM

report, tabled in Parliament on 8 April 1998, the recommendation was rejected, as follows:

The Government firmly believes that political advertising should be truthful in its content. However, any legislation introduced to enforce this principle would be difficult to enforce and could be open to challenge.

Previous Committees have found that it was not possible to legislate to control political advertising and that voters, using whatever assistance they see fit from the media and other sources, remain the most appropriate arbiters of the worth of political claims.

59. It should be noted, however, that Free TV (formerly the Federation of Australian Commercial Television Stations) reviews election advertisements prior to broadcast by commercial television stations for the purpose of:

- classifying the advertisement under the Commercial Television Industry Code of Practice
- ensuring the advertisement includes the authorisation tag required by the Broadcasting Services Act (Clause 4 of Part 2 of Schedule 2) and complies with other requirements on broadcasters under applicable Electoral Acts (Commonwealth, State or Territory), and
- protecting broadcasters from liability for publishing defamatory material.

60. The party or candidate authorising the advertisement is expected to ensure that the advertisement complies with all relevant laws including the applicable Electoral Act and the laws of defamation.

Defamation of Candidates

Note: The Electoral and Referendum Legislation Amendment Bill 2006 (introduced into Parliament on 30 November 2006) proposes to repeal s 350.

61. Section 350(1) makes it an offence to make or publish any false and defamatory statement in relation to the personal character or conduct of a candidate. It should be noted that s 350(1A) provides that it is a defence to a prosecution for defamation if the defendant proves that he or she had a reasonable ground for believing, and did believe, the statement to be true. The penalty for the offence is \$1,000 or imprisonment for 6 months or both.

62. Aggrieved candidates have a special right under s 350(2) to seek an injunction restraining any person, who makes a false and defamatory statement in relation to the personal conduct of a candidate in contravention of s 350(1), from repeating the statement or any similar false and defamatory statement.

63. Aggrieved candidates are also entitled to seek redress under the common law of defamation.

64. If candidates believe they have been defamed by statements made in electoral advertising, then the AEC recommends that they pursue their own action against those responsible, either under the common law of defamation or under s 350. The AEC does not initiate action on behalf of candidates. Candidates are in a better position to know the truth of statements made against them than the AEC.

Electronic Media Blackout

65. Under Schedule 2 to the *Broadcasting Services Act 1992*, which is administered by the Australian Communications and Media Authority (ACMA), there is an election advertising blackout on all electronic media from midnight on the Wednesday before polling to the end of polling on the Saturday. This three-day blackout effectively provides a 'cooling off' period in the lead up to polling day, during which political parties, candidates and others are no longer able to purchase time on television and radio to broadcast political advertising.

66. The electronic media blackout provisions, and other provisions relating to the broadcast-

ing of 'political matter' are administered by ACMA.

Political Advertising Bans

67. In June 1989, the JSCEM tabled its Report No 4, entitled 'Who pays the piper calls the tune', on minimising the risks of private funding of political campaigns. The JSCEM concluded that the high cost of advertising on television was placing increasing pressures on Australian political parties and candidates to become dependent on corporate funding. This dependence carried the risk of corporate interests bringing undue influence to bear on the federal political agenda. In its examination of the problem, the JSCEM looked at the possibility of legislating for a complete ban on all political advertising, but rejected such an option in the following terms:

While some viewers might support a complete ban on political advertising it would have a direct effect on freedom of speech by reducing opportunities for discussion during election periods when voters are determining the candidate or party they wish to support.

Most witnesses disagreed with a complete ban on political advertising, claiming that it would have an adverse effect on freedom of speech and in particular would disadvantage citizens and groups who wished to bring issues before the electorate. The beneficiaries of a complete ban would be the existing major parties.

68. The JSCEM decided instead to recommend a 'carrot and stick' approach to the problems raised by corporate donations to political campaigns: the provision of free time by all electronic broadcasters to political parties, and an extension of the requirements for disclosure of political donations.

69. Subsequently, on 3 January 1992 the *Political Broadcasts and Political Disclosures Act 1991* came into force. This Act amended the Electoral Act with respect to election funding and disclosure, and inserted Part IIID of the *Broadcasting Act 1942* to ban political advertising

at all parliamentary elections and to provide for free air time for all political parties on television stations. The ban also applied to all government advertising for three months before polling day.

70. However, in August 1992, Part IIID of the *Broadcasting Act 1942*, which was inserted by the *Political Broadcasts and Political Disclosures Act 1991*, was struck down by the High Court as unconstitutional (see *Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106*).

71. Six of the seven Justices of the High Court held that there was a freedom of political communication in relation to political matters inherent in the Constitution. The Constitution is predicated on representative government, and freedom of communication is essential to that system. All of the Justices who recognised an implied freedom also recognised that the freedom was not absolute and could be restricted to the extent that other legitimate public interests required. They held that control of the use of the media for political advertising could be valid in some circumstances. However, five of the Justices found that Part IIID of the *Broadcasting Act 1942* went beyond a justifiable restriction of the freedom.

Non-compliance - Electoral Advertising Offences

72. The following discussion provides a guide as to courses of action that the AEC will be taken in response to an apparent or alleged breach of the law. However, there are a guide only - the AEC reserves the right to take any other course of action it considers necessary in the circumstances.

73. Further, while compliance with the law is important at all times, the AEC recognises that some breaches of the law are more serious than others. These are described below, for convenience, as 'more serious' and 'less serious' instances of non-compliance and are used to distinguish significant instances of non-compliance from non-compliance with the precise requirements

of the law.

More serious non-compliance

74. More serious non-compliance is a matter of concern for the AEC at all times. More serious non-compliance involves instances where the purpose of the law, for example, the prevention of anonymous electoral advertising, is undermined by the publication of electoral advertising that fails to provide the elector with the ability to discern the identity of the person responsible for the advertisement. Advertisements which carry the words '*published by people concerned about...*' represent more serious matters as they do not provide any information as to who is responsible for the advertisement.

Less serious non-compliance

75. Examples of less serious instances of non-compliance include:

- absence of an explicit authorisation in an otherwise clearly identifiable advertisement (State, Territory and Commonwealth Government advertising with clearly displayed government logos, a coat of arms, or the display of the name of a prominent member of a Government, such as Ministers, Premiers or the Prime Minister)
- absence of the word 'advertisement' in an otherwise authorised advertisement in a newspaper
- absence of the place of business of the printer of an electoral advertisement in an otherwise compliant electoral advertisement, and
- absence of a suburb or locality in the street address of an authorisation.

76. While all instances of non-compliance with the law are serious matters, those that occur during federal election periods have the potential to have a more significant and direct impact on the casting of votes. In light of their capacity to directly affect the casting of votes in a federal election, misleading or deceptive publications receive a high priority in the AEC's compliance

activities. Outside of the periods during which provisions relating to misleading or deceptive publications operate (see above at paragraph 40), the AEC prioritises anonymous electoral advertisements over advertisements containing less serious instances of apparent non-compliance.

77. Breaches of s 329, because of their possible impact on the outcome of an election, require immediate action. If offending material is not immediately withdrawn or amended, the AEC may take injunction action in accordance with s 383 of the CEA. (*Note: Injunctive action may also be taken by a candidate in the election pursuant to s 383*).

78. If, the AEC considers there to be a breach of ss 328 or 328A, generally, the AEC will write to the relevant person seeking that the material be withdrawn until such time as the material is amended so as to comply with the law. In relation to a breach of s 331, the AEC will write to the relevant person seeking that any future publication of the same material to comply with the law.

79. If there is continued non-compliance or a more serious breach of ss 328, 328A, 329 or 331, the matter may be referred to the AFP and/or DPP for further action. Further, because the electoral impact of a less serious matter may vary according to the circumstances in which it occurs, the AEC, v may also consider it appropriate to refer a less serious matter to the AFP and/or the DPP.

80. If there is any doubt as to whether there may have been a breach, the matter will be referred to the DPP for advice.

81. In summary, the AEC may adopt any or all of the following strategies in response to an apparent breach of the Act:

- a request by the AEC to cease and desist
- injunction action undertaken in the Federal Court to compel compliance
- referral to the Australian Federal Police for investigation, and/or

- referral to the Director of Public Prosecutions for preliminary advice or prosecution action.

82. Decisions with respect to the institution of criminal proceedings by the Commonwealth rest with the Director of Public Prosecutions (DPP).

Complaints

83. Complaints must be made in writing addressed to the Electoral Commissioner and the complainant should also provide as much information as possible to enable assessment of the alleged breach. If possible, complaints should be accompanied by an original copy of the electoral advertisement from which the AEC can make a formal assessment of its compliance with the law. If an original copy cannot be obtained, a copy of the entire document may be forwarded to the AEC. Similarly, in relation to a complaint about electoral advertisements on the Internet, the complaint should, if possible, be accompanied by a print copy of the webpage, showing the advertisement, from which the AEC can make a formal assessment of its compliance with the law. In the absence of a printed copy of the advertisement as it appeared on the Internet being provided with the complaint, the AEC will require enough information about the Internet site in order to locate the advertisement and make an assessment regarding compliance with the Act.

84. Information relevant to a complaint, allegation or investigation that is, or could become, subject to Part XXI proceedings (dealing with offences), will not be provided to any person not directly involved with the matter. In all cases after a complaint has been laid, the AEC will not provide any further information to the complainant until the investigating authorities advise the AEC that it is appropriate to do so. When appropriate the AEC will write to the complainant advising of its decision and actions.

Conclusion

85. The AEC is able to assist organisations and individuals by informing them of the legislative requirements in relation to electoral advertising at federal elections. The AEC is not authorised to approve electoral advertisements for publication, nor does it provide legal advice on whether a particular advertisement is in breach of the Electoral Act. If you are in doubt about the interpretation of the law in particular circumstances you should seek your own independent legal advice.

86. Members of the media are asked to use the Media Liaison contact numbers listed rather than the general enquiry number 13 23 26 which appears on AEC advertising.

AEC PUBLICATIONS

The AEC has available a number of publications for people interested in the electoral process including:

- *Electoral Pocketbook*: a concise hand book of electoral facts and statistics
- *2004 Electoral Boundaries Map*: map showing the geographic boundaries of the 150 electoral divisions
- *Nominations pamphlet*: key facts for people considering standing for election
- *Electoral Newsfile* series: editions are produced on various electoral events

- *Candidates Handbook*: a handbook to assist candidates standing for election to the Senate and House of Representatives

- *Scrutineer's Handbook*: an information handbook for scrutineers at federal elections and referendums

- *Election Funding and Financial Disclosure Handbook*: a handbook of funding and disclosure requirements of candidates and political parties

Copies of these and other publications are available from the AEC website, by phoning 13 23 26 or at your local Divisional Office.

MEDIA LIAISON

Members of the media are asked to use the Media Liaison contact numbers listed rather than the general enquiry number 13 23 26 which appears on AEC advertising.

Director

Media Communications Strategy Section

Phil Diak (02) 6271 4415

Assistant Director

Media Communications Strategy Section

Bernadette O'Meara (02) 6271 4724

ENDNOTES

Parliamentary reports that deal with the subject of electoral advertising may be accessed through any major public library, or the relevant Internet site. For JSCEM reports, contact the JSCEM through the Australian Parliament internet site (www.aph.gov.au).

Court decisions dealing with the subject of electoral advertising and “free speech” may be accessed through any major public library, or the Australasian Legal Information Institute Internet site (www.austlii.edu.au).

The *Commonwealth Electoral Act 1918* can be purchased over the counter in major cities, or accessed through any major public library, or the ComLaw website (www.comlaw.gov.au). For information about over the counter or mail order sales, ring the Attorney-General’s Department (02 6250 6666).

Relevant provisions of the *Commonwealth Electoral Act 1918* (Cth)

The following relevant provisions on electoral advertising in the *Commonwealth Electoral Act 1918*, are extracted for the convenience of readers. The extracted law is current at 18 August 2004. In some instances, emphasis has been added to keywords of particular relevance.

4 Interpretation

- (1) In this Act unless the contrary intention appears:

...***electoral matter*** means matter which is intended or likely to affect voting in an election

- (9) Without limiting the generality of the definition of ***electoral matter*** in subsection (1), matter shall be taken to be intended or likely to affect voting in an election if it contains an express or implicit reference to, or comment on:
- (a) the election
 - (b) the Government, the Opposition, a previous Government or a previous Opposition
 - (c) the Government or Opposition, or a previous Government or Opposition, of a State or Territory
 - (d) a member or former member of the Parliament of the Commonwealth or a State or of the legislature of a Territory
 - (e) a political party, a branch or division of a political party or a candidate or group of candidates in the election, or
 - (f) an issue submitted to, or otherwise before, the electors in connection with the election.

Part XXI—Electoral offences

322 Interpretation

In this Part, *relevant period*, in relation to an election under this Act, means the period commencing on the issue of the writ for the election and expiring at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election.

328 Printing and publication of electoral advertisements, notices etc.

- (1) A person shall not print, publish or distribute or cause, permit or authorize to be printed, published or distributed, an electoral advertisement, handbill, pamphlet, poster or notice unless:
 - (a) the name and address of the person who authorized the advertisement, handbill, pamphlet, poster or notice appears at the end thereof; and
 - (b) in the case of an electoral advertisement, handbill, pamphlet, poster or notice that is printed otherwise than in a newspaper—the name and place of business of the printer appears at the end thereof.
- (1A) A person must not produce, publish or distribute or cause, permit or authorise to be produced, published or distributed an electoral video recording unless the name and address of the person who authorised the video recording appears at the end of it.
- (1AB) Subject to subsection (1AC), a person must not print, publish or distribute or cause, permit or authorise to be printed, published or distributed an electoral advertisement that takes up the whole or part of each of 2 opposing pages of a newspaper unless, in addition to fulfilling the requirement under paragraph (1)(a) that the name and address of the person who authorised the electoral advertisement appear at the end of it, such name and address also appears on the other page, or the part of the other page, taken up by the electoral advertisement.
- (1AC) Subsection (1AB) does not apply to an advertisement of the kind referred to in that subsection:
 - (a) that is contained within:
 - (i) a broken or unbroken border, or
 - (ii) broken or unbroken lines extending across, or partly across, the top and bottom of the advertisement, or
 - (iii) a broken or unbroken line extending along, or partly along, each side of the advertisement, or
 - (b) that is printed so that to read one or more lines of the text of the advertisement it is necessary to read across both pages.
- (2) A person who contravenes subsection (1), (1A) or (1AB) is guilty of an offence punishable on conviction:
 - (a) if the offender is a natural person—by a fine not exceeding \$1,000; or
 - (b) if the offender is a body corporate—by a fine not exceeding \$5,000.
- (3) Subsection (1) does not apply in relation to:
 - (a) T-shirt, lapel button, lapel badge, pen, pencil or balloon; or

- (b) business or visiting cards that promote the candidacy of any person in an election for the Parliament, or
 - (c) letters and cards:
 - (i) that bear the name and address of the sender, and
 - (ii) that do not contain a representation or purported representation of a ballot paper for use in an election for the Parliament, or
 - (d) an article included in a prescribed class of articles.
- (4) Nothing in paragraph (3)(a), (b) or (c) is taken, by implication, to limit the generality of regulations that may be made by virtue of paragraph (3)(d).
- (5) In this section:

address of a person means an address, including a full street address and suburb or locality, at which the person can usually be contacted during the day. It does not include a post office box.

electoral advertisement, handbill, pamphlet, poster or notice means an advertisement, handbill, pamphlet, poster or notice that contains electoral matter, but does not include an advertisement in a newspaper announcing the holding of a meeting.

electoral video recording means a video recording that contains electoral matter.

329 Misleading or deceptive publications etc.

- (1) A person shall not, during the relevant period in relation to an election under this Act, print, publish or distribute, or cause, permit or authorize to be printed, published or distributed, any matter or thing that is likely to mislead or deceive an elector in relation to the casting of a vote.
- (4) A person who contravenes subsection (1) is guilty of an offence punishable on conviction:
- (a) if the offender is a natural person—by a fine not exceeding \$1,000 or imprisonment for a period not exceeding 6 months, or both, or
 - (b) if the offender is a body corporate—by a fine not exceeding \$5,000.
- (5) In a prosecution of a person for an offence against subsection (4) by virtue of a contravention of subsection (1), it is a defence if the person proves that he or she did not know, and could not reasonably be expected to have known, that the matter or thing was likely to mislead an elector in relation to the casting of a vote.

Note: A defendant bears a legal burden in relation to the defence in subsection (5) (see section 13.4 of the *Criminal Code*).

- (6) In this section, **publish** includes publish by radio or television.

331 Heading to electoral advertisements

- (1) Subject to subsection (2), where an advertisement in a journal contains electoral matter (whether or not the advertisement was inserted for consideration) the proprietor of the journal must cause the word ‘advertisement’ (in letters not smaller than 10 point) to be printed as a headline to the advertisement:
- (a) if the advertisement takes up one page or part of one page—on that page, or

- (b) if the advertisement takes up the whole or part of each of 2 opposing pages — on each page

Penalty: 5 penalty units.

- (2) Where an advertisement of the kind referred to in subsection (1) that takes up the whole or part of each of 2 opposing pages of a journal:
 - (a) is contained within:
 - (i) a broken or unbroken border, or
 - (ii) broken or unbroken lines extending across, or partly across, the top and bottom of the advertisement, or
 - (iii) a broken or unbroken line extending along, or partly along, each side of the advertisement, or
 - (b) is printed so that to read one or more lines of the text of the advertisement it is necessary to read across both pages, the proprietor of the journal must cause the word ‘advertisement’ to be printed as a headline in letters not smaller than 10 point to the advertisement on one of the pages.

Penalty: \$500.

- (3) In this section:

journal means a newspaper, magazine or other periodical, whether published for sale or for distribution without charge.

350 Defamation of candidate

- (1) A person is guilty of an offence if the person makes or publishes any false and defamatory statement in relation to the personal character or conduct of a candidate.

Penalty: \$1,000 or imprisonment for 6 months, or both.

Note: Part IA of the *Crimes Act 1914* contains provisions dealing with penalties.

- (1A) Subsection (1) does not apply if the person proves that he or she had a reasonable ground for believing, and did believe, the statement to be true.

Note: A defendant bears a legal burden in relation to the defence in subsection (1A) (see section 13.4 of the *Criminal Code*).

- (2) Any person who makes a false and defamatory statement in relation to the personal character or conduct of a candidate in contravention of this section may be restrained by injunction at the suit of the candidate aggrieved, from repeating the statement or any similar false and defamatory statement.

351 Publication of matter regarding candidates

- (1) If, in any matter announced or published by any person, or caused by any person to be announced or published, on behalf of any association, league, organization or other body of persons, it is:
 - (a) claimed or suggested that a candidate in an election is associated with, or supports the policy or activities of, that association, league, organization or other body of persons, or
 - (b) expressly or impliedly advocated or suggested:

- (i) in the case of an election of Senators for any State—that a voter should place in the square opposite the name of a candidate on a ballot paper a number not greater than the number of Senators to be elected, or
- (ii) in the case of an election of a Member of the House of Representatives—that that candidate is the candidate for whom the first preference vote should be given; that person shall be guilty of an offence.

Penalty:

- (a) if the offender is a natural person—\$1,000 or
- (b) if the offender is a body corporate—\$5,000.

- (1A) Subsection (1) does not apply if the person proves that he or she is authorised in writing by the candidate to announce or publish the thing claimed, suggested or advocated.

Note: A defendant bears a legal burden in relation to the matter in subsection (1A) (see section 13.4 of the *Criminal Code*).

- (2) Where any matter, the announcement or publication of which by any person without the written authority of a candidate would be an offence against subsection (1) on the part of that person, is announced or published by or on behalf of, or with the support of, any association, league, organization or other body of persons, every person who was an officer thereof at the time of that announcement or publication shall be deemed to be guilty of an offence against subsection (1).

- (3) For the purposes of this section, where any matter purports expressly or impliedly to be announced or published by or on behalf of, or in the interests or with the support of, any association, league, organization or other body of persons, the matter shall, in the absence of proof to the contrary, be deemed to be announced or published by or on behalf, or with the support, of the association, league, organization or other body of persons.

Note: A defendant bears a legal burden in relation to proof to the contrary under subsection (3) (see section 13.4 of the *Criminal Code*).

- (4) Nothing in the foregoing provisions of this section shall apply to or in relation to any announcement or publication made or authorized by any *bona fide* political party or by any *bona fide* branch thereof respecting a candidate who, by public announcement, has declared his or her candidature to be a candidature on behalf of or in the interests of that party.

- (5) The person whose name and address appears at the end of any matter as the person who authorised the matter under section 328, in the absence of evidence to the contrary, is taken to have announced or published the matter, or caused it to be announced or published, for the purpose of this section.

Note: A defendant bears an evidential burden in relation to evidence to the contrary under subsection (5) (see subsection 13.3(3) of the *Criminal Code*).

385A Evidence of authorship or authorisation of material

- (1) In proceedings for an offence against this Act:
- (a) an electoral advertisement, handbill, pamphlet, notice or video recording that includes a statement that it was authorised by a specified person is admissible as evidence of that fact, and
 - (b) a printed electoral advertisement, handbill, pamphlet or notice that includes a

statement that a specified person or firm was the printer is admissible as evidence of that fact, and

- (c) a newspaper, circular, pamphlet or ‘dodger’ containing an article, or part of an article, containing electoral matter that includes a name purporting to be the author’s name is admissible as evidence that the person named is the author of the article.

(2) In this section:

article means an article, report, letter or other matter to which section 332 applies.

electoral advertisement, handbill, pamphlet or notice and **electoral video recording** have the same meaning as in section 328.

PROTOCOL FOR THE INVESTIGATION OF COMPLAINTS DURING A FEDERAL ELECTION REGARDING POSSIBLE BREACHES OF THE COMMONWEALTH ELECTORAL ACT 1918

The most common complaints received by the Australian Electoral Commission (AEC) at election time concern possible breaches of ss 328, 329 and 331 of the *Commonwealth Electoral Act 1918* (CEA).

Section 328 deals with the need to identify the person who takes responsibility for an electoral advertisement, section 329 covers the content of such advertisements where they may mislead or deceive the reader and section 331 places responsibilities on publishers to ensure that an advertisement is clearly that - an advertisement.

While this document relates to the process adopted by the AEC during investigations of complaints under these sections, in the course of those enquiries other matters may be disclosed warranting further consideration. In any event the following protocol will be applied.

The Protocol

The AEC will exercise its discretion in the operation of this protocol, commensurate with its obligations under Part XXI of the CEA. (Part XXI deals with electoral offences.)

Information relevant to a complaint, allegation or investigation that is, or could become, subject to Part XXI proceedings, will not be provided to any person not directly involved with the matter.

Complaints must be made in writing addressed to the Electoral Commissioner and be accompanied by **original** examples of the material in question; e.g. a How-To-Vote card or other electoral advertisement. This provides the context for preliminary assessment of the advertisement and also enables it to be tendered in court if proceedings are undertaken at a later date. The complainant should also provide as much additional information as possible to enable assessment of the alleged breach.

If the AEC has any doubt as to whether the material contravenes the CEA, the material will be referred to the Commonwealth Director of Public Prosecutions for advice.

If on the DPP's advice the AEC forms a prima facie view that whilst s 328 may have been contravened, the material is attributable to a person who takes responsibility for its content and/or its printing, and if that person is prepared forthwith to withdraw it from circulation or amend it to comply with the legislation, no further action will be taken by the AEC. There is no public interest to be served by pursuing 'letter of the law compliance' when the 'mischief' the legislation is designed to address, has not occurred.

If a publisher fails to comply with the requirements of s 331 of the CEA, the AEC will treat a complaint under this section in the same manner as above in the event of a technical breach. If it is a technical breach no action will be taken other than to advise the publisher of the need to comply with the legislation and that further breaches may involve prosecution.

Complaints relating to s 329 of the CEA are not likely to involve technical breaches in the above sense. Consequently, all complaints concerning s 329 require immediate action. If after preliminary consideration by the AEC the offending material is not withdrawn or amended immediately, injunction action may be taken by the AEC in accordance with s 383 of the CEA. (*Note: Injunctive action may also be taken by a candidate in the election pursuant to section 383*)

With any complaint, where preliminary advice to the AEC indicates a substantial breach of the legislation, the AEC will refer the matter to the Australian Federal Police (AFP). Following completion of the AFP's enquiries the AEC will determine what, if any, further action is required.

In all cases after a complaint has been laid, the AEC will not provide any further information to the complainant until the investigating authorities advise the AEC that it is appropriate to do so. When appropriate the AEC will write to the complainant advising of its decision and actions.

AEC Website
www.aec.gov

Enquiry Service
13 23 26