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Campaigning in the new millennium

Modern election campaigns

12.1 Modern political campaigning is an increasingly professional activity.[1] Political parties and candidates use new information tools to target voters, to conduct polls, and to persuade the electorate both individually and en masse.

12.2 During the 2004 election period a combination of innovative and traditional communication media engulfed the electorate with a new intensity. Voters were subject to a "continuous campaign"; and they wondered who was paying for it.

12.3 Are Australia's electoral laws adequate regulators of modern election campaigns in this high information environment?

12.4 This chapter evaluates questions about the laws governing political campaigns, specifically in relation to:

- the regulation of internet commentary;
- the cost of modern elections;
- overseas regulation of campaign finance;
- expenditure controls; and
- advertising costs and controls.

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1 Submission No. 104, (Mr P Van Onselen & Dr W Errington).

Regulation of internet commentary

12.5 This section of the report evaluates the potential for effective regulation of electoral material in cyberspace.

Technological challenges

12.6 Advances in electronic publishing systems, email and teletext technologies have enabled a more immediate and freer dissemination of viewpoints about electoral matters by candidates, members of the public and interest groups.

12.7 Internet technologies introduce the potential for instant interactive advertising and commentary. Material can be produced by anyone without the editorial vetting conventional to the print media and at low or no cost. Websites can be accessed at any time while chat rooms facilitate nationwide discussion in a moment. The opportunities for the generation of political commentary, of every tenor, are obvious.

12.8 At present, internet technologies are not subject to regulation under the CEA or Broadcasting Act, whereas other media are. In this apparent regulatory vacuum, concerns have grown that without CEA requirements for identification of an author, offended parties can not access remedies under the law.

12.9 Events during the last election period, when internet sites with subversive names and content were logged,[2] intensified political parties' attention on regulating the internet. It was suggested that electoral laws requiring authorisation of electoral material in print and on radio and television broadcasts should also apply to internet communications.[3]

Authorising of advertising

12.10 The current, pre-internet, provisions of the CEA are in section 328:

> 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:

2 Eg. *Johnhowardlies.com* and *marklathamsuks.com*

3 Schubert M, "Bloggers, Spammers Face Clamp Down", *Sydney Morning Herald*, 16 March 2005.

> (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.

12.11 Section 328(2) extends these requirements to electoral video recorded matter. Television and radio advertising have separate authorisation requirements which are set out in the *Broadcasting Services Act 1922*.[4]

12.12 Evidence to the Committee expressed various views about the interpretation of s328 and its extension to cover internet material.

Authorising and the internet

12.13 The AEC previously held the view that s328 applied to electoral advertising on the internet. However, during the inquiry it reported legal advice that s328 does not apply to internet publications, although this has not been tested in the Courts.[5]

12.14 The Australian Labor Party considered that as electronic technologies are used to "publish or distribute " electoral material, s328 should clearly apply to all new technologies. Accordingly, the ALP recommended that the CEA be amended to require that electoral matter circulated by the internet, email, SMS and pre-recorded telephone material should require authorisation.[6]

12.15 However, website publishers took a different view. They maintained that the dynamic and candid nature of internet communications would make regulation of this type both undesirable and impractical.

12.16 Professor John Quiggin, who operates a "blogg" website,[7] argued that applying s328 to the internet would not be feasible legally nor

4 Administered by the Australian Broadcasting Association, Submission No. 182, (AEC), p. 7.

5 Submission No. 182, (AEC), Attachment B, *Electoral Backgrounder No. 15*, "Electoral Advertising", p. 2.

6 Submission No. 136, (ALP), p. 15; and see discussion below.

7 The term "blogg" site is derived from "web log", and is defined as an online personal journal with reflections, comments and hyperlinks provided by the writer.

technically, and would make his position as the operator of a continuing website untenable.[8] In particular:

- the legislation would be unenforceable because websites are often published outside Australia's legal jurisdiction (eg the United States);
- anonymity is a feature of web communications, given the nature of the medium and the personal and other information exchanged (and this is unlikely to change even if the law was applied);
- any successful litigation on commentary would not be timely enough to limit the proliferation of the offending material;
- a web administrator would not have the resources to verify the names and addresses of contributing authors; and
- the regulation would unduly affect administrators of continuing sites, but would not prevent fly-by-night sites from publishing detrimental material anonymously in the lead up to an election.[9]

12.17 Mr William Bowe, also an independent website editor, had no objections to authorisation requirements, although he did have reservations about carrying editorial responsibility for material logged on his site:

> I would have thought that it would be sensible for anyone running a web site that is going to make it its business to make comment on the electoral process and election campaigns to be authorised and to have an identifiable person take responsibility for what is printed on that web site. The issue, of course, is the *comments facilities* that many web logs contain.[10]

Reconsidering "advertising" on the internet

12.18 One option offered to the Committee was to amend the definition of electoral *advertising* matter in the legislation. It was suggested that s328 could distinguish between "electoral advertising" material *per se*, and general commentary on the net. Regulations could apply to the first, and not to the latter.

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8 Submission No. 180, (Prof. J Quiggin).

9 Submission No. 180, (Prof. J Quiggin); and see *Evidence*, Wednesday, 6 July 2005, pp. 22–31.

10 Mr W Bowe, *Evidence,* Wednesday, 3 August 2005, p. 53 (Committee italics).

12.19 Professor Quiggin argued that a precedent for this is set by AEC exemptions from authorisation requirements permitted for other media. 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.[11] He concluded:

> on this basis, consistent application of the Electoral Act to Internet publications would appear to imply that it is permissible to publish electoral matter, without identifying details as part of ordinary editorial content, but that advertisements, presented as a discrete part of the page or site would require authorisation, whether they were paid for or published without charge.[12]

12.20 The Committee notes that the United States Federal Electoral Commission's (FEC) Inquiry into Internet Communications is considering making a distinction between paid political advertising and non-partisan commentary.[13]

12.21 Legal advisers to the FEC suggested this distinction be made based on two considerations:

- the need to preserve the robust nature and democratic value of the internet's "free low cost speech and information exchange"; and
- Supreme Court findings that internet communications are not as "invasive" as communications via traditional media.[14]

12.22 It was concluded that disclosure requirements should not apply broadly to internet communications.[15] Instead, only paid advertisements, in the form of streaming video in banner advertisements or in "pop-ups" appearing on another entity or individual's website, should be required to comply.[16]

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11 AEC, *Electoral Backgrounder No. 15,* p. 3.

12 Submission No. 44, (Prof. J Quiggin).

13 The inquiry commenced on 24 March 2005, following legal action against FEC rulings released after the introduction of the Bipartisan Campaign Reform Act of 2002. See Potter T and K L Lowers, "Election Law and the Internet", Chapter 9, *The New Campaign Finance Sourcebook*, updated February 2005.

14 Internet users must be more "proactive"" in accessing the medium than users of traditional media. Ref: *Reno v ACLU, 521 U.S.844,870* in "Draft Notice of Proposed Rulemaking on Internet Communications", Memorandum to the Federal Electoral Commission, Agenda Item, 23 March 2005, pp. 10–11.

15 Memorandum to the FEC, 23 March 2005, pp. 1, 10.

16 Memorandum to the FEC, 23 March 2005, p. 13.

The Committee's view

12.23 The Committee acknowledges that regulation of internet communications presents a number of practical problems, making application of s328's authorisation requirements to the internet cumbersome, and perhaps unenforceable.

12.24 While, for example, a web administrator may wish to comply with the authorisation requirements, it would be very difficult to enforce a law requiring maintenance of an accurate record of all contributors of commentary to a website. It is also feasible that authorisation requirements may not effectively control misleading commentary, but would certainly impose onerous and, perhaps, impossible burdens on web administrators.

12.25 Notwithstanding these limitations, the Committee could see merit in a proposal for targeted treatment of electoral advertisement, ie *promotional* material. The difficulty remains in making a clear distinction between this and other commentary on the internet under Australian electoral law: the scant definition within the CEA of what constitutes an advertisement[17] is unhelpful; its application to the internet would need clarification by the courts.

12.26 The Committee judges that a distinction could be made between advertising/promotional material and the type of political debate which the internet facilitates. Such a distinction is supported by considerations that internet discussion is more akin to editorial commentary or letters to the editor.

12.27 With the developments in the United States in mind, the Committee suggests that authorisation requirements should at the very least be consistently applied to discrete promotional material on the internet, as it is to electoral advertisements in the print and broadcasting media.

12.28 To make this enforceable, the criteria for defining advertisements on the internet will need to specify that the material has been sponsored by an external organisation or individual, and is presented in a visually discrete manner.

17 CEA s4 *Interpretation* identifies **electoral advertisement**, as "an advertisement…that contains electoral matter…" **electoral matter** means matter which is intended or likely to affect voting in an election.

Recommendation 44

12.29 **The Committee recommends that the AEC review section 328 of the Commonwealth Electoral Act to devise authorisation requirements for electoral advertisements, as distinct from general commentary, on the internet.**

12.30 In drafting these amendments, the AEC should ensure that the definition of published electoral matter specifies that the authorisation requirements are also to apply to material *republished* on the internet. In this instance, the AEC should determine a cut off point for disclosure of authorisations, such as whether disclosure of the original sponsor, as well as of the immediate re-publisher of the material, will be sufficient.

12.31 The Committee also considers there may be merit in a broader review of authorisation requirements within s328 of the Electoral Act, to ensure greater transparency of financial disclosures or party political affiliations.

12.32 The AEC may consider, for example, the feasibility of setting requirements for registration of the names of web domains commenting on political matters. This could also include consideration of requirements for identification of political party sponsorship on any websites making political commentary.

Recommendation 45

12.33 **The Committee recommends that the AEC review section 328 of the Commonwealth Electoral Act to enhance the accountability and transparency of the electoral process.**

Misleading and defamatory internet publications

12.34 This section looks at regulatory responses to defamatory or misleading electoral material in the context of internet publications.

Electoral Act remedies for misleading and defamatory comment

12.35 The CEA has remedies for defamatory and misleading comment in electoral advertising in the print and broadcasting media. Evidence questioned whether these can be applied to the internet without significantly impeding the free exchange of ideas which characterises the internet environment. There are two relevant sections.

12.36 Section 329 governs misleading comment. As discussed in Chapter 5, *Election Day*, this section has been restricted through court interpretation to apply only to *the casting of a vote*; it is not a matter of influencing a voter's judgement in doing so.[18] The AEC views s329 as applicable to the internet, for regulation of material such as how-to-vote cards and ballot material.[19] There were some concerns that the legislation could halt all political discussion on the web during an election, given the prohibitions on circulation of "misleading" material during an election period.[20] This would imply a broader interpretation of s329 than is currently applied.

12.37 Section 350 sets out penalties for publishing false or defamatory statements and provides that:

> 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.[21]

12.38 Section 350(2) provides that any offending person:

> may be restrained by injunction at the suit of the candidate aggrieved, from repeating the statement or any similar false and defamatory statement.

12.39 While this section is apparently a potent provision, the AEC had concerns that the section may be ineffective following two judgements in 2002. It recommended to the Committee in that year that s350 be removed from the CEA leaving redress for alleged defamation to be pursued in civil proceedings.[22]

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18 See implications of High Court judgement *Evans v Crighton – Browne (1981) 147 CLR section 329(1)*, as discussed below in the section on misleading advertising.

19 Submission 182, (AEC), p. 8.

20 Prof. J Quiggin, *Evidence*, Wednesday, 6 July 2005, p. 30.

21 CEA s350 (1).

22 Submission No. 198, (AEC), to JSCEM Inquiry on 2001 Election, pp. 4–7. Dow Jones and Company Inc. v Gutnik established a precedent for the AEC's regulation of defamatory comment on the internet. In Roberts v Bass, the High Court decided that attempting to injure a candidate during the course of a campaign was justifiable on the grounds of

Evidence on proposed removal of section 350

12.40 During the inquiry, the AEC's position was endorsed. The application of s350 to internet publications was seen as problematical in a number of respects.

12.41 Professor Quiggin advised that jurisdictional issues and the anonymous nature of internet interaction made prosecution of defamation of any type a challenge for the courts, and s350 superfluous in the internet context:

> obviously, if I were going to publish something I knew to be defamatory, I would seek anonymity. In that case, I would be relying on undetectability, not on the fact that I was not breaching a provision of the Electoral Act. I would point out that the problem of anonymous defamation on the internet is far more serious outside the political sphere. After all, you can say a fair bit under decisions of the High Court in a political context that would be defamatory in other contexts. To have a special electoral provision directed at anonymous defamation seems anomalous to me.[23]

12.42 There were also issues of equity and free speech. Evidence claimed that s350 would disproportionately affect private commentators running websites, rather than political parties or journalists, striking dumb political debate.[24] Mr David Edgar observed:

> to require a single person to carefully watch what they say on the topic of politics places an onerous responsibility on them …If they allow a reader to leave comments—as most websites do—they are required to ensure each comment can be traced back to an individual. What are the implications of the global nature of their site? Must they ensure that a South African reader must leave an address?
>
> These decisions can only lead to a chilling effect on political speech. With apparently little to differentiate political speech, electoral material and personal opinion, the very real possibility of a not insignificant fine or expensive court case to clear one's name will lead to self–censorship.[25]

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qualified privilege, based on the implied right to freedom of communication guaranteed in the Australian Constitution.

23 Prof. J Quiggin, *Evidence,* Wednesday, 6 July 2005, p. 23.

24 Submission Nos 44; 59; 117; and 180.

25 Submission No. 117, (Mr D Edgar), p. 1.

12.43 Mr Bowe has personal experience of litigation under s350 as a website publisher. He maintained that the legislation is anachronistic in a modern communications environment and recommended it be removed from the Electoral Act:

> I think that the section may have been drawn up in an environment that has changed quite dramatically in relation to free speech issues. In particular, with the emergence of the internet, there has been an explosion in private comment on political matters and the means of making those comments have become a lot more freely available. I would suggest that in the distance past, when this section was drawn up, if one was a publisher presumably one had vast means at one's disposal or was engaging in an attempt to influence the outcome of the election, neither of which is true of me. I think that the section, in addition to the legal matters that were raised by the Electoral Commission, is obsolete in the environment that has emerged with the emergence of the internet.[26]

12.44 Senator Andrew Murray also supported the removal of the section, or its amendment to include a clause making it clear that defamatory material had *significantly affected the outcome* of an election. This might facilitate prosecution of defamatory political comment on the internet through the Court of Disputed Returns, which handles allegations of corruption of the electoral process.[27]

The Committee's view

12.45 Internet communications are by their nature both ephemeral and pervasive. The feasibility of regulating misleading or defamatory commentary in such an environment effectively, poses immense obstacles.

12.46 As noted, the Committee's consideration of this issue takes place at a time when other democratic nations grapple with the difficulties of developing appropriate regulatory standards for internet campaigning and political commentary.

12.47 In interpreting its requirements for campaign disclosure, the US Federal Electoral Commissioner has distinguished between classes of

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26 Mr W Bowe, *Evidence*, Wednesday, 3 August 2005, pp 52, 54. He noted that Professor Williams and Dr Orr are presently reviewing the constitutionality of s350.

27 Senator A Murray, *Evidence*, Wednesday, 3 August 2005, p. 56.

internet operator activity. A "non partisan" individual operator may spend any amount, for example, setting up a political website without being captured by electoral law. However, if he or she advocates a particular candidate, whether in a coordinated campaign with the candidate or not, expenditure disclosure rules will apply.[28] No more rigorous approach to regulation of "blogger" activity has been undertaken, however, given web operator outcry and the concomitant drive to preserve free speech under the First Amendment.[29]

12.48 The Committee considers that these regulatory approaches in the United States are not sufficiently advanced for the Committee to form a view beyond agreement that preservation of our constitutional convention of free speech is essential. The broader implications for the regulation of truth in political advertising, more generally, are discussed later in the chapter.

12.49 Nevertheless, in view of the AEC's previous opinion, and its reiteration in evidence to the current inquiry, the Committee believes that s350 should be removed and prosecution of defamation revert to existing defamation laws.

Recommendation 46

12.50 **The Committee recommends that the Government give consideration to amendment of the Commonwealth Electoral Act to remove section 350, which carries criminal actions and penalties for defamation against electoral candidates.**

28 Expenditure over $250 must be disclosed by an individual operator. If there is coordination with the candidate's campaign, amounts to be disclosed are different and are based on annual contribution categories. These are set under US campaign finance law, see section below. Corporations lodging campaign material on their websites must always disclose expenditure. Any news entity carrying out a press function is not considered to be "contributing" to a campaign, so is not subject to the Federal election law. Potter and Lowers, Chapter 9, *The New Campaign Finance Sourcebook*, updated February 2005.

29 Hasen R, "Should the FEC Regulate Political Blogging?", *Personal Democracy Forum*, 3 July 2005, p. 1, www. personaldemocracy.com/No.de/416.

Cost of modern elections

12.51 Election costs appear to be rising with every election campaign. This trend is occurring around the world, catalysing debate about the means and desirability of controlling campaign expenditure.

12.52 The costs of campaigns are carried and regulated by various arrangements in different jurisdictions. Australia's system has evolved to include mechanisms to moderate cost and make elections more equitable.[30] Amendments to the CEA in 1924 to require compulsory voting were introduced, for example, to increase voter turnout but also to reduce campaign expenditure.[31]

12.53 This section looks at the marshalling of the electoral campaign by:

- the AEC, which administers the election machinery and public awareness campaigns to expand and secure the electoral franchise; and
- political parties and candidates, with the support of business and public organisations, which wage high profile campaigns to inform the electorate and secure votes.

The AEC

12.54 The AEC's orchestration of the electoral process is a massive and expensive exercise. Independent of public funding (considered below), the AEC's expenditure for the 2004 election was almost $76 million, as set out in Table 12.1[32] AEC expenditure on the previous two federal elections was approximately $67 million spent for the 2001 election,[33] and $62 million for the 1998 election.[34]

30 Arrangements include provision of public funding to electoral candidates, and requirements for disclosure of campaign expenditure and of donations.

31 AEC, *Electoral Backgrounder No. 17*, p. 1.

32 To 30 June 2005. Submission No. 182, (AEC), p. 2.

33 JSCEM, *The 2001 Federal Election*, June 2003.

34 As at June 1999, JSCEM, *The 1998 Federal Election*, June 2000.

Table12.1 2004 Federal election expenses as at 30 June 2005

EXPENSES	$
Employee Expenses	37,008,089.38
Property Expenses	2,902,705.71
Election Supplies and Services[35]	13,281,785.93
Consultancy	983,655.60
Travel	1, 150,282.29
Advertising and Promotion	10,193,444.89
Computer Services	2,871,444.96
Mailing Services	1,610,371.95
Printing and Publications	5,583,442.29
Legal Services	230,207.63
Training of Polling Staff	79,474.86
Other Expenses	93,022.52
TOTAL ELECTION EXPENSES	**75,987,928.01**
+ Public funding	41,926,158.91
TOTAL ELECTION COST	**117,914,086.92**

Source *Submission 182, (AEC), p. 29.*

Educating the electorate

12.55 Educating the public about elections, sometimes at short notice, poses substantial challenges.

12.56 Voter education takes on an unprecedented significance and importance. New technologies and innovative approaches must be employed to ensure the widest franchise. These factors put a high demand on resources and drive up costs. As Table 12.1 shows, campaign advertising and promotion was the largest single item of AEC expenditure after wages and salaries.

Public funding

12.57 The other significant expenditure item for the AEC during elections is the public funding allocated to electoral candidates under Part XX, Funding and Disclosure, of the Electoral Act. The total for the 2004 Election, nearly $42 million, compares with $38.5 million allocated for the 2001 Federal Election.[36]

35 Including freight, election equipment, call centre services and forms.

36 JSCEM, *The 2001 Federal Election*, June 2003.

Campaign costs

12.58 The substantial cost of modern election campaigns drives campaign budgets well beyond the public funding provided to electoral candidates by the AEC.[37]

12.59 To address this deficiency in funds, parties and candidates rely on financial support garnered from fundraising events and from donations by organisations and private individuals. It is estimated that more than 80 per cent of funding gained by political parties comes from private sources and that, until recently, the amount of private funding has been growing.[38]

12.60 The Committee's report on the 2001 Federal election recorded that in the 2001-2002 financial year political parties spent a total of $131.5 million, more than three times the amount—$38.5 million—allocated to them in public funding.[39] Total campaign expenditures for the last election are not yet available.[40] Table 12.2 charts the rise in party expenditure reported over the last two election periods.[41]

37 See, for example, Mr T Gartrell, National Secretary, ALP, *Evidence*, *Monday*, 8 August 2005, p. 37; and see discussion in Chapter 13.

38 Exhibit No. 45, (Tham J-C and D Grove), "Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections", *Federal Law Review*, Vol. 32, 2004, p. 401.

39 As at February 2003. JSCEM, *The 2001 Federal Election,* June 2003, pp. 32–35.

40 Annual returns cover the period 1 July to June 30, and are provided to the AEC by 20 0ctober each year. See discussion of the legislation below.

41 Based on information as lodged with the AEC by February 2002. It does not incorporate amendments to returns as a result of AEC compliance reviews, nor does it include returns that were lodged after the returns generally became publicly available. See www.aec.gov.au/_content/How/political_disclosures/2001_report/page03.htm.

Table 12.2 Annual return summaries, showing total party expenditure 1999–2002

	1999-2000	2000-01	2001-02
	$m	$m	$m
Political parties			
Revenue	60.97	66.86	147.24
Expenditure	61.32	63.46	136.57
Loans	10.95	16.65	16.05
Associated entities			
Revenue	70.86	52.37	63.59
Expenditure	64.79	46.15	56.34
Loans	54.18	54.71	58.10

Source AEC Funding and Disclosure Report—Election 2001, "Financial Disclosure", p. 3

12.61 Between 1987 and 1996 campaign expenditure overall went from 21.2 million to 32.8 million. Advertising costs were the most expensive item in election campaign budgets. Between 1987 and 1996 political advertising costs almost doubled, from $8.6 million to $16.5 million.[42]

12.62 Estimates are that the Liberal-National Coalition and Australian Labor Party each spent some $20 million on advertising during the 2004 election year.[43] This $40 million package is an increase on former Federal election campaigns when they spent a combined $30 million in 2001 and 1998, and $27.2 million in 1996 on election marketing.[44]

The Committee's view

12.63 Australia's electoral law and funding regimes are designed to ensure that political candidates are adequately resourced to conduct forceful and fair campaigns. On the basis of the figures set out above, it would appear that the cost of conducting such campaigns is growing exponentially: the AEC and political candidates commit more resources with each election.

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42 Exhibit No. 45, (Tham J-C and D Grove), p. 405.

43 Submission No. 145, (Dr S Young), p. 4.

44 Cited in Miskin S, "Campaigning in the 2004 Federal Election: Innovations and Traditions", *Research Notes* (Information and Research Services), Parliamentary Library, No. 30, 2004-05.

12.64 The importance of effective communications within the modern electoral process is indicated by the high level of advertising expenditure for the AEC and for political parties.

12.65 While this is to some extent a consequence of media pervasiveness in society, the Committee is concerned that the steady and substantial increase in these costs may not be sustainable.

12.66 To develop an appropriate response to the apparent problem of rising campaign costs, the Committee surveyed arrangements for regulation of campaign expenditure in jurisdictions internationally.

Regulating campaign costs: overseas comparisons

12.67 Evidence before the Committee referred to regulatory approaches adopted by the United Kingdom, United States, Canada, New Zealand and Ireland. The main components of campaign finance regulation were :

- campaign expenditure caps;
- disclosure obligations and private funding limits;
- public funding allocations; and
- controls on campaign advertising and broadcasting.

Campaign expenditure caps

12.68 Some countries impose expenditure caps or other limits on the monies that can be spent by candidates on an election campaign. The arrangements for Canada, New Zealand and the United Kingdom are summarised below in Table 12.3.

12.69 In 2001 the United Kingdom overhauled its system of party finance regulation, and now has the most comprehensive regulatory regime for campaign finance. Among other things, the *Political Parties Elections and Referendums Act 2000* (PPERA) imposed specific limits on party campaign expenditure for the year before the date of the polls and ending on the date of the poll.[45]

45 Schedule 8 lists eight separate categories of campaign expenditure, including political advertising, see below.

12.70 Allowable expenditure is determined according to the number of seats being contested, although the amount allocated cannot fall below a prescribed minimum.[46] Any excessive allocation by a party treasurer is a punishable offence.[47]

Table 12.3: Campaign expenditure limits—selected countries

Jurisdiction	Expenditure limits
Australia (Federal)	No limit
Canada (Federal)	Preselection: 20% of election expenses in that district last election; Candidates: sliding scale $41,450 for 25, 000 electors +$0.52 per additional elector. Parties: $0.70 per elector in constituencies contested Third Parties: $150 000 including no more than $3000 in particular constituency race
New Zealand	$1 million for parties and $20, 000 per seat
United Kingdom	£30,000[48] per national party; under £10,000 for typical constituency campaign

Source: Professor Graeme Orr, Schedule reproduced in Submission 160, Exhibit 31, p. 50.[49]

Disclosure obligations and private funding limits

12.71 Regulations governing the amount of private funding that political parties receive have been implemented, or reinforced, in the United States, Canada and the United Kingdom in recent years.

12.72 In the United States, the Federal Election Campaign Act places monetary limits on contributions to candidates and prohibits funds from some sources.[50] Special limits are imposed on individual donations, with a biennial limit of US$101,400 and US$61,400 for all political action committees and parties. Each Senate candidate may

46 A distinction is made in the legislation between party candidate election expenditure, and party expenditure. Only funds "incurred for the election" are affected, meaning a candidate's own election expenses are not included. PPERA sch 9 (3) (2). (b). See discussion in Exhibit 45, (Tham, J-C and , D Grove), pp. 416–17.

47 *Political Parties Elections and Referendums Act 2000* (UK), s79 (2).

48 Adjusted up reflecting figure in Exhibit 45, (Tham J-C and D Grove), p. 417.

49 Submission No. 160, (Mr J-C Tham and Dr G Orr).

50 The current law in the area, the Bipartisan Campaign Reform Act (BCRA) was introduced in 2002, and was subject to amendment in early 2005. The Consolidated Appropriations Act of 2005 adjusted certain limits and conditions on permissible uses of campaign funds. FEC, *Record*, Vol. 31, No. 1, January 2005, p. 1.

receive US$37, 300 per campaign from State, district and local party committees.[51]

12.73 The US legislation also bans donations from corporation treasury funds and from some organisations and groups, including labour organisations, national banks, government contractors and political action committees. In addition, disclosure obligations for all annual donations above $200 apply.

12.74 Table 12.4 shows how Australia's regulation of the area compares with New Zealand, Canada and the United Kingdom.

Table 12.4 Donor limits and disclosure requirements—selected countries

Jurisdiction	Acts	Maximum amount for individual or corporation	Minimum amount for disclosure by party or donor
Australia (Federal)	Commonwealth Electoral Act	No maximum amount	$1,500 threshold for each separate donor
Canada (Federal)	Canada Elections Act	$5, 000 for individuals; $1 000 for corporations and trade unions; no foreign donations	$200: parties and candidates (and third parties spending over $500)
New Zealand	Electoral Act	No maximum amount; no foreign donations	$1, 000 for electorate donations $10, 000 for "national organisations" donations
United Kingdom	Political parties, Elections and Referendums Act	No maximum amount but donations above £200 only to be made by "permissible" donors (includes individuals, trade unions and corporations); no foreign donations	£5,000 for parties; £1,000 for local branches and individuals. Individual donors must declare donations of £200 or more

Source *Professor Graeme Orr, Schedule reproduced in Submission No. 160, Exhibit 31, p. 50.*[52]

Public funding allocations

12.75 In Australia, candidates receive public funding to assist with campaign expenses. Some other jurisdictions limit the use of public funding for campaign purposes.

51 In the United States, committees are established at state, district and local level to support candidates. Political action committees (PACs) are also formed by interest groups to militate support for their favoured candidates. "FAQs on BCRA and Other New Rules", www.fec.gov/pages/bcra/bcra_faq.shtml#Introduction

52 Submission No. 160, (Mr J-C Tham and Dr G Orr).

12.76 In the United Kingdom, specific electoral funding is limited to the entitlement of free postage for one communication to each constituent during an election.[53] Other public funding is not specifically tied to electoral purposes. Instead, monies are allocated to Opposition parties for performance of parliamentary functions. The amount is calculated on the seats obtained and electoral support achieved at the previous general election.[54]

12.77 In Ireland, public funding is allocated to parties but cannot be spent on campaign advertising. It must be used only for general administration of the party, research, education and training, policy formulation and branch and member coordination of activities.[55]

Controls on campaign advertising and broadcasting

12.78 The United Kingdom has the most rigorous controls on campaign advertising expenditure. The definition of "campaign expenditure" includes "party political" broadcasts and "advertising of any nature (whatever the medium used)".[56]This means that expenditure on political communication is banned, as mentioned above, for a full year preceding an election. Instead, parties are allocated free airtime by broadcasting licensees and public broadcasters.[57]

12.79 The UK also has other broadcasting controls, as do Canada and New Zealand. These countries use a combination of free airtime and broadcasting bans to moderate the political contest and to prevent an expenditure race.

12.80 These approaches are discussed in more detail under the section below on Advertising.

The Committee's view

12.81 The Committee notes that jurisdictions overseas provide a range of models for regulation of campaign finance expenditure. These models

53 Policy development grants are also allocated under the *Political Parties, Elections and Referendums Act 2000,* Exhibit 45, (Tham J-C and D Grove), pp. 408–09.

54 Known as "Short" and "Cranbourne" money. See Exhibit No. 45, (Tham J-C and D Grove), p. 408.

55 Submission No. 124, (Dr S Young), p. 5.

56 *Political Parties Elections and Referendums Act 2000* (UK), sch 9 (3) (7).

57 Submission No. 97, (Democratic Audit of Australia), pp. 3-4.

will be taken into account in the following section when evaluating options for adjustment to campaign finance regulation in Australia.

12.82 Senator Murray alerted the Committee to overseas prohibitions on foreign donations, as a discrete area of interest. His views are set out in the section on overseas funding and disclosure regimes in Chapter 13, *Funding and Disclosure.*

Expenditure controls

12.83 Unlike comparable jurisdictions overseas, Australia adopts a minimalist approach to regulation of campaign expenditure.[58] Our regime comprises:

- the provision of public funding;[59]
- candidate campaign expenditure disclosure requirements;[60]
- donation disclosure requirements;[61]
- broadcasting and publisher disclosure statements;[62]
- three day electronic advertising ban to 6pm on polling day; with broadcasters to provide opportunity for advertising prior to this period;[63] and
- the "caretaker convention" which limits all government advertising once an election is called.[64]

12.84 For the purposes of this section, the Committee will focus on the potential of proposed expenditure options to *limit campaign expenditure*. The Committee will not engage with systemic questions about public funding and political finance disclosure, which is the subject of the following chapter. Funding controls will, however, be touched upon in the section on campaign expenditure limits.

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58 For definition of electoral expenditure see CEA s308.

59 CEA s294.

60 CEA Division 5A.

61 CEA, s305A: candidates; s305B: parties.

62 CEA, ss310 and 311.

63 *Australian Broadcasting Act 1922,* (ABA), Schedule 2.

64 The convention requires among other things that the Government should avoid making major policy decisions and taking action that would "involve departmental employees in electoral activities". See *House of Representative Practice*, Fifth Edition, 2005, p. 58.

Campaign expenditure caps

12.85 Prior to 1980, Australia had campaign expenditure limits in place.[65] In order to maintain parity with other major democracies, a number of submissions proposed that caps on campaign expenditure should be reintroduced. However, few put forward any developed proposals for their implementation.

12.86 Mr Joo-Cheong Tham and Professor Graeme Orr were exceptions, providing detailed commentary. Mr Tham noted that whereas the United Kingdom had made its regulation of the area more robust, Australia leaves campaign finance largely unregulated.[66] He and Professor Orr cited British justifications for applying controls on campaign expenditure:

- the anti-corruption rationale—with campaign expenditure controls in place, parties would not be tempted to seek larger donations, carrying the risk of corruption and undue influence; and
- the equality/level playing field rationale—which assumes that "campaign expenditure buys votes", so destabilizing the integrity of the electoral contest.[67]

12.87 When applied to the Australian situation, the first principle suggested companion controls on donations should be implemented. This is discussed below.

12.88 The second criterion raised questions about the efficacy of campaigning to change voter opinion.

12.89 Although Mr Tham and Professor Orr noted that there was no true equation between campaign activity and voting patterns in Australia,[68] they considered that expenditure caps were necessary given that:

> one side or other of politics can use money to inordinately shape the landscape of political and electoral discourse. Whilst ideas need some airtime and hence money to breathe, it is unhealthy for representative democracy to allow open-

65 ABA, Schedule 2.

66 Exhibit 45, (Tham J-C and D Grove), p. 39.

67 Submission No. 160, Exhibit 31, (Mr J-C Tham and Dr G Orr), pp. 36-37.

68 Statistics did not support the view that increased campaign expenditure necessarily wins elections. For instance the biggest spender on political elections from 1974 to 1996 only won half the contests. Submission No. 160, Exhibit 31, (Mr J-C Tham and Dr G Orr), p. 37.

> slather electoral expenditure, because this can skew public policy debates.[69]

12.90 A stumbling block to proposed caps on campaign expenditure was that the courts may consider such controls an unjustified interference in free speech.[70]

12.91 Mr Malcolm Turnbull MP raised this issue when proposing caps on donations. He suggested the burden of the law could be limited by providing that a candidate or party's compliance would be a condition of receiving public money, leaving this as optional.[71]

12.92 Tham and Orr noted that workable legislation is already place in other countries with liberal traditions. They considered that capping laws are not only feasible but are highly effective. In the UK, Labour, Liberal Democrats and Conservative parties collectively spent total of £45.5 million in 1997. In 2001, after new cap legislation was introduced there was sharp drop in campaign expenditure, to £25.1 million.[72]

Private donations and campaign expenditure

12.93 Caps and controls on private donations are important features of regulatory regimes for campaign expenditure in the United States and Canada. Both apply conditions or bans on donations to political parties from unions, corporations and other organisations, and also caps on individual donations. The intention is to limit undue influence and contain campaign expenditure.

12.94 During the inquiry, a correlation was made between the size of private donations and increasing campaign costs in Australia.[73]

12.95 The origin of these funds, and the regulations governing their receipt, has been commented on during the Committee's inquiries into successive elections. Referring to the findings of the JSCEM's seminal report on the matter (1989), Mr Turnbull observed:

> as long as businesses and unions with vested interests can finance political campaigns real concerns will continue to be

69 Submission No. 160, Exhibit 31, (Mr J-C Tham and Dr G Orr) p. 39.

70 For reference: *David Lange v Australian Broadcasting Corporation* (1197) 189 CLR 520.

71 Submission No. 196, (Mr M Turnbull MP).

72 Exhibit 45, (Tham J-C and D Grove), p. 418.

73 Major parties were estimated to receive approximately $60 million annually. Submission No.145, (Dr S Young), p. 7.

> expressed. Some Australians will always have the perception, rightly or wrongly, that 'he who pays the piper calls the tune'.[74]

12.96 The Committee evaluated proposals to moderate these perceptions along the lines adopted overseas. Options included:

- imposing restrictions on the size of donations; and
- banning donations from certain organisations and groups.

12.97 The related issue of disclosure of donations and political expenditure is discussed in the following chapter.

12.98 One suggestion was that only individuals, not unions or corporations, should be allowed to make donations. Mr Turnbull recommended the CEA be amended so that that candidates and political parties may not spend money for campaign electoral purposes other than:

> (a) funds received from the Australian Electoral Commission as part of public funding,
>
> (b) donations received directly from individuals who are Australian citizens or otherwise on the electoral roll and who certify that the funds contributed are from their own or spouse's resources.

12.99 Mr Turnbull proposed that an annual cap on individual donations could be considered.[75] To encourage support of the measure, donations should be tax deductible, up to a certain limit.[76]

12.100 Mr Christopher Pyne MP supported this proposal, suggesting the annual cap could be $10,000. He predicted:

> there would be an immediate outcome from such a move—the spending by political parties on election campaigns would probably come down as it is likely less money would be available to political parties. I would hazard a guess that that would be welcomed by the voters.[77]

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74 Submission No. 196, (Mr M Turnbull MP), p. 1; and see JSCEM, *Who Pays the Piper Calls the Tune—Minimising the Risks of Funding Political Campaigns,* Inquiry into the Conduct of the 1987 Federal Election and 1988 Referendums, Report No. 4, June 1989.

75 To overcome a potential Constitutional challenge, as mentioned above, the new rule should provide that public funding is *conditional* on compliance with (a) and (b),

76 Submission No. 196, (Mr M Turnbull MP).

77 Submission No. 195, (Mr C Pyne MP).

12.101 Another view was that limits on donations from unions and corporations, as adopted in Canada, should apply. Senator Bob Brown stated:

> I am in favour and the Greens are in favour of a prohibition on donations coming from other entities to political parties. That is what public funding is for. I have just been in Canada, where, nationally, they put a ban on donations coming from unions, corporations and so on. They have given very good public funding to make up for that.[78]

Controls on the use of public funding for campaign expenditure

12.102 The aim of the public funding regime is to promote equitable and fair elections by providing a more level playing field in the political contest:

> It can help secure greater equality between citizens, promote freedom of speech by increasing the range of persons who have the opportunity to meaningfully exercise that freedom, relieve politicians from the burden of fundraising and to prevent corruption.[79]

12.103 Public funding is allotted to candidates who achieve four per cent of formal first preference votes in an election. The electoral funding rate at the last election was $1.94 for each vote.[80]

12.104 However, in absence of appropriate expenditure controls or caps, Mr Tham and Professor Orr considered that:

> public funding of political parties has fuelled campaign expenditure. In the absence of expenditure limits, and with open slather television advertising, there is no necessary limit to campaign expenditure or, more generally, to the parties' expenditure. The only real limit is the size of the parties' budgets. Even their perception of campaign saturation is no longer a natural limitation, with the contemporary advent of 'permanent campaigning' included increased use of internal polling, direct mail, and computerised tracking of elector's views, particularly by the major parties. Thus, if the parties' budgets expand because of public funding, we should expect

78 Senator B Brown, *Evidence,* Monday, 8 August 2005, p. 95.

79 Submission No. 145, (Dr S Young), p. 4.

80 See Chapter 13 for discussion.

> increases in campaign expenditure in the absence of other constraints like expenditure limits.[81]

12.105 With these cost drivers in place, Dr Sally Young submitted that:

> Australian politicians may in future legislate again to increase the rate of public funding so that they may spend more.[82]

12.106 Recommendations for review of public funding arrangements to control campaign expenditure included:

- the imposition of spending caps, with candidates accountable for expenditure;[83]
- that funding should only be allocated for actual expenditure, and not be paid on a dollar amount per vote;[84]
- public funding arrangements should not apply;[85] and
- parties should pay for their own campaign material.[86]

The Committee's view

12.107 Despite having derived our regulatory model from the United Kingdom, Australia has rejected the UK's more interventionist approach to regulation of campaign finance matters. In this, we stand outside approaches taken in other Commonwealth countries such as Canada and New Zealand.

Advertising costs and controls

12.108 This section deals with election advertising, defined as advertisements which candidates and parties use to canvass votes during an election period.

12.109 As discussed earlier in this chapter, advertising costs are a key budgetary item for governments, political parties and candidates. The political advertising budget has increased in proportion to overall budgetary expenditure, and rises with each election.

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81 Submission No. 160, Exhibit 31, (Mr J-C Tham and Dr G Orr), p. 25.
82 Submission No. 145, (Dr S Young), p. 5.
83 Submission No. 8, (Mr B Patterson), p. 1.
84 Submission No. 89, (Mr E Jones), p. 17.
85 Submission No. 125, (Festival of Light), p. 5.
86 Submission No. 130, (Mr P Andren MP), p. 5.

12.110 Within this budget, television broadcasting is the most expensive item. A breakdown of the 2004 advertising figures cited earlier indicates that the Coalition and the ALP each spent approximately $6 million on direct-mail and research, $2 million on television broadcasts, $1 million on radio, and $500,000 on newspaper advertisements.[87] New technologies add to this mix, with telemarketing and internet exposure[88] now used extensively.[89]

12.111 This intense media deployment became the focus of commentary in submissions, prompting recommendations for restraint in the form of advertising prohibitions and spending limits.

Advertising bans

12.112 Some regulatory jurisdictions routinely include advertising and broadcasting controls as part of their campaign finance regulatory architecture.

12.113 As mentioned above, the UK bans expenditure on electoral advertising for the full year before an election.[90] In addition, its *Broadcasting Act 1990* provides that "any body whose object is wholly or mainly of a political nature" is not permitted to advertise on radio and television. Major parties spend around 80 per cent of expenditure on billboards and hoardings. Paid advertisements in newspapers are also unusual.[91] Instead of paid advertising on television, parties are allocated free airtime by broadcasting licensees and public broadcasters.[92]

12.114 New Zealand also allocates free public broadcasting time. Additionally, the NZ Electoral Commission allocates funds to parties for purchase of time on commercial broadcasters. The amount of time allocated is proportionate to the vote achieved at a previous election

87 Submission No. 145, (Dr S Young), p. 4.

88 Australia experienced a huge growth in internet use between the 2001 and 2004 elections, from 50% in 2001 to 77% in 2004. Murphy M and Burgess G, "Keys to Power", *The Age,* 30 September 2004, p. 4.

89 Estimates from industry sources and media monitors. See Submission No. 145, (Dr S Young), p. 4.

90 *Political Parties Elections and Referendums Act 2000* (UK), Schedule 9 (3) (7).

91 Miskin S, "Political Advertising in Australia", *Parliamentary Library Research Brief No. 5, 2004-05,* 29 November 2004, p. 16.

92 Submission No. 97, (Democratic Audit of Australia), pp. 3-4.

or, for new candidates, is based on other indicators of voter support such as party membership.[93]

12.115 In the United States advertising bans or limits would conflict with First Amendment protections of free speech.[94] However, the US has some controls via advertising cost. Under the Federal Communication Act of 1934, broadcasters must sell advertising time to election candidates at the "lowest rate it has charged other commercial advertisers during the preceding 45 days, even if that rate is part of a discounted package rate". The Act also requires that if advertising space is offered to one candidate it is offered to all.[95]

12.116 Australia has experimented with imposition of advertising bans in the past, but these have been subsequently withdrawn when constitutional and operational problems were identified.[96]

12.117 Controls remain limited to the provisions set out in Schedule 2 of the *Broadcasting Act 1922.* These impose a three day ban on political advertising, from Wednesday to the end of polling on Saturday. The ban is administered under a code by the Australian Broadcasting Authority.[97]

12.118 There was no support in the evidence for advertising bans *per se*. Instead, such controls were seen as integral to proposed campaign finance regimes.

The Committee's view

12.119 The past experience and absence of agitation for bans indicated to the Committee that this was not an issue which required further consideration.

12.120 However, other more localised concerns about advertising bans emerged during the 2004 election. The Committee understands that a number of local governments have introduced by-laws to limit or ban electoral advertising, in particular election signage.

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93 Submission No. 97, (Democratic Audit of Australia), pp. 3-4.

94 Miskin S, "Political Advertising in Australia", 29 November 2004, p. 12.

95 Kaid L, and A Johnston, *Videostyle in Presidential Campaigns: Style and Content of Televised Political Advertising*, Praeger series in Political Communication, Praeger, Westport, Connecticut, 2000, p. 7, quoted in Submission No. 124, (Dr S Young), p. 6.

96 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, in AEC, *Electoral Backgrounder No.15,* p. 9.

97 AEC, *Electoral Backgrounder No. 15,* pp. 7–8.

12.121 Aside from obvious practical difficulties arising from inconsistent requirements being imposed by different councils, often located within a single Federal electorate's boundaries, the Committee is concerned that these developments undermine an important principle for candidates.

12.122 In particular, the Committee believes that candidates for a Federal Election should enjoy uniform entitlements to advertise, and should not be subject to additional and inconsistent regulation imposed by other jurisdictions.

12.123 Furthermore, the Committee considers that these by-laws are possibly in breach of section 327of the CEA, which provides for political liberty of expression,[98] and determines that State and Territory laws have no effect if they discriminate against and between electoral candidates.[99]

12.124 The Committee therefore concludes that the AEC should assess concerns about the jurisdiction of local and State laws governing electoral signage, and determine whether Commonwealth legislation safeguards equal advertising rights for all candidates, especially where signage is erected on private property.

Recommendation 47

12.125 **The Committee recommends that the AEC assess local and state legislation governing electoral signage and determine whether the Commonwealth Electoral Act should be amended to preserve candidates' equivalent rights to display electoral advertising during an election period.**

Spending limits

12.126 As noted in the section on campaign expenditure, the United Kingdom, Canada and New Zealand have limitations on campaign expenditure, a key objective being to contain advertising expenditure.

12.127 In the Australian context, the lack of a comprehensive approach to campaign regulation finance regulation was thought to drive the "continuous campaign" described by Dr Young:

98 CEA s327(1).

99 CEA ss327(2) and (3).

> Australian politicians are no longer confining their election campaigning to the official election campaign period but are instead, stringing their campaigns throughout the election cycle and, increasingly, pushing the costs of this 'permanent' campaigning onto taxpayers.[100]

12.128 Professor George Williams and Mr Brian Mercurio, among others, made connections between the lack of controls on donations private donations, and the spiralling costs of campaign advertising by major parties:

> Australia's laissez-faire approach to campaign finance and advertising laws is troubling for a number of reasons, not the least of which is that it inherently favours major parties. For instance, the fact that Australia allows unlimited donations and no expenditure caps effectively means that the parties can blitz the electorate with advertising similar to what we are used to with corporate ads, such as Coles v Woolworths or Coke v Pepsi.[101]

12.129 The Democratic Audit of Australia concluded that:

> the laissez-faire attitude in Australia towards paid political advertising: (a) compounds inequality between political parties and; (b) creates a spending race between major political parties, with the cost of this race driving up the dependence on large corporate donations already discussed.[102]

12.130 These various criticisms suggested a more appropriate balance of campaign broadcasting and expenditure controls are needed.

12.131 One proposal was that purchased television advertising time should be regulated.[103] Mr Eric Jones advocated for free airtime to counteract a system which he saw as privileging incumbent members and political parties.[104]

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100 Submission No. 145, (Dr S Young), p. 1.
101 Submission No. 48, (Prof. G Williams and Mr B Mercurio).
102 Submission No. 97, (Democratic Audit of Australia), p. 3.
103 Submission No. 97, (Democratic Audit of Australia), p. 3.
104 Submission No. 89, (Mr E Jones), p. 14.

12.132 A different approach to the problem was to regulate perceived high costs of advertising caused by the peculiarities of the Australian electoral system:

> Australian political parties appear to pay up to 50 per cent more 'for advertising time than do private companies'. This is because political advertisers do not know precise election dates until they are called so they are unable to book in advance. Once they do know the election date, they want advertising time urgently and are willing to pay for dearly for it. For all of these reasons, they are often charged a very expensive rate.[105]

12.133 Accordingly Dr Young judged:

> The lack of a requirement to sell airtime to political candidates at a reasonable rate is ultimately costing Australian taxpayers through the public funding system and contributing to pushing up the increasingly high costs of election campaigning.[106]

12.134 Overwhelmingly, however, advertising controls were discussed as a discrete but integral part of campaign expenditure architecture. The Committee was referred to overseas models for this, and for examples of approaches to broadcasting regulation.

The Committee's view

12.135 Australia's regulation of electoral advertising is commensurate with comparable approaches overseas; it is based on two principal regulatory features seen in those regimes:

- an election advertising blackout on all electronic media from midnight on the Wednesday before polling to the end of polling on the Saturday; and
- guaranteed opportunities for pre-election broadcasts.

12.136 While not obliged under the law, the Australian Broadcasting Commission provides opportunities to political parties for free-to-air advertising prior to the three day electronic media blackout.[107] Other

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105 Submission No. 145, (Dr S Young), p. 6; and see Submission No. 160, Exhibit 31, (Mr J-C Tham and Dr G Orr), p. 26.

106 Submission No. 145, (Dr S Young), p. 6.

107 The ABC allocates free TV air-time by a decision of its Election Coverage Committee. See www.aceproject.org/main/english/pc/pce03a.htm.

broadcasters are also encouraged to offer time, paid or unpaid, at their discretion.[108]

12.137 In the Committee's view, there is an appropriate balance between restriction and opportunity in the current laws. The three day ban preserves a reasonable period for review and assessment before the vote is cast. The broadcasting allocation encourages the expansion of political debate, and the clarification of important issues for the electorate in the lead up to election day.

12.138 The Committee supports the continued operation of these arrangements and does not consider that any further restrictions on airplay, advertising expenditure or other adjustment is warranted.

Laws governing 'misleading' advertisements

12.139 As previously discussed, the CEA does not seek to regulate information that will influence how an elector makes a decision.[109]

12.140 Under s329(1) the AEC is relieved of making value judgements about the veracity of the content of political advertising. Instead, its role is to regulate the publications—such as how-to-vote (HTV) cards—that assist voters with the actual marking of the ballot paper, and the depositing of that paper in the ballot box.

12.141 Questions about material that is *factually misleading or defamatory*, in the broader sense, is discussed below under truth in advertising. Here the narrower interpretation provided by the AEC is taken.

12.142 In Chapter 5, *Election day,* the Committee examined issues associated with the Liberals for Forests HTV and other allegations of misleading conduct. These highlighted for the Committee the limited effect of the regulations on conduct, over and above AEC adjudication of published electoral matter.

12.143 In its report on the 2001 Federal Election, the Committee expressed concerns about the limited capacity of the legislation to deal with misleading conduct. To ensure that any misconduct could be immediately addressed on election day, the Committee recommended :

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108 ABA Schedule 2 provides that broadcasters must provide "opportunities" for parties to access air-time but does not require that this be free.

109 This important distinction was upheld by the High Court in 1981, in *Evans v Crighton – Browne* (1981) 147 CLR.

- relevant parties should be advised of Divisional Retuning Officers (DRO)/Australian Electoral Officer (AEO) decisions on disputed material; and
- that presiding officers should advise that any continued handing out of this material will be considered by the AEC as in breach of the Electoral Act.[110]

12.144 This recommendation was supported in principal by the Government.[111]

12.145 The AEC has advised that it remains steadfast in its view that s329 does not apply to misleading conduct, as against publications. Hence: "there is no regulation or section of the Act which allows us to enforce any of that".[112]

The Committee's view

12.146 The Committee has arrived at the view that the visual agreement between the green Liberals for Forests HTV card and the Liberal party card could not have been effective if the name *Liberals* for Forests had not been prominent. The prominence of the name exacerbated the confusion rather than otherwise. In this respect the Committee considers that further consideration needs to be given to the registration of party names. This issue is considered in Chapter 4, *Party registration*.

12.147 The Committee made a recommendation in Chapter 5, *Election day,* based on evidence that officials are not employed in sufficient number on election days. This matter must be addressed; it has clear implications for the type of behaviour evinced at Richmond. However, without a positive judgement that an HTV card is misleading, AEC officers are in any case powerless.

12.148 The AEC's reluctance to broaden the interpretation of s329 is understandable but the inability to act, in such circumstances, discredits the integrity of the electoral process on polling day.

12.149 The Committee considers that recourse could be in review of s340 of the CEA which governs prohibition of canvassing near polling booths and s348, regulating behaviour at polling booths.

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110 Recommendation 23, JSCEM, *The 2001 Federal Election,* 2003, p. 198.

111 *Government Response to the Report of the JSCEM: The 2001 Federal Election*, 2003, p. 10.

112 Mr P Dacey, Deputy Electoral Commissioner, AEC, *Evidence,* Friday, 5 August 2005, p. 79.

Recommendation 48

The Committee recommends that the AEC review Sections 340 and 348 of the Commonwealth Electoral Act with a view to addressing issues of "misleading conduct" on polling day.

Truth in advertising

12.150 The potential to better regulate electoral material that is misleading or defamatory has been a recurrent theme for this Committee and for the Parliament.

12.151 A Senate evaluation of "truth" proposals set out in *the Electoral Amendment (Political Honesty) Bill 2000* [2002] concluded that there are both legal and practical obstacles to the implementation of "truth" legislation.[113] The Bill had been introduced by Senator Murray to amend the CEA to prohibit, on pain of substantial penalties, any electoral advertising material containing a purported statement of fact that is "inaccurate or misleading to a material extent".[114]

12.152 Commenting on the Evans v Crichton-Brown (1981) judgement, and the consequent unenforceability of "truth" in political advertising under s329, the Professor Williams and Mr Mercurio submitted:

> by allowing deceptive and misleading advertisements to air, Australia is potentially violating the internationally known standard for 'free and fair' elections. Moreover, it can be argued that the party running the deceptive or misleading advertisement denies the other parties a fair and equal piece of the electoral process. While this argument can be countered by asserting that all parties engage in such deceptive and misleading comment, such a response is unsatisfactory.[115]

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113 Senate Finance and Public Administration Legislation Committee, *Charter of Political Honesty Bill 200{2002}, Electoral Amendment (Political Honesty) Bill 200 [2002], Provisions of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000; Auditor of Parliamentary Allowances and Entitlements Bill 2000 [2002]*, August 2002, pp. 91–92.

114 The Bill provided substantial penalties of $5,000 for individuals and up to $50,000 for corporations. SFPALC report, p. *v*; and see discussion JSCEM, *The 2001 Federal Election*, p. 131.

115 Submission No. 48, (Prof. G Williams and Mr B Mercurio).

Can facts be misleading?

12.153 The Committee is aware that there could be difficulty in establishing the "fact" of a matter in an Election situation.

12.154 The interpretation of "inaccurate and misleading" under the present legislation was raised in the Committee's public hearings. The issue for the ALP was verification of the factual content of advertising material sourced to the Reserve Bank of Australia.

12.155 The ALP maintained that :

> the Liberal Party issued misleading flyers which had the effect of deceiving voters thinking that the Reserve Bank… supported their claims. This included the statement:
>
> > Over 30 years interest rates have risen to over 10% under every Labor government. Source: Reserve Bank of Australia.
>
> No report, media release or public comment from the Reserve Bank is cited for this purely political statement. This is because none exists.[116]

12.156 The contrary view heard by the Committee was that:

> statistics reveal that during the Hawke and Keating period of government, between 1983 and 1996, the standard variable home mortgage rate rose to 17 … according to those statistics published by the RBA… Those are matters of public record, as revealed by the statistics published by the RBA.[117]

12.157 Irrespective of any complaint to the RBA, the ALP confirmed that the statistics quoted were: factual; produced by the RBA; and, indisputably, "the[re] would be those published statistics".[118]

12.158 Senator Brown referred to an article in the Melbourne *Herald Sun* which the Australian Press Council found had misled voters about Greens' policies. He stated:

> I believe we should legislate to ensure that an independent office in the Electoral Commission has that power to challenge people, to test the veracity at least of advertising and of election material generally before it is put into the public arena. We need to defend the right of voters to be

116 Mr T Gartrell, National Secretary, ALP, *Evidence*, Monday, 8 August 2005, pp. 37–38.

117 Senator G Brandis, *Transcript of evidence*, Monday, 8 August 2005, p. 52.

118 Mr T Gartrell, *Evidence*, Monday, 8 August 2005, p. 51.

> properly informed and not misled on the way to the ballot box, particularly in a system which has compulsory voting.[119]

12.159 A number of submissions also expressed concerns about authorisation tags on broadcast and other electoral advertising material. The AEC noted in its submission that most complaints of this type arise because of misconceptions that authorisation requirements under s328 require:

- the disclosure of the identity of the political party which distributed the material; and
- that authorisation requirements apply to internet or telephone advertisements.[120]

Truthfulness in TV electoral advertising

12.160 Another area of commentary was the regulation of truthfulness in televised electoral broadcasts.

12.161 Prior to June 2004, complaints about the truthfulness of television electoral advertising were made to the Federation of Australian Commercial Television Stations (FACTS). FACTS could then investigate the veracity of the advertisement's content and recommend on its continued broadcasting.[121]

12.162 Evidence to the Committee raised concerns that FACTS, now known as Free TV Australia, no longer has the authority to monitor the truthfulness of electoral advertising.

12.163 Senator Brown submitted that television advertisements, which falsely represented Green policies in the lead-up to the election, would not have been permitted under the previous regime. He asked the Committee to review the relevant legislation and ask for reinstatement of Free TV Australia's surveillance authority over the content of television political advertising.[122]

12.164 In its report on the 2001 election, the Committee recorded how FACTS had accepted, following legal advice, that it had no jurisdiction to vet the content of political advertising.

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119 Senator B Brown, *Evidence*, Canberra, Monday, 8 August 2005, p. 67.

120 Submission 182, (AEC), p. 7.

121 Submission No. 39, (Senator B Brown), p. 2.

122 Submission No. 39, (Senator B Brown), p. 2.

12.165 FACTS acknowledged this in a letter to political parties, stating that it had formerly acted on the belief that the *Trade Practices Act 1987* applied to political advertising. This had led to a situation where advertisements on television were subject to stricter controls than those broadcast on radio.[123]

12.166 Free TV Australia now reviews election material:

- for classification under the Commercial Television Industry Code of Practice;
- to ensure that it complies with relevant legislation under the Broadcasting Services Act (Clause 2, Part 2 of Schedule 2) relating to provision of authorisation tags, and with state and Federal Electoral Acts; and
- to protect broadcasters from liability under defamation laws.[124]

12.167 Under this arrangement, electoral laws governing defamation and the prohibition of misleading information are consistently applied to both radio and television advertising (under s329 [1] and s 350). The responsibility for compliance rests with the party or candidate authorising the advertisement, and penalties apply if the requirements are not met.[125]

12.168 As indicated, under s350 (2) candidates have the right to make a complaint about false or defamatory statements in advertising material, and to seek an injunction preventing the repeated publication of such statements. This action would be taken out against the person authorising the speech, usually a party representative or employee.

12.169 This approach prevents any possible incursion on the implied freedom of political communication, or "free speech" in the Australian Constitution, that would be made if legislation controlling "truth" in television political advertising was to be introduced.[126] It also removes any responsibility for adjudication of contentious matter from the AEC.

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123 JSCEM, *The 2001 Federal Election*, pp. 128-29.

124 AEC, *Electoral Backgrounder No. 15,* p. 7.

125 AEC, *Electoral Backgrounder No. 15,* p. 7.

126 This conclusion being reached by the High Court in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, in which proposed legislation, the *Political Broadcasts and Political Disclosures Act 1991,* was struck down as unconstitutional. AEC, *Electoral Backgrounder No. 15,* pp. 6, 9.

The Committee's view

12.170 The Committee's view remains that there is a high risk that the introduction of so-called "truth" legislation would traverse the implied freedom of political speech underpinning the democratic principles which govern our electoral processes.

12.171 The Committee considers that the primary objective of the regulation of electoral advertising under electoral law is that it should be consistent.

12.172 The present system defers decisions about the truthfulness of any advertisement to the courts. The CEA does not give the AEC authority to make judgements on matters of truth in political advertising; instead it is the offended candidate who can take action against allegedly untrue statements about that candidate and his or her policies.

12.173 In this respect, the Committee finds there is no foundation to ALP assertions that there was anything misleading or deceptive about the use of RBA statistics in the Liberal Party electoral advertisements. All figures quoted were verifiable and accurate, and had been issued by the Reserve Bank of Australia in official publications.

12.174 Of more serious import, the Committee believes that Senator Brown's representations over the inaccuracy of statements in the Melbourne *Herald Sun* article are of less than honest intent. The policies described in the article were identical to those publicly and explicitly advocated on the Greens' party website at the time. There was one exception which was a technical error, but it too had been sourced from an earlier Greens' policy announcement.[127]

12.175 On consideration of the facts of this matter, the Committee concludes that the Australian Press Council's findings against the Melbourne *Herald Sun* article constitute an error of judgement. Nothing in the article was invented; it was entirely sourced from the Green's website and its intention was to do nothing other than to truthfully inform the public.

12.176 In relation to the prosecution of untruthful matters more generally, the Committee has concurred with the AEC's view that current

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127 "The *Herald Sun* ran an old policy". Senator B Brown, *Evidence,* Monday, 8 August 2005, p. 70. The Green's Corporate Tax rate, which was quoted as being 49 per cent, was an accurate reflection of the tax rate represented on the site at the time. It was later adjusted. See Mr T Smith MP, House of Representatives, *Hansard*, 17 March 2005, pp. 104-05.

mechanisms for treatment of defamatory material under s350, are deficient, and potentially unenforceable as criminal law.

12.177 It has therefore recommended that the Government give consideration to repealing the section, and that action be taken through civil court jurisdictions.