



NICK XENOPHON
Independent Senator for South Australia
AUSTRALIAN SENATE

Committee Secretary
Joint Standing Committee on Electoral Matters

BY EMAIL: jscem@aph.gov.au

Dear Secretary

RE: Inquiry into the conduct of the 2010 federal election

I would like to thank the Committee for the opportunity to make a submission to this Inquiry.

While I was not a candidate during the 2010 election, I remain very concerned about the activities of some candidates during the campaign period, particularly in relation to what could be considered misleading advertising.

During the campaign, two different candidates placed advertisements in print media which made what I felt were misleading statements in relation to me. I have attached copies of these for the Committee's information.

The first advertisement, published in the *Adelaide Advertiser*, was issued by a candidate representing Family First. The advertisement inferred that I had endorsed this candidate, which I had not. It also stated that, if the candidate was elected, he would be an 'independent' Senator, which is incorrect.

The second advertisement, which was published in same paper, encouraged people who support me to vote for a particular candidate, who I had not endorsed. It also inferred that I am a climate change sceptic, which I am not.

I wrote to the Australian Electoral Commission with my concerns, which were essentially that my supporters were being encouraged, through inaccurate or easily misinterpreted advertisements, to vote for people I had not endorsed and did not support.

My response Mr Paul Priani, Chief Legal Officer of the AEC read, in part, as follows:

I note several things in relation to the facts of this matter.

First, Senator Xenophon is not an candidate for this Senate election.

Second, Mr Day is a candidate and on the ballot paper is clearly identified as being endorsed by the Family First Party. The only candidate on the SA Senate ballot paper who appears with the word "independent" against their name Michelle Drummond.

Third, the statement made in the advertisement is:

"SA currently has one Senator who is independent of the two major parties (Nick Xenophon). Imagine what we could do if we had two independent Senators representing the interests of South Australia."

As has been made clear by the High Court in the case of Webster v Deahm, an electoral advertisement is to be "read as a whole" (see paragraph 30). The first sentence that has been highlight merely refers to Senators who are independent of the two main parties, not Senators who are "Independent" per se.

As Senator Xenophon is not a candidate in this election, then it would appear that section 351 of the Commonwealth Electoral Act 1918 is unable to operate based on the current facts.

I also note that Senator Xenophon's position and interest on the protection of the Murray Darling Basin is a matter of public record. The claim in the advertisement that you have highlighted is merely that Mr Day claims to have a similar concern. Accordingly, this appears to be the reverse of the situation contemplated by section 351 of the Act.

As I previously advised you last week there is no possibility of section 329 operating based on the facts of this matter due to the operation of the High Court in of Webster v Deahm [1993] HCA 38 and Evans v Crichton-Brown [1981] HCA 14 which stated that a clear distinction is drawn between material that is used to form a judgement of which candidate to vote for and material that misleads or deceives an elector in relation to the "casting of a vote".

Based on the above, there does not appear to be anything that falls within the jurisdiction of the AEC to be able to take action.

I appreciate that the AEC is only able to administer the Act, and cannot take action outside the limits of the current law, and I would like to thank them for their advice in this instance.

However, I am concerned that there appears to be little protection for Senators or MPs, whether candidates in an election or not, if another candidate chooses to take advantage of the goodwill an individual or party has built up among their constituency.

I am concerned that the Act is not strong enough, and that candidates can issue information that is technically (under the current Act) not misleading, but can be open to misinterpretation.

This protection is particularly important for independents and minor parties, who often rely on preferences and do not have the large campaign funds of the major parties.

Equally, however, independents and minor parties must be subject to the same level of scrutiny as the major parties.

I believe there is a responsibility to ensure that voters are provided with clear, correct information so that they can make an informed choice about how to cast their vote.

Information that is misleading or can be easily misinterpreted no longer has a place in election campaigns, and I strongly encourage the Committee to consider what changes can be made to tighten the Act in this area.

Yours sincerely

NICK XENOPHON

16/02/2011