

Authorisation of electoral materials

Overview

- 2.1 This chapter focuses specifically on issues raised about authorisation of communications to voters in electoral materials. Significant concerns were raised about how changes in technology have led to the change in the way voter communications are delivered to the public. Additionally, considerable concerns were raised that current legislation is inconsistent, and has not kept up with modern methods of communication.
- 2.2 Broadly, concern has arisen when electoral material is communicated through new means without the requirement to authorise. This places in doubt the integrity of the material being disseminated to the public and is at odds with the overarching purpose of authorisation which exists to ensure that electors know the source of any electoral advertising they receive.
- 2.3 Mr Tom Rogers, the Australian Electoral Commissioner, summarised public expectation of electoral processes for authorisation as follows:
- As I read out the other day in my opening statement to the first hearing, our understanding of what people say to us about what electors expect out of the process is that it is straightforward, free from discord or violence and that results are marked by high integrity. In my mind, high integrity also means transparency so that they understand what is occurring.¹
- 2.4 Submitters and witnesses to the inquiry raised specific issues about SMS, robo-calling and the use of social media to deliver political messages in that it may be difficult or impossible to know who the message is from as it falls outside the scope of the current legislation.

1 Mr Tom Rogers, AEC, *Proof Committee Hansard*, Canberra, 11 November 2016, p. 12.

2.5 For example, at a public hearing on 15 November 2016, Mr Tony Nutt, Federal Director of the Liberal Party stated:

I think the general principle is ... that, if a message is robo-called through or mass phone called through, you should be able to work out who is raising the issue with you and what they are saying. That gives an elector some notice, and they can then make judgements about that in the same way they can with a TV ad, a radio ad, a mail piece or something online which has got money behind it.²

2.6 The Australian Greens also stressed in their submission the importance of people knowing the source of electoral information, stating:

We recognise the importance of voters being aware of the source of the party, candidate and third party communications during election campaigns.³

2.7 Evidence provided to the Committee is discussed in more depth throughout this chapter.

New media and the case for reform

2.8 Communications technology is rapidly evolving and has led to a revolution in the way we communicate with each other. Political parties, candidates, associated entities and third parties from across the political spectrum now make full use of the many methods of communication available to deliver their political messages. This includes the use of social media, email, SMS and robo-calling, as well as the more traditional methods of print, radio and television advertising.

2.9 In recent federal elections, the mix of traditional and new communications media used in campaigns has continued to evolve with the addition of new social media. The “inherent cheapness of electronic communications to direct marketers suggests that SMS, email, ‘robo-calling’ and variations as yet unimagined will continue to be employed.”⁴

2.10 Authorisation of election materials is a critically important issue and questions were asked throughout the inquiry about how best to manage requirements as they apply to various communication methods, beyond the traditional.

2 Mr Tony Nutt, Liberal Party of Australia, *Proof Committee Hansard*, Melbourne, 15 November 2016, p. 39.

3 The Australian Greens, *Submission 89*, p. 6.

4 Graeme Orr, *The Law of Politics*, 2010, p. 181.

- 2.11 Given the international and dynamic nature of new media, and the relative ease and anonymity with which material can be made available, “key questions for consideration are the extent to which new and emerging campaign techniques made possible by new media require regulation, the extent to which any attempts to extend current campaign regulations to emerging forms of new media are likely to be successful.”⁵
- 2.12 Mr Chris Althaus of the Australian Mobile Telecommunications Association (AMTA) provided evidence at a Committee hearing in relation to the growth in messaging traffic and the trends in the use of new media:
- Again, just to underscore the volume of messaging that is going on: typically in a mobile context, for example, we are experiencing data traffic on our networks that doubles annually. We are now sending in the order of 50 billion text messages in a year ...⁶
- 2.13 Submitters and witnesses to the inquiry generally agreed that changes in election campaigning formats and techniques are a driver for change to authorisation requirements. For example, the Liberal National Party argued “in the interests of integrity and transparency, there is clearly a need for the authorisation requirements under the electoral law to be modernised.”⁷
- 2.14 Mr Nathan Quigley, NSW Nationals, also commented on the growth in use and importance placed on new media, suggesting that it is necessary to consider how to manage this phenomena:
- ... we live in a world where mainstream sources of media are trusted less and less. People are drawing their information from a variety of sources and if people are targeting a number of those sources, whether they be text messages or Facebook pages, at the right demographic with the right messages, even if they are untrue, the propensity of people to weigh that up against what they are hearing from traditional media is becoming less and less. I think the effectiveness of lines of communication like that is only increasing and if people are not using them responsibly then we leave ourselves open to a lot of trouble.⁸
- 2.15 When originally drafted, the legislation did not contemplate that election campaigns would come to rely heavily on these new methods of

5 Australian Government Electoral Reform Green Paper, *Strengthening Australia's Democracy*, 2009, p. 149.

6 Mr Chris Althaus, AMTA, *Proof Committee Hansard*, Canberra, 11 November 2016, p. 16.

7 Liberal National Party, *Submission 68*, p. 6.

8 Mr Nathan Quigley, NSW Nationals, *Proof Committee Hansard*, Sydney, 16 November 2016, p. 29.

communication. The *Commonwealth Electoral Act 1918* has therefore been amended over time in an attempt to keep up with modern technology.

2.16 The Committee heard evidence from the AMTA that technology is moving very rapidly and “the over-the-top use of internet applications in association with our networks is something that we are unable to control.”⁹

2.17 The AMTA also noted that “in every month there are about 15 million unique Australian actions taken over Facebook, 14 million on YouTube et cetera.”¹⁰

Committee comment

2.18 The Committee is of the view that the current requirements for authorisation for print and broadcast do not appropriately cover many new forms of communications of electoral materials. In seeking to establish a level playing field for all participants, where the source of electoral advertising is always available to electors, the Committee recognises the need to implement regulations that meet that objective without compromising the purpose of the advertising.

2.19 In considering how to address the issues arising in relation to the authorisation of voter communications, the Committee is of the view that a principle based approach is most appropriate:

- ⇒ Accountability – parties and other participants should be held to account and be responsible for their political statements;
- ⇒ Traceability – those who authorise electoral materials should be identifiable and traceable for enforcement and other purposes; and
- ⇒ Consistency – in the application of the rules and requirements to all electoral material.

2.20 These principles are explored in more detail below.

Principle 1 – Accountability

2.21 The principle that all campaign participants should be equally accountable is fundamental in laying the bedrock for a level playing field. Any loss in accountability regarding an individual, party or other organisation could be viewed as a threat to the election process.

2.22 The Committee supports a system of full accountability so that the source of any communication is readily available to the elector and the relevant

9 Mr Chris Althaus, AMTA, *Proof Committee Hansard*, Canberra, 11 November 2016, p. 15.

10 Mr Chris Althaus, AMTA, *Proof Committee Hansard*, Canberra, 11 November 2016, p. 15.

authorities. While the existing authorisation requirements apply to all participants, the lack of authorisation requirements for increasingly prevalent mass communication formats such as messaging and robo-calls has created the potential for participants to communicate with electors anonymously.

2.23 While some participants may choose to authorise their communication in unregulated formats in the spirit of accountability, others choose not to. This does not provide a level playing field for participants or meet the three principles of effective regulation.

2.24 Mr Paul Pirani, Australian Electoral Commission noted:

... the worst thing for the AEC is when we get an electoral advertisement that is totally unauthorised, which leaves us scratching around trying to find out who was responsible for publishing it, and that can be a very difficult task.¹¹

2.25 Submitters and witnesses to the inquiry from across the political spectrum expressed strong consistent views on this point. For example, the Liberal National Party noted that “while participation in the political process is a fundamental democratic right, it is important that all players are made to abide by the same rules to ensure a level playing field.”¹²

2.26 The Australian Greens “recognise the importance of voters being aware of the source of party, candidate and third party communications during election campaigns.”¹³

2.27 The ALP observed the current rules are confusing and difficult to administer. Thus, as noted in the ALP’s submission, “there is an arguable case that the rules have not kept up with technological change and are unfit for the digital age.”¹⁴

2.28 In his evidence Mr Nutt supported accountability, saying “there is a general public policy issue which we regard as urgent and compelling, which is that, where an elector gets a communication, they ought to be able to tell who that communication is from and it ought to be authorised so that people can be held to account for it.”¹⁵

2.29 The Australian Labor Party (ALP) supports a level playing field but:

... would be extremely concerned by any proposal to impose stricter regulations on any individual participant or class of participants in an election campaign, for example grassroots

11 Mr Paul Pirani, AEC, *Proof Committee Hansard*, Canberra, 11 November 2016, p. 5.

12 Liberal National Party, *Submission 68*, p. 7.

13 The Australian Greens, *Submission 89*, p. 6.

14 ALP, *Submission 69*, p. 3.

15 Mr Tony Nutt, Liberal Party of Australia, *Proof Committee Hansard*, Melbourne, 15 November 2016, p. 33.

organisations such as GetUp!, trade unions or stakeholder groups such as the Business Council of Australia.¹⁶

Recommendation 1

2.30 **The Committee recommends that the Act is amended to specifically and explicitly address the matter of authorisation of electoral materials to ensure that:**

- **parties and other participants should be held to account and be responsible for their political statements;**
- **those who authorise electoral materials should be identifiable and traceable for enforcement and other purposes; and**
- **there is consistency in the application of the rules and requirements to all electoral material.**

2.31 The Committee notes that authorisations do not currently fall under its own part within the Act but is prescribed in Part XXI (Electoral Offences) of the *Commonwealth Electoral Act 1918*:

- Section 328 covers various printed and video recorded advertisements.
- Section 328A covers paid electoral advertising on the internet.
- Section 328B covers how-to-vote cards.
- Section 331 covers headings for electoral advertisements in newspapers and magazines.

2.32 Section 334 covers depiction of electoral matter on footpaths and buildings.

2.33 Mr Noah Carroll, National Secretary, Campaign Director, ALP, explained the difficulty that some candidates have in understanding the difficulty with inconsistency in authorisation requirements:

The first principle outlined that, as it is in the act right now, whoever is saying or purporting a position politically actually has their name against it in the event that it is not required. At the moment there are formats where it is not required. There is an inconsistency. I cannot count how many candidates I have who do not understand until we spend a lot of time explaining to them that in one particular format you do not need to do anything and in another one you need to do a lot – to the extent, as I read out, with newspaper advertisements they even have a prescribed font size. The inconsistency is not just in my view obviously that it is

not fit for purpose, but equally I think it inadvertently and unnecessarily confuses the candidates, much less the electors.¹⁷

- 2.34 Similarly, Printing Industries Association of Australia noted that:
... the remaining reason for our recommendation is to get rid of all the confusion and inconsistency in the current laws, which cause even the most well intentioned to question, if not breach, the law. During any election, we field any number of calls from our members who have been approached by a customer, with confusion about what is required in terms of the material ... those inconsistencies encourage the ill-intentioned to play mischief.¹⁸
- 2.35 This evidence suggests that part of the problem may be that the *Commonwealth Electoral Act 1918* is not always easy to navigate, and that authorising provisions may be better placed in a stand-alone part so that they are clear and easily accessible.
- 2.36 In light of the numerous provisions dealing with this issue, the Pirate Party Australia recommended “the Electoral Act be amended to combine sections 328, 328A and 328B into a single, comprehensive section dealing with the inclusion of authorisation and printing information in voter communications.”¹⁹
- 2.37 In addressing changes to the Act, the Committee has also considered whether an objects clause would be useful in clarifying the principles and purpose of the Act in order to complement and strengthen the existing legislation.
- 2.38 The Australian Law Reform Commission states:
An objects clause is a provision – often located at the beginning of a piece of legislation – that outlines the underlying purposes of the legislation and can be used to resolve uncertainty and ambiguity. Objects clauses have been described as a ‘modern day variant on the use of a preamble to indicate the intended purpose of legislation.’²⁰
- 2.39 Further, the Office of Parliamentary Counsel, which is responsible for drafting Australian Government legislation has noted that:
Some objects provisions give a general understanding of the purpose of the legislation... Other objects provisions set out

17 Mr Noah Carroll, ALP, *Proof Committee Hansard*, Canberra, 11 November 2016, p. 26.

18 Ms Mary Jo Fisher, Printing Industries Association of Australia, *Proof Committee Hansard*, Adelaide, 17 November 2016, p. 20.

19 Pirate Party Australia, *Submission 54*, p. 2.

20 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report, Volume 1, 2008, Report 108, p. 281.

general aims or principles that help the reader to interpret the detailed provisions of the legislation.²¹

- 2.40 Objects clauses may assist the courts and others in the interpretation of legislation. Section 15AA of the *Acts Interpretation Act 1901* (Cth) states that:
- In the interpretation of a provision of an Act, a construction that would promote the purpose of object underlying the Act (Whether that purpose of object is expressly state in the Act or not) shall be preferred to a construction that would not promote that purpose or object.
- 2.41 In particular reference to authorisations, an objects clause within the current Act would complement and strengthen the current legislation by providing a general rule for authorisations and formally recognise the necessity that elections and campaigning should be in line with the principles of accountability, traceability and consistency.
- 2.42 An objects clause would also assist the courts and others in determining whether materials, acts and the transmission of voter communication are considered to be in contravention of the legislation. Given the current position in which the Act does not explicitly regulate specific forms of communication, a general objects clause would address such inadequacy.

Recommendation 2

- 2.43 **The Committee recommends that the *Commonwealth Electoral Act 1918* be amended to include a separate part/division addressing authorisations, and that the requirements should be clear, concise and easy to navigate.**

Recommendation 3

- 2.44 **The Committee recommends that an objects clause is included into the *Commonwealth Electoral Act 1918* to complement and strengthen existing legislation.**

21 Office of Parliamentary Counsel, *Working with the Office of Parliamentary Counsel: A Guide for Clients*, 2008, 3rd ed., p. 125.

Principle 2 – Traceability

- 2.45 Fundamental to the purpose of authorisation of electoral materials is that electors should know the precise and true origins of the communication. Identification should be clear for a range of reasons, including accountability, enforceability and to ensure that materials come from the stated source.
- 2.46 Professor Graeme Orr, in his private capacity, gave evidence that:
- ...authorisation is a form of disclosure, and we know that disclosure is a cat-and-mouse game in electoral law. Party activists have long, on occasion, used stooges or front persons to authorise material to disguise its party source, and that is even when they have not resorted to outright anonymity.²²
- 2.47 In spite of this view, it appears that for regulated media, current requirements work reasonably well. However, two issues emerged during the inquiry and the committee will consider these further: impersonating a Commonwealth entity and printer details on printed materials.

Impersonating a Commonwealth entity

- 2.48 Concerns were raised in relation to the 2016 election that voter communication was disseminated by individuals or organisations alleged to be – or giving the impression that they were – a Commonwealth entity, in particular Medicare. This material was distributed by text message and was unregulated under current authorisation requirements.
- 2.49 Impersonating a Commonwealth entity is different to anonymous election material. With anonymous election material, the reader may be able to interpret the anonymity as someone who is unprepared to back their views. This arguably weakens the message.
- 2.50 In the Medicare example however, the association with a Commonwealth entity arguably strengthened the authority and legitimacy of the message. As Mr Nutt put it, Commonwealth entities “speak with authority”:
- Preventing people falsely claiming to be Commonwealth entities is pretty straightforward. You are either a Commonwealth entity or you are not. If you are a Commonwealth entity – the tax office, Medicare, the police or whoever – you speak with authority, and I do not think that people should be able to impersonate Commonwealth entities in that way. I think that is pretty straightforward. Having authorisation so it is clear to electors who is speaking to them is a reasonable change. That can be done in a way that does not impact the capacity of candidates and parties to

22 Professor Graeme Orr, *Proof Committee Hansard*, Canberra, 11 November 2016, p. 32.

make their points, but it will add to a fairer and more reasonable electoral system.²³

- 2.51 Media reports and evidence provided to the inquiry indicates that these text messages were referred to the Australian Federal Police, who were reported to have found that there was no scope for a criminal prosecution because there is no law against impersonating, or purporting to act on behalf of, a Commonwealth entity. This matter will be examined further by the Committee in early 2017.
- 2.52 Current legislation makes it an offence to impersonate a Commonwealth official (Division 148 of the *Criminal Code Act 1995*). The Committee has been advised that if an individual purporting to be a Medicare officer had approached potential electors to campaign for a party, this would have been an offence.
- 2.53 Clearly this technicality in the legislation does not sit well with submitters, with some commenting on the issue, including Mr Keith Jurd who opined that the legislation should be amended to enable electors to make informed decisions in future:

The content and delivery techniques of this campaign while not illegal under the current laws were clearly both inaccurate and misleading.

The apparent success of this dishonest campaign does not bode well for future elections. ... Voters will have little opportunity to access accurate information on which to make an informed decision on their vote.²⁴

- 2.54 In relation to SMS material and telephone use specifically, the following evidence was provided by Mr Nutt during the hearing on 15 November 2016:

There was a lot of SMS material produced at the last election... We think that those SMS messages need to be properly regulated, and the principle is that an elector should be able to tell who the message is from and what the conveyance mechanism is. We felt that some of the material distributed was not only false but also misleading in who it may well have been from or alleged to be from. So we think some authorisation provisions in that area are necessary, and we think that that can be accommodated in a way that will work for electors.

Telephone – there is extensive use of telephone; there has been for many years. Obviously, genuine individual calls from one citizen

23 Mr Tony Nutt, Liberal Party of Australia, *Proof Committee Hansard*, Melbourne, 15 November 2016, p. 40.

24 Mr Keith Jurd, *Submission 13*, p. 1.

to another – no-one is seeking to regulate that, but we have extensive phone banks, we have extensive robo-calls and we have extensive automated systems by which individuals can speak to each other as part of a mass-based system. These days, as members and senators will know, an automated system can have you sitting in your lounge room with a cup of coffee while it makes one automated call after another to target voters, et cetera. We feel that – again, without being excessively bureaucratic – an elector ought to know who is ringing them: if it is part of a mass-based robocall, or if it is part of mass-based phone banks or if it is an automated system in which multiple calls are being made to electors. It ought to be open to an elector to know who is ringing them and who the genuine originator of that call is. We think there are some changes necessary there.²⁵

Committee comment

- 2.55 The Committee considers that impersonating, or purporting to act on behalf of, a Commonwealth officer or an entity is unacceptable and that steps should be taken to ensure that neither occurs in future.
- 2.56 Currently, impersonating a Commonwealth officer is a criminal offence under Division 148 of the *Criminal Code Act 1995* however, impersonating a Commonwealth entity is not.
- 2.57 The Committee also considered evidence to the inquiry about the use of Commonwealth logos and symbols during the 2016 election campaign. The Committee considers, in line with the Committee's three principles, that the unauthorised use of Commonwealth logos and/or symbols should not occur in an election campaign. This matter will be examined further by the Committee in early 2017.
- 2.58 The Committee notes that further inquiry and investigation into this issue is required to ensure the principles of accountability, traceability and consistency are upheld.

Recommendation 4

- 2.59 **The Joint Standing Committee on Electoral Matters conduct further inquiry and make recommendations in early 2017 regarding the issues of impersonating a Commonwealth officer and Commonwealth entity.**

25 Mr Tony Nutt, Liberal Party of Australia, *Proof Committee Hansard*, Melbourne, 15 November 2016, p. 32.

Printed material

- 2.60 Printed electoral materials was raised as a discreet issue because of the current requirement that the name and address of the printer be included on the material. This differs from the requirement for other forms of material which do not require this detail. This requirement is historical in nature and was included in the first Commonwealth electoral legislation in 1902 to place liability on the printer.
- 2.61 Some submitters agreed that this requirement remains necessary and is appropriate. For example, in its submission the Printing Industries Association of Australia provided extensive reasoning for why the requirement that printers' details appear on printed electoral materials not only be maintained as a requirement, but extended:
- Our recommendations today are premised on three things: firstly, the belief that Australia's laws must ensure voters are informed about the source of political advertising; secondly, the belief that Australia's laws must prevent voters from being misled by political advertising; and, thirdly, the belief that Australia's laws should do the best to facilitate the taking of legal action and serving of documents in the case where a person considers that voters have been misled. I can talk later about why we think the current laws fail to do every one of those things in any comprehensive sense. In this context, Printing Industries recommends that the current Electoral Act requirements for 'authorised by' and 'printed by' in relation to printed material be maintained and, in the process of making them consistent, be elevated, if you like, to the highest level of current requirements. Secondly, and perhaps more importantly, we recommend that as far as is technologically possible the equivalent of the current 'authorised by' and 'printed by' in relation to traditional print material be extended to each and every medium by which electoral advertising can take place. In this context 'authorised by', depending on the medium, might include 'organised by' or 'sponsored by'. 'Printed by' might be replaced by 'spoken by', 'broadcast by', 'posted by', 'texted by' – whatever.²⁶
- 2.62 It was raised with the Committee that the existing requirements for two-sided printed material is unclear, as to specifically where the authorisation needs to be printed on the material.
- 2.63 The Committee notes that by way of comparison, New Zealand, Canada and the UK require electoral advertising, including by third parties, to be endorsed by a promotor registered with their respective electoral
-

26 Ms Mary Jo Fisher, Printing Industries Association of Australia, *Proof Committee Hansard*, Adelaide, 17 November 2016, p. 20.

commissions. Information including the addresses of registered promoters is publicly available so that promoters are accountable for the content of all their advertisements.

Committee comment

- 2.64 The Committee is of the view that, in line with the Committee's three principles, and in particular traceability, it is still appropriate to include printer details on printed voter communications.
- 2.65 The Committee is also of the view that it is essential to ensure that the identity of an authoriser of voter communications is clear, to ensure transparency as well as elector confidence in the credibility of the materials.

Principle 3: Consistency in the application of the rules

- 2.66 An issue consistently raised with the Committee in submissions is the inconsistency in authorisation requirements between different forms of media. Different authorisation requirements exist for print, telecommunications and broadcast voter communications.
- 2.67 As previously identified, the current requirements for authorisation of electoral advertising are prescribed in the Part XXI of the *Commonwealth Electoral Act 1918, Electoral Offences*.
- section 328 covers various printed and video recorded advertisements;
 - section 328A covers paid electoral advertising on the internet;
 - section 328B covers how-to-vote cards; and
 - section 331 covers headings for electoral advertisements in newspapers and magazines.
 - section 334 covers depiction of electoral matter on footpaths and buildings.
- 2.68 Section 328(5) of the *Commonwealth Electoral Act 1918* defines an electoral advertisement, handbill, pamphlet, poster or notice as containing 'electoral matter'. The term electoral matter is defined in section 4(1) as meaning "matter which is intended or likely to affect voting in an election" and further defined in section 4(9).
- 2.69 Following the 2004 federal election the Committee considered whether the "electoral laws requiring authorisation of voter communication in print

and on radio and television broadcasts should also apply to internet communications".²⁷

- 2.70 The Committee's view was that "application of s328's authorisation requirements to the internet would be cumbersome and perhaps unenforceable."²⁸
- 2.71 In 2006, section 328A *Publication of electoral advertisements on the internet* was added to the *Commonwealth Electoral Act 1918*. Section 328A does not reference the broader term "electoral matter"²⁹ to define an electoral advertisement and applies only to paid advertising on the internet.
- 2.72 The *Commonwealth Electoral Act 1918* does not currently require authorisation of electoral advertising by telephone, text messaging or social media.
- 2.73 In relation to authorisation of how-to-vote cards Mr Paul Pirani gave evidence that:
- It is the lack of consistency that causes confusion and, clearly, anything that is going to assist in removing that confusion would be of some benefit.³⁰
- 2.74 The AEC also noted the difficulty with applying authorisation requirements consistently across all forms of communication:
- To be truly "platform agnostic" there should not be references to "the end thereof" (subsection 328(1)) or "at the end" (section 328A(1)(d)) or "the top or bottom of each printed face." Clearly such requirements would be difficult to apply to voice messages and text messages. Perhaps there is some scope of creating a single requirement at the start/top of the electoral advertisement so that electors are clearly informed as to the source of the electoral advertisement.³¹
- 2.75 Additional legislation further complicates the regulatory regime. Authorisation of electoral advertising in broadcasting and telecommunications are covered by Schedule 2 of the *Broadcasting Services Act 1992* including provisions that deal with access, timing and identification in relation to the broadcast of political and election matter. The Australian Communications and Media Authority "only has power

27 Joint Standing Committee on Electoral Matters, *Report of Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, 2005, p. 274.

28 Joint Standing Committee on Electoral Matters, *Report of Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, 2005, p. 278.

29 *Commonwealth Electoral Act 1918*, subsections 4(1) and 4(9).

30 Mr Paul Pirani, AEC, *Proof Committee Hansard*, Canberra, 11 November 2016, p. 12.

31 AEC, *Submission 66.1*, p. 6 of Attachment A.

- over entities that have been granted a broadcast licence”³² under the *Broadcasting Services Act 1992*.
- 2.76 Changes to authorisation requirements for electoral advertising would need to consider harmonisation or consolidation of legislation in the *Commonwealth Electoral Act 1918* and the *Broadcasting Services Act 1992*.
- 2.77 The Australian Government Electoral Reform Green Paper of 2009 noted that “Commercial tele-marketing in Australia is subject to the Do Not Call Register and unsolicited commercial emails are subject to the Spam Act 2003.”³³ These regulations apply to commercial activities (election campaign activities would generally be considered non-commercial) and registered political parties are exempt.
- 2.78 In addition, the Australian Electoral Commission, the Australian Communications and Media Authority and the industry Advertising Standards Bureau each publish guidelines about electoral advertising including authorisation requirements.
- 2.79 Thus, the regulatory framework is complex and inconsistent.
- 2.80 The print, telecommunications and broadcast industries noted the different impacts of authorisation requirements on their respective business models. For example, the Communications Alliance noted that unlike print and broadcast media, telecommunications carriers (and carriage service providers) “do not, in the ordinary course of business, pre-approve, authorise or have any similar role in relation to third-party content carried by their networks.”³⁴ They argued it should remain the responsibility of the communicating party to ensure its communications meet any authorisation requirements.
- 2.81 Similarly Free TV Australia “does not support the introduction of any laws or regulations which place liability or an increased regulatory burden on commercial broadcasters who publish political advertising.”³⁵
- 2.82 Ms Jodie Sangster, Association of Data-Driven Marketing and Advertising gave evidence that if authorisation requirements were:
- ... going to extend out to new channels, or to all channels, in fact, the provision or the requirement would have to be worded so that it is within the advertisement or there is the means throughout the advertisement to link through to that information.³⁶

32 Australian Government Electoral Reform Green Paper, *Strengthening Australia’s Democracy*, 2009, p. 148.

33 Australian Government Electoral Reform Green Paper, *Strengthening Australia’s Democracy*, 2009, p. 147.

34 Communications Alliance, *Submission 83*, p. 1.

35 Free TV Australia, *Submission 90*, p. 2.

36 Ms Jodie Sangster, ADMA, *Proof Committee Hansard*, Canberra, 11 November 2016, p. 19.

- 2.83 Given the inconsistencies, submitters generally supported the need for a consistent approach, noting that the legislation has been developed over time and that this has resulted in an ad-hoc or piecemeal approach to authorisation.
- 2.84 The ALP suggested inconsistencies in the current authorisation requirements for the same message delivered in different formats and suggested:
- ...authorisation rules have been developed over time and in a piecemeal fashion. As a result, the rules are confusing and difficult to administer. There is an arguable case that the rules have not kept up with technological change, and are unfit for the digital age.³⁷
- 2.85 The ALP further stated that it “supports the implementation of a uniform authorisation rule which is format neutral.”³⁸
- 2.86 Dr Kevin Bonham, appearing in a private capacity, recommended “that authorisation be required for all voter communications, including online and pre-recorded telephone materials and including all opinion polls, conducted within the campaign period.”³⁹
- 2.87 Mr Nutt suggested that the legislation should cover all forms of communication:
- I hold to the same general principle. Different vehicles and different platforms have their own challenges because of the nature of the number of characters you can send or on forwarding material through Facebook et cetera. But, as a general principle, the Electoral Act should protect the right of the electors to know who is sending them messages. I think that in all of these cases there will be a way forward to identify who is sending you a message and then you can make a judgement about it. I do not think that technology has got to the point where it is inconceivable to make it plain who it is from.⁴⁰
- 2.88 During a public hearing, Dr Bonham, provided information regarding the different communication platforms and the way in which legislation applied. The committee asked Dr Bonham to elaborate on his views about authorisation of online materials. Dr Bonham responded:
- It might get impractical to police if you are going to say, “Well, everyone who comments on the election on Twitter should have

37 Australian Labor Party, *Submission 69*, p. 3.

38 Australian Labor Party, *Submission 69*, p. 5.

39 Dr Kevin Bonham, *Submission 74*, p. 2.

40 Mr Tony Nutt, Liberal Party of Australia, *Proof Committee Hansard*, Melbourne, 15 November 2016, p. 43.

an authorisation thing at the bottom of their website,” or something like that, but just in theory I do not see that there is a problem with it.

... I think there should be standardisation across different platforms in a way that does not make any of them impractical. There has been some concern with the Tasmanian legislation as to how you deal with authorising a tweet under the Tasmanian legislation. You cannot put an authorisation in a tweet.

... A blog is more straightforward because it is just like a written thing that you are putting on the internet, and you can just whack an authorisation stamp and disclaimer at the bottom of the page or at the bottom of it. Because it is an unlimited length format, it is not a problem. I have something at the bottom of mine, “Authorised by”, and it has got my name, in a very abbreviated form.⁴¹

- 2.89 Professor Graeme Orr, appearing in a private capacity, suggested the Committee “consider banning political spam advocacy, particularly via SMS – in other words bringing it clearly under the umbrella of the ACMA.”⁴²

Recommendation 5

- 2.90 **The Committee recommends that the government ensures consistency between all other relevant legislation and the *Commonwealth Electoral Act 1918* in relation to authorisation of electoral advertising.**

Flexibility around different formats

- 2.91 The theme of evidence during the inquiry was that consistency in regulation should be flexible around the capacities of different formats. The Australian Greens summarised the issue as follows:

We recognise the importance of voters being aware of the source of party, candidate and third party communications during election campaigns. With the growth in a range of electronic platforms for election communications the form this takes will need to vary. For example as a message on Twitter is only 140 characters the traditional form of authorisation required on printed materials would not be appropriate. We believe that the overarching requirement is that the voter who reads or views a communication is aware of who it comes from. So if the party or

41 Dr Kevin Bonham, *Proof Committee Hansard*, Hobart, 14 November 2016, p. 18.

42 Professor Graeme Orr, *Proof Committee Hansard*, Canberra, 11 November 2016, p. 32.

candidate is adequately identified in the communication that is adequate. With Twitter that would be by their Twitter name, provided that the name or associated description is not misleading or false.⁴³

2.92 Dr Bonham also took this approach, stating that an innovation such as a link on the message could satisfy an authorisation requirement:

... legislation covering online material take into account the impracticality of including an authorising statement in tweets and other forms of micro-blogging, and therefore classify a statement as authorised if the author's profile includes a link to a website on which an authorising statement is clearly visible.⁴⁴

2.93 The Science Party recommends "authorisation of an official party or candidate account should be sufficient to cover all material published by that account"⁴⁵ for social media. Therefore, if a person is making a political tweet, the account home page can have the authorisation, which is accessible through the tweet.

2.94 In some circumstances, such links may not operate. The Committee discussed with the ALP how a person could have mobile telephone reception, but not Internet reception. On that occasion, a voter communication could be received without the authorisation being available:

I am not familiar with this idea but I certainly would not suggest that you are completely in the wrong on it. It would occur to me that you could potentially have a scenario where you might have mobile phone reception but you have not got internet reception. So in the event that you get a message and you try to link to find out who authorised it, there might be significant to delay depending on where you are. That would be the only complication I could see off the top of my head with that proposal. You can have a certain amount of bars for reception at times but your internet is down.⁴⁶

2.95 As the ALP noted, particular circumstances would have to apply for this to occur. The general theme of the evidence received is that the requirements for new media must be reasonable.

2.96 It would therefore be unlikely that the Committee would regard a slight technical mishap as triggering non-compliance with the authorisation requirement, for example. The Committee would also welcome innovative

43 The Australian Greens, *Submission 89*, p. 6.

44 Dr Kevin Bonham, *Submission 74*, p. 2.

45 Science Party, *Submission 70*, p. 1.

46 Mr Noah Carroll, ALP, *Proof Committee Hansard*, Canberra, 11 November 2016, p. 28.

solutions which provide electors with the information they need about who is communicating with them.

- 2.97 New media is delivered through a wide range of formats and mediums. What is most striking about it is that many communications are shorter and less formal. This raises the potential issue about what authorisation requirements should be imposed on them. Twitter, for example, has a limit of 140 characters per tweet. Therefore, a complete authorisation requirement could take up most of the message space, making voter communication impractical in this format.
- 2.98 The Committee notes that some clarity to such a system would assist the regulatory agencies, in particular the AEC and the Australian Communications and Media Authority, as well as campaign participants, in understanding their obligations. The Committee would also welcome guidance, regulation or other measures being taken to support compliance.

Recommendation 6

- 2.99 **The Committee recommends that authorisation requirements in line with the principles of accountability, traceability and consistency should, as far as reasonably possible, not interfere with the purpose of the communication, which is to communicate with electors.**

Committee views

- 2.100 The Committee received significant evidence in relation to authorisations of voter communications, and notes the general support for the importance of authorisation to voter communications. In short, it is acknowledged that electors should know who is communicating with them via voter communications.
- 2.101 Authorisation is an important way of ensuring accountability for voter communications that are placed in the public domain. It helps to ensure transparency and can engender public confidence in the materials that members of the public rely on in making their own decisions in relation to voting.
- 2.102 The crucial nature of authorisation of voter communications has recently been exemplified during the federal election 2016 where modern methods of communication highlighted the ways in which the supporting electoral legislation has struggled to keep up with technological changes. In particular, the Committee notes that the legislation requires amendment

so that it can evolve to deal with new, digital forms of communication that have changed the landscape of political campaigns.

- 2.103 The Committee received overwhelming evidence supporting legislative reform to keep up with innovations in campaigning that make use of new technologies. Robo-calls and text messaging play an integral role in political campaigns and should be addressed in the electoral laws.
- 2.104 The Committee is also of the view that the legislation should cover possible future innovations in communication, so far as it is able.
- 2.105 The Committee supports a level playing field with regulation applying to all forms of electoral advertising based on the following principles:
- ⇒ Accountability - parties and other participants should be held to account and be responsible for their political statements;
 - ⇒ Traceability - those who authorise electoral materials should be identifiable and traceable for enforcement and other purposes; and
 - ⇒ Consistency - in the application of the rules and requirements to all electoral material.
- 2.106 These principles should be reflected in an objects clause in updated and consolidated legislation covering authorisation requirements.
- 2.107 Campaign participants and the agencies responsible for administering the regulations need the updated legislation to provide clarity about what is required and the consequences for noncompliance.
- 2.108 After careful consideration of the various issues raised and the evidence presented during this inquiry, the Committee has made a number of recommendations designed to facilitate the evolution of the regulatory regime in relation to authorisations so that the rules can be applied to all forms of electoral materials, including new media. The committee's recommendations are based on the three principles of accountability, traceability and consistency.

Senator Linda Reynolds CSC
Chair