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Dear Ms Beverley

Authorisation requirements for videos containing electoral advertisements published on websites

At the Budget Estimates Hearing of the Senate Finance and Public Administration Committee, on Thursday 29 May 2014, the Australian Electoral Commission (AEC) agreed to provide a written explanation of the impact of the requirements of section 328A of the *Commonwealth Electoral Act 1918* (Electoral Act) on videos that are published on websites. The following information is now provided to assist the Committee in its consideration of this issue in relation to the videos hosted on the website www.pm.gov.au.

The AEC notes the following as part of its consideration of this matter:

1. The authorisation requirements contained in the *Commonwealth Electoral Act 1918* (Electoral Act) are designed to ensure that electors are made aware of the source of any electoral advertisements.
2. Subsection 328(1A) of the Electoral Act contains the authorisation requirements for videos that are published which contain electoral advertisements.
3. However, if a video containing an electoral advertisement is published on the Internet, the legal advice available to the AEC is that subsection 328(1A) does not apply and that section 328A covers the field in relation to electoral advertisements that appear on the Internet.
4. Similarly, if a video containing an electoral advertisement is published by a broadcaster, then the Electoral Act does not apply and the publication would be subject to the requirements of Schedule 2 to the *Broadcasting Services Act 1992*.

5. The definition of an “electoral advertisement” contained in subsection 328(5) only applies to matters covered by section 328 and does not apply to electoral advertisements published on the Internet. This issue was specifically addressed in the Explanatory Memorandum to the Bill that introduced this measure in 2006 and is also supported by the opening words of subsection 328(5) “In this section”.
6. Unless there is some evidence that shows that a particular website contains an electoral advertisement and that the publication or hosting of the advertisement on that website has been “paid for”, then there is no requirement to include authorisation details. The requirements of section 328A are therefore quite different to those that apply to electoral advertisements that appear in the print media.

Discussion

The AEC has examined the website www.pm.gov.au against the requirements of section 328A of the Electoral Act. After examining the website the AEC has formed the view that the publication of the videos on this website that could not reasonably be regarded as being in breach of the requirements of the Electoral Act due to the failure to include authorisation details. Let me explain the basis for the AEC’s conclusion.

Section 328A of the Electoral Act provides that:

“(1) A person commits an offence if:
(a) either:
(i) the person publishes an electoral advertisement on the Internet; or
(ii) the person causes, permits or authorises an electoral advertisement to be published on the Internet; and
(b) the electoral advertisement is intended to affect voting in an election; and
(c) the electoral advertisement is paid for by the person or another person; and
(d) the name and address of the person who authorised the advertisement do not appear at the end of the advertisement.

Penalty: 10 penalty units.”

Section 328A was inserted into the Electoral Act by item 87 of Schedule 1 to the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (the 2006 Amending Act). The Explanatory Memorandum that accompanied the Bill which became the 2006 Amending Act stated that:

“75. The provisions distinguish between promotional electoral material on the Internet, and general political commentary, in line with recommendation 44 of the JSCEM’s Report into the 2004 federal election. This is achieved by:

- removing the term ‘electoral matter’ as defined in sections 4(1) and 4(9) of the Electoral Act from section 328A;
- requiring an *intent* (on the part of the person causing an advertisement to be published or the publisher of the advertisement) to affect voting in an election. This prevents Internet Service Providers unaware of the content of web pages hosted on their mainframes from being captured by this provision;
- requiring the advertisement to have been paid for as an additional element of the offence; and

- specifying that general commentary on a website is a defence to a breach of the provision.

76. The defence to the new provisions places the evidential burden of establishing that the material published was 'general commentary' on the defendant. Despite the fact that the defendant bears the evidential burden, the prosecution would have to establish that the material published was an electoral advertisement, pursuant to section 328A(1)(a) of the Electoral Act or paragraph 121A(1)(a) of the Referendum Act, as appropriate. Moreover, the offence carries a relatively low penalty (10 penalty units)."

Consistent with the statements made in the Explanatory Memorandum and previous advice from the Commonwealth Director of Public Prosecutions, the AEC has administered section 328A of the Electoral Act on the basis that it only applies to matters on the Internet that meet all of the following criteria:

- electoral advertisements;
- intended to affect voting in a federal election; and
- where a person has "paid for" the advertisement to be published on the Internet.

The AEC is therefore required to administer section 328A of the Electoral Act as only applying to advertising on the Internet that appears on general subject websites that contain paid spaces on a webpage which are advertisements, including pop up ads, as distinct from the entire front page of a website. There is also a distinction drawn between those websites that are maintained by registered political parties, candidates and Members of Parliament and those websites where a wide range of general information appears that could not be categorised as either "electoral advertisements" or intended to affect voting in an election.

The AEC notes that one of the elements of the offence in section 328A of the Electoral Act is that the publication of the electoral advertisement on the Internet itself has been "paid for". This requirement in the Electoral Act is not that the website has been "paid for" or that the material contained on the website has been "paid for" (such as the costs of the production of the video clips). Rather the requirement is that the publishing or hosting of the advertisement on the Internet has been "paid for". It is a question of fact in each case to determine whether payment has been made for the publication of the particular electoral advertisement that is alleged to constitute a criminal offence. However, the fact that a website, domain name and registration has been paid for does not necessarily mean that the publication or hosting of a particular advertisement itself that appears on that website has been "paid for".

In the present matter, the AEC notes that the website www.pm.gov.au has at the top of every page the "Prime Minister of Australia, the Hon Tony Abbott MP". The webpage entitled "Contact your PM" includes the following details:

“The Hon. Tony Abbott, MP
Prime Minister
Parliament House
CANBERRA ACT 2600”

The above leads the AEC to conclude that any person who accesses the material contained on this website will have no doubt as to the source of the information and the person who has authorised all of the material that is published on this website.

The AEC also notes that some of the videos that are available through this website are hosted on YouTube. The AEC understands that the hosting and publication of video material on YouTube does not involve any costs being incurred. One of the effects of the “paid for” requirement in section 328A is that videos that would otherwise be subject to the authorisation requirements under subsection 328(1A) will not be subjected to the same requirements if they are hosted on free websites such as Facebook, YouTube and MySpace.

Similarly, audio and video material that would have been subjected to the authorisation requirements of Schedule 2 to the *Broadcasting Services Act 1992* will not need to contain those authorisation details if published on a website without any accompanying fee or charge being imposed. Schedule 2 to the *Broadcasting Services Act 1992* is administered by the Australian Communications and Media Authority (ACMA). This Schedule imposes requirements in relation to electoral advertisements that are published on radio or television. These requirements are placed on the license owners of the radio and television broadcasters as licence conditions on a broadcaster under this legislation. These requirements include both the content of authorisations on electoral advertisements published on radio and television, but also the blackout period on the publication of electoral advertisements leading up to polling day. ACMA has investigative powers and deals with any breaches of these licence requirements.

Further, the broader regulation of the Internet and internet service providers are matters that are regulated under *Telecommunications Act 1997* and which are also administered by the ACMA. The AEC has no direct powers over Internet Service Providers and, given the ability of persons to publish material (including electoral advertisements) hosted on overseas servers, there are doubts about the ability of the AEC to administer any laws that attempt regulate the publication of electoral advertisements on the Internet.

The AEC is not aware of any evidence that the publication or hosting of the videos on this website have been “paid for”. Accordingly, the AEC is not able to conclude that there is any prima facie evidence pointing to those videos being required by section 328A(1)(d) of the Electoral Act to contain any authorisation details.

I trust that the above information is of assistance to the Committee's consideration of this matter.

Yours sincerely

Paul Pirani
Chief Legal Officer

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