

believes they have been defamed or otherwise have some legal cause of action arising from the publication of the material.

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

Authorisation of electoral advertisements – printed matter and videos

8. In relation to printed matter, subsection 328(1) requires electoral advertisements to state at the end of an electoral advertisement the name and street address of the person who authorised the advertisement and the name and place of business of the printer. However, subsection 328(1) does not apply to particular items (such as T-shirts and how-to-vote cards) set out in subsection 328(3). This is discussed in further detail below under the heading, 'What does not require authorisation?'

Subsection 328(1A) requires that all electoral video recordings contain the name and address of the person authorising the video recording at the end of the recording.

9. It is important to note that electoral advertisements must be authorised at all times – not just during an election period. 'Election period' is defined in section 287 as follows:

... period commencing on the day of issue of the writ for the election and ending at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election.

10. An 'electoral advertisement' is defined in subsection 328(5) as follows:

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

11. 'Electoral matter' is defined in subsections 4(1) and 4(9). In subsection 4(1) 'electoral matter' is defined as matter which is intended or likely to affect voting in an election. Subsection 4(9) further states that:

... matter shall be taken to be intended or likely to affect voting in an election if it contains an express or implicit reference to, or comment on:

- (a) the election
- (b) the Government, the Opposition, a previous Government or a previous Opposition
- (c) the Government or Opposition, or a previous Government or Opposition, of a State or Territory
- (d) a member or former member of the Parliament of the Commonwealth or a State, or of the legislature of a Territory
- (e) a political party, a branch or division of a political party or a candidate or group of candidates in the election; or
- (f) any issue submitted to, or otherwise before, the electors in connection with the election.

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

13. The effect of the above is that the closer to the due date for the holding of an election (for example, the 3-year term for the expiry of the House of Representatives in section 28 of the Constitution) the more likely that a reference to one of the above matters will be 'likely to affect voting'. This will therefore be an electoral matter that requires the inclusion of the authorisation details set out in section 328.

The tests applied by the AEC

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

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

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

Is the reference in the material to 'the election' a reference to the federal election? If the answer is 'yes', the advertisement is likely to contain 'electoral matter' and requires the inclusion of the authorisation details 'at the end thereof' as stated in section 328.

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

16. With respect to paragraphs 4(9)(b), (c) and (d), the AEC's view is that these provisions may operate slightly differently depending on the proximity of the publication of the electoral advertisement to the due date for the holding of an election. Generally speaking, the closer the publication date for the electoral advertisement to the due date for the holding of an election, the greater the likelihood that the AEC may conclude that a matter is 'intended or likely to affect voting in an election'. Clearly once an election date has been set for a federal election or a by-election, the presumption is that all printed and video advertising that covers any of the subject matters listed in subsection 4(9) is likely to be required to include the authorisation details set out in section 328.
17. The AEC notes that the current practice of political parties is that the conduct of an election campaign commences well in advance of the actual issue of the writs for an election. The AEC also notes that there are some provisions in the Act which only create an offence during the 'relevant period' which is defined in section 322 as being the period between the issue of the writs for an election and polling day. However, the Parliament has specifically not placed such a limited operation on section 328. In circumstances where there is an absence of bi-partisan political support for measures and policies that may be the subject of advertisements, the AEC will regard such advertising as prima facie amounting to advertising containing 'electoral matter' notwithstanding that there has been no announcement or issuing of the writs for an election.
18. Accordingly, in determining whether material which makes reference to paragraphs 4(9)(a), (e) and (f) and therefore whether the material falls within section 328, the AEC applies the following:

During a federal election period

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

Outside a federal election period

Where the advertisement falls outside a federal election period, the issue is whether there is some connection between the reference to a person or institution described in paragraphs 4(9)(b), (c) or (d) and a federal election. If the answer is 'yes', for example, if the reference is intended or likely to affect voting in a federal election, the advertisement requires authorisation as stated in section 328. Importantly, this requires an assessment of the intention or effect of the advertisement.

19. Of course, where material falls outside of the deeming provision in subsection 4(9), it will only require authorisation if it otherwise contains 'electoral matter' in subsection 4(1), for example, if it is intended or likely to affect voting in a federal election. This will require an assessment of the intention or effect of the advertisement.

Details of the person who authorised the advertisement

20. Section 328 requires electoral advertisements to include the name and full street address of the person who authorised the advertisement, as well as the name and place of business of the printer of the advertisement, at the end of the advertisement. This ensures that anonymity does not become a protective shield for irresponsible or defamatory statements. The inclusion of the street address details enables legal proceedings to be issued and served.

Address of the authoriser

21. The address requirements contained in subsection 328(5) prohibit the use of a post office box and require a full street address and suburb or locality at which the person can usually be contacted during the day. The address does not have to be a residential address.

Place of business of the printer

22. Paragraph 328(1)(b) states that 'the name and place of business of the printer appears at the end thereof'. The purpose of this provision is to facilitate the taking of legal action and the serving of legal documents where a person believes that they have been defamed or otherwise have some legal cause of action arising from the publication of the material. Accordingly, the AEC has the view that the details of the actual street address of the printer at which the business of printing is undertaken is required to be included to comply with this requirement.

Advertisements published in newspapers

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

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

What does not require authorisation?

25. Subsections 328(3) and (5) provide certain exceptions to the usual authorisation requirements. The following electoral advertisements do not require an authorisation and printer details:

- electoral advertisements in newspapers announcing the holding of a meeting;
- electoral advertisements on T-shirts, lapel buttons and badges, pens, pencils and balloons;
- business cards that promote a candidate;

- letters and cards that already bear the name and address of the sender (and do not contain a representation of a ballot paper).

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

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

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

Headings to electoral advertisements

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

28. 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.

29. The maximum penalty for a contravention of section 331 is five penalty units. (A single penalty unit is currently equivalent to \$170 under section 4AA of the *Crimes Act 1914*.)

30. It is important to note that section 331 applies at all times, not just during an election period.

Electoral advertising – internet

31. Section 328A applies to electoral advertisements intended to affect voting in a federal election where a person has paid for the advertisement to appear on the internet.
32. It is important to distinguish the reference to 'electoral advertisement', as it applies to advertising on the internet in section 328A, from the definition of an 'electoral advertisement' contained in subsection 328(5) that applies to printed matter (see section 328). Section 328A does not define electoral advertisements that are published on the internet by reference to the term 'electoral matter'. This was deliberate in giving effect to Recommendation 44 of the report of the Joint Standing Committee on Electoral Matters (JSCEM) entitled 'Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto', which led to the inclusion of section 328A. The AEC has the view that the ordinary natural meaning of the word 'advertisement' applies to the interpretation of section 328A. The Macquarie Dictionary defines 'advertisement' as 'any device or public announcement, as a printed notice in a newspaper, a commercial film on television, a neon sign, etc., designed to attract public attention, bring in custom, etc'.
33. Accordingly, any paid-for announcement on the internet designed to attract public attention, which is intended to affect voting in a federal election, would appear, on its face, to attract the operation of subsection 328A(1).
34. It is important to note that subsection 328A(2) provides a defence to a contravention of subsection 328A(1) if the material published forms part of a general commentary on a website.
35. The maximum penalty for a contravention of section 328A is five penalty units. A single penalty unit is currently equivalent to \$170 under section 4AA of the *Crimes Act 1914*.
36. It is important to note that section 328A applies at all times, not just during an election period.

How-to-vote cards

37. Section 328B deals with the requirements for how-to-vote cards which are a subset of other forms of printed electoral advertisements covered by section 328. These requirements will apply for the first time to the 2013 federal election.

38. Subsection 4(1) contains the definition of what is a how-to-vote card. In very broad terms, it is any printed medium that lists the name of two or more candidates and directs or encourages electors to mark their preference for the candidates in a particular order.
39. Section 328B provides that a person must not publish how-to-vote cards during 'the relevant period for an election' unless the name of the registered political party or candidate on whose behalf the cards have been published is clearly printed at either the top or bottom of the cards. In addition, the name and address of the person who authorised the card must also appear at either the top or bottom of the cards. The address of the person must be the full street address at which the person can normally be contacted during business hours and does not include a post office box. However, as section 328 does not apply to how to vote cards (see paragraph 328(3)(aa)) there is no requirement for the printer details to be included on the cards. The 'relevant period' which is defined in section 322 is the period commencing on the issue of the writs for the election and expiring at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election.
40. A person found guilty of this offence may be fined up to 50 penalty units. A single penalty unit is currently equivalent to \$170 under section 4AA of the *Crimes Act 1914*, so this would be a total of up to \$8 500. It only applies during an election period.

Misleading or deceptive electoral advertisements

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

42. Political parties and candidates, and other interested individuals and organisations, also produce electoral advertising during an election campaign to assist voters in choosing their preferred candidates when casting a vote. The print versions of such electoral advertising will usually take the form of how-to-vote cards, which demonstrate how voters should number their preferences against each candidate on the ballot paper so as to ensure the election of the most favoured candidate or group of candidates.
43. Voters are not required to follow how-to-vote cards. The order in which preferences are placed against candidates on the ballot paper is a decision for the voter alone, in the privacy of the voting compartment in accordance with the principle of the secret ballot.
44. Although the AEC has no role in regulating the political content of electoral advertising, the AEC is responsible for ensuring, as far as possible, that electoral advertising does not mislead or deceive voters about the way in which they must cast their vote. For example, how-to-vote cards should not advocate optional preferential voting because, with limited exceptions, the Act clearly requires full preferential voting. Incomplete ballot papers are informal and are unable to be counted.
45. Subsection 329(1) makes it an offence to print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing that is likely to mislead or deceive an elector in relation to the casting of a vote. Section 329 applies not only to printed matter but also to electoral advertisements broadcast on radio, television, the internet or by telephone. Subsection 329(5) provides that in a prosecution of an offender, it is a defence if it is proved that the person did not know, and could not reasonably be expected to have known, that the matter or thing was likely to mislead an elector in relation to the casting of a vote.
46. Unlike sections 328, 328A and 331 (which apply at all times), subsection 329(1) is in force only during the relevant period in relation to an election. The 'relevant period' which is defined in section 322 is the period commencing on the issue of the writ for the election and expiring at the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election.
47. The maximum penalty for a contravention of subsection 329(1) is a fine not exceeding \$1 000 or imprisonment for a period not exceeding six months, or both, for a person, and a fine not exceeding \$5 000 for a body corporate.
48. The intention of subsection 329(1) is not to regulate the content of political messages directed at influencing the choice of preferred candidates or political parties by voters but to regulate publications and broadcasts that are directed at influencing the way in which the ballot paper is actually marked. This distinction was upheld by the High Court in *Evans v Crichton-Browne* (1981) 147 CLR 169, the leading case on subsection 329(1).
49. In this case the provision in question was section 161, the relevant part of which is now contained in subsection 329(1), so that the following conclusion of the court is equally applicable to subsection 329(1) as it stands today: The words in section 161(e) 'in or in relation to the casting of his vote' refer to the act of recording or expressing the elector's political judgment, for example, in obtaining and marking a ballot paper and depositing it in the ballot box, and not to the formation of that judgment.
50. This means that the AEC has no role or responsibility in handling complaints about allegedly untrue statements in published or broadcast electoral advertisements that are intended to influence the judgment of voters about who they should vote for. Complaints that do fall within the scope of subsection 329(1) are those that relate to electoral publications, broadcasts, internet or telephone messages that are likely to mislead or deceive an elector in relation to the way the ballot paper is marked.
51. In coming to its conclusion in *Evans v Crichton Browne*, the High Court indicated that it will be reluctant to find that the offence provisions of the Act infringe on conduct that is more appropriately covered by the political process:
- But even if the paragraph were thought to apply only to those statements affecting a voter's choice of candidate which appear to be statements of fact, that construction would require an election campaign to be conducted in anticipation of proceedings brought to test the truth or correctness of any statement made in the campaign. Indeed any person who published an electoral advertisement containing an incorrect statement of fact

might be exposed to criminal proceedings. In a campaign ranging over a wide variety of matters, many of the issues canvassed are likely to be unsuited to resolution in legal proceedings, and a court should not attribute to the Parliament an intention to expose election issues to the potential requirement of legal proof in the absence of clear words.

52. The above High Court decision was also considered in the context of the 2010 election in the cases of *Faulkner v Elliott* [2010] FCA 884 and *Peebles v Honourable Tony Burke* [2010] FCA 838, and most recently in the decision of the South Australian Supreme Court in *Holmdahl v Australian Electoral Commission (No 2)* [2012] SASCFC 110. At paragraph 10 of the decision in the *Peebles v Honourable Tony Burke* case the Court stated that:

It is clear from reading the entire reasons for judgment of the High Court in Crichton-Brown that the prohibition in s 329 concerns misleading or deceptive conduct which might affect the process of casting a vote rather than the formation of the political judgment about how the vote will be cast. That is, the section concerns conduct which might, for example, lead a voter either to fail to record a valid vote or to record a valid vote but not for the candidate or candidates of the voter's choice. An obvious example would be information which told a voter how to go about completing the ballot paper which was wrong and would result in the casting of an informal vote.

53. Accordingly, the test that is applied by the AEC in examining a publication under section 329 is whether the publication merely goes towards the formation of the judgment as to who to vote for, rather than the actual act of marking the ballot paper. The AEC notes that the distinction between these two things is a question of fact and degree.
54. Section 329 also extends to radio and television advertising. The courts have not yet considered the application of section 329 to the electronic publication of electoral advertising on the internet. However, the AEC considers that section 329 does apply to electoral advertising on the internet.

Second preference how-to-vote cards

55. Second preference how-to-vote cards are those in which a party (usually a major party) recommends a first preference vote for a candidate of another party (usually a minor party) while recommending its own candidate as the second preference (or at least a preference higher than other major parties). These how-to-vote cards are actually authorised by the originating political party (usually a major party) although they sometimes appear, due to their heading, colour and general layout, similar to the official how-to-vote card of the party endorsing the candidate recommended as the first preference. A party which puts out a second preference how-to-vote card may also put out its own official how-to-vote card recommending a first preference vote for its own endorsed candidate.
56. The political strategy involved in major political parties issuing second preference how-to-vote cards is to capture the second or later preferences ahead of other major political parties after the minor political party candidate or independent candidate is eliminated from the count. The concern is that voters might be misled into believing that these second preference how-to-vote cards are the official how-to-vote cards for the minor political party or independent candidate shown as the first preference.
57. On the basis of relevant decisions handed down by the courts over the years, second preference how-to-vote cards would probably be held by a court to be in contravention of subsection 329(1) if they were very similar in appearance to the official how-to-vote card for another political party or independent candidate. This might mislead a voter into thinking it is the official how-to-vote card and thereby mislead the voter in casting a vote.
58. The previous concerns over these types of how-to-vote cards will hopefully be addressed by all candidates and political parties complying with the requirements of new section 328B which now requires the details of the candidate or political party, on whose behalf the card was published, to be clearly identified.
59. It should be noted that section 351, which relates to the publication of matter regarding candidates, might also apply to first preference

recommendations for one political party candidate in second preference how-to-vote cards issued by another political party.

Truth in political advertising

60. Although the Act previously contained a prohibition on 'untrue' advertising (see former subsection 161 (2)), this was repealed in 1984. Subsequent JSCEM reports have made various recommendations about reinstating it. Successive governments have not supported these recommendations. For example, in the Government's response to the 1997 JSCEM report tabled in Parliament on 8 April 1998, the recommendation was rejected, as follows:

The Government firmly believes that political advertising should be truthful in its content. However, any legislation introduced to enforce this principle would be difficult to enforce and could be open to challenge. Previous Committees have found that it was not possible to legislate to control political advertising and that voters, using whatever assistance they see fit from the media and other sources, remain the most appropriate arbiters of the worth of political claims.

61. It should be noted, however, that Free TV Australia (formerly the Federation of Australian Commercial Television Stations) reviews election advertisements prior to broadcast by commercial television stations for the purpose of:
- classifying the advertisement under the Commercial Television Industry Code of Practice
 - ensuring the advertisement includes the authorisation tag required by the *Broadcasting Services Act 1992* (Clause 4 of Part 2 of Schedule 2) and complies with other requirements on broadcasters under applicable electoral acts (Commonwealth, State or Territory), and
 - protecting broadcasters from liability for publishing defamatory material.
62. The party or candidate authorising the advertisement is expected to ensure that the advertisement complies with all relevant laws including the applicable electoral acts and the laws of defamation.

Defamation of candidates

63. Section 350 of the Act previously provided for an offence of defaming a candidate. However, on 15 March 2007 the *Electoral and Referendum Legislation Amendment Act 2007* repealed section 350. Aggrieved candidates will now need to seek redress under the applicable statutory or common law if they believe they have been defamed.

Electronic media blackout

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

Political advertising bans

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

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

Most witnesses disagreed with a complete ban on political advertising, claiming that it would have an adverse effect on freedom of speech

and in particular would disadvantage citizens and groups who wished to bring issues before the electorate. The beneficiaries of a complete ban would be the existing major parties.

67. The JSCEM decided instead to recommend a 'carrot and stick' approach to the problems raised by corporate donations to political campaigns: the provision of free time by all electronic broadcasters to political parties, and an extension of the requirements for disclosure of political donations.
68. Subsequently, on 3 January 1992 the *Political Broadcasts and Political Disclosures Act 1991* came into force. This Act amended the *Commonwealth Electoral Act* with respect to election funding and disclosure, and inserted a new Part IIID into the *Broadcasting Act 1942* to ban political advertising at all parliamentary elections and to provide for free air time for all political parties on television stations. The ban also applied to all government advertising for three months before polling day.
69. However, in August 1992 Part IIID of the *Broadcasting Act 1942*, which was inserted by the *Political Broadcasts and Political Disclosures Act 1991*, was struck down by the High Court as unconstitutional (see *Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106*).
70. Six of the seven Justices of the High Court held that there was a freedom of political communication in relation to political matters inherent in the Constitution. The Constitution is predicated on representative government, and freedom of communication is essential to that system. All of the Justices who recognised an implied freedom also recognised that the freedom was not absolute and could be restricted to the extent that other legitimate public interests required. They held that control of the use of the media for political advertising could be valid in some circumstances. However, five of the Justices found that Part IIID of the *Broadcasting Act 1942* went beyond a justifiable restriction of the freedom.

Non-compliance – electoral advertising offences

71. The following discussion provides a guide as to courses of action that the AEC will take in response to an apparent or alleged breach of the law. However, they are a guide only;

the AEC reserves the right to take any other course of action it considers necessary in the circumstances.

72. Further, while compliance with the law is important at all times, the AEC recognises that some breaches of the law are more serious than others. These are described below, for convenience, as more serious and less serious instances of non-compliance.

More serious non-compliance

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

Less serious non-compliance

74. Examples of less serious instances of non-compliance include:
 - absence of an explicit authorisation in an otherwise clearly identifiable advertisement (State, Territory and Commonwealth Government advertising with clearly displayed government logos, a coat of arms, or the display of the name of a prominent member of a Government, such as Ministers, Premiers or the Prime Minister)
 - absence of the word 'advertisement' in an otherwise authorised advertisement in a newspaper
 - absence of the place of business of the printer of an electoral advertisement in an otherwise compliant electoral advertisement
 - absence of a suburb or locality in the street address of an authorisation.
75. While all instances of non-compliance with the law are serious matters, those that occur during federal election periods have the potential to have a more significant and direct impact on the casting of votes. In light of their

capacity to directly affect the casting of votes in a federal election, misleading or deceptive publications receive a high priority in the AEC's compliance activities. Outside of the periods during which provisions relating to misleading or deceptive publications operate, the AEC prioritises anonymous electoral advertisements over advertisements containing less serious instances of apparent non-compliance.

76. Breaches of sections 328B and 329, because of their possible impact on the outcome of an election, require immediate action. If offending material is not immediately withdrawn or amended, the AEC may take injunction action in accordance with section 383 of the Act. *(Note: Injunctive action may also be taken by a candidate in the election pursuant to section 383.)*
77. If the AEC considers there to be a breach of sections 328 or 328A, generally the AEC will write to the relevant person seeking that the material be withdrawn until such time as the material is amended so as to comply with the law. In relation to a breach of section 331, the AEC will write to the relevant person seeking that any future publication of the same material comply with the law.
78. If there is continued non-compliance or a more serious breach of sections 328, 328A, 328B, 329 or 331, the matter may be referred to either, or both, the Australian Federal Police (AFP) and the Director of Public Prosecutions (DPP) for further action. Further, because the electoral impact of a less serious matter may vary according to the circumstances in which it occurs, the AEC may also consider it appropriate to refer a less serious matter to either, or both, the AFP and the DPP.
79. If there is any doubt as to whether there may have been a breach, the matter will be referred to the DPP for advice.
80. In summary, the AEC may adopt any or all of the following strategies in response to an apparent breach of the Act:
 - a request by the AEC to cease and desist
 - injunction action undertaken in the Federal Court to compel compliance
 - referral to the AFP for investigation
 - referral to the DPP for preliminary advice or prosecution.

81. Decisions with respect to the institution of criminal proceedings by the Commonwealth rest with the DPP.

Other action

82. Because many of the electoral offences contained in the Act are not punishable by a term of imprisonment, section 13 of the *Crimes Act 1914* applies which enables any person to launch a criminal prosecution against an alleged offender.
83. There is also a risk that if a person has engaged in an 'illegal practice', which is defined in section 352 as a contravention of the Act or the regulations, the election of a candidate could also be challenged in the Court of Disputed Returns (CDR). Section 362 gives the CDR the power to void an election on the grounds of an illegal practice where the Court is satisfied that the results of the election was likely to have been affected as a result of the practice (see *Mitchell v Bailey (No.2)* [2008] FCA 692 and *Scott-Irving v Oakeshott* [2009] FCA 487).

Complaints

84. Complaints must be made in writing addressed to either the Deputy Electoral Commissioner or the Chief Legal Officer of the AEC in Canberra. The complainant should also provide as much information as possible to enable assessment of the alleged breach. If possible, complaints should be accompanied by an original copy of the electoral advertisement from which the AEC can make a formal assessment of its compliance with the law.
85. If an original copy cannot be obtained, a copy of the entire document may be forwarded to the AEC. Similarly, in relation to a complaint about electoral advertisements on the internet, the complaint should, if possible, be accompanied by a printed copy of the web page showing the advertisement. The AEC can then make a formal assessment of its compliance with the law.
86. If complaints with attachments are being sent to the AEC by e-mail, some care needs to be taken to ensure that the attachments are less than 10 megabytes in size and that a read receipt is requested to ensure that they actually are received through the AEC's systems firewall.
87. In the absence of a printed copy of the advertisement as it appeared on the internet being provided with the complaint, the AEC will

require enough information about the internet site in order to locate the advertisement and make an assessment regarding compliance with the Act.

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

Conclusion

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

Endnotes

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

Court decisions dealing with the subject of electoral advertising and free speech may be accessed through any major public library or the Australasian Legal Information Institute website www.austlii.edu.au

The *Commonwealth Electoral Act 1918* can be accessed at any major public library or on the ComLaw website www.comlaw.gov.au.

Relevant provisions of the *Commonwealth Electoral Act 1918*

The following relevant provisions on electoral advertising in the *Commonwealth Electoral Act 1918* are extracted for the convenience of readers. The extracted law is current at July 2007. In some instances, emphasis has been added to keywords of particular relevance.

Part I – Preliminary

4 Interpretation

- (1) In this Act unless the contrary intention appears:
- electoral matter* means matter which is intended or likely to affect voting in an election
- how-to-vote card* means a card, handbill or pamphlet:
- (a) that:
- (i) is, or includes, a representation of a ballot paper or part of a ballot paper for an election (or something apparently intended to represent a ballot paper or part of a ballot paper for an election); and
- (ii) is apparently intended to affect, or is likely to affect, how votes are cast for any or all of the candidates in the election; or
- (b) that lists the names of 2 or more of the candidates or registered political parties in an election, with a number indicating the order of voting preference in conjunction with the names of 2 or more of the candidates or parties; or
- (c) that otherwise directs or encourages the casting of votes in an election in a particular way, other than a card, handbill or pamphlet:
- (i) that only relates to first preference votes; or
- (ii) that only relates to last preference votes.
- (9) Without limiting the generality of the definition of *electoral matter* in subsection (1), matter shall be taken to be intended or likely to affect voting in an election if it contains an express or implicit reference to, or comment on:
- (a) the election;
- (b) the Government, the Opposition, a previous Government or a previous Opposition;
- (c) the Government or Opposition, or a previous Government or Opposition, of a State or Territory;
- (d) a member or former member of the Parliament of the Commonwealth or a State or of the legislature of a Territory;

- (e) a political party, a branch or division of a political party or a candidate or group of candidates in the election; or
- (f) an issue submitted to, or otherwise before, the electors in connection with the election.

Part XX1 – Electoral offences

322 Interpretation

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

328 Printing and publication of electoral advertisements, notices etc.

- (1) A person shall not print, publish or distribute or cause, permit or authorise to be printed, published or distributed, an electoral advertisement, handbill, pamphlet, poster or notice unless:
 - (a) the name and address of the person who authorised the advertisement, handbill, pamphlet, poster or notice appears at the end thereof; and
 - (b) in the case of an electoral advertisement, handbill, pamphlet, poster or notice that is printed otherwise than in a newspaper – the name and place of business of the printer appears at the end thereof.
- (1A) A person must not produce, publish or distribute or cause, permit or authorise to be produced, published or distributed an electoral video recording unless the name and address of the person who authorised the video recording appears at the end of it.
- (1AB) Subject to subsection (1AC), a person must not print, publish or distribute or cause, permit or authorise to be printed, published or distributed an electoral advertisement that takes up the whole or part of each of 2 opposing pages of a newspaper unless, in addition to fulfilling the requirement under paragraph (1) (a) that the name and address of the person who authorised the electoral advertisement appear at the end of it, such name and address also appears on the other page, or the part of the other page, taken up by the electoral advertisement.
 - (1AC) Subsection (1AB) does not apply to an advertisement of the kind referred to in that subsection:
 - (a) that is contained within:
 - (i) a broken or unbroken border; or
 - (ii) broken or unbroken lines extending across, or partly across, the top and bottom of the advertisement; or
 - (iii) a broken or unbroken line extending along, or partly along, each side of the advertisement; or
 - (b) that is printed so that to read one or more lines of the text of the advertisement it is necessary to read across both pages.
- (2) A person who contravenes subsection (1), (1A) or (1AB) is guilty of an offence punishable on conviction:
 - (a) if the offender is a natural person – by a fine not exceeding \$1 000; or
 - (b) if the offender is a body corporate – by a fine not exceeding \$5 000.
- (3) Subsection (1) does not apply in relation to:
 - (aa) a how-to-vote card; or
 - (a) T-shirt, lapel button, lapel badge, pen, pencil or balloon; or
 - (b) business or visiting cards that promote the candidacy of any person in an election for the Parliament; or
 - (c) letters and cards:
 - (i) that bear the name and address of the sender; and
 - (ii) that do not contain a representation or purported representation of a ballot paper for use in an election for the Parliament; or
 - (d) an article included in a prescribed class of articles.
- (4) Nothing in paragraph (3)(aa)(a), (b) or (c) is taken, by implication, to limit the generality of regulations that may be made by virtue of paragraph (3)(d).
- (5) In this section:

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

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

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

328A Publication of electoral advertisements on the Internet

- (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.

- (2) Subsection (1) does not apply if the matter published on the internet forms part of a general commentary on a website.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the Criminal Code).

- (3) Section 15.2 of the Criminal Code (extended geographical jurisdiction – category B) applies to an offence against subsection (1).

- (4) In this section:

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

328B Requirements relating to how-to-vote cards

- (1) The following information (the *authorisation details*) must be included at the top or bottom of each printed face of a how-to-vote card:

- (a) the name and address of the person who authorised the how-to-vote card;

- (b) the following information (to the extent that it is not already required by paragraph (a)):

- (i) if the card is authorised by or on behalf of a registered political party, or by or on behalf of a candidate who is endorsed by a registered political party – the name of the registered political party;
- (ii) if the card is authorised by or on behalf of a candidate who is not endorsed by a registered political party – the candidate's name, and the word 'candidate'.

Offence of publishing etc. how-to-vote card that does not contain required authorisation details

- (4) A person (the *first person*) commits an offence if:

- (a) the first person:
 - (i) publishes or distributes a document; or
 - (ii) causes, permits or authorises another person to publish or distribute a document; and
- (b) that conduct of the first person occurs during the relevant period for an election; and
- (c) the document is a how-to-vote card; and
- (d) the how-to-vote card does not comply with the requirements of subsection (1) relating to authorisation details; and
- (e) if regulations made for the purpose of this paragraph provide that this subsection does not apply to prescribed kinds of articles—the how-to-vote card is not an article of any of those kinds.

Penalty: 50 penalty units.

Offence of publishing etc. how-to-vote card that contains false authorisation details

- (5) A person (the *first person*) commits an offence if:

- (a) the first person:
 - (i) publishes or distributes a document; or
 - (ii) causes, permits or authorises another person to publish or distribute a document; and

- (b) that conduct of the first person occurs during the relevant period for an election; and
- (c) the document is a how-to-vote card; and
- (d) some or all of the authorisation details on the how-to-vote card are false; and
- (e) if regulations made for the purpose of this paragraph provide that this subsection does not apply to prescribed kinds of article – the how-to-vote card is not an article of any of those kinds.

Penalty: 50 penalty units.

Definition

- (2) In this section:

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

329 Misleading or deceptive publications, etc.

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

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

- (5A) Section 15.2 of the *Criminal Code* (extended geographical jurisdiction—category B) applies to an offence against subsection (4).

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

331 Heading to electoral advertisements

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

Penalty: 5 penalty units.

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

Penalty: \$500.

- (3) In this section:

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

351 Publication of matter regarding candidates

- (1) If, in any matter announced or published by any person, or caused by any person to be announced or published, on behalf of any association, league, organisation or other body of persons, it is:

- (a) claimed or suggested that a candidate in an election is associated with, or supports the policy or activities of, that association, league, organisation or other body of persons, or
- (b) expressly or impliedly advocated or suggested:
 - (i) in the case of an election of Senators for any State – that a voter should place in the square opposite the name of a candidate on a ballot paper a number not greater than the number of Senators to be elected; or
 - (ii) in the case of an election of a Member of the House of Representatives – that that candidate is the candidate for whom the first preference vote should be given;

that person shall be guilty of an offence.

Penalty:

- (a) if the offender is a natural person – \$1 000; or
 - (b) if the offender is a body corporate – \$5 000.
- (1A) Subsection (1) does not apply if the person proves that he or she is authorised in writing by the candidate to announce or publish the thing claimed, suggested or advocated.
- Note: A defendant bears a legal burden in relation to the matter in subsection (1A) (see section 13.4 of the Criminal Code).*
- (2) Where any matter, the announcement or publication of which by any person without the written authority of a candidate would be an offence against subsection (1) on the part of that person, is announced or published by or on behalf of, or with the support of, any association, league, organisation or other body of persons, every person who was an officer thereof at the time of that announcement or publication shall be deemed to be guilty of an offence against subsection (1).
 - (3) For the purposes of this section, where any matter purports expressly or impliedly to be announced or published by or on behalf of, or in the interests or with the support of, any association, league, organisation or other body of persons, the matter shall, in the absence of proof to the contrary, be deemed to be

announced or published by or on behalf, or with the support, of the association, league, organisation or other body of persons.

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

- (4) Nothing in the foregoing provisions of this section shall apply to or in relation to any announcement or publication made or authorised by any *bona fide* political party or by any *bona fide* branch thereof respecting a candidate who, by public announcement, has declared his or her candidature to be a candidature on behalf of or in the interests of that party.
- (5) The person whose name and address appears at the top, bottom or end of any matter as the person who authorised the matter under section 328, 328A or 328B, in the absence of evidence to the contrary, is taken to have announced or published the matter, or caused it to be announced or published, for the purpose of this section.

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

385A Evidence of authorship or authorisation of material

- (6) In proceedings for an offence against this Act:
 - (a) an electoral advertisement, handbill, pamphlet, notice or video recording that includes a statement that it was authorised by a specified person is admissible as evidence of that fact; and
 - (aa) an electoral advertisement published on the internet that includes a statement that it was authorised by a specified person is admissible as evidence of that fact; and
 - (b) a printed electoral advertisement, handbill, pamphlet or notice that includes a statement that a specified person or firm was the printer is admissible as evidence of that fact; and
 - (c) a newspaper, circular, pamphlet or ‘dodger’ containing an article, or part of an article, containing electoral matter that includes a name purporting to be the author’s name is admissible as evidence that the person named is the author of the article.

(7) In this section:

article means an article, report, letter or other matter.

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

Protocol for the investigation of complaints during a Federal Election regarding possible breaches of the Commonwealth Electoral Act 1918

The most common complaints received by the AEC at election time concern possible breaches of sections 328, 329 and 331 of the Act. Following amendments to the Act by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* on 22 June 2006, the AEC also expects complaints under section 328A of the Act.

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

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

The Protocol

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

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

Complaints must be made in writing addressed to the Deputy Electoral Commissioner and be accompanied by **evidence** of the material in question, for example, an original copy of how-to-vote card, electoral advertisement or other documents relevant to the allegation. Depending on the nature of the document in question a scanned copy or an emailed photograph may be acceptable. This provides the context for preliminary assessment of the matter and also

enables relevant evidence to be tendered in court if proceedings are undertaken at a later date. The complainant should also provide as much additional information as possible to enable assessment of the alleged breach. The AEC will immediately acknowledge receipt of the complaint.

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

Breaches of section 329, because of their possible impact on the outcome of an election, require immediate action. If offending material is not withdrawn or amended immediately, the AEC may seek injunctive relief in accordance with section 383 of the Act. (*Note: a candidate in the election pursuant to section 383 may also seek injunctive relief.*)

If there is any doubt as to whether there may have been a breach, the matter will be referred to the DPP for advice. If that advice indicates a breach of sections 328, 328A, 329 or 331, generally the AEC will follow the steps set out above.

If there is continued non-compliance or a more serious breach, the matter may be referred to either, or both, the AFP and the DPP for further action.

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

The AEC recognises that all complaints during the election period must be handled promptly. As some complaints may require the AEC to seek external advice (from, for example, the DPP), it is not possible to set a minimum response time. However, the AEC will generally aim to respond to all complaints within one day of receipt.

Further information in relation to compliance with the Act is set out in the AEC's Electoral Backgrounder publications which can be found on the AEC's website at: http://www.aec.gov.au/About_AEC/Publications/Backgrounders/index.htm.

AEC Publications

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

- *Electoral Pocketbook*: a concise handbook of electoral facts and statistics
- *Electoral Boundaries Maps*: maps showing the geographic boundaries of the 150 electoral divisions
- *Nominations pamphlet*: key facts for people considering standing for election
- *Candidates Handbook*: an information handbook to assist candidates standing for election to the Senate and House of Representatives
- *Scrutineers Handbook*: an information handbook for scrutineers at federal elections and referendums
- *Election Funding and Financial Disclosure Handbook*: an information handbook of funding and disclosure requirements of candidates and political parties.

Copies of these and other publications are available from the AEC website www.aec.gov.au, or at national, state, territory and divisional offices, or by phoning 13 23 26.

Media Liaison

Members of the media are asked to use the Media Liaison contact numbers listed here rather than the general enquiry number.

Director

Media
02 6271 4415

Assistant Director

Media
02 6271 4724

For enquiries call **13 23 26** or visit www.aec.gov.au

