

Modernising regulatory arrangements

- 10.1 The *Commonwealth Electoral Act 1918* includes a range penalties and processes to encourage compliance. The Australian Electoral Commission (AEC) has proposed that these arrangements be modernised to provide a staged approach to enforcing compliance. Events in the division of Lindsay during the 2007 election campaign suggest that the current penalties relating to the distribution of unauthorised material are inadequate.

Commonwealth Electoral Act offence provisions

- 10.2 The Commonwealth Electoral Act is generally highly prescriptive of the responsibilities of the AEC and the processes that the AEC must follow in carrying out its duties. The Act also includes prescribes a range of obligations for electors (such as the requirement to enrol and vote) as well as obligations for candidates and political parties in some areas of their campaign activity (such as requirements to disclose some donations and to include on printed electoral advertisements the name and address of the person who authorised the advertisement and the name and place of business of the printer).¹
- 10.3 Penalties imposed by the Commonwealth Electoral Act are, in some cases, significant. For example, electoral bribery is subject to a penalty of \$5,000 or imprisonment for two years, or both.²

1 *Commonwealth Electoral Act 1918*, part XX in relation to disclosure obligations and s 328(1) in relation to printed electoral advertisements.

2 *Commonwealth Electoral Act 1918*, s 326.

10.4 The AEC noted that it may adopt any or all of the following strategies in response to an apparent breach of the Act:

- a request to cease and desist;
- injunction action undertaken in the Federal Court to compel compliance;
- referral to the Australian Federal Police (AFP) for investigation; and
- referral to the Commonwealth Director of Public Prosecutions (CDPP) for preliminary advice or prosecution.

10.5 The offence provisions in the Act are solely criminal offences. The AEC noted that, as such, the involvement of external agencies such as the AFP and the CDPP are required in order for such matters to be pursued.³

10.6 The reliance on other agencies to pursue possible breaches of the Commonwealth Electoral Act raised a number of difficulties in enforcing compliance. The AEC told the committee:

The existing process for dealing with serious breaches of the Act is that the first step is to identify prima facie evidence of the breach, including the identity of any persons involved. The matter is then referred to the AFP for investigation and the preparation of a brief of evidence to be given to the CDPP.

The above processes are also subject to the guidelines issues by both the AFP and the CDPP for the referral and handling of alleged criminal offences. Both of these sets of guidelines refer to an assessment of the seriousness of the alleged offence, the resources available for dealing with these matters and the public interest involved. It is noted that with the exception of the bribery offence in section 326 of the Act, almost all of the penalties for a breach of the Act are fines of up to \$1,000 that under the criminal law they are summary offences (see section 4H of the Crimes Act 1914).

Accordingly, the evaluation undertaken by the AFP of the available resources and the relatively low penalties in the Commonwealth Electoral Act, almost always results in the AFP deciding not to accept the referral and therefore it is unable to investigate breaches of the Commonwealth Electoral Act.⁴

3 Australian Electoral Commission, submission 169.6, p 7.

4 Australian Electoral Commission, submission 169, pp 68–69.

10.7 As an alternative to criminal action, section 383 of the Commonwealth Electoral Act provides for injunctive relief. The power to seek an injunction was first introduced into the Commonwealth Electoral Act in 1983. The AEC, political parties or candidates are able to use this power to obtain an injunction to stop any alleged breaches of the Act.⁵

10.8 The injunctive power has rarely been exercised by the AEC. The AEC noted a number of legal and practical issues that arise in attempting to seek the issuing of an injunction from the courts:

The major issue relates to the availability of admissible evidence, having regard to both the requirements of the Commonwealth Electoral Act and the common law dealing with the equitable relief of an injunction. The High Court of Australia in the case of *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63 set out the common law test for the equitable relief available as an injunction. In short the requirement is that the person seeking the injunction must show (1) that there is prima facie evidence supporting a finding that the Commonwealth Electoral Act has been breached by the Respondent named in the proceedings; (2) that the person is suffering damage for which a payment of compensation will be insufficient; and (3) the balance of convenience supports the granting of an injunction.

Accordingly, for the AEC or any other party to consider exercising the right to seek an injunction under section 383 of the Commonwealth Electoral Act it must possess admissible evidence that addresses all three elements of the above common law test. In practice, this has become an insurmountable obstacle to the obtaining by the AEC of an injunction, especially on polling day.⁶

10.9 In light of the difficulties faced by the AEC in taking action for alleged breaches of the Commonwealth Electoral Act, the AEC considered that 'an entirely fresh approach' be adopted, including a hierarchy of sanctions that may be imposed by the AEC itself, rather than having to look to an external agency to impose sanctions.⁷

10.10 The AEC proposed that the Commonwealth Electoral Act be amended to provide the AEC with a range of options for dealing with electoral offences including:

5 Australian Electoral Commission, submission 169, p 69.

6 Australian Electoral Commission, submission 169, pp 69–70.

7 Australian Electoral Commission, submission 169, p 70.

- warning letters for technical breaches;
 - public shaming and reports to Parliament for more serious breaches;
 - compliance agreements that are signed and published on the internet that acknowledge the breach and agreed steps to prevent future breaches;
 - civil penalties; and
 - withholding election funding for continuing breaches.⁸
- 10.11 The committee sought clarification on the AEC's proposals and further detail was provided by the AEC in submission 169.6. The committee notes that the range of options under the proposed enforcement model reflects those available to the Canadian electoral authority (Elections Canada). The AEC considers that this model provides 'an effective and transparent framework in which compliance matters are able to be handled'.⁹
- 10.12 The model proposed by the AEC is for a compliance regime that is based on a hierarchy of graduated responses to non compliance. The AEC noted that the model is based on the well known 'Braithwaite Enforcement Pyramid' that was developed in the 1980s. The lowest level of the Enforcement Pyramid involves a softer approach which is employed more frequently to the less serious matters of non compliance. The toughest sanctions (such as criminal penalties), are at the apex of the pyramid and are applied less frequently.¹⁰
- 10.13 The AEC noted that this does not mean that the regulator should not retain the ability to use the toughest sanction possible to a flagrant violation of the regulatory laws, merely that a range of sanctions often results in making lower-level sanctions more effective in preventing the non compliance, without needing to escalate the sanctions up the pyramid to the more serious levels of punishment.¹¹
- 10.14 The five levels in the enforcement approach proposed by the AEC would cover:
- The first enforcement tool in the proposed Enforcement Pyramid that is available is the publication of information about the requirements of electoral laws. This is currently dealt with on an administrative basis by the AEC with the publication of a range of
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8 Australian Electoral Commission, submission 169, p 70.

9 Australian Electoral Commission, submission 169.6, p 8.

10 Australian Electoral Commission, submission 169.6, p 7.

11 Australian Electoral Commission, submission 169.6, p 7.

information in such documents as the Electoral Backgrounders and other Fact Sheets that are freely available on the AEC's website.

The second level ... is the use of warning letters. While this is currently an administrative practice within the AEC, it is proposed that the Commonwealth Electoral Act should be amended to clearly reflect this process and to remove any suggestion that the only action that is available to the AEC to deal with non compliance is criminal action.

The third level ... is the ability to publish public announcements of the details of complaints and undertakings and agreement that have been given that noncompliant action will be remedied. This would provide a transparent and accountable process for the handling of complaints.

The fourth level ... would be the ability to impose civil sanctions/penalties. Such civil action is already contained in other Commonwealth legislation.

The fifth level ... would be the imposition of criminal sanctions and penalties as is currently provided for in the Commonwealth Electoral Act.¹²

Committee conclusion

- 10.15 The committee considers that the current regulatory model under the Commonwealth Electoral Act requires modernisation to provide for effective methods of enforcing compliance.
- 10.16 The committee notes that the Electoral Reform Green Paper on Donations, Funding and Expenditure has raised a number of issues associated with the enforcement of current funding and disclosure arrangements. Some of the options canvassed in the green paper include the approach adopted in Canada discussed previously and how offences could be applied to political parties (rather than party 'agents').¹³
- 10.17 Given the uncertainty about the funding and disclosure approach, including any changes to enforcement approaches and the limited opportunities for the committee to examine the AEC's proposals in detail, the committee is reluctant to support the changes proposed by the AEC at

12 Australian Electoral Commission, submission 169.6, p 7.

13 Australian Government, *Electoral Reform Green Paper: Donations, funding and expenditure* (2008), pp 69-72.

this stage. The committee considers that this issue should be addressed, but that it would be more effectively undertaken once the final model for funding and disclosure reform is developed.

Events in the division of Lindsay

- 10.18 Under the Commonwealth Electoral Act, the maximum penalty for printing and publication of electoral advertisements or notices that do not include the name and address of the person who authorised it and the name and place of business of the printer, is \$1,000 if the offender is a natural person and \$5,000 if the offender is a body corporate.¹⁴
- 10.19 As noted in chapter 1, the committee has not examined in detail the events relating to the distribution of unauthorised election material in the division of Lindsay at the 2007 election because the court processes are not complete.
- 10.20 The events in the division of Lindsay gave rise to some comment from inquiry participants about the appropriateness of penalties and other provisions of the Commonwealth Electoral Act regarding misleading statements.¹⁵ The ALP National Secretariat told the committee that:

The ALP remains concerned about the events which occurred in the final week of the election campaign in Lindsay. The Committee will be familiar with these events, which do not need to be recounted here.

The ALP does, however, believe that the events, the investigation process and the penalties finally issued fall well below a standard that would be acceptable to the general community.

We believe that JSCEM should now review the provisions of the Commonwealth Electoral Act 1918 relating to misleading statements, specifically s.329, with a view to providing further legislative definition to an offence under this part of the Act, and with a view to strengthening the penalties.¹⁶

14 *Commonwealth Electoral Act 1918*, s 328.

15 NSW Greens, submission 64, p 5; Bowe W, submission 106, p 1; Australian Labor Party National Secretariat, submission 159, p 4.

16 Australian Labor Party National Secretariat, submission 159, p 4.

10.21 Media reporting of the event, and subsequent court proceedings are set out in table 10.1.

Table 10.1 Media reporting of the events in the division of Lindsay

Date	Media comments
20 November 2007	Pamphlet claiming to be from 'The Islamic Australia Federation' and carrying the ALP logo are alleged to have been distributed in the division of Lindsay. (a)
22 November 2007	Australian Electoral Commission refers complaints by the Australian Labor Party and the State Director of the NSW Liberal Party of Australia to the Australian Federal Police. (b)
22 March 2008	NSW police confirm that they had commenced legal proceedings over the incident against five men. After consulting the Commonwealth Director of Public Prosecutions, the NSW Police charged the men under Section 328 of the Commonwealth Electoral Act, which deals with the printing and publication of election material. (a)
29 April 2008	Mr Troy Craig pleads guilty to one count of distributing unauthorised electoral material. The magistrate agreed with Mr Craig's barrister that his client's prior good character and minor role in the incident made it appropriate for the charge to be dismissed. (c)
7 May 2008	Mr Greg Chijoff is convicted and fined \$750 for distributing unauthorised electoral material. (d)
20 May 2008	Mr Mathew Holstein pleads guilty to distributing unauthorised election material and is fined \$500. (e)
29 April 2009	Mr Gary Clark is convicted of distributing unauthorised electoral material. Mr Jeff Egan is acquitted of distributing unauthorised electoral material. The court found that he did not know the leaflet failed to contain the necessary authorisation and printing details. (f)
19 May 2009	Mr Gary Clark is fined \$1,100 and was ordered to pay court costs of more than \$2,000. (f)

Source (a) Gilmore H and Carty L, *Lib charges over leaflet*, <http://www.smh.com.au/news/national/lib-charges-over-leaflet/2008/03/22/1205602728688.html>; (b) ABC News, 'Candidate's husband faces expulsion over flyer scandal', <http://www.abc.net.au/news/stories/2007/11/22/2098121.htm>; (c) Perth Now, 'Bogus leaflet charge dropped', http://www.news.com.au/perthnow/story/0,21498,23617680-5005361,00.html?from=public_rss; (d) Jacobson G, *Sydney Morning Herald*, 7 May 2008, *Chijoff fined over extremist scare*, <http://www.smh.com.au/news/national/chijoff-fined-over-extremist-scare/2008/05/07/1210131046871.html>; (e) *Herald Sun*, 'Lib supporter sorry for leaflet drop', <http://www.news.com.au/heraldsun/story/0,,23729323-5005961,00.html>; (f) Salusinszky I, *The Australian*, *Court bites Jackie Kelly's husband*, <http://www.theaustralian.news.com.au/story/0,25197,25406750-5013871,00.html>; (f) ABC Local Radio, 'MP's husband fined for bogus election leaflets', viewed on 20 May 2009 at <http://www.abc.net.au/news/stories/2009/05/19/2574605.htm?site=local>.

Committee conclusion

10.22 While the committee intends to examine in detail the events in the division of Lindsay once court proceedings are concluded, the court judgements in several of the cases relating to the events in the division of Lindsay, where fines of less than \$1,000 were imposed, have clearly demonstrated that the penalties imposed under the Commonwealth Electoral Act for the distribution of unauthorised material are inadequate.

Recommendation 46

- 10.23 **The committee recommends that the penalties imposed under s 328 of the *Commonwealth Electoral Act 1918* (\$1,000 for a natural person and \$5,000 for a body corporate) be revised to ensure that they provide a greater deterrent.**