

## Penalties under section 328

### Introduction

- 2.1 Section 328 of the *Commonwealth Electoral Act 1918* (CEA) provides guidelines for the printing and publication of electoral advertisements, notices and other material. If a person or organisation wishes to print or publish electoral advertisements then they must include on the advertisement the name and address of the person authorising the advertisement, and the name and place of the printer.
- 2.2 The penalty for not complying with these requirements is \$1 000 for an individual and \$5 000 for a body corporate. The persons involved in the events in the division of Lindsay were in breach of section 328. Mr Gary Clark was fined the maximum amount. Mr Jeff Egan was not convicted because he claimed that he did not know that the electoral pamphlet did not contain the name and address of the person who authorised it and the name and address of the business of the printer.
- 2.3 This chapter will examine whether the current penalties under section 328, which have not been updated since 1983, provide suitable deterrence. The committee also examines whether the offence should be changed to a strict liability offence to help act as an increased deterrence in the future.
- 2.4 In addition, the committee uses this review as an opportunity to examine more broadly the adequacy of the suite of penalties in the CEA which have not been updated since 1983.

## Penalties in the CEA and the need for reform

- 2.5 During the hearings, the committee sought information on the penalty levels in the CEA, and the process by which they are updated. The AEC stated:

The penal sanctions in the act and the levels were set in 1983. They have not been changed since the major amendments that were done to the act in 1983. So the \$1 000 has not changed.<sup>1</sup>

- 2.6 The age of the penalties in the CEA is also reflected by the fact that the older sections refer to dollar amounts rather than the modern approach of penalty units. The AEC stated:

...there was mention about why the offence in section 328A is punishable by penalty units. That reflects, again, the age of the penalties that are here. The 328 provision dealing with electoral advertising on the internet was only put in to the act in 2006. So that is why the reference there is the modern reference to penalty units while the remainder of the provisions in part 21 of the act are expressed in fixed dollar amounts.<sup>2</sup>

- 2.7 Section 4AA of the *Crimes Act 1914* currently sets one penalty unit at \$110. The Attorney-General's Department (AG's) noted that 'expressing a penalty in penalty units assists in adjusting penalties upwards in line with inflation.'<sup>3</sup>

- 2.8 The fact that the penalty units in the CEA have not been updated since 1983 was conclusive grounds for their review. The AEC stated:

...the AEC would support a view and recommendations that the level of the penalties should be reviewed and should be increased to make them up to date and to reflect modern circumstances.<sup>4</sup>

- 2.9 It should be noted that the committee has a long history in examining the adequacy of penalty provisions in the CEA. In 1989 the then committee as part of its review of the 1987 federal election made the following recommendations:

- Recommendation 54: The penalties for election offences under the *Commonwealth Electoral Act 1918* be substantially increased with those
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1 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Transcript T1*, p. 5.

2 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Transcript T1*, p. 5.

3 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, December 2007, p. 44.

4 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Transcript T1*, p. 5.

penalties currently set at \$1 000 or 6 months imprisonment being increased to \$12 000 or imprisonment for not more than two years; and

- Recommendation 55: All election penalties be subject to regular review.<sup>5</sup>

2.10 In 1997 the then committee as part of its review of the 1996 federal election made the following recommendation:

- Recommendation 51: that a review of the level of penalties for offences under the Electoral Act and the Referendum Act be undertaken by the AEC with the assistance of the Attorney-General's Department, with a view to bringing the penalties into line with penalty rates for comparable offences under the other Commonwealth statutes.<sup>6</sup>

2.11 In 1999, as part of the review of the 1998 federal election, the AEC in a submission, made the following response to recommendation 51 as quoted above:

This recommendation of the 1996 JSC EM has not been progressed,...for the following reasons. Firstly, the penalty units system is gradually being inserted into the Electoral Act to replace the old penalty system specifying actual dollar amounts for pecuniary penalties and in some cases, term of imprisonment, as individual sections of the Act are amended (see for example section 91A(1AA))...

Finally, the AEC has been informally advised by the Criminal Law Branch of the Attorney-General's Department that any review of the level of penalty levels in the Electoral Act would have to be conducted within given policy guidelines concerning desirable and specified penalty levels. The AEC is now of the view that such policy guidelines should more appropriately come from the JSC EM rather than the AEC, and should be evaluated by the JSC EM for each particular offence in question.<sup>7</sup>

2.12 The AEC in its submission to the current inquiry notes that the policy responsibility for framing Commonwealth offences falls within the AG's portfolio. The AEC stated that 'any legislation to implement JSC EM

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5 Joint Standing Committee on Electoral Matters, *The 1987 Federal Election, Inquiry into the conduct of the 1987 Federal Election and 1988 Referendums*, May 1989, p. xxi.

6 Joint Standing Committee on Electoral Matters, *The 1996 Federal Election, Report of the Inquiry into the conduct of the 1996 Federal Election and matters related thereto*, June 1997, p. 90.

7 Australian Electoral Commission, *Supplementary Submission 239 to the JSC EM Inquiry into the conduct of the 1998 Federal Election and matters related thereto*, paras 8.3 to 8.5.

recommendations on penalties could only be progressed with the approval of that Department and its Minister.’<sup>8</sup>

- 2.13 The AEC, as part of its submission, has provided a table which lists all provisions contained in the Electoral Act which contain a penalty offence. This list is reproduced in full at **Appendix K**. The AEC commented that ‘the proposed penalties for the offences contained in Part XX of the Act reflects the revised disclosure regime that was contained in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009.’<sup>9</sup> Therefore, the penalties proposed for sections 315 to 316 have been publicly available through the political donations and other measures bill. The proposed changes to offences under Part XXI which includes sections 323 to 351 have not been previously circulated.
- 2.14 In examining the AEC’s proposed changes to penalty provisions monetary penalties, in many cases, have been raised to a higher level and then converted to penalty units. For example the penalty for section 315(2) which relates to lodging an incomplete return or failing to retain relevant records is currently \$1 000 and a strict liability offence. The AEC has proposed that this be no longer a strict liability offence but the fine be increased to 120 penalty units.
- 2.15 A further aspect about the proposed changes to penalties is the introduction of terms of imprisonment where previously there were none and in cases where there are currently penalties of imprisonment, the proposal in some cases is to increase these significantly. For example, section 327(1) relates to interference with any political right or duty. The current penalty is \$1000 or imprisonment for 6 months, or both. The AEC has proposed that this be revised to a maximum penalty of 240 penalty units or imprisonment for 4 years or both. The increased monetary penalty and increased term of imprisonment reflects the serious nature of the offence and the need to underpin Australia’s electoral laws.
- 2.16 The AEC advised that many of the penal offences in the Electoral Act are mirrored in the *Referendum (Machinery Provisions) Act 1984* and, accordingly, any changes proposed to the Electoral Act should also be recommended to the *Referendum (Machinery Provisions) Act*.

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8 Australian Electoral Commission, *Submission 3A*, p. 1.

9 Australian Electoral Commission, *Submission 3A*, p. 7.

## Conclusions

- 2.17 The penalty provisions in the *Commonwealth Electoral Act 1918* have not been updated since 1983. The deterrent value of the penalties have been decreasing over time and it is now essential that the penalties be updated. It should be noted that since 1989 the committee has been recommending that the penalties be updated but unfortunately this has not occurred. The Australian Electoral Commission has provided a submission to the current inquiry which identifies all provisions in the CEA which contain a penalty offence and proposes possible changes. This list is reproduced at **Appendix K**.
- 2.18 The committee appreciates the information provided by the AEC as it now provides a guide for proceeding with legislative amendments to update the penalty provisions in the CEA. It is noted that the offences under Part XX of the CEA have previously been circulated as they reflect the disclosure regime that was contained in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009. The proposed changes to Part XXI which includes sections 323 to 351 of the CEA have not been previously circulated. The committee notes that in some cases the monetary fines and length of imprisonment have been significantly increased.
- 2.19 The committee recommends that the Special Minister of State with assistance from the Attorney-General should seek to update the penalties as soon as possible using the AEC's proposed changes to penalties as a guide. As some of the proposed changes have not been subject to public debate the committee requests that the Special Minister of State refer amending legislation to the committee so that the committee can conduct a bills inquiry into the proposed reforms to penalties in the CEA. A future bills inquiry will help to highlight the proposed changes to penalties and ensure that the new penalties adequately reflect community values.

## Recommendation 1

- 2.20 **The committee recommends that the Special Minister of State, with assistance from the Attorney-General, introduce amending legislation to update the penalty provisions in the *Commonwealth Electoral Act 1918* using the schedule provided by the Australian Electoral Commission which is reproduced at Appendix K as a guide.**

**The penalty provisions in the *Referendum (Machinery Provisions) Act 1984* should be updated in accordance with changes to the *Commonwealth Electoral Act 1918*.**

**The Special Minister of State is requested to refer the relevant amending legislation to the committee so that it can conduct a bills inquiry into the proposed changes to the penalties in the *Commonwealth Electoral Act*.**

## Section 328 penalties

- 2.21 The circulation of unauthorised electoral material is a very serious matter and all participants in the inquiry were in agreement that it is a practice that must be stamped out. The level of the current penalties, however, did not support this goal as there was not sufficient deterrence to prevent people or organisations from undertaking this illegal practice. Mr Luke Foley, Assistant General Secretary of the Australian Labor Party (ALP), NSW Branch, stated:

So we would submit that there is an unfortunate trend in Australian politics exhibited at the last two federal elections concerning bogus material seeking to push the buttons of religion and race and seeking to divide the community on that basis. When that sort of material has been distributed on both occasions the aim has been to hurt the Labor candidate in a highly marginal seat. We are concerned to ensure that these tactics are drummed right out of Australian politics. We think that a \$1,000 fine, the current maximum penalty that exists, is clearly inadequate for offences of this degree of seriousness.<sup>10</sup>

- 2.22 The Australian Democrats stated:
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<sup>10</sup> Mr Luke Foley, Assistant General Secretary, Australian Labor Party, NSW Branch, *Transcript T1*, p. 26.

There can of course be serious electoral consequences in the practice of distributing misleading and/or unauthorised material, especially if it isn't picked up until after the election and the fines or other penalties should act as a sufficient deterrent.<sup>11</sup>

- 2.23 Senator Steven Hutchins, Labor Senator for New South Wales, was part of a group of Labor party members who confronted members of the Liberal Party responsible for distributing unauthorised election material in the division of Lindsay. Senator Hutchins stated:

This is not the first time that the NSW Liberals have been caught doing something like this, but it is the first time that they have been properly brought to justice. In doing so, the Commonwealth Electoral Act has proven to be lacking when it comes to ensuring the integrity of electoral material.<sup>12</sup>

- 2.24 The full text of section 328 of the CEA is reproduced in full at **Appendix H**.

## The application of section 328

- 2.25 The distribution of unauthorised election material, as occurred in Lindsay, is not unique. The events that occurred in Lindsay, however, were unusual because it was one of the few occasions where evidence was available to convict those guilty of distributing unauthorised material.

- 2.26 During the 2007 election, three incidents were reported that involved anonymous pamphlets. The AEC stated:

In this particular incident in Lindsay, we were sent photographs of the persons involved in the publication and distribution of the documents. That made it rather easier to refer it to the Australian Federal Police....

In the two other matters we had extreme difficulties, as did the Australian Federal Police, in attempting to identify the persons involved in the publication of those pamphlets.<sup>13</sup>

- 2.27 The advice of the AEC was that if there was no evidence to identify the persons involved then little or no action can be taken. The AEC stated:

The matter in Tasmania involved an extremely offensive and highly defamatory sticker that was placed on a candidate's

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11 Australian Democrats, *Submission 2A*, p. 1.

12 Senator Steve Hutchins, *Submission 1A*, p. 1.

13 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Transcript T1*, p. 2.

election posters around Hobart in particular. The AFP investigated that matter and could not find the persons involved in the distribution and publication of that defamatory material. As far as the Electoral Commission is concerned, this particular pamphlet shows one of the problems that we have with the operation of the legislation – that if we and the Australian Federal Police are unable to identify the person who caused the publication then little action can be taken.<sup>14</sup>

2.28 Other witnesses reported cases involving the distribution of anonymous pamphlets. Senator Steve Hutchins stated:

In the Greenway Campaign during the 2004 election, the ALP Candidate Ed Husic was subjected to a similar spate of letterboxing fake, unauthorised, and misleading material. While this cannot be traced to the Liberal Party, they were the direct beneficiary.<sup>15</sup>

2.29 Mr Foley presented the committee with a copy of the anonymous pamphlet referred to by Senator Hutchins. Mr Foley stated:

So we have had our candidates in marginal seats, in Greenway in 2004 and in Lindsay in 2007, subject to this sort of bogus material being distributed at night in the final few days of an election campaign. We want to ensure it never happens again. The only difference between Greenway in 2004 and Lindsay in 2007 is that the perpetrators were caught in Lindsay. They got away with it in Greenway. Louise Markus was elected narrowly over Ed Husic.<sup>16</sup>

2.30 The pamphlet referred to by Mr Foley is reproduced at **Appendix I**.

## Liability options to enhance deterrence

2.31 While the Lindsay incident was significant for the fact that the persons responsible for distributing unauthorised election were convicted, the incident also revealed key features about the operation of the penalty provisions.

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14 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Transcript T1*, p. 2.

15 Senator Steve Hutchins, *Submission 1A*, p. 1.

16 Mr Luke Foley, Assistant General Secretary, Australian Labor Party, NSW Branch, *Transcript T1*, p. 26.



2.32 The NSW Police commenced legal proceedings against five persons who were involved in distributing unauthorised election material. Three of these pleaded guilty while Mr Clark and Mr Egan pleaded not guilty. Mr Egan was found not guilty after arguing that he did not know that the pamphlet was not authorised. The Court judgment states:

Mr Egan agrees that he distributed the pamphlet, but says that he did not know that the pamphlet did not contain the name and address of the person who authorised the electoral pamphlet and the name and place of business of the printer of the electoral material.<sup>17</sup>

2.33 The Court judgment, in relation to Mr Egan, concluded:

There is insufficient evidence to conclude that Egan was aware of a substantial risk the pamphlet was not authorised when he distributed the pamphlet. The evidence tends to show that for Mr Egan it was just a routine 'letterbox drop', similar to many others he had done for the Liberal Party.<sup>18</sup>

2.34 Senator Hutchins, in evidence to the committee, commented that 'the trial judge found that Mr Egan was not acting with intent or recklessness, but rather on the reasonable belief that the material he was distributing was authorised.'<sup>19</sup> Consequently, Senator Hutchins proposed that section 328 be amended to be a strict liability offence. Senator Hutchins stated that 'this would mean that no evidence of intent or recklessness would be necessary and the mere fact of publication and distribution without authorisation would be sufficient for a finding of guilt.'<sup>20</sup>

## Strict liability and absolute liability

2.35 AG's has issued guidelines for the application of strict and absolute liability offences.<sup>21</sup> In addition, the Senate Standing Committee for the Scrutiny of Bills has reported on the application of absolute and strict liability offences in Commonwealth Legislation and has identified basic

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17 Local Court, New South Wales, Commonwealth DPP V Egan, para. 6, p. 2.

18 Local Court, New South Wales, Commonwealth DPP V Egan, para. 51, p. 13.

19 Senator Steve Hutchins, *Submission 1A*, p. 4.

20 Senator Steve Hutchins, *Submission 1A*, p. 4.

21 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, December 2007.

principles that should be complied with if an agency is intending to introduce strict or absolute liability offences.<sup>22</sup>

- 2.36 Strict liability offences are ‘those which do not require guilty intent for their commission, but for which there is a defence if the wrongful action was based on a reasonable mistake of fact. Absolute liability offences are ‘those which do not require a guilty intent, but for which there is no defence of a reasonable mistake of fact.’<sup>23</sup>
- 2.37 If it is intended that no fault element apply then the element must be expressly provided as one of strict liability (section 6.1 of the Criminal Code) or absolute liability (section 6.2 of the Code).
- 2.38 AG’s states that the application of either strict or absolute liability negates the requirement to prove fault. Strict and absolute liability are expressed in 6.1 and 6.2 of the Criminal Code.

### **Strict liability**

**Section 6.1 of the Criminal Code** provides:

- (1) If a law that creates an offence provides that the offence is an offence of strict liability:
  - (a) there are no fault elements for any of the physical elements of the offence; and
  - (b) the defence of mistake of fact under section 9.2 is available.
- (2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:
  - (a) there are no fault elements for that physical element; and
  - (b) the defence of mistake of fact under section 9.2 is available in relation to that physical element.
- (3) The existence of strict liability does not make any other defence unavailable.

### **Absolute liability**

**Section 6.2 of the Criminal Code** provides:

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22 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2002, Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, June 2002.

23 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2002, Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, June 2002, p. 258.

- (1) If a law that creates an offence provides that the offence is an offence of absolute liability:
  - (a) there are no fault elements for any of the physical elements of the offence; and
  - (b) the defence of mistake of fact under section 9.2 is unavailable.
- (2) If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:
  - (a) there are no fault elements for that physical element; and
  - (b) the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element.
- (3) The existence of absolute liability does not make any other defence unavailable.

2.39 In relation to the application of strict and absolute liability, AG's stated:

The application of strict liability allows a defence of honest and reasonable mistake of fact to be raised. The application of absolute liability does not. The defence does not apply to circumstances where a mistake results from a lack of awareness of relevant facts.<sup>24</sup>

2.40 The Senate Standing Committee for the Scrutiny of Bills has set out a list of principles that it believes should apply to the framing and administration of strict and absolute liability. In particular, the Senate committee states:

...strict liability should be introduced only after careful consideration on a case-by-case basis of all available options; it would not be proper to base strict liability on mere administrative convenience or on a rigid formula.<sup>25</sup>

2.41 AG's noted that, in considering strict liability, agencies should also look to the deterrent value arising from the application of strict liability. AG's stated:

**We also suggest that agencies who are considering that look at whether the punishment of offences not involving fault – that is, strict liability offences – is likely to significantly enhance the effectiveness of an enforcement regime in deterrence value and**

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24 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, December 2007, p. 24.

25 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2002, Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, June 2002, p. 283.

**whether there are legitimate grounds for penalising individuals even though they lack fault as a relevant mental element.<sup>26</sup>**

2.42 The AEC, in evidence to the committee, agreed that strict liability is an easier offence to prove in relation to unauthorised distribution of electoral material. The AEC stated:

That is true and that is why we suggest in relation to section 328 that it may well be an appropriate offence to have as a strict liability offence.<sup>27</sup>

2.43 AG's, during the hearing, was asked the pivotal question as to whether strict liability would be an appropriate offence applying to section 328. AG's advised that strict liability would be applicable and stated:

...on the deterrent effect and the policy considerations in this instance we defer to the Australian Electoral Commission. But from the perspective of the department we do not see any of these factors as ruling out strict liability in this instance.<sup>28</sup>

## Maximum penalty under strict liability

2.44 AG's states that 'different considerations apply to the use of strict and absolute liability depending on how it applies to an offence.'<sup>29</sup> AG's notes that the application of strict or absolute liability to all physical elements of an offence has generally only been considered appropriate where each of the following considerations is applicable:

- The offence is not punishable by imprisonment and is punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate) in the case of strict liability or 10 penalty units for an individual (50 for a body corporate) in the case of absolute liability. A higher maximum fine has been considered appropriate where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment.
- The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences.

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26 Ms Sarah Chidgey, Attorney-General's Department, *Transcript T2*, p. 5.

27 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Transcript T2*, p. 8.

28 Ms Sarah Chidgey, Attorney-General's Department, *Transcript T2*, p. 5.

29 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, December 2007, p. 25.

- There are legitimate grounds for penalising persons lacking ‘fault’, for example because they will be placed on notice to guard against the possibility of any contravention. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made an honest and reasonable mistake of fact.<sup>30</sup>

2.45 In evidence to the committee, Senator Hutchins proposed that section 328 be amended to be a strict liability offence, and the ‘the maximum fine payable for a breach of section 328 should be raised to \$10 000 for an individual and \$50 000 for a corporate body and a table outlining the various levels of severity should be included to ensure that more minor breaches are not unduly punished.’<sup>31</sup>

2.46 Senator Hutchins further commented that ‘I do firmly believe that incarceration would be a significant deterrent to people putting out these sorts of leaflets again.’<sup>32</sup> Senator Hutchins stated:

If we legislated to make the deterrent stronger, you would not get Liberal or even Labor Party activists putting out, if I can use the term, shit sheets before an election. They would not do it if they knew that they could be fined \$10,000, that they could be put in jail and that it would not matter whether they said, ‘I did not know what I was doing, Governor’ – that it would not wash with the local courts.<sup>33</sup>

2.47 Mr Luke Foley supported the need to increase the penalties applying to section 328. He advised that the Labor party ‘calls for reform to impose a maximum penalty of \$10 000 or imprisonment for five years, or both.’<sup>34</sup> Mr Foley stated:

What is important for us is that there be a significantly greater deterrent than there is now. I think officials in all political parties would welcome that to ensure that maverick elements cannot peddle, or would think twice before peddling, this sort of material in the future. We do not have a particularly strong view on whether it should be five years or three years. We believe that a maximum penalty of imprisonment would send a clear signal to

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30 Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, December 2007, p. 25.

31 Senator Steve Hutchins, *Transcript T1*, p. 14.

32 Senator Steve Hutchins, *Transcript T1*, p. 15.

33 Senator Steve Hutchins, *Transcript T1*, p. 16.

34 Mr Luke Foley, Assistant General Secretary, Australian Labor Party, NSW Branch, *Transcript T1*, p. 25.

political activists that they cannot peddle this sort of material in Australian politics.<sup>35</sup>

2.48 AG's, in evidence to the committee, advised that if an agency was considering making an offence strict liability then imprisonment would not be appropriate and the maximum penalty should be up to 60 penalty units for an individual and 300 penalty units for a body corporate.<sup>36</sup> Currently that equates to \$6 600 for an individual and \$33 000 for a body corporate.

2.49 The AEC in its submission to the inquiry noted that their main concern about section 328 relates to the totally anonymous electoral advertisements where there is no person who is readily identifiable. The AEC stated that in these cases:

...criminal forensic investigation skills and resources would need to be obtained (e.g. the use of services from the Australian Federal Police (AFP)) in an attempt to locate the persons responsible for the publication of the anonymous advertisement. Changing the fault elements on their own would not appear to provide a solution for the AEC to deal with these anonymous electoral advertisements. However increasing the penalty for a breach of section 328 (and also 328A) to include a term of imprisonment may well have an effect as any increase in the quantum of the penalty appears to increase the likelihood that the AFP may be in a position to accept a referral and to devote their scarce investigation resources to dealing with these types of offences.<sup>37</sup>

2.50 The AEC advised that through the illegal practice specified under section 328, the ultimate sanction could be the voiding of the election. The AEC stated:

So if one is able to show that as a result of the illegal practice – in that the result of the election was likely to be affected – then that has the ultimate sanction which is that the particular candidate, if they were successful, would potentially lose being declared the winner and a new election could be called by the Court of Disputed Returns. So there is another potential sanction that is

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35 Mr Luke Foley, Assistant General Secretary, Australian Labor Party, NSW Branch, *Transcript T1*, p. 26.

36 Ms Sarah Chidgey, Attorney-General's Department, *Transcript T2*, p. 5.

37 Australian Electoral Commission, *Submission 3A*, p. 6.

there in relation to illegal practice which includes a breach of section 328.<sup>38</sup>

- 2.51 Section 320 of the *Canada Election Act 2000* requires electoral material to be authorised. The AEC advised that it is a strict liability offence with a penalty of not more than \$1 000 or imprisonment for a term of not more than three months or both.<sup>39</sup>

## Defence under strict liability

- 2.52 It was noted during the hearing that strict liability is preferential to absolute liability because there is a defence under strict liability. AG's stated:

That is right. You have a defence of mistake of fact that is available. If an individual can show that they turned their mind to it and, for whatever reason, had an honest and reasonable belief that the material was appropriately authorised and marked then they would be able to avail themselves of that defence.<sup>40</sup>

## Conclusions

- 2.53 Section 328 of the *Commonwealth Electoral Act 1918* (CEA) provides guidelines for the printing and publishing of electoral advertisements. It is an offence to distribute electoral advertisements such as pamphlets if they do not contain the name and address of the person who authorised the material and the name and place of business of the printer.
- 2.54 During the 2007 federal election then members of the Liberal party were involved in the distribution of unauthorised election pamphlets in the division of Lindsay. The contents of the pamphlet sought to turn voters away from the Labor candidate and incite racial tensions. A copy of the pamphlet is reproduced at Appendix C.
- 2.55 Persons connected with the Labor party were tipped off by a Liberal Party member that unauthorised pamphlets were going to be distributed in Lindsay on 20 November 2007. The committee commends the decision of the anonymous Liberal Party member who took the action to report on the

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38 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Transcript T1*, p. 5.

39 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Transcript T1*, p. 4.

40 Ms Sarah Chidgey, Attorney-General's Department, *Transcript T2*, p. 6.

illegal activities of fellow Liberal members. This course of action is not easy and it takes courage and conviction.

- 2.56 All witnesses and committee members are in agreement that the distribution of unauthorised election material like that circulated in Lindsay is a disturbing crime and the practice needs to be stamped out through the introduction of more significant penalties.
- 2.57 The penalties under section 328 are \$1 000 for an individual and \$5 000 for a body corporate. The penalties have not been updated since 1983 and are clearly inadequate as a deterrence. In addition, the penalty is not framed as a strict liability offence. This aspect allowed Mr Jeff Egan to be found not guilty because he claimed that he did not know that the pamphlets were not authorised.
- 2.58 The evidence is overwhelming in its support for overhauling and modernising section 328 of the CEA. First, the committee is recommending that section 328 be re-drafted to make it a strict liability offence. The Australian Electoral Commission agrees with this course of action and believes it would make the offence easier to prove and add to the deterrence value. The Attorney-General's Department confirmed that there did not appear to be any factors ruling out section 328 being framed as a strict liability offence. The committee is confident that the proposal complies with the guidance set out in the Attorney-General's *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, and the basic principles outlined by the Senate Standing Committee for the Scrutiny of Bills.<sup>41</sup>
- 2.59 Second, the committee is recommending that the penalties under section 328 be increased. Some groups in evidence to the committee proposed that the fines be increased to \$10 000 for an individual and \$50 000 for a body corporate. It was also proposed that individuals be subject to an imprisonment term of up to five years. The Australian Electoral Commission noted that its main concern is a 'truly anonymous electoral advertisement where no person is readily identifiable.' The AEC commented further that 'changing the fault element on their own would not appear to provide a solution for the AEC to deal with these anonymous electoral advertisements. The AEC suggested that increasing the penalty for a breach of section 328 to include a term of imprisonment may well have an effect as any increase in the quantum of the penalty
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41 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, December 2007.; Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2002, Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, June 2002.



appears to increase the likelihood that the Australian Federal Police may be in a position to accept a referral and to devote their scarce investigation resources to dealing with these types of offences. While the AEC has discussed this point it has not recommended that there be a penalty of imprisonment.

- 2.60 The committee notes the views regarding imprisonment but believes that they would be excessive in the context of a strict liability offence and would go against the advice provided by the Attorney-General's Department and the Senate Standing Committee for the Scrutiny of Bills. The AEC proposed that section 328 penalties be increased to a maximum penalty of 50 penalty units for a natural person or a maximum penalty of 250 penalty units for a body corporate.
- 2.61 The committee notes the AEC's proposal but supports introducing the highest possible fine provided for under the Attorney-General's guide relating to strict liability offences. The committee, therefore, supports raising the penalty for an individual to 60 penalty units and 300 penalty units for a body corporate. Currently that equates to \$6 600 for an individual and \$33 000 for a body corporate. These increased level of penalties together with the fact that the committee is proposing that the offence be redrafted as a strict liability offence will significantly increase the level of deterrence associated with this unacceptable practice. In the future, party member or non-aligned persons should think very carefully about the ramifications of undertaking the illegal practice of distributing unauthorised election material.

## **Recommendation 2**

- 2.62 **The committee recommends that section 328 of the *Commonwealth Electoral Act 1918* be redrafted as a strict liability offence, and the maximum penalties be 60 penalty units for an individual and 300 penalty units for a body corporate.**