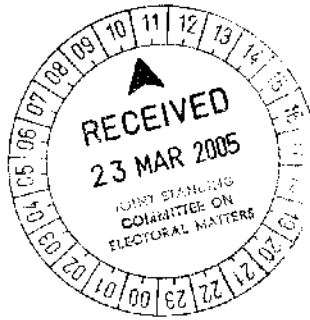


SUBMISSION NO. 44



Joint Standing Committee on Electoral Matters	
Submission No.	44
Date Received	23-3-05
Secretary	<i>[Signature]</i>

Internet comment on electoral matters

**Submission to Parliamentary Electoral Matters Committee
Inquiry into the Conduct of the 2004 Federal Election and Matters
Related Thereto**

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Internet comment on electoral matters

Recent public comments have raised the possibility that Section 328 of the Electoral Act could be applied to Internet sites. The effect would be to criminalise anonymous political or social comment, to the extent that this is deemed to be 'electoral material'. Particular concern was expressed in relation to the site <http://www.johnhowardlies.com/> which listed purported false statements by the Prime Minister, Mr Howard.

More precisely, Section 328 requires that electoral advertising include the name and address of the person authorising the advertisement and, if applicable, the printer.

The reach of this section, as described in AEC Electoral Backgrounder #15 is very broad. It applies at all times and the scope under 4(1) includes 'include any express or implicit reference to, or comment on: the election; the Government; the Opposition; a political party or candidate; or any issue submitted to, or otherwise before, the electors in connection with the election.' As the AEC notes, 'the term "electoral matter" has a very wide application.'

To give just a few examples, issues before the electors in recent elections have included taxation policy, the performance of government business enterprises, the state of the national economy, the future course of interest rates, the desirability of gay marriage or civil unions, and the appropriate policy in relation to drugs.

Thus, the restriction on freedom implied by Section 328 is substantial. Someone unwilling to identify themselves, for whatever reason, is effectively prohibited from publishing any advertisement on any topic of social or political interest.

Thus, the crucial question relates to the interpretation of the term 'advertisement'. An "electoral advertisement" is defined in section 328(5) of the Electoral Act as any advertisement, handbill, pamphlet, poster or notice that contains electoral matter. It seems clear that the Act has never been deemed to apply to the editorial and news content of newspapers and magazines, including opinion columns, or to broadcasting of political opinion, as distinct from free or paid

advertisements. In addition, although the law formerly required identification from writers of 'Letters to the Editor' and callers to talkback radio programs, this requirement was repealed in 2001.

On this basis, consistent application of the Electoral Act to Internet publications would appear to imply that it is permissible to publish electoral matter, without identifying details as part of ordinary editorial content, but that advertisements, presented as a discrete part of the page or site would require authorisation, whether they were paid for or published without charge.

Examining the johnhowardlies.com site, it can be seen that the majority of the pages consist of quotes from the Prime Minister and other ministers, under the heading "The Lie", along with a claimed refutation, under the heading "The Fact".

In addition, the page contains links to other sites. Some of these take the form of underlined text hyperlinks. Others appear as graphics, advertising the content of the sites concerned, which are mostly political.

For comparison, it may be useful to examine the site johnquiggin.com, written and maintained by the author of this submission. Although the author's name and photograph are prominently displayed, the site does not include the address details required for political advertisements. In addition, the site publishes comments from readers, many of whom are anonymous. During the 2004 election campaign, numerous posts commented on the performance and policies of the parties, the likely outcome and so on, as well as on a variety of issues before the electorate. The site is generally updated daily, whether or not an election is in progress, and much of this material would be classed as 'electoral matter'. In addition, there are numerous links to other sites.

There are some obvious definitional difficulties here. Nevertheless, applying analogies from print, it would seem reasonable to view the johnquiggin.com site as a kind of magazine, the comments as letters to the editor, and the links as analogous to references in a magazine or journal article.

If these analogies are accepted, it is hard to see that the same view should not be extended to johnhowardlies.com, and similar pro-government sites. While the style is more tabloid and graphic, the publication model is essentially similar. As regards the advertisements on the site, these are advertisements for other websites rather than political advertisements in the traditional sense of the term.

It may also be useful to consider various other forms of electoral matter disseminated through the Internet, including email, on-line discussions and so forth. These are viewed by most users as extensions of private activities in civil society such as correspondence or talking with friends. It is undesirable that they should be regulated by the state, except in the limited instances that apply in general, for example in relation to defamation.

Suppose, alternatively, that these analogies are not accepted, and that Section 328 is taken to apply to a wide range of Internet publications. It is important then, to consider, whether the costs of such a restriction on speech are justified by benefits to the democratic process.

The AEC defends Section 328 as 'ensuring that anonymity does not become a protective shield for irresponsible or defamatory statements.' However, the basis for this claim seems weak.

The concept of 'irresponsible statements' is entirely subjective and has no legal basis. There are no legal penalties for the publication of irresponsible, or even knowingly false, statements in political advertising.

As regards defamation, High Court decisions have allowed broad latitude for political comment. More generally, anonymous publication does not provide a legal defence against defamation action. While anonymity may create difficulties for plaintiffs in such an action, it is hard to see why politically defamatory statements should be singled out.

Under current circumstances, the person authorising advertisements is typically a paid official of a political party, unknown to the general public. Such a person is unlikely to face significant adverse consequences even if the advertisement is of a kind to elicit a hostile reaction from

political opponents. By contrast, private individuals commenting on public affairs might face a range of negative consequences from the publication of their name and address including, for example, adverse employment consequences.

A concern arises in various contexts, including calls to talkback radio, that what is presented as spontaneous individual comment is in fact organised and perhaps paid for by political parties. Requirements for names and addresses are, however, a very blunt instrument in such cases. If any intervention is required, it would be preferable to require that people engaged in commenting on electoral matters declare party affiliations or employment.

It would seem sensible, and consistent with past practice, to take a narrow view of the operation of legislation that has the potential to substantially restrict speech. Section 328 should be confined to advertisements in the ordinary sense of the term. As regards the Internet, the Section should apply only to pop-up advertisements or discrete advertisements, and should exclude hyperlinks.