

NGO problems with Federal electoral expenditure disclosure laws



This paper discusses problems with the Commonwealth electoral laws in relation to the authorization of electoral material and the disclosure of political expenditure by non-candidates and non-political parties – that is, by individuals, community organisations and businesses. It does not seek to address issues of the monetary limits of disclosure or broader issues about reform of the electoral funding and disclosure regime, but could hopefully form part of this wider discussion.

The *Commonwealth Electoral Act 1918* sets out provisions which attempt to make the electoral process more democratic by requiring a level of transparency in electoral advertising and expenditure. The Wilderness Society supports this goal. Unfortunately, if taken on its face, the wording of the Act makes the provisions simply unworkable – and onerous on an organisation attempting to comply with those laws. If the provisions are not taken on their face, then the system is open to different interpretations and inconsistent reporting. It is also open to people to hide behind the vagaries, thus defeating the goal of transparency.

The Legislative Framework

Section 314AEB(1) of the Act requires annual disclosure of expenditure greater than \$10,000 incurred on a range of things including:

- (ii) the public expression of views on an issue in an election by any means;
- (iii) the printing, production, publication or distribution of any material ... that is required under section 328 or 328A to include a name, address or place of business;
- (iv) the broadcast of political matter in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*;

Subparagraph (iii) here refers to s328 which requires the authorization of “an electoral advertisement, handbill, pamphlet, poster” with this phrase referring to “an advertisement, handbill, pamphlet, poster or notice that contains *electoral matter*”. “Electoral matter” is then defined by section 4 of the Act as “matter which is intended or likely to affect voting in an election”, with this intent or affect refined by s4(9) as something containing an express or implicit comment on or reference to:

- (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.

The same definitions and requirements apply to “electoral videos” under s328(1A).

Subparagraph (iv) of s314AEB(1) refers to the *Broadcasting Services Act* which requires authorisation of “political material”. This “political material” is defined as “any political material” and is separate from an “election matter”.

The authorizations required under both s328 of the CEA and the relevant part of the *Broadcasting Services Act* are not limited to an election period but are permanently in operation.

The Problem

These provisions and the regulatory regime they establish have a number of problems. The boundaries of subparagraph s314AEB(1)(iv) are completely unclear. The definition of “political material” which requires authorisation as meaning “any political material” is no help when the definition of “political” is hotly contested in political philosophy. What is “political” can legitimately mean very different things to different people. Thus there is no clarity as to what broadcasts require the relevant particulars and therefore disclosure of expenditure.

For instance, is an advertisement advocating solar power “political”? Does it become “political” if it says nuclear power is bad and solar power is good? Does it become “political” if it refers to government policies on electricity generation? What about if it refers to government rebates for solar power? Is the “political” issue here climate change, greenhouse gases, electricity generation or government in/action on supporting solar industries? The requirement for authorisation changes depending on how generally the matter is defined. It is not clear who makes these judgments or on what basis.

Subparagraph (iii) of s314AEB(1) is more narrowly focused on elections (“electoral matter” rather than the broader “political material”) but similar problems emerge as it picks up the definition of “electoral matter” in s4(9) of the Act. Subsection (d) of s4(9) captures any reference to a former Australian MP. This is so wide that the following would be considered as containing “electoral matters”:

- a museum pamphlet on Edmund Barton,
- the guide to the 2008 Adelaide Festival of the Arts (because it contains an advertisement for “Lovers and Haters” - a play about Don Dunstan),
- a poster for the musical *Keating*.

Those publications would in theory therefore require authorization, and if the expenditure on those publications was over \$10,000, the museum, the Adelaide Arts Festival or the music company would be required to declare them as electoral expenditure.

Subsection (f) of the s4(9) definition of an “electoral matter” is also problematically wide, vague and unusable - as is s314AEB(1)(ii) which simply refers to “an issue in an election”. When the relevant period for electoral disclosure was at the time of the election, it was at least a little easier to determine what issues were before the electorate – although even here it is impossible to know what issues were “before” or “in” the electorate in every seat in the House of Representatives, or issues which every senate candidate may submit to the public.

The lack of clarity of these sections is made much worse by the requirement for annual reporting of election expenditures. It would appear that a community group publishing a leaflet raising an environmental or social issue in July 2008 is required to guess (under s328) whether that issue will be an issue in the Federal Election in 2010 in order to decide whether the leaflet requires authorization. In order to know whether to declare the expenditure on the leaflet under s314AEB(1), they must (in August 2009) reassess the decision they made the previous year about what the election issues might be in the 2010 election to decide whether they should disclose the expenditure.

It may be possible to read the Act so as to require only disclosure on electoral matters pertaining to an election in that year, although this is not stated in the Act and is probably not a good reading of the Act. However, in the example above, a community organisation would still be in the position of not really knowing at the time of the expenditure whether the money for the leaflet (and under s314AEC any donation enabling the publication of the leaflet) should be disclosed as electoral expenditure because there may be a by-election somewhere later in the year where the issue is raised.

The crystal-ball gazing required in the above, plus the apparent requirement for the Adelaide Arts Festival and other non-political organisations to disclose electoral expenditure, are so wide and self-evidently silly that they render the disclosure regime unusable.

The AEC Guidelines

The Australian Electoral Commission has published guidelines on the disclosure requirements which appear to narrow the scope of the Act (see http://www.aec.gov.au/pdf/political_disclosures/forms/ppar_expend/info_sheet.pdf).

Those guidelines narrow the interpretation of the Act in two ways:

- By interpreting expenditure under s314AEB(1)(i) and (ii) as requiring declaration only where the *primary or dominant purpose* was to fund an expression of views referred to in (i) and (ii); and
- By interpreting “an issue in an election” in s314AEB(1)(ii) as being an issue that is “likely to affect the outcome of an election”.

I could not find any case law to support an interpretation based around primary or dominant purpose. Section 314AEB(1) simply requires disclosure of expenditure incurred for the relevant purposes – with one of the purposes having a definition (via s328 and s4(9)) which explicitly does not require any subjective “primary or dominant” purpose. It simply requires particular acts (eg. reference to MPs, parties etc).

The difference for community organisations is crucial. For instance, for The Wilderness Society, *all* its expenditure is directed towards protecting the environment (as is required by its constitution and the Tax Act), and therefore the primary or dominant purpose is to protect the environment - not to express views on an issue in an election. However, where The Wilderness Society, in pursuit of environmental protection, makes comment on particular policies, any expenditure on this may still require authorization under s314AEB(1)(iii) and probably should be disclosed.

Similarly, I can see no statutory justification for interpreting “an issue in an election” as “likely to affect” an election. The “likely to affect” interpretation appears to pick up the definition of an “electoral matter” from s4(1), but there is no statutory relationship of this clause to s314AEB(1)(ii). Subsection 314AEB(1)(ii) is in fact much wider than s4(9) in its application as the former could include expenditure on rallies and public meetings, whereas s4(9) only relates to actual publications (as it is only operational through s328 which deals with publications). In any case, the definition of “electoral matter” in s4(9) appears to trump the “likely to affect” notion by actually defining things which that expression means. This clause also relates to an *intention* to affect the outcome regardless of whether or not it actually could/does affect the outcome - yet an intention without affect appears to be discounted in the AEC guidelines (bottom of page 3).

In both these cases, the AEC guidelines do not seem to have any support in the Act, and may be contradicted by the Act.

Conclusion

While much of the above appears to be legal semantics, it is important because if the Act is interpreted in the way I suggest is its plain meaning, then it is unusable and people will simply not comply. Alternatively, if it is interpreted as per the AEC guidelines, then any organisation will be free not to make any disclosure on the basis that the primary purpose was some broader goal. In either case, the problem is that interpretation is arbitrary and left to individuals and organisations who may interpret it quite differently and therefore make very different disclosures. This inconsistency and potential lack of compliance then defeats the worthy purpose of making electoral funding transparent.

On top of this, from the point of view of a community organisation seeking to comply with what it sees as important laws, the authorisation and disclosure requirement are onerous because they are so unclear and require guesswork and uncertainty stretching over years.

The laws should be amended.

Greg Ogle
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Relevant Provisions of the Commonwealth Electoral Act 1918

4 Interpretation

(1) ...

electoral matter means matter which is intended or likely to affect voting in an election.

...

- (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.

314AEB Annual returns relating to political expenditure

- (1) A person must provide a return for a financial year in accordance with this section if:
- (a) the person incurred expenditure for any of the following purposes during the year, by or with his or her own authority:
 - (i) the public expression of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate by any means;
 - (ii) the public expression of views on an issue in an election by any means;
 - (iii) the printing, production, publication or distribution of any material (not being material referred to in subparagraph (i) or (ii)) that is required under section 328 or 328A to include a name, address or place of business;
 - (iv) the broadcast of political matter in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*;
 - (v) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors; and
 - (b) the amount of the expenditure incurred was more than \$10,000; and
 - (c) at the time the person gave the authority the person was not:
 - (i) a registered political party; or
 - (ii) a State branch of a registered political party; or

- (iii) the Commonwealth (including a Department of the Commonwealth, an Executive Agency or a Statutory Agency (within the meaning of the *Public Service Act 1999*)); or
- (iiia) a member of the House of Representatives or the Senate; or
- (iv) a candidate in an election; or
- (v) a member of a group.

Note: The dollar amount mentioned in this subsection is indexed under section 321A.

- (2) The person must provide to the Electoral Commission a return for the financial year setting out details of the expenditure incurred.
- (3) The return must:
 - (a) be provided before the end of 20 weeks after the end of the financial year; and
 - (b) be in the approved form.

328 Printing and publication of electoral advertisements, notices etc.

- (1) A person shall not print, publish or distribute or cause, permit or authorize to be printed, published or distributed, an electoral advertisement, handbill, pamphlet, poster or notice unless:
 - (a) the name and address of the person who authorized 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:
- (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)(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.

Relevant Provisions of the Broadcasting Services Act 1992

Schedule 2

1. Definitions

"political matter" means any political matter, including the policy launch of a [political party](#).

4. Identification of certain political matter

- (2) If a broadcaster broadcasts political matter at the request of another person, the broadcaster must, immediately afterwards, cause the required particulars in relation to the matter to be announced in a form approved in writing by the [ACMA](#).