

CHAPTER 10: THE CAMPAIGN

This chapter outlines the current guidelines and restrictions on campaigning in Australia and examines the impact of recent trends in campaigning, before discussing a number of proposals for reform of the way in which campaign activities are regulated.

INTRODUCTION

- 10.1 The election campaign is the set of activities candidates and political parties use to seek support of electors to win political office.⁶⁷⁵ Campaigning is commonly understood as the process by which candidates and political parties seek to communicate the merits of their respective policies to the voters, in an effort to persuade electors to vote for them. Third parties who are not directly standing for office can also be involved in campaigning, either for specific candidates or parties, or about particular issues or policies. How the campaign unfolds is shaped by Australia's political, electoral and party systems, our social and cultural context, legislation governing the electoral process, and by the behaviour of campaign participants.
- 10.2 The Australian Government's *Electoral Reform Green Paper – Donations, Funding and Expenditure* canvassed a number of options for reform of the funding and expenditure of political parties which are relevant to the campaign. This chapter looks at broader issues relating to the conduct of parties and candidates during the campaign, examining emerging trends in campaigning and the consequences of these trends for electoral administrators.

THE CURRENT ARRANGEMENTS

Commonwealth regulation of the campaign

- 10.3 The Electoral Act contains a number of provisions relevant to the campaign. For instance, at all times, it is an offence to:
- bribe any person, or otherwise attempt to influence his or her vote;⁶⁷⁶
 - interfere with the exercise of political rights or duties;⁶⁷⁷
 - announce or publish on behalf of any association or organisation a claim or suggestion (without the authorisation of the candidate) that a candidate is associated with or supports the policies of that organisation or association;⁶⁷⁸
 - print or publish 'unauthorised' electoral advertisements (including on the internet),⁶⁷⁹ or
 - write, draw or depict any electoral material directly onto a public building or public space.⁶⁸⁰
- 10.4 Further, during the period between the issue of the writ for the election and the close of the polls on polling day, it is an offence to:

⁶⁷⁵ D Kavanagh, 'Campaigning' in R Rose (ed.), *International Encyclopaedia of Elections*, CQ Press, Washington, 2000, p. 29.

⁶⁷⁶ Electoral Act, op. cit., section 326.

⁶⁷⁷ *ibid.*, section 327.

⁶⁷⁸ *ibid.*, subsection 351(1).

⁶⁷⁹ *ibid.*, sections 328 and 328A. These provisions require all electoral advertising to carry the name and address of the person 'authorising' printing or publication of the campaign material.

⁶⁸⁰ *ibid.*, section 334.

- attempt to mislead or deceive an elector in relation to the casting of a vote;⁶⁸¹ or
- engage in disorderly behaviour at public political meetings.⁶⁸²

10.5 In addition, on election day it is an offence to:

- canvass for votes within six metres of a polling booth;⁶⁸³
- wear candidate or party badges or emblems within polling booths, if you are a scrutineer or AEC official;⁶⁸⁴
- broadcast political material which can be heard within six metres of a polling booth;⁶⁸⁵ or
- make false statements to electors relating to enrolment.⁶⁸⁶

10.6 The *Broadcasting Services Act 1992* (the BSA) prescribes the election advertising blackout period which applies from midnight on the Wednesday before polling day to the end of polling on the Saturday. This Commonwealth legislation applies to elections at both the federal and state and territory level. The BSA also provides that should a broadcaster broadcast 'election matter'⁶⁸⁷ during an election period,⁶⁸⁸ it must give reasonable opportunities for the broadcasting of election matter to all political parties represented in either House of Parliament contesting the election, though there is no requirement to broadcast matter free of charge.⁶⁸⁹ The non-commercial broadcaster, the Australian Broadcasting Corporation (ABC), makes allocations of free broadcast time on ABC radio and television during federal, state and territory election campaigns for party political purposes.⁶⁹⁰

10.7 The use of public resources during the campaign period is also governed by a mix of convention and regulation. Caretaker conventions limit the scope for an incumbent government to utilise the public service and its facilities for campaign purposes and restrict government advertising during the campaign period. For advertising outside the campaign period, the Australian Government's *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*, released in June 2008, provide that government

⁶⁸¹ *ibid.*, section 329.

⁶⁸² *ibid.*, section 347.

⁶⁸³ *ibid.*, subsection 340 (1).

⁶⁸⁴ *ibid.*, section 341.

⁶⁸⁵ *ibid.*, subsection 340 (1A).

⁶⁸⁶ *ibid.*, section 330.

⁶⁸⁷ *Broadcasting Services Act 1992*, Schedule 2, Part 1 defines 'election matter', in relation to an election, as meaning matter of any of the following kinds:

- matter commenting on, or soliciting votes for, a candidate at the election;
- matter commenting on, or advocating support of, a political party to which a candidate at the election belongs;
- matter commenting on, stating or indicating any of the matters being submitted to the electors at the election or any part of the policy of a candidate at the election or of the political party to which a candidate at the election belongs;
- matter referring to a meeting held or to be held in connection with the election."

⁶⁸⁸ *ibid.* Schedule 2, Part 1 defines the election period as follows:

'(b) in relation to any other election to a Parliament—the period that starts on:

- the day on which the proposed polling day for the election is publicly announced; or
- the day on which the writs for the election are issued;

whichever happens first, and ends at the close of the poll on the polling day for the election;...'

⁶⁸⁹ *ibid.* Schedule 2, Part 2 refers.

⁶⁹⁰ Section 79A of the *Australian Broadcasting Corporation Act 1983* enables the ABC to determine the extent and manner in which it broadcasts political matter. These guidelines are summarised in ABC, 'Factsheet: Allocation of Free Broadcasting Time to political parties during election campaigns', 2007, available at www.abc.net.au/corp/pubs/documents/election_campaigns.pdf.

advertising should not be directed at promoting party political interests.⁶⁹¹ Convention also stipulates that federal parliamentarians do not claim travel allowance from the day of their official party campaign launch to the day after polling day.⁶⁹²

State and territory regulation of the campaign

- 10.8 State and territory regulation of campaigning is broadly similar to the Commonwealth arrangements; for example, offences exist in each jurisdiction that are similar to those at the Commonwealth level. A key difference across jurisdictions arises in the restriction of canvassing for votes on election day at polling booths. Both the ACT⁶⁹³ and Tasmania⁶⁹⁴ prohibit canvassing for votes within 100 metres of a polling booth on election day. Other jurisdictions allow canvassing within much shorter distances of the polling booth, with the prohibited distance ranging from three to ten metres.⁶⁹⁵
- 10.9 Defamation laws in each state and territory jurisdiction are also relevant to the campaign for both federal and state and territory elections. If an election candidate believes that he or she has been defamed, he or she may seek redress under the applicable statutory or common law, including during federal elections.
- 10.10 Local laws and regulations also shape the conduct of campaigns for elections in all jurisdictions, dealing with acts such as the display of posters on public property. Regimes for canvassing on private property, such as in shopping centres, are often determined by the relevant property manager.

Implied freedom of political communication

- 10.11 At the Commonwealth level,⁶⁹⁶ there is no legislated freedom of expression in Australia.⁶⁹⁷ The power to make laws with respect to elections, including campaign activities, is subject to the implied freedom of political communication derived from sections 7 and 24 and other provisions of the Australian Constitution, identified by the High Court of Australia in a series of cases.⁶⁹⁸ The High Court has recognised that freedom of communication on matters of government and politics is an 'indispensable incident' of the system of representative and responsible government which is established by sections 7 and 24 of the Constitution.⁶⁹⁹

⁶⁹¹ Department of Finance and Deregulation, *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*, 2008, available at www.finance.gov.au/advertising/guidelines-on-campaign-advertising.html.

⁶⁹² Department of the Prime Minister and Cabinet, *Guidance on Caretaker Conventions*, 2007, p. 8. For further discussion of the caretaker conventions, see Chapter 5, 'Caretaker Conventions: An Overview of Australian Jurisdictions' in A Tiernan and J Menzies, *Caretaker Conventions in Australasia: Minding the shop for Government*, ANU E-Press, Canberra, 2007.

⁶⁹³ *Electoral Act 1992* (ACT) section 303.

⁶⁹⁴ *Electoral Act 2004* (TAS) section 177.

⁶⁹⁵ New South Wales – 6 metres: *Parliamentary Electorates and Elections Act 1912* (NSW) section 151H; Victoria – 3 metres: *Electoral Act 2002* (Vic) section 158; Queensland – 6 metres: *Electoral Act 1992* (QLD) section 166, Western Australia – 6 metres: *Electoral Act 1907* (WA) section 192; South Australia – 6 metres: *Electoral Act 1985* (SA) section 125; Northern Territory – 10 metres: *Electoral Act 2004* (NT) section 275.

⁶⁹⁶ Both the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT) guarantee freedom of expression.

⁶⁹⁷ The Australian Government has conducted a National Human Rights Consultation, which seeks community views on the best ways to protect and promote human rights in the future, and on which human rights and responsibilities should be protected and promoted. Further information is available at www.humanrightsconsultation.gov.au.

⁶⁹⁸ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁶⁹⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559 (the Court).

- 10.12 In *Lange v Australian Broadcasting Corporation*,⁷⁰⁰ the Court found that the freedom of political communication is not an individual right, rather it is a limit on the power of the Commonwealth to enact legislation that restricts the freedom of political communication. Furthermore, the Court found that the freedom of political communication is not absolute: the freedom is limited to the extent necessary for the effective operation of the system of representative and responsible government in Australia.
- 10.13 A two-part test for determining whether a law infringes the implied freedom of political communication was outlined by a full bench of the High Court in *Lange v Australian Broadcasting Corporation* and refined by McHugh J, supported by Gummow, Hayne and Kirby JJ, in *Coleman v Power*⁷⁰¹ as follows. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?⁷⁰²
- 10.14 In *Australian Capital Television Pty Ltd v Commonwealth*,⁷⁰³ the Court found that the *Political Broadcasts and Political Disclosures Act 1991*, which banned political advertising during election campaigns and introduced mandatory free radio and television political advertising time, was invalid for breaching the implied freedom of political communication, because 'there were other less drastic means by which the objectives of the law could be achieved'.⁷⁰⁴
- 10.15 The precise scope of the implied freedom remains unclear. It is clear that the freedom is not confined to election periods⁷⁰⁵ and extends to federal, state and territory political matters.⁷⁰⁶ Protected political communications include those between elected representatives, candidates and electors, as well as those between electors themselves.⁷⁰⁷ It has also been accepted that the implied freedom applies to non-verbal as well as verbal communication.⁷⁰⁸
- 10.16 The implied freedom of political communication operates to limit the extent to which political discussion and activity can be regulated. It appears that, especially during campaign periods, this implied freedom will operate to prevent excessive restrictions on political communication.⁷⁰⁹

CHALLENGES, OPPORTUNITIES AND OPTIONS FOR CHANGE

- 10.17 The constantly evolving nature of the campaign is an ongoing challenge for election administrators. Political parties and other participants in the political process have proved willing to adopt new practices, technologies and techniques which might allow them to reach or persuade more voters.

⁷⁰⁰ *ibid.*

⁷⁰¹ *Coleman v Power* (2004) 220 CLR 1.

⁷⁰² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 (the Court); *Coleman v Power* (2004) 220 CLR 1 at 51 (McHugh J), 77-78 (Gummow and Hayne JJ), and 82 (Kirby J).

⁷⁰³ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁷⁰⁴ This is the High Court's explanation of its decision in *Australian Capital Television Pty Ltd v Commonwealth* in its judgment in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568 (the Court).

⁷⁰⁵ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 121 (Mason CJ, Toohey and Gaudron JJ).

⁷⁰⁶ *ibid* at 122 (Mason CJ, Toohey and Gaudron JJ), 155-156 (Brennan J).

⁷⁰⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560 (the Court).

⁷⁰⁸ *Levy v Victoria* (1997) 189 CLR 579 at 594-5 (Brennan CJ), 613 (Toohey and Gaudron JJ), 622-3 (McHugh J), and 641 (Kirby J).

⁷⁰⁹ G Williams, 'The State of Play in Constitutionally Implied Freedom of Political Discussion and Bans on Electoral Canvassing in Australia', *Research Paper No. 10 1996-97*, Parliament of Australia Parliamentary Library.

- 10.18 The current provisions in the Electoral Act regulating campaigning are based on the predominant styles of campaigning in 1918, such as public meetings, newspaper advertising, the distribution of printed leaflets and flyers, and soapbox public addresses. Today, principal campaigning techniques revolve around radio and television advertising, media friendly campaign events and appearances, direct mail, and an increasing number of digital mediums, referred to as 'new media'.
- 10.19 Restrictions on campaign activities in Australia have only been seen as necessary where there are demonstrable reasons why certain campaign behaviours need to be restricted. The existing provisions seek to achieve a balance between the objectives of allowing an open campaign with participants free to engage in public debate, and of protecting candidates and voters from behaviour that is viewed as overly malicious or damaging to the integrity of the electoral process. The evolving nature of the campaign leads to challenges for electoral administrators, in seeking to find a similarly balanced approach to apply to emerging campaign behaviours.
- 10.20 Current restrictions on the campaign, and options for future reform, can be considered against a number of the key principles outlined in chapter 2. For example, to ensure representation, it could be argued that arrangements for the campaign should aim to create a level playing field for all parties and candidates. To ensure neutrality, it might be contended that rules governing the campaign should be applied equally to all parties and candidates, and public resources should not benefit incumbents. Further, from the perspective of ensuring transparency and a better informed public, it might be argued that regulation should ensure that political advertising is accurate and transparent and does not prevent citizens from exercising their vote freely and without undue pressure.
- 10.21 A number of challenges for electoral administrators are posed by the evolving nature of the campaign process. Particular challenges addressed below are:
- the developing use of new media;
 - the use of publicly-funded resources for party-political election campaigning; and
 - the increasing length of 'unofficial' election campaigns.
- 10.22 There are also a number of opportunities for change in relation to various aspects of the campaign. Specific opportunities addressed below include:
- possible changes to the campaign media blackout;
 - options to improve clarity in the operation of electoral advertising laws;
 - controls on the content of campaign advertising ('truth in advertising' laws);
 - measures to ensure the neutrality of the polling booth;
 - reforms to the how-to-vote card distribution process; and
 - possible harmonisation of campaign regulations across jurisdictions.
- 10.23 In all of these areas, proposals for change would need to take account of the implied freedom of political communication, outlined at paragraphs 10.11 to 10.16 above. One 'light touch' approach to regulation in these areas could be use of a voluntary code or codes of conduct for political parties and candidates.⁷¹⁰ Such codes could be developed by the AEC or by parties and candidates themselves; compliance would be voluntary, but parties and candidates could face public criticism if they failed to adhere to a widely-accepted code. Compliance with the voluntary code could be reported on publicly by the AEC. A voluntary code could potentially cover matters that may not easily be regulated by law. Parties and candidates may view this system as preferable to formal legislative prohibitions restricting the campaign.

⁷¹⁰ For instance, see International IDEA, *Code of Conduct for Political Parties – Campaigning in Democratic Elections*, Stockholm, 1999, available at www.idea.int/publications/coc_campaigning/upload/polparties.pdf.

On the other hand, there may be some circumstances in which a 'heavier touch' (formal regulation) may be preferable to a voluntary code, as compliance could be enforced where necessary.

Developing use of new media

- 10.24 'New media' is a term meant to encompass the emergence of digital, computerised, or networked information and communication technologies.⁷¹¹ Examples of new media include the internet, e-mail, and mobile communications technology.
- 10.25 The rise of the internet has fundamentally influenced the campaign process. Over the last decade, household access to the internet at home has more than quadrupled from 16% to 67%, while access to computers has increased from 44% to 75%.⁷¹² Political parties both in Australia and abroad now use the internet to maximise the audience for their messages, both between elections, and, in particular, in the year before an election, communicating their messages through advertising and commentary in a range of forums including party internet sites and applications such as *FaceBook*, *MySpace*, *YouTube* and *Twitter*.⁷¹³
- 10.26 Other new media campaigning techniques seen at recent federal elections have included tele-marketing, including through 'robo-calling' with automated telephone messages, and viral e-mail spam campaigning.⁷¹⁴ Other techniques, such as the use of text messaging, have been used in overseas campaigns and are likely to be a feature of future Australian elections.⁷¹⁵ None of these forms of media are currently regulated by the Electoral Act. While commercial tele-marketing in Australia is subject to the Do Not Call Register⁷¹⁶ and unsolicited commercial emails are subject to the *Spam Act 2003*,⁷¹⁷ registered political parties are exempt from the application of these regulations. Even if this exemption were to be removed, these mechanisms would have limited application to campaign activities, as most campaign activities are likely to be considered non-commercial in nature.
- 10.27 There are undoubtedly future and currently unknown forms of new media which will emerge to influence the campaign. Use of current forms of new media will also become more sophisticated, particularly as internet access and speeds within Australia improve. As a consequence, it might be argued that any amendments to impose electoral regulations on new media should aim to retain a degree of flexibility to address potential new technologies, so as not to require substantial legislative revisions at a future point in time.
- 10.28 The rise of the internet and other new media techniques has provided a number of benefits for campaigning, including the following.
- By providing an additional avenue through which to inform and educate voters, it might be argued that public debate about our democracy has been enhanced.
 - The internet is emerging as a tool for encouraging civic participation. The wide availability and use of the internet makes it a valuable forum for people to discuss political issues.

⁷¹¹ See T Flew, *New Media: an Introduction*, third edition, Oxford University Press: South Melbourne, 2008, pp. 2-3.

⁷¹² ABS cat. no. 8146.0, *Household Use of Information Technology, Australia, 2007-08*. During 2007-08, 72% of people aged 15 years or over accessed the internet from any location in the previous 12 months.

⁷¹³ T Flew, 'Not yet the Internet election: Online media, political commentary and the 2007 Australian federal election', *Media International Australia*, vol. 126, 2008, accessed at eprints.qut.edu.au; C Elsworth, 'US Election 2008 fought out over the internet', *The Telegraph (UK)*, 4 November 2008; C Miller, 'How Obama's internet campaign changed politics', *New York Times*, 7 November 2008.

⁷¹⁴ S Miskin, 'Campaigning in the 2004 Federal Election: Innovations and Traditions', *Research Note No. 30 2004-05*, Parliament of Australia Parliamentary Library.

⁷¹⁵ *The Age*, 'Msg 2 candidates: u get more votes with txt', 18 December 2007.

⁷¹⁶ For further information on the Do Not Call Register, see www.donotcall.gov.au.

⁷¹⁷ *Spam Act 2003*, subsection 16(1).

The 2007 federal election saw a record number of 'citizen journalists' discussing political developments and campaign issues on a range of blogs, discussion boards, and news sites.⁷¹⁸

- The speed with which material can be disseminated on the internet has also made it possible for parties and candidates to speedily clarify incorrect assertions, or respond to rival advertising messages.
- While the involvement of third parties in the campaign is not a new phenomenon, new media gives third parties a greater opportunity to disseminate their message more quickly than was previously possible.

New media can also assist Australians abroad to obtain information about, and participate in, the campaign in Australia, which may have particular benefits if options to expand the expatriate franchise (as discussed in chapter 4) were adopted.

10.29 However, while there have been no widespread allegations of misuse of new media in campaigning to date, the emergence of new media poses a number of challenges for electoral administrators, as the following examples illustrate.

- The election advertising blackout, which applies to television and radio, does not apply to the internet or other forms of new media such as tele-marketing or text messaging.⁷¹⁹ The electronic media blackout is governed by the *Broadcasting Services Act 1992* (BSA), which is administered by the Australian Communications and Media Authority (ACMA). ACMA only has power over entities that have been granted a broadcast license under the Act. This extends only to radio and television broadcasters, as internet sites do not require a license. Applying the blackout to the internet and other new media could not be accomplished through the BSA.
- Section 328A of the Electoral Act applies specifically to the publication of electoral advertisements on the internet, requiring each paid advertisement to carry the name and address of the person who authorised it. The AEC received a number of complaints in relation to the use of the internet during the 2007 election, chiefly in relation to unpaid advertisements, which are not regulated by section 328A.⁷²⁰

10.30 Regulating campaign activity on the internet poses a number of difficulties, including the following.

- The international nature of the internet⁷²¹ means that tracking down, charging and prosecuting persons outside Australia can be extremely complicated, even where offences are expressed to have extra-territorial operation.⁷²²
- The dynamic nature of the internet, and its ability to distribute information rapidly and widely, means that it can be difficult to remove offending material in a timely manner. Even if material is promptly removed, harmful consequences may have already occurred.
- It can be relatively straightforward for individuals to place misleading or inaccurate material on internet sites, but much harder for electoral officials to ensure that such material is removed. For example, in the lead-up to the 2007 federal election, an incident occurred where an unauthorised MySpace account was established in the name of a candidate and used to distribute incorrect information about the candidate.⁷²³

⁷¹⁸ A Bruns, 'Citizen Journalism in the 2007 Federal Election', 2008, available at ejournalist.com.au/v8n1/Bruns.pdf.

⁷¹⁹ L Sinclair, 'Net loophole in pre-poll blackout', *The Australian*, 18 October 2007.

⁷²⁰ AEC, submission no. 169 to JSCEM, *Inquiry into the 2007 Federal Election*, p. 71.

⁷²¹ Administration and Cost of Elections (ACE) Project, 'New Media', *ACE Encyclopaedia*, available at aceproject.org/ace-en/topics/me/meb/meb03/meb03b.

⁷²² For example, subsection 328A(1) of the Electoral Act has extra-territorial operation.

⁷²³ S Bennett and S Barber, 'Commonwealth Election 2007', *Research Paper No. 30 2007-08*, Parliament of Australia Parliamentary Library, p. 23; Australian Broadcasting Corporation, 'Row erupts over fake ACT Treasurer Facebook page', *ABC News Online*, 24 April 2009, available at www.abc.net.au/news/stories/2009/04/24/2551794.htm.

In addition to these practical challenges, the implied freedom of political communication would limit the degree to which legislators can regulate political discussion conducted through new media. Freedom of speech arguments might also be advanced as to why any restrictions on new media should be limited.

- 10.31 In light of these challenges, key questions for consideration are the extent to which new and emerging campaign techniques made possible by new media require regulation, the extent to which any attempts to extend current campaign regulations to emerging forms of new media are likely to be successful, and possible scope for use of voluntary codes of conduct as an alternative to formal regulation.
- 10.32 Noting the difficulties outlined above in effectively regulating new media, options for a 'heavier touch' approach (formal regulation) could include:
- regulating the use of new media in the campaign by imposing restrictions directly onto registered parties and candidates, and possibly third parties and organisations involved in campaign activities; or
 - explicitly prohibiting certain types of emerging campaign behaviour that are determined to be an unacceptable threat to the electoral process.

Other forms of regulation could be considered as future campaign practices using new technologies develop.

Use of public resources for political campaigns

- 10.33 Many of the benefits enjoyed by incumbents are not explicitly related to the campaign. Printing and communication allowances, and the provision of office equipment and facilities, are all entitlements provided to elected parliamentarians. Outside of the campaign, these entitlements allow parliamentarians to service and inform their electorate about community issues and relevant government programs and policies.
- 10.34 However, there have been some suggestions that these entitlements are increasingly being used for party-political campaign purposes.⁷²⁴ Commentators contend that the use of such entitlements for election campaign purposes provides incumbents with public resources not available to other candidates.⁷²⁵ It has also been suggested that an emerging practice is the use of parliamentary printing allowances to fund 'what is effectively direct canvassing by mail to constituents'.⁷²⁶
- 10.35 2006 amendments saw changes to the carryover provisions for printing entitlements, permitting 45% of the allowance of a member of the House of Representatives to be rolled over annually, thus increasing the amount incumbent members could spend in an election year.⁷²⁷ Some commentators argued this allowed incumbent members to build up an 'election-year nest egg', providing a big advantage over prospective challengers.⁷²⁸ This rollover provision for the printing allowance was removed from 1 July 2008, and the rollover provision for the communications allowance has been removed from 1 October 2009.

⁷²⁴ See, for instance, S Young, submission no. 77 to JSCEM, *Inquiry into the 2007 Federal Election*, 2008, p. 8; P Strangio, 'Incumbency Benefits: An Unhealthy Trend?', Australian Senate Occasional Lecture, Main Committee Room, Parliament House, 25 August 2006.

⁷²⁵ M Sawyer, 'Democratic Values: Political Equality?', Democratic Audit of Australia, 2007, pp. 4-5.

⁷²⁶ M Sawyer, 'Election 2004: How democratic are Australia's elections?', *Australian Review of Public Affairs*, Digest, 3 September 2004.

⁷²⁷ P Coorey, 'MPs \$60m junk mail allowance', *Sydney Morning Herald*, 17 August 2006.

⁷²⁸ P Andren, 'Level Democratic Playing Field—You Must Be Joking', Democratic Audit of Australia, 2004, p. 1.

10.36 From 1 July 2008, the annual printing entitlement for a member of the House of Representatives was reduced by one-third, from \$150,000 to \$100,000.⁷²⁹ From 1 October 2009, this entitlement will be reduced by a further 25%, to \$75,000 per year. This further reduction is one element of a range of reform measures introduced to reduce cost and increase transparency of the parliamentary entitlements system, following a performance audit of the administration of Parliamentarians' entitlements that was undertaken by the Australian National Audit Office.⁷³⁰ Additional reforms that will commence on 1 October 2009 include:⁷³¹

- a prohibition on the use of the printing entitlement for party, personal, commercial or electioneering purposes;
- a specific prohibition on the use of printing entitlements to print how to vote cards;
- a limit on the number of postal vote applications that may be printed using printing entitlements;⁷³²
- a cap of \$35,000 per annum on office consumables such as toner and paper;
- combining the current printing and communications allowances into a single entitlement and removal of the carryover provisions of the communications allowance entitlement;
- establishing a vetting and checking system within the Department of Finance and Deregulation to ensure that printed material is within entitlement; and
- expanding reporting and accountability arrangements to provide that all expenditure related to parliamentary entitlements administered by the Department of Finance and Deregulation will be tabled in the Parliament and published on the Department's website.

Further, an independent panel is to undertake a review of all parliamentary entitlements, and will report to the Australian Government within six months of its establishment.

10.37 In addition to printing and communications entitlements, members of both Houses of Parliament are entitled to use their publicly funded travelling allowances during the campaign period.⁷³³ According to the current convention, parliamentarians continue to be eligible to receive travelling allowance after Parliament has been dissolved,⁷³⁴ and ministers and shadow ministers continue to be eligible to claim travelling allowance up until their party's 'official' campaign launch. After this point, the political parties must foot the bill for candidate travelling allowances. At both the 2004 and 2007 elections, both major parties did not formally 'launch' their campaign until two weeks prior to polling day, allowing incumbent ministers and shadow ministers to claim four weeks of publicly funded travel allowance following the issue of the writs.⁷³⁵

⁷²⁹ *Parliamentary Entitlements Regulations 1997*, subregulation 3(2).

⁷³⁰ Australian National Audit Office, *Administration of Parliamentarians' Entitlements by the Department of Finance and Deregulation*, Audit Report No.3 2009-10, 2009.

⁷³¹ Senator the Hon J Ludwig, (Cabinet Secretary and Special Minister of State), *Reform of Parliamentary entitlements*, Media Release, 8 September 2009.

⁷³² The number of postal vote applications that may be produced per election is 50% of the number of enrolled voters in the state, territory or electorate that a member or Senator represents, as at the last working day of March prior to an election (Senator the Hon J Ludwig, Special Minister of State, *Ministerial Circular 2009/21: Changes to the Printing Entitlement and the Communications Allowance*, 8 September 2009).

⁷³³ Under Remuneration Tribunal Determination 2006/18, clause 2.1, travel by scheduled services may be accessed for parliamentary and electorate business, but not party business, other than for meetings or a parliamentary political party (such as occurs at a campaign launch).

⁷³⁴ Subject to the limits in the relevant provisions of the Remuneration Tribunal Determination 2008/15.

⁷³⁵ S Young and J-C Tham, 'Political finance in Australia: a skewed and secret system', *Democratic Audit of Australia*, 2006, p. 57.

- 10.38 Electorate offices have been used for canvassing constituents by using the office telecommunication systems, and production of party political paraphernalia.⁷³⁶ Parliamentarians are advised that as the electorate office is an Australian Government leased office, signs promoting a member's own, or any other person's candidacy, or that of a political party or other political slogans should not be displayed on the external walls, windows, fences, etc. of the electorate office. The permanent signage on a Senator or member's electorate office may include the party affiliation of the Senator or member, as well as a party logo, provided such signage conforms to the terms of the lease and any other local government requirements.
- 10.39 Electorate staff are employed to assist a Senator or member to carry out their duties as a member of Parliament, and by convention, they may not be used for party political purposes. Also by convention, both electorate and personal employees may undertake activities in support of the re-election of their employing Senator or member, but not in support of the election or re-election of others.
- 10.40 Additional options for ensuring incumbents are not provided with public resources not available to other candidates might include:
- expanding the reforms outlined at paragraph 10.36 to apply to other parliamentary entitlements;
 - independent audits of the use of parliamentary entitlements, once in each electoral cycle;⁷³⁷ or
 - giving the power to determine the levels of, and rules governing, all parliamentary entitlements to an independent body.⁷³⁸

Increasing length of campaign period

- 10.41 It is clear that the campaign is no longer limited to the period between the issue of the writ and polling day. The approach to campaigning for election in Australia has evolved from campaigning in the period immediately before an election to engaging in continuous or permanent campaigning between elections, with a dramatic increase in campaigning in the year before an election.⁷³⁹ Commentators have coined the term 'phony campaign' to describe the period of campaigning before an election is officially called.⁷⁴⁰
- 10.42 While most existing electoral regulations apply at all times, there are some that apply only during the 'campaign period', defined as the period between the issue of the writ and polling day.⁷⁴¹ The expanding length of the campaign period has led to arguments that campaign regulations should apply for a longer period.⁷⁴² On the other hand, extending such regulation might be seen as an unjustified restriction on freedom of speech and political communication.
- 10.43 Options for reform in this area include:
- a voluntary code of conduct for parties and candidates, which could be expressed to cover campaigning activities during the official 'campaign period' as well as outside that period;

⁷³⁶ Z Ghazarian, 'State of assistance? Political parties and state support in Australia', *Australian Review of Public Affairs*, Volume 7, Number 1, 2006, pp. 70-71.

⁷³⁷ A Murray, submission no. 5 to Australian Government *Electoral Reform Green Paper - Donations, Funding and Expenditure*, 2009, p. 4.

⁷³⁸ N Kelly, 'MPs incumbency benefits keep growing', *Democratic Audit of Australia*, 2006.

⁷³⁹ P Van Onselen and W Errington, 'The Democratic State as a Marketing Tool: The Permanent Campaign in Australia', *Commonwealth & Comparative Politics*, vol. 45, no. 1, 2007, p. 78.

⁷⁴⁰ R Taylor, 'Australians wait on PM to end "phony" election war', *Reuters*, 11 October 2007.

⁷⁴¹ See paragraph 10.4.

⁷⁴² F Fletcher, 'Free and Fair Elections: regulations that ensure a "fair go"', Address to the Parliament of Victoria, 2007, pp. 10-11, available at: www.sisr.net/publications/0706fletcher.pdf.

- extending the operation of existing campaign regulations for longer periods;
- legislatively designating a specific period of time prior to an election being required (such as the six months before the date upon which the House of Representatives is due to expire, or the date of announcement of an early election held prior to that time) as the 'campaign period', and applying additional restrictions to matters such as use of public resources during this period; or
- amending existing campaign regulations and drafting future campaign regulations so that they have application at all times.

Media blackouts

10.44 The three-day media 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.

10.45 The media blackout is common to many countries and is intended to allow 'the electorate to weigh the options and to exercise their franchise freely and without undue pressure.'⁷⁴³ The blackout was also designed to prevent candidates from releasing, close to polling day with minimal opportunities for response, 'a scandalous allegation or scare story which would deceive the voters and secure some unfair advantage'.⁷⁴⁴

10.46 The blackout is accepted by many as an effective technique during the final days of an election campaign to ensure electors are able to make informed and independent decisions about the candidates, without being subject to advertising persuasion. It might be argued that the media blackout should be extended,⁷⁴⁵ particularly given the ever-increasing number of votes being cast before the media blackout applies.⁷⁴⁶ However, the implied freedom of political communication would restrict the extent to which the blackout period could be lengthened. As noted above, consideration could also be given to the extent to which the blackout could or should be applied to new media.

10.47 On the other hand, given the limited application of the media blackout to the range of media utilised in campaigning and the increasing number of votes being cast before polling day, it might be argued that the blackout is becoming increasingly redundant and should be ceased.

10.48 Potential areas for reform in relation to the media blackout might include:

- extending the media blackout so that it runs for a longer period prior to polling day;
- extending the application of the blackout to other forms of media, such as newspaper, internet and other forms of new media;
- a blanket ban on all campaign activity for a specified period prior to polling day; or
- noting the challenges in applying the blackout to new media, ceasing the blackout entirely.

Clarity in the operation of electoral advertising laws

10.49 As noted at paragraph 10.3, the Electoral Act includes an offence for printing or publishing an 'electoral advertisement' that does not state the name and address of the person who authorised the advertisement. Subsection 328(5) of the Electoral Act defines 'electoral advertisement' as follows:

⁷⁴³ International IDEA, 'Democratic Electoral Campaigns', Chapter 9, in International IDEA, *International Electoral Standards: Guidelines for reviewing the legal framework for elections*, Stockholm, 2002, p. 56, available at www.idea.int/publications/ies/upload/9.%20Democratic%20electoral%20campaigns.pdf.

⁷⁴⁴ S Mills, *The New Machine Men: Polls and Persuasion in Australian Politics*, Penguin, Ringwood, 1986, p. 178.

⁷⁴⁵ Complete bans on election campaign advertising existing in the UK: *Broadcasting Act 1990* (UK) paragraph 8(2)(a) for television and paragraph 92(2)(a) for radio.; and New Zealand: *Broadcasting Act 1989* (NZ), section 70.

⁷⁴⁶ AEC, submission no. 169 to JSCEM, *Inquiry into the 2007 Federal Election*, op. cit., pp. 37-41.

‘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.’

10.50 ‘Electoral matter’ is defined by subsection 4(1) of the Electoral Act as ‘matter which is intended or likely to affect voting in an election’. Subsection 4(9) of the Electoral Act provides that ‘matter shall be taken to be intended or likely to affect voting an election if it contains an express or implicit reference to, or comment on’:

- the election;
- the Government, the Opposition, a previous Government or a previous Opposition of the Commonwealth, a state or a territory;
- a member or former member of the Parliament of the Commonwealth or a state, or of the legislature of a territory;
- a political party, a branch or division of a political party or a candidate or group of candidates in the election; or
- an issue submitted to, or otherwise before, the electors in connection with the election.

10.51 This broad definition of ‘electoral matter’ has given rise to some uncertainty about the types of material that must be authorised under the Electoral Act. For example, doubt has arisen as to the circumstances in which Government signage and other material must carry authorisation.⁷⁴⁷

10.52 The AEC has noted that while the intent of these provisions is to ‘ensure electors are informed about the source of political advertising’,⁷⁴⁸ there is a lack of full clarity in relation to the operation of electoral advertising laws.⁷⁴⁹ Options that could be considered to enhance clarity around these laws include:

- tightening the definition of ‘electoral matter’ in the Electoral Act to provide greater certainty about the types of material that require authorisation; and/or
- providing greater explanatory and guidance material, through the AEC, about the application of the electoral advertising laws in the Electoral Act.

Truth in advertising

10.53 The issue of ‘truth’ in political advertising has been raised periodically by concerned electors, commentators, political parties and other community members. At present, the ‘truth’ of political advertising is not specifically regulated at the Commonwealth level.⁷⁵⁰ The Electoral Act provides that it is an offence during an election period to ‘print, publish or distribute, or cause, permit or authorise to be printed, published or distributed’ anything ‘likely to mislead or deceive an elector in relation to casting of a vote’.⁷⁵¹ However, this provision only applies to material aimed at deceiving an elector in relation to procedural aspects of ‘casting a vote’, such as how to mark a ballot paper and deposit it in the ballot box.⁷⁵²

⁷⁴⁷ See, for example, Senator J Ludwig, ‘Australian Government Signs’, Media Release, 3 September 2009, available at www.smos.gov.au/media/2009/mr_332009.html.

⁷⁴⁸ AEC, *Electoral Backgrounder No. 15 – Electoral Advertising*, 2007, available at www.aec.gov.au/pdf/backgrounders/15/EB_15_Electoral_Advertising07.pdf

⁷⁴⁹ AEC, ‘National Building – Economic Stimulus Plan school signage’, Media Release, 7 September 2009, available at www.aec.gov.au/About_AEC/Media_releases/2009/09-07.htm/

⁷⁵⁰ Note that defamation laws, as discussed in paragraph 10.9, do provide some redress against false allegations being uttered in the political context.

⁷⁵¹ Electoral Act, op. cit., subsection 329(1).

⁷⁵² *Evans v Crichton-Browne* (1981) 147 CLR 169 at 207-8 (the Court); *Webster v Deahm* (1993) 116 ALR 222.

10.54 One commentator has contended that:

The potential impact of misleading or false statements made in the course of electioneering is undoubted. Such campaigning obviously has an adverse affect upon the public interest. It may distort election outcomes, divert voter attention from substantive issues and may even discourage qualified individuals from seeking election.⁷⁵³

10.55 Proponents of regulation argue that penalties for failure to represent the truth in political advertising would 'promote fairness, improve accountability and restore trust in politicians and the political system'.⁷⁵⁴ Others point to the difficulties candidates and parties face in rebutting false or misleading claims made about them, particularly when such claims are disseminated close to polling day.⁷⁵⁵

10.56 The Electoral Act has previously contained, albeit briefly, a prohibition on 'untrue' advertising. In 1983, the *Commonwealth Electoral Legislation Amendment Act 1983* introduced new section 116(2) into the Electoral Act. This section provided:

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 electoral advertisement containing a statement:

1. that is untrue; and
2. that is, or is likely to be, misleading or deceptive.

10.57 This provision was repealed just six months after it entered into force, following recommendations from JSCER in its Second Report of August 1984. JSCER deemed the section 'unworkable',⁷⁵⁶ concluding that legislation was not a means by which fair and truthful advertising could be achieved.⁷⁵⁷ The Committee found that political advertising involves concepts, ideas, policies and images (often contested by the opposing parties) which cannot be subjected to a test of truth, truth itself being inherently difficult to define.⁷⁵⁸ It was also concerned that decisions as to whether a political statement is 'true' would necessarily involve a political judgment, based upon political premises, which an impartial body would be poorly placed to adjudicate.⁷⁵⁹

10.58 South Australia is the only Australian jurisdiction which has enacted legislation which attempts to regulate truth in electoral advertising. In 1985, an offence was introduced making it illegal to authorise or publish an advertisement purporting to be a statement of fact, when the statement is inaccurate and misleading to a material extent.⁷⁶⁰ The South Australian legislation does not ban all 'untruths' in political advertising; it extends to inaccurate statements of fact rather than any statements (including expressions of opinion) found to be 'untrue'.⁷⁶¹

⁷⁵³ G Williams, 'Truth in Political Advertising Legislation in Australia', *Research Paper No. 13 2006-07*, Parliament of Australia Parliamentary Library.

⁷⁵⁴ A Murray, 'Truth in Political Advertising', *Australian Democrats*, 2007, available at www.andrewmurray.org.au/documents/505/Electoral_PoliticalAdvertising.pdf.

⁷⁵⁵ JSCER, *1998 Federal Election: Report of the inquiry into the 1998 Federal Election and Matters Related Thereto*, op. cit., p. 42.

⁷⁵⁶ JSCER, *Commonwealth Parliament, Second Report*, August 1984, p. 21.

⁷⁵⁷ *ibid.*, p. 26.

⁷⁵⁸ *ibid.*, pp. 18-19, 26.

⁷⁵⁹ *ibid.*, p. 21.

⁷⁶⁰ *Electoral Act 1985 (SA)* section 113.

⁷⁶¹ Senate Finance and Public Administration Legislation Committee, *Commonwealth Parliament, Report on the Charter of Political Honesty Bill 2000 [2002]; Electoral Amendment (Political Honesty) Bill 2000 [2002]; Provisions of Government Advertising (Objectivity, Fairness and Accountability) Bill 2000; Auditor of Parliamentary Allowances and Entitlements Bill [No. 2], 2002*, p. 83.

- 10.59 Subsequent JSCEM deliberations and reports have considered this matter and made various recommendations about re-instating similar 'truth' in advertising provisions.⁷⁶² In 1997, JSCEM supported the introduction of legislation to prohibit misleading statements of fact in terms very similar to the South Australian provision. The Committee drew parallels with section 52 of the *Trade Practices Act 1974*, finding that if misleading and deceptive conduct could be effectively prohibited from private sector advertising, there was no reason why the same could not apply to political advertising. The then government did not support this recommendation, arguing that the legislation would be too difficult to enforce and could be open to challenge,⁷⁶³ and that voters remain the most appropriate arbiters of the veracity of political claims made through advertising.⁷⁶⁴
- 10.60 Calls for increased regulation have grown since political advertising on commercial television ceased to be subject to industry guidelines on truthfulness and accuracy. Until 2002, the then Federation of Australian Commercial Television Stations (FACTS) held political advertisements to the same industry standards as private sector advertisements, seeking substantiation for statements made in political advertisements and considering complaints regarding the accuracy of statements. During the 2001 election campaign, FACTS forced the withdrawal of five advertisements that it deemed to be false or misleading.⁷⁶⁵ However, after receiving advice that the *Trade Practices Act 1974* did not apply to political advertisements, FACTS announced it would 'no longer vet political advertising for accuracy or seek any substantiation of claims made in the advertisements'.⁷⁶⁶
- 10.61 Some argue that the long standing South Australian precedent, which has survived constitutional challenge,⁷⁶⁷ is an 'effective and valid [model] by which truth in political advertising might be regulated'.⁷⁶⁸ Opposition parties in both Queensland⁷⁶⁹ and New South Wales⁷⁷⁰ have attempted to introduce regulation along lines similar to South Australia, but have not managed to secure passage of the legislation through parliament.
- 10.62 In 2002, the Senate Finance and Public Administration Committee examined the South Australian model in depth, hearing evidence from a former South Australian Electoral Commissioner that in his opinion the provision had not changed the political culture of the state to any great extent and instead offered the opportunity for political parties to disrupt the electoral process.⁷⁷¹ The limited number of prosecutions under the provision was also cited

⁷⁶² JSCEM, *The 1993 Federal Election: Report of the inquiry into the conduct of the 1993 federal election and matters related thereto*, 1994, p. 109; JSCEM, *The 1996 federal election: Report of the inquiry into the conduct of the 1996 federal election and matters related thereto*, op. cit., p. 85.

⁷⁶³ Australian Government Response to JSCEM, *The 1996 federal election: Report of the inquiry into the conduct of the 1996 federal election and matters related thereto*, 1998, paragraph 48.

⁷⁶⁴ *ibid.*, paragraph 49.

⁷⁶⁵ ABC Radio, 'Media blitz before election', *AM Program*, 6 November 2001, as cited in S Miskin and R Grant, 'Political advertising in Australia', *Research Brief No.5, 2004-05*, Parliament of Australia Parliamentary Library, p. 7.

⁷⁶⁶ See J Koutsoukis, 'Major parties welcome new election advertising rules', *The Age*, 25 August 2004, p. 3, as cited in S Miskin and R Grant, *ibid.*, p. 1.

⁷⁶⁷ *Cameron v Becker* (1995) 64 SASR 238.

⁷⁶⁸ G Williams, 'Truth in Political Advertising Legislation in Australia', op. cit. See also Senator B Brown, Australian Greens, Dissenting Report in JSCEM, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto*, op. cit., pp. 335-336

⁷⁶⁹ Electoral Amendment Bill 1999 (Qld) section 163A: 'A person must not, during the election period for an election, publish or permit or authorise another person to publish an electoral advertisement containing a statement that is false or misleading in a material particular'.

⁷⁷⁰ Parliamentary Electorates and Elections Amendment (Truth in Advertising) Bill 2007 (NSW), section 151AA: 'A person who authorises, causes or permits the publication of an electoral advertisement (an advertiser) is guilty of an offence if the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent'.

⁷⁷¹ Senate Finance and Public Administration Legislation Committee, op. cit., p. 88.

as evidence against its effectiveness.⁷⁷² Ultimately, the Committee recommended against the introduction of such a provision, citing the 'difficulties in ensuring a prompt response to complaints and preventing misuse of the legislation to score political advantage'.⁷⁷³

- 10.63 The Committee also examined the possibility of extending the application of section 52 of the *Trade Practices Act 1974* to political advertising. Section 52 currently prohibits corporations from engaging in conduct that is misleading or deceptive or likely to mislead or deceive. The provision has been commonly applied to commercial advertising.⁷⁷⁴ Four key distinctions were made between the trade practices model and proposals to regulate political advertising by legislation: the impact of the implied freedom of political communication, the difference between political and commercial advertising, the distinction between civil and criminal penalties, and the speed of available remedies.⁷⁷⁵ Again, the Committee noted difficulties in drafting suitable and practical provisions to achieve truth in electoral advertising and recommended against such a provision.⁷⁷⁶
- 10.64 Those against truth in advertising regulation argue any provision would be unworkable,⁷⁷⁷ for reasons including the following.
- The lack of a suitable body for enforcement is a key hurdle.⁷⁷⁸ It can be argued that the neutrality and impartiality of existing bodies, such as the AEC, may be compromised if they are required to rule on what will be highly vexed and publicised political issues.⁷⁷⁹
 - As the preferred remedy in case of misleading or deceptive advertising would generally be injunctive, there is an argument that judicial oversight may be warranted. Remedies would also have to be provided in an efficient and timely manner to ensure offending advertising material is removed or corrected as soon as possible. Such prompt enforcement of remedies may not be readily available on polling day.
 - Further, it is contended that regulation may lead to increased numbers of nuisance claims by voters or candidates seeking to prevent an opposition advertisement from publication.⁷⁸⁰
- 10.65 Given these potential challenges, one option that could be considered to increase the deterrent effect of truth in advertising laws might be to disqualify any person who had breached such laws from being chosen or sitting as a member of either House of Parliament for a specified period (such as two years). This could align with a similar provision currently in the Electoral Act which disqualifies persons convicted of bribery or undue influence offences from being chosen or sitting as a member for two years from the date of their conviction.⁷⁸¹

⁷⁷² *ibid.*, pp. 91-92 – there were only two prosecutions from 1985 to 2001.

⁷⁷³ *ibid.*, p. 93.

⁷⁷⁴ *Makita (Aust) Pty Ltd v Black and Decker (A'asia) Pty Ltd* (1990) 18 IPR 270; *Union Carbide Australia Ltd v Duracell Australia Pty Ltd* (1986) 7 IPR 481; *Gillette Australia Pty Ltd v Energizer Australia Pty Ltd* (2002) 56 IPR 1.

⁷⁷⁵ Senate Finance and Public Administration Legislation Committee, *op. cit.*, p. 92.

⁷⁷⁶ *ibid.*, pp. 92-93.

⁷⁷⁷ JSCEM, *2001 Federal Election: Report of the inquiry into the 2001 Federal Election and Matters Related Thereto*, 2003, p. 133.

⁷⁷⁸ Senator P Durack, 'Electoral and Referendum Amendment Bill: Second Reading', Senate, *Debates*, 11 October 1984, p. 1679.

⁷⁷⁹ JSCEM, *The 1993 Federal Election: Report of the inquiry into the conduct of the 1993 federal election and matters related thereto*, *op. cit.*, p. 109; AEC, submission no. 109 to JSCEM, *The 1996 federal election: Report of the inquiry into the conduct of the 1996 federal election and matters related thereto*, 1996; G Carney, submission no. 11 to Senate Finance and Public Administration Legislation Committee, *Inquiry into the Charter of Political Honesty Bill 2000 [2002]; Electoral Amendment (Political Honesty) Bill 2000 [2002]; Provisions of Government Advertising (Objectivity, Fairness and Accountability) Bill 2000; Auditor of Parliamentary Allowances and Entitlements Bill [No. 2]*, p. 2.

⁷⁸⁰ Senate Finance and Public Administration Legislation Committee, *op. cit.*, *Hansard* (A Becker), 6 April 2001, p. 43; Commonwealth Parliament, Senate, *Debates*, Senator R Ray, Electoral and Referendum Amendment Bill 1984, 16 October 1984, p. 1716.

⁷⁸¹ Electoral Act, *op. cit.*, section 386.

However, it might be argued against this option that this approach would be too heavy-handed, or that it would encourage parties to implement arrangements in which candidates or members did not play a role in authorising advertisements.

- 10.66 Against truth in advertising laws, it has also been argued that it should be up to the voters to judge the veracity of claims made in political advertising, just as they judge the veracity of claims made in commercial advertising.⁷⁸² Given the experience that voters have with negative campaign advertising in Australia,⁷⁸³ it might be contended that voters can distinguish between legitimate claims and mere allegations.

Polling booth neutrality

- 10.67 The Electoral Act prohibits the canvassing for votes and the exhibition of any notice or sign (other than an official notice relating to an election) within six metres of the entrance to a polling booth. However, the Act does not prohibit campaign activity outside the six metre limit. At most polling booths, electors will find the booth's perimeter decorated by large and colourful signage and bunting, either for one particular party or a number of different parties and candidates.
- 10.68 Large and colourful signage outside polling booths can serve a useful purpose. For example, such signage on election day can provide a valuable guide to electors in locating polling booths within their division. The colour can also add to the election day atmosphere and foster a sense of civic engagement. Regulation needs to strike a balance between competing aims – on the one hand, maintaining the neutrality of the polling booth, whilst on the other hand, allowing parties and candidates to promote themselves to electors.
- 10.69 Around 10% of voters report that they are 'undecided' as to which way they will vote on election day.⁷⁸⁴ Many of these voters report that they only decide in the polling booth, and candidates might therefore see the area surrounding the polling booth an important opportunity to 'reach' undecided voters before they enter the booth to cast their vote.
- 10.70 One line of argument is that voters should be able to cast an informed vote, in a neutral environment, free of any undue pressure or influence. Opponents of this view might advocate that parties and candidates should be able to freely express their views and promote their candidate outside the booth, and that many voters have come to rely on the provision of voting information at the polling booth for their preferred candidate.
- 10.71 Minor parties have complained that the major political parties are taking advantage of the current lack of regulation, by monopolising all available space for posters at certain polling booths.⁷⁸⁵ At present, parties can erect posters and signage at polling booths on a first come, first served basis subject to state, territory and local regulations. JSCEM has noted that these practices affect smaller parties more than larger ones, which have 'the resources for more and larger signs, and often more personnel to deploy to reserve desirable locations outside booths'.⁷⁸⁶

⁷⁸² AEC, submission no. 109 to JSCEM, *The 1996 federal election: Report of the inquiry into the conduct of the 1996 federal election and matters related thereto*, op. cit., p. 7.

⁷⁸³ See, for instance, S Young, 'Scare Campaigns: Negative Political Advertising in Australia', Paper presented to the Australasian Political Studies Association Conference, University of Tasmania, Hobart, 2003.

⁷⁸⁴ Australian Election Study, Question B.4. 'When did you decide how you would definitely vote in this election?', Australian National University, 1998 – 11.3%, 2001 – 12.3%, 2004 – 8.6%, 2007 – 7.9%.

⁷⁸⁵ Australian Greens, submission no. 107 to JSCEM, *Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, 2005, pp. 2-3.

⁷⁸⁶ JSCEM, *Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, op. cit., p. 114.

10.72 Options for reform (bearing in mind the need to take account of the implied freedom of political communication) might include:

- a complete ban on electoral advertising within a specified distance of polling booths;
- a ban on canvassing for votes within 100 metres of a polling booth, as applies in Tasmania and the ACT;
- limiting the size or type of posters or signs displayed at a polling booth;⁷⁸⁷
- limiting the number of posters or signs each candidate can display at a polling booth;
- limiting the number of supporters each candidate is allowed to distribute candidate information outside a polling booth;⁷⁸⁸ or
- a prohibition on advertising material being displayed on a polling booth fence or perimeter prior to a certain time on election day.

How-to-vote cards

10.73 How-to-vote cards are a common, but not universal, element of polling days in Australia. At most polling booths, political party workers will set up desks or stands outside entry points to polling booths to distribute how-to-vote cards to voters, in accordance with the rules in each jurisdiction prohibiting canvassing within a specified distance from polling booths, as discussed at paragraph 10.8.

10.74 How-to-vote cards in Australia are the key material distributed by candidates and their supporters at the booth, and a majority of voters report that they use how-to-vote cards in casting their vote.⁷⁸⁹ A number of existing regulations in the Electoral Act apply to the how-to-vote card. Section 329 has application to how-to-vote cards, making it an offence to print, publish or distribute any how-to-vote card that is likely to mislead or deceive an elector in relation to the casting of a vote in an election. Section 335 makes it offence to exhibit or leave how-to-vote cards in any polling booth. Section 328 also has application to how-to-vote cards, requiring the name and full street address of the authoriser to be printed on the cards.

10.75 The AEC has noted that how-to-vote cards can assist in reducing the number of informal votes cast at an election, by providing voters clear guidance as to how to mark the ballot paper.⁷⁹⁰ It has also been contended that the distribution of how-to-vote cards on election day both 'mobilises democratic participation and keeps political parties in touch with their members and supporters'.⁷⁹¹ There may also be implications regarding the implied freedom of political communication in attempting to limit the ability of candidates and their supporters to provide material to voters. The political parties also rely on voter adherence to how-to-vote cards so that value can be attached to preference deals executed between competing parties and candidates.⁷⁹²

10.76 There have been a number of proposals for reform in the use of how-to-vote cards, largely motivated to address the following issues:

⁷⁸⁷ New South Wales currently restricts the size of campaign posters to an area which is not more than 8,000 square centimetres: *Parliamentary Electorates and Elections Act 1912* (NSW) section 151B(6).

⁷⁸⁸ This option may also require limits being placed on the ability of third parties to distribute election and campaign information outside polling booth. It could be argued that placing limits on parties or candidates alone might lead to a rise in the involvement of third parties in distributing material.

⁷⁸⁹ I McAllister and J Clark, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987-2007*, Australian Election Study, 2007, p. 6.

⁷⁹⁰ Australian Electoral Commission, *Candidate's Handbook for federal elections*, Chapter Four – Voting, 2007 pp. 40-41.

⁷⁹¹ JSCEM, *Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, op. cit., p. 123.

⁷⁹² C Sharman, A Sayers, and N Miragliotta, 'Trading Party Preferences: the Australian Experience of Preferential Voting', *Electoral Studies*, vol 21, no. 4, 2002, pp. 543-560.

- the allegedly misleading nature of some how-to-vote cards;⁷⁹³
- the behaviour of political party workers distributing how-to-vote cards; and
- the environmental impact of current how-to-vote card practices.

10.77 Some complaints have been made about misleading how-to-vote cards, often because the cards suggest an association between a particular candidate and another candidate or party which does not exist.⁷⁹⁴ Whilst existing electoral offences do prohibit this behaviour, remedial action can be difficult to enforce on election day, and allegedly prohibited how-to-vote cards can continue to be distributed.

10.78 Options for reform in this area include:

- allowing the presiding officer at any given polling booth to confiscate how-to-vote cards deemed to be misleading;⁷⁹⁵
- requiring all how-to-vote cards to be registered with the AEC prior to election day;⁷⁹⁶ or
- requiring the AEC to approve all how-to-vote cards before election day.⁷⁹⁷

10.79 To address concerns that electors were being harassed on their way into the polling booths by party workers distributing how-to-vote cards,⁷⁹⁸ it has been suggested that the AEC develop a code of conduct to be signed and agreed by all party workers at polling places on election day.⁷⁹⁹ Alternatively, it has been suggested that how-to-vote cards for each candidate be displayed in booths rather than handed out.⁸⁰⁰

10.80 This latter suggestion has also been raised in the context of ensuring the neutrality of the polling booth, and in limiting the environmental impact of the distribution of how-to-vote cards. Given that each voter can be given multiple how-to-vote cards, the amount of paper used in this process is high. Though the AEC currently provides recycling bins at each polling booth to minimise wastage,⁸⁰¹ some argue that other initiatives, such as the display of the how-to-vote cards for all candidates in each booth, would greatly reduce the amount of paper used on election day.⁸⁰²

⁷⁹³ JSCem, *Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, op. cit., pp. 114-122; JSCem, *2001 Federal Election: Report of the inquiry into the 2001 Federal Election and Matters Related Thereto*, op. cit., pp. 193-195.

⁷⁹⁴ For instance, at the 2004 Federal Election, how-to-vote cards distributed by a Liberals for Forests candidate were held to have influenced the outcome of the election by suggesting an associating between that candidate and the Liberal Party of Australia; see JSCem, *Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, op. cit., pp. 115-119.

⁷⁹⁵ JSCem, *2001 Federal Election: Report of the inquiry into the 2001 Federal Election and Matters Related Thereto*, op. cit., p. 195.

⁷⁹⁶ As occurs in New South Wales, see New South Wales Electoral Commission, 'Election Materials Including How-to-vote Cards', 2009, available at: www.elections.nsw.gov.au/state_government_elections/how_to_vote_cards.

⁷⁹⁷ In Queensland, how-to-vote cards must be lodged with the Electoral Commission Queensland; in Victoria, the Victorian Electoral Commission approves all how-to-vote cards before election day.

⁷⁹⁸ JSCem, *1998 Federal Election: Report of the inquiry into the 1998 Federal Election and Matters Related Thereto*, op. cit., p. 70.

⁷⁹⁹ JSCem, *2001 Federal Election: Report of the inquiry into the 2001 Federal Election and Matters Related Thereto*, op. cit., p. 190.

⁸⁰⁰ Senators A Bartlett and A Murray, Australian Democrats, *Minority Report*, in JSCem, *The 1996 federal election: Report of the inquiry into the conduct of the 1996 federal election and matters related thereto*, op. cit., p. 166.

⁸⁰¹ At the 2007 Federal Election, approximately 14,000 recycling bins were provided to polling booths: Australian Electoral Commission, *Media Fact Sheet*, '2007 Federal Election Key Facts and Figures', 7 February 2008, available at www.aec.gov.au/elections/federal_elections/2007/media/key_facts.htm.

⁸⁰² JSCem, *Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, op. cit., p. 121.

A single national regulatory code for campaign activities

- 10.81 As noted earlier in this chapter, there are variations in the legal framework governing federal, state and territory election campaigns.
- 10.82 Variations in regulations between jurisdictions will inevitably cause some uncertainty for centralised political parties and campaign bodies that conduct elections at both the federal and state and territory level. This inconsistency of regulation may lead to additional breaches of electoral law, as candidates and their agents are unaware of jurisdictional differences. It may also cause some confusion for voters who may expect the same arrangements to apply to matters such as advertising or canvassing around polling booths for all elections.
- 10.83 Some examples, among many, of areas in which consideration could be given to developing a single national regulatory code for campaign activities, or to harmonising arrangements in identified key areas, include:
- controls on canvassing for votes near polling booths, particular in relation to the distance from a polling booth that canvassing is prohibited;
 - the use of parliamentary entitlements for campaign purposes at both the federal and state and territory level; and
 - requirements for the authorisation of campaign advertisements, including the place where the authorisation is to appear on newspaper advertisements and/or requirements (if any) for details such as printer name and authoriser address to be included in authorisations.

DISCUSSION POINTS

- 10.84 Submissions are invited on what aspects (if any) of the campaign in Australia should be reformed. In particular, comments are invited on the following questions:
- To what extent should the government seek to regulate the use of new media, including the internet, for campaign purposes, or encourage the development of a voluntary code of conduct?
 - Are there any specific emerging campaign practices which you would like to see tackled?
 - Should any additional measures be put in place to govern the use of public resources for campaign purposes?
 - If so, what measures do you think might be appropriate?
 - Are reforms needed to address the shift towards 'continuous' campaigning?
 - Do you believe the current media blackout arrangements should be changed in any way?
 - Should 'truth in advertising' laws be introduced?
 - If so, what form should such laws take?
 - Are there any changes that you think should be introduced to the arrangements governing the neutrality of the polling booth?
 - Should any changes be made to the arrangements governing how-to-vote cards?
 - Do you favour any particular options for greater harmonisation of campaign regulations across the Commonwealth, states and territories – including possible use of national voluntary or regulatory codes of conduct?