

**AEC**

Australian Electoral Commission

Electoral Commissioner

The Hon Christopher Pyne MP
Federal Member for Sturt
429 Magill Road
ST MORRIS SA 5068

Original by facsimile: (08) 8431 2288

Dear Mr Pyne

Thank you for your letter of 28 August 2009 in which you have drawn the attention of the Australian Electoral Commission (AEC) to signage relating to projects funded by the Australian Government under the "Nation Building – Economic Stimulus Plan". You have asked whether the AEC can guarantee that these signs are not within six metres of a polling place.

Before responding to the detail of the matters raised in your letter, let me clearly state that the AEC is concerned with any action that is taken by persons which is in breach of the requirements of the *Commonwealth Electoral Act 1918* (Electoral Act). The functions given to the AEC under the Electoral Act include a range of matters that relate to federal elections and ensuring that they are fair, transparent and conducted according to law. The AEC has no powers beyond those which have been provided in the Electoral Act to deal with electoral complaints and has no power to undertake or initiate prosecutions for electoral offences under Part XXI of the Act. Accordingly, the AEC has adopted the approach of placing particular emphasis on informing stakeholders about the requirements of the Electoral Act and has produced a range of publications including "Electoral Backgrounders" that deal with topics such as electoral advertising and polling place offences.

The AEC has examined the sign photographed in the attachment to your letter and formed the view that it is likely that a Court could find that section 328 of the Electoral Act applies to the sign to require authorisation details to be included. In relation to the operation of paragraph 340(1)(e) of the Electoral Act, the AEC is unaware of any evidence that the sign photographed in the attachment to your letter has been placed "within six metres of the entrance to a polling booth". If circumstances do subsequently arise whereby the sign appears within six metres of the entrance to a polling booth on a polling day for a federal election, then the AEC is of the view that the sign would need to be covered or removed during the hours of polling.

Let me explain the basis for the AEC's views.

Authorisation and printer details

Subsection 328(1) of the Electoral Act provides that:

- "(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."

The term "electoral advertisement" is defined in subsection 328(5) of the Electoral Act to mean an advertisement that "contains electoral matter, but does not include an advertisement in a newspaper announcing the holding of a meeting". The term "electoral matter" is defined in subsection 4(1) of the Electoral Act to be "matter which is intended or likely to affect voting in an election". Subsection 4(9) of the Electoral Act expands the definition of what is to be regarded as an "electoral matter" by stating that:

".....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.....the Governmentan issue submitted to, or otherwise before, the electors in connection with the election."

The AEC is aware that the Courts have taken a wide interpretation of the term "advertisement" in the context of the Broadcasting legislation and is of the view that a similar approach would be taken to the interpretation of the Electoral Act. However, section 328 of the Electoral Act applies at all times and not just during the conduct of an election campaign. The period of operation of this section is relevant to determining its scope having regard to the definition of "electoral matter" in subsection 4(9) of the Electoral Act. The issue here is that the power under the *Constitution* for the Parliament to enact laws such as the Electoral Act must be clearly tied to the conduct of a federal election.

The AEC is of the view the definition of "electoral matter" in subsection 4(9) and the requirements of section 328 of the Electoral Act would result in the need to examine each particular advertisement to determine the nexus or connection with a federal election (which includes a by-election). As you will appreciate, this is a question of fact and degree.

In the present instance, the AEC notes that the sign photographed in the attachment to your letter refers to the "Australian Government" and the "Nation Building - Economic Stimulus Plan". The AEC has previously been advised that

the mere reference to the "Australian Government" does not of itself attract the operation of subsection 4(9) and 328 of the Electoral Act. This is particularly the case outside an election period. The advertisement must contain something more to indicate that it is likely to affect voting at a federal election.

The AEC is aware of the present debate in the Parliament and reports in the media about the impact of the Economic Stimulus Plan on Australians. The AEC is also aware of the stated intention of the Member for Bradfield to resign his seat in the Parliament by the end of September 2009 which will result in a by-election to be held at some future date to be determined by the Speaker of the House of Representatives. The AEC understands that it is likely that this will be before the end of 2009.

Based on the consideration of the above matters, the AEC has formed the view that the reference to the Economic Stimulus Plan and the impending by-election in the Division of Bradfield has resulted in the sign requiring the inclusion of the authorisation and printer details imposed by section 328 of the Electoral Act.

6 metres from the entrance to a polling booth

The AEC notes that many polling places that are used within which to locate a polling booth in a general election are located at schools. The AEC also notes that based on section 28 of the *Constitution* a general election must take place before 16 April 2011. The AEC wishes to clarify your letter which misstates the contents of subsection 340(1) of the Electoral Act. This subsection prohibits certain conduct from taking place "within 6 metres of the entrance to a polling booth" – not a "polling place". This distinction is crucial to assist with your understanding of the requirements of the Electoral Act and its possible application to the sign photographed in the attachment to your letter.

A "polling place" is a place appointed under section 80 of the Electoral Act. The term "polling booth" which is used in section 340, is defined in subsection 4(1) of the Electoral Act and means:

"....a building, structure, vehicle or enclosure, or a part of a building, structure, vehicle or enclosure, provided at a polling place, in pursuance of paragraph 203(1)(a), for the purpose of taking votes during polling."

Further, section 203 of the Electoral Act makes it clear that a "polling booth" only exists on the actual polling day for a federal election and not at other periods of time. Accordingly, the 6 metre rule does not generally apply to a "polling place" but rather to the entrance of a "polling booth" that is located within the precinct of that "polling place" on polling day. There is one exception to this. Subsection 340(2) of the Electoral Act contains the discretion for a Divisional Returning Officer to place a notice at the entrance to the enclosed grounds in which the polling booth is located whereby the grounds are deemed to be part of the polling booth.

The effect of the above is that the mere placement of the sign photographed in the attachment to your letter in front of the Magill Primary School in compliance with the Guidelines cited in your letter will not necessarily result in that sign being placed within 6 metres of the entrance to a polling booth.

Paragraph 340(1)(e) of the Electoral Act only regulates messages on a notice or sign that can be said to involve material that is "relating to an election". The context of paragraph 340(1)(e) of the Electoral Act can be gathered from the earlier paragraphs in the subsection which involve canvassing and soliciting for votes. It is noted that a breach of section 340 is not an offence of strict liability. The legal test of what amounts to "relating to" is well known and is an expression that is general and wide-reaching. Further the meaning given to this phrase is determined by the context in which it appears.

The AEC is of the view that the reference to the Economic Stimulus Plan and the impending by-election in the Division of Bradfield has resulted in the sign containing a message that is "relating to an election". As such, the signs could not lawfully be placed within 6 metres of the entrance to any "polling booth" on the day of the polling for a federal election. In the event that the sign is within 6 metres of the entrance to a "polling booth", the sign will need to be either removed or covered during the hours of polling on the polling day for a federal election.

The earlier comments on section 328 equally apply to the possible interpretation of section 340 and its application to the sign photographed in the attachment to your letter. There is presently no breach of the requirements of paragraph 340(1)(e) of the Electoral Act.

The AEC already has measures in place to address signs at polling booths to ensure that the requirements of paragraph 340(1)(e) are complied with. The Polling Place Procedures Manual that is used to train polling officials contains several requirements for the presiding officials to examine the outside of each polling booth and to cover or remove signs that may infringe against the requirements of subsection 340(1) of the Electoral Act.

The current status

The AEC has communicated the above views directly with the Government and relevant Commonwealth agencies. This is in accordance with our usual operating procedures in dealing with allegations of electoral advertising offences. The AEC has investigated the matter, drawn to the publishers' attention the views of the AEC on whether or not the requirements of the Electoral Act had been met and sought action to address any areas of non-compliance.

The announcements on 3 September 2009 by the Minister Assisting the Prime Minister for Government Service Delivery, Senator the Hon Mark Arbib, and the Special Minister of State, Senator the Hon Joe Ludwig, appear to have resolved this matter. The AEC is of the view that the implementation of the action outlined

in the Government announcements has addressed all the issues relating to the signs complying with the requirements of the Electoral Act.

I trust that the above rather lengthy explanation assists with your understanding of the application of the existing provisions of the Electoral Act, the results of the current investigation and the constraints that are placed on the AEC. Thank you for bringing your concerns to the attention of the AEC.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ed Killesteyn', with a horizontal line extending to the right.

Ed Killesteyn
Electoral Commissioner

7 September 2009