Australian Electoral Commission

SUPPLEMENTARY SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

IMPLEMENTATION OF TRUTH IN POLITICAL ADVERTISING

Canberra

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1. Preamble

1.1 This supplementary submission by the Australian Electoral Commission (AEC) is presented to the Joint Standing Committee on Electoral Matters (JSCEM) in response to its "Inquiry into the 1996 Federal Election", as advertised on Saturday 22 June 1996 in all major newspapers. The submission is supplementary to the major AEC submission, "The Conduct of the 1996 Federal Election", presented to the JSCEM on 29 July 1996 (submission No 30).

1.2 The AEC has opposed the introduction of a law to regulate truth in political advertising for the past decade, and this position has been in accordance with the conclusions of a number of parliamentary inquiries over that period. However, two significant recent events suggest that this JSCEM may recommend the introduction of such a law: the minority report of the 1993 JSCEM inquiry which recommended the re-introduction of section 329(2) of the CEA; and the amendment to the Electoral and Referendum Amendment Bill 1995, moved in the Senate last year by the Democrats and supported by the Liberal/National Coalition, which would have re-introduced section 329(2) of the CEA. This provision, which made it an offence to print, publish or distribute "untrue" advertising, was repealed in 1984, six months after its enactment.

1.3 On the understanding that some form of regulation of the content of political advertising may be imminent, this supplementary submission suggests, in outline only, a possible model for an independent, separately resourced, statutory organisation to administer any new such law - the **Election Complaints Authority** (ECA). The AEC emphasises that this model organisation is indicative only, and a more detailed examination of its place in the larger scheme of Commonwealth enforcement policy would be required if the JSCEM is interested in pursuing the model. However, the AEC has been advised by the Attorney-General's Department and the Director of Public Prosecutions, on a preliminary basis, that there appear to be no major legal/policy obstacles to the establishment of such an organisation.

2 Introduction

2.1 The possibility of legislating to regulate the content of political advertising at federal elections has been the subject of periodic inquiry by parliamentary committees for the past decade. In the major reforms to the Commonwealth Electoral Act 1918 (CEA) in 1983, section 329(2), which made it an offence to print, publish or distribute "untrue" political advertising, was enacted. Some six months later in 1984 it was repealed as being unworkable. The 1984 Joint Select Committee on Electoral Reform recommended that it be repealed for the following reasons:

> Political advertising differs from other forms of advertising in that it promotes intangibles, ideas, policies and images. Moreover, political advertising during an election period may well involve vigorous controversies over the policies of opposing parties.
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> ...The Committee has noted the concern expressed by broadcasters and publishers on the inhibiting effect this section would have on political advertising. The Committee notes with some concern the fact that these difficulties were not raised during debate on the 1983 Bill. This oversight suggests the need for legislation committees to closely examine complex Bills such as this, to ensure that the Parliament is aware of the full implications of every provision.
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> ... The Committee concludes that even though fair advertising is desirable it is not possible to control political advertising by legislation. As a result, the Committee concludes that s.329(2) should be repealed. In its present broad scope the section is unworkable and any amendments to it would be either ineffective, or would reduce its scope to such an extent that it would not prevent dishonest advertising. The safest course, which the Committee recommends, is to repeal the section effectively leaving the decision as to whether political advertising is true or false to the electors and to the law of defamation.

2.2 Following the Report of the 1989 Joint Standing Committee on Electoral Matters (JSCEM), entitled "Who Pays the Piper Calls the Tune", and the Report of the Senate Select Committee on Political Broadcasts and Political Disclosures of 1991, the Political Broadcasts and Political Disclosures Act 1992 was enacted to ban political advertising altogether on the electronic media. For some six months in 1992 the Australian Broadcasting Tribunal was obliged to order the removal of electronic advertising that offended against this law. This included, for example, ordering the removal of Forest Industry advertising from the airwaves during the 1992 Tasmanian State election.

2.3 In August 1992 the High Court decided that the political advertising ban was unconstitutional in that it was contrary to the implied freedom of political discussion in the Constitution *(Australian Capital Television Pty Ltd v Commonwealth (1992) 108 ALR 577; Nationwide News Pty Ltd v Wills (1992) 108 ALR 681).* The amendments to the Broadcasting Services Act 1992 made by the Political Broadcasts and Political Disclosures Act 1992 were repealed soon after. It is now understood that the reach of the constitutional

right to “free speech” has considerable implications for any form of regulation of political discussion.

2.4 The AEC made a detailed submission to the 1993 JSCEM, entitled “Truth in Political Advertising” (submission No 115 of 19 October 1993) which said the following:

> The Commission is of the view that nothing has happened since 1984 to reduce or remove the practical problems with requiring “truth” in political advertising which were identified then. For that reason, the Commission does not favour the re-introduction of legislation provisions requiring “truth” in political advertising.
>
> ... It is worth considering, in the light of the High Court’s recent finding of an implied freedom of speech guarantee in the Constitution, whether any legislation designed to curtail political advertising would survive a challenge in the court.
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> Whilst the Australian Electoral Commission does not of course condone the publication of political material that is untrue or misleading, it opposes legislating for “truth in political advertising” because of the imponderables in a volatile political environment pre-election, the difficulty of assessing “policy” statements, and the risks of manipulation/mischief/misuse, and particularly if the Commission were to have a role which could appear to compromise its neutrality and/or impose a burden of work such as to interfere with its electoral task.

2.5 After considering the issues, the majority of the 1993 JSCEM concluded the following at page 109 of its Report on the 1993 federal election:

> ...the Committee still believes that legislation cannot sensibly regulate the assertions that are the essence of an election campaign. Voters, using whatever assistance they see fit from the media and other sources, remain the most appropriate arbiters of the worth of political claims.
>
> **The Committee is also of the view that it would be entirely inappropriate for the AEC to be made responsible for the administration of truth-in-advertising legislation. Any decision the AEC could make in a truth-in-advertising case would inevitably lead to perceptions that its political neutrality had been compromised. (emphasis added)**

2.6 However, the minority report of the 1993 JSCEM made the following comments at page 164 of the Report:

> We disagree with the majority’s conclusion that no form of truth-in-advertising legislation is necessary. At the 1993 election it was clearly demonstrated that such legislation is needed to eliminate deliberate misrepresentation of a party’s stated policies on particular issues. We note that if some of the misrepresentations which occur during election campaigns were to occur in the private sector, the perpetrators would find themselves liable to prosecution under the Trade Practices Act.

> Truth-in-advertising legislation has worked very effectively in South Australia. The existence of such legislation at a national level would provide a means of protecting electors against misleading information.
>
> We recommend that
>
> > the former subsection 329(2) of the Electoral Act, which prohibited misleading political advertising, be reinstated.
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> Senator Charmarette supports this recommendation.

2.7 The Electoral and Referendum Amendment Bill 1995, which arose out of the majority recommendations of the 1993 JSCEM Report, failed to gain passage by the Parliament before the announcement of the 1996 federal election. Part of the reason for that failure to gain passage was the disagreement between the Houses of Parliament on an amendment to the Bill, moved in the Senate by the Australian Democrats and supported by the Liberal/National coalition, which would have re-enacted section 329(2) to make "untrue" statements in political advertising an offence.

2.8 In the AEC submission No 30 of 29 July 1996 to this JSCEM, the AEC once again stated its opposition to the re-enactment of section 329(2) to require truth in political advertising. The AEC not only re-iterated the principle objection to such a law, that it is unworkable because of the difficulties of defining "truth" in a political context, but also stated its agreement with the 1993 JSCEM majority view, that if such a law were to be enacted, it should not be administered by the AEC, because this might compromise its reputation for political neutrality:

> If such regulation of the content of political advertising were to be introduced, some consideration should also be given to whether a separate body should be established to receive complaints and to undertake the necessary investigations and prosecutions. If the AEC were to become the responsible body, there would inevitably be accusations of political partisanship in decisions on investigations and prosecutions, which could impair the AEC's reputation for political neutrality. Further, it is probable that the creation of such an offence would lead to a large case load which suggests the creation of a separate regulatory body specifically equipped for such tasks. Essentially, the AEC does not believe that its central charter, which is the conduct of federal elections and referendums, should be extended to include the monitoring of "truth" in political advertising.

2.9 It is noted that the AEC's view is shared by the Queensland Electoral Commissioner, who said the following in a submission to the Queensland Legal Constitutional and Administrative Review Committee in July 1996:

> If legislation is introduced to regulate political advertising, consideration needs to be given as to the appropriate body to investigate complaints and prosecute offences. ECQ does not have investigative staff and even it did have the resources, the number of complaints would likely interfere with the efficient conduct of the election. Furthermore, any action taken by ECQ during an election period would impair its reputation for political neutrality and

> may influence electors in a manner disproportionate to the matter being investigated. Therefore ECQ would be most reluctant to seek injunctions or other direct action until after polling day in relation to any complaints it may receive.

2.10 During the current JSCEM hearings it has become apparent that some members of the JSCEM are giving serious consideration to recommending the enactment of a law similar to that which already operates for South Australian State elections, section 113 of the Electoral Act 1985 (SA), which prohibits the making of inaccurate statements of fact in political advertising. In submission No 30 the AEC said the following:

> The AEC remains opposed to the regulation of the "truth" content of political advertising, believing that it is the right and responsibility of voters, with the assistance of a vigilant media, to make their own judgements about such matters. However, if the JSCEM were minded to recommend some form of regulation, then the AEC would suggest a closer consideration of section 113 of the South Australian Electoral Act, rather than the reinsertion of the old section 329(2) of the CEA.

2.11 On the assumption that some form of regulation of the content of political advertising will be recommended by this JSCEM, the AEC is concerned to ensure that the responsibility for the administration of such a law be carefully considered. If the Government accepts any JSCEM recommendation to either re-enact section 329(2), which prohibits "untrue" political advertising, or to enact section 113 (SA), which prohibits "inaccurate statements of fact", then the definitional boundaries of such an offence will probably result in considerable public interest and litigation at the next federal election.

2.12 As indicated in oral evidence to the JSCEM provided by the AEC on 15 August 1996 (at pages EM 61 to EM 63), the AEC believes that there should be an independent statutory authority established to administer the expected high case load, and put decision-making on the content of political advertising at a distance from the AEC, in order to avoid any public perceptions developing that the organisation primarily responsible for the conduct of federal elections is biased in the application of the law.

2.13 This AEC submission suggests, in outline only, a possible model for an independent, separately resourced, statutory organisation to administer any new law to regulate the truth content of political advertising - the Election Complaints Authority (ECA). The AEC emphasises that this model organisation is indicative only, and a more detailed examination of its place in the larger scheme of Commonwealth enforcement policy would be required if the JSCEM is interested in pursuing the model.

3. Preliminary Issues - Injunctions

3.1 There would be little point in legislating to regulate the truth content of political advertising if remedies are not available during the election period, when any likely damage to the political campaign process is occurring. To

leave the enforcement of such law to post-election prosecutions is to shut the gate after the horse has bolted. The most obvious immediate remedy during the election period is the use of court-ordered injunctions to stop any apparently illegal activity from arising or continuing.

3.2 Under section 383 of the CEA, the AEC and candidates in a federal election are empowered to seek injunctions from the court in relation to offences under the CEA or any other law of the Commonwealth. The AEC invoked this power most recently in obtaining an injunction against Mr Albert Langer at the 1996 federal election to restrain him from continuing to breach section 329A of the CEA. The public reaction to the result of the exercise of this power by the AEC was substantial.

3.3 If the CEA were to be amended to re-enact section 329(2) or to enact section 113 (SA) for the next federal election, then the AEC would be obliged, in circumstances where compliance with the law regulating the content of political advertising could not be obtained voluntarily, to make use of the injunctive power in section 383 to enforce compliance with that law during the election period.

3.4 However, it is not clear at this stage whether the implied freedom of political discussion in the Constitution, would suggest to a court in an injunction application that some particular caution be exercised in granting that injunction, and that a higher than usual standard of evidence that the alleged offence is indeed untrue or factually incorrect be produced.

3.5 In deciding on whether to apply for an injunction in particular cases, the AEC would be placed in the very difficult position of assessing the truth (or factual) content of party political campaign advertising and gathering sufficient supporting evidence to convince a court, a task well beyond its present responsibilities, and would be obliged to initiate court proceedings that would undoubtedly provoke serious and possibly damaging criticism of the AEC from one or other side of politics.

3.6 This risk of damage to the public reputation of the AEC, and the impact the administration of such a law would have on the resources of the AEC, the Director of Public Prosecutions, the Australian Federal Police, the Australian Government Solicitor and the courts, would be compounded by the opportunities available to the political parties to derail the campaign activities of their opponents. This potential for disruption of the political process through the use of the injunctive power by political parties is aptly summarised by the Queensland Electoral Commissioner in his July 1996 submission to the Queensland Legal Constitutional and Administrative Review Committee:

> Once an offence of untruthful political advertising is created by legislation, the Electoral Act 1992 allows any candidate or ECQ to seek an injunction (section 177). An injunction could prove an effective tactic for a candidate or political party to obtain publicity and to disrupt the advertising campaign of another party. With the existing media “black out” law prohibiting political advertising after Wednesday evening preceding polling day, a party’s

campaign could be seriously damaged by an injunction granted against it in the final week of an election period.

Accordingly, as the injunctive remedy has the potential to cause a grave injustice to political parties or candidates and disrupt the normal cut and thrust of electoral campaigns, ECQ is most reluctant to enter the political fray and seek injunctions during an election period.

3.7 The AEC agrees with the ECQ about the risks to the integrity of the political process arising from the use of the injunctive power by candidates. It would be possible of course, to provide specifically in section 383 of the CEA, that candidates are not able to seek injunctions in relation to advertising offences in the CEA. However, the AEC remains as reluctant as the ECQ to be put in the position of having to enter the political fray to seek injunctions in relation to the truth content of political advertising. It is for this reason that the AEC suggests that the JSCEM consider removing the regulation of truth in political advertising to a separate statutory organisation specifically equipped and resourced to enforce such a law.

4. Preliminary Issues - Investigations

4.1 The speed at which the AEC, the DPP and the AFP are able to deal with complaints concerning alleged CEA offences during the election period has been criticised in some submissions to this JSCEM. Any law to regulate truth in political advertising would also require rapid investigation to obtain evidence in preparation for the issuance of warnings, the obtaining of injunctions, or the initiation of prosecution proceedings.

4.2 It has been suggested by some that perhaps AEC officers should be supplied with specific investigatory powers similar to those available to the Australian Federal Police. Under section 316 of the CEA, for example, in relation to audit investigations for financial disclosure purposes, authorized officers of the AEC are provided with specific powers to require appearances and the production of documents, and if necessary to obtain search and seizure warrants (although if a matter reaches the point where a warrant may be necessary it is usually turned over to the Australian Federal Police).

4.3 However, the AEC does not commend this pathway to the JSCEM. The AEC does not believe that such a fundamental shift in the role of AEC staff would in any way enhance the electoral process. Further, the additional burden of undertaking potentially complex investigations would put AEC staff at risk of not adequately attending to their core duties in the conduct of the election.

4.4 It may be of interest to compare developments in this area in Canada. In the 1994 Report of the Chief Electoral Officer of Canada, a new organisational structure for the investigation and speedy resolution of election complaints is outlined (Appendix).

4.5 Elections Canada previously relied on the services of the Royal Canadian Mounted Police for election investigations, but with the developing

need to find: “alternative means to investigate breaches of election law, most of which are not of a truly criminal nature”, it has now established a complaints investigation office with the following staff:

- the Counsel to the Commissioner, assisted by two staff lawyers;
- a lawyer seconded from Legal Services at Elections Canada to assist with case management part time during and after the election period;
- the Chief Investigator for the Commissioner of Canada Elections;
- twenty-four special investigators, in locations across the country; and
- three support staff.

5. Background - Political Advertising Ban

5.1 In suggesting a statutory body separate from the AEC to investigate complaints about the truth content of political advertising, the AEC was mindful of the strongly-stated views of the majority of the 1993 JSCEM (see para 2.5), and of the 1989 JSCEM, which covered some analogous territory.

5.2 In its June 1989 Report entitled “Who Pays the Piper Calls the Tune” that JSCEM, in recommending the allocation of free broadcasting time for political advertising, made the following specific recommendation at page 99 of the Report, on how such time should be allocated:

> An independent committee, such as the Party Political Broadcast Committee in the United Kingdom, be established and that it have responsibility for allocating free time to parties and candidates and the determination of time slots.

5.3 The 1989 JSCEM Report went on to say:

> The Australian version of the Party Political Broadcast Committee (which would be referred to as the PPBC) should have discretion in allocating free time in certain circumstances as is currently the case with the allocation of time for the political broadcasts by the Board of the ABC. The role of the PPBC would be of the utmost importance in the application of a system of free time and hence its membership would also be of importance. The final view of the Committee is that as the ABT has been responsible for the regulation of television and radio in the past it should be responsible for this further development in the broadcasting area. Some form of consultative process would be necessary between the PPBC and radio and television networks to ensure fairness to all participants. Should there be disagreement over a decision of the PPBC there should be a right of appeal to an Appeals Committee. Such a committee should consist of representatives from the ABT, the AEC and representatives from FARB and FACTS.

5.4 It appears that the 1989 JSCEM was concerned to avoid any perception of political bias in the allocation of free broadcasting time, and accordingly recommended the establishment of an independent committee, responsible to the Australian Broadcasting Tribunal (as the Australian Broadcasting Authority was then known), but with separate membership and with powers to exercise its own discretions in decision-making.

5.5 The recommendations of this 1989 JSCEM led to the enactment of the Political Broadcasts and Political Disclosures Act 1992, which amongst other things, gave the Australian Broadcasting Tribunal powers to enforce the ban on political advertising. From January to August 1992, prior to the striking down of the legislation by the High Court, the ABT used those powers to enforce the political ad ban at the New South Wales The Entrance by-election, the Tasmanian State election, and the A.C.T. Legislative Assembly election, by demanding the withdrawal of some advertising with political content.

6. Election Complaints Authority - Truth in Advertising

6.1 The regulation of truth in political advertising could be undertaken by an independent statutory organisation, separate from the AEC in the same manner that, for example, the above described PPBC was to be. This would have the effect of putting the AEC at a distance from any allegations that might arise in the heat of an election campaign that investigations into truth in political advertising complaints were being handled in a politically biased manner.

6.2 Such an organisation, which is here called the “Election Complaints Authority” (ECA) for ease of reference, could be created with its own functions and powers under the CEA, and relatively few staff, perhaps seconded in part from the AEC, and other government agencies and departments such as the Australian Federal Police and the Australian Broadcasting Authority.

6.3 The ECA could be established at each federal election for a specified time period only, say one year from the announcement of a federal election - assuming that any offence relating to truth in political advertising would be in force only from the announcement of the election until the end of polling day, and any prosecutions recommended by the Director of Public Prosecutions would be completed within a year. If no prosecutions arose from the election, and its business was concluded, the ECA could be disbanded at any time after polling day.

6.4 As indicated in the oral evidence provided by the AEC on 15 August 1996 (transcript pp EM60-EM63), the ECA would ideally be provided with strong coercive powers of investigation, together with the power to seek injunctions as in section 383 of the CEA (but excluding candidates), to enable it to investigate and act upon complaints with the speed necessary to enable effective regulation in the relatively short time period of an election campaign.

6.5 A possible model for the sorts of powers that could be considered is the Australian Broadcasting Authority (ABA). The ABA is an independent statutory authority established under the Broadcasting Services Act 1992 (BSA). The ABA is responsible for technical planning and licensing of broadcasting services, ownership and control regulation of media companies and content regulation for the services provided.

6.6 The ABA is granted the power to undertake investigations by Part 13 of the BSA for the purpose of the performance of or exercise of any of its functions and powers, and may use one or more of the following methods to obtain all the necessary information:

- written submissions from the public, the licensee and/or a complainant;
- meetings between the ABA and interested parties;
- examination of documents;
- exchange of correspondence;
- hearings;
- consultation with groups;
- consultation with or examination of individuals.

6.7 Section 177 of the BSA states that an individual must provide any documents which may contain information relevant to an investigation. When a person is examined, the questions are asked in private but the person may have an adviser present. Examinees are required to take an oath or affirmation to the effect that the information provided is true to the best of the person's knowledge or belief. Under section 208 of the BSA it is an offence to knowingly provide false or misleading evidence, to do so carries a penalty of up to one year.

6.8 The ABA is obliged to investigate complaints referred to it which have not been resolved between complainants and broadcasters. However, under section 149(2) of the BSA the ABA is not required to investigate complaints it finds to be "frivolous, vexatious, or not made in good faith". At its discretion, the ABA may publish a report of its investigation or release information from the report to the general public. However, information on the progress of an investigation is not usually made publicly available.

6.9 In deciding what action to take in the course of an investigation and in its outcome the ABA is required by section 5(2) of the BSA to use its powers in a manner which is appropriate for the seriousness of the breach concerned. If licensees are found to be in breach of their licence conditions or of the control provisions of the BSA, the ABA may issue notices directing them to take action to conform with the requirements of the licence or to take action to remedy the breach. Licensees may face fines up to $200,000 for breach of licence conditions or up to $2m for failure to comply with notices. If the investigation relates to conduct that could amount to an offence under the BSA, the ABA may refer the matter to the Director of Public Prosecutions.

6.10 In summary, an organisation similar to the ABA, could be established under the CEA with its own powers and functions to regulate truth in political

advertising. The powers of the Election Complaints Authority might include the holding of public hearings, ordering the production of documents, the examination of witnesses, the issuance of warnings, and the making of remedial orders, and where necessary, obtaining injunctions and instituting prosecution proceedings.

6.11 In this organisational model the role of the Director of Public Prosecutions remains unchanged, but strong coercive powers of investigation are provided directly to the ECA, rather than being available indirectly only through the assistance of the Australian Federal Police. While there might still be a need to enlist the assistance of the AFP in particular local circumstances, or where the scope or seriousness of the case suggests the forces of the AFP are necessary, there would not be complete dependence by the ECA on the AFP for all investigations of possible breaches of the legislation, as is currently the case for electoral offences under the CEA.

6.12 This model organisation, the Election Complaints Authority, has the following advantages:

(a) Because the ECA would possess strong coercive powers of investigation, and the power to seek injunctions, rapid resolution of complaints within the short time frame of a federal election period would be possible;

(b) Because the ECA would be established as separate from the AEC, there could be no allegations of political bias levelled at the AEC, the organisation primarily responsible for the conduct of the election.

(c) Because the ECA would be separately resourced, there would be no competition with the AEC for scarce resources in administering the expected large case load.

6.13 It is important to note that if the ECA powers of investigation were to include requiring people to answer questions and produce documents even though that may involve self-incrimination, the evidence so obtained would generally not be able to be used against the person in a criminal prosecution, although civil remedies, such as injunctions, would not be affected.

6.14 Further, if the Election Complaints Authority were to be given the power to make orders outside the judicial process, such as for example

the court for an injunction must be supported by sufficient evidence to satisfy the court that there are appropriate grounds to issue the injunction. If this evidentiary standard is relaxed in order to expedite action, as might be implied in the making of immediate orders by the ECA, there will of necessity be a greater risk that the ECA will make an order for a person or party to desist from advertising which is not in fact proscribed by the law.

6.16 Two related issues are those of appeal rights, and the effect of wrongful ECA orders on the validity of an election. In case an ECA order were to be wrongly issued, a right of appeal is imperative to enable that error to be corrected. Further, it is possible that a campaign strategy by a political party, and its impact on the voting public, could be seriously compromised through obedience to a wrongful ECA order. The question would then arise as to whether such a disruption, arguably representing a form of "official error", ought to be able to form the basis of a challenge to the validity of the election in the Court of Disputed Returns.

7. Election Complaints Authority - All Offences

7.1 It is also worth considering whether the responsibilities of such an Election Complaints Authority should be widened to deal with complaints in relation to all election offences under the CEA, during the election period only. The AEC notes that some submissions to this JSCEM have complained about the necessary time taken by the AEC, the DPP and the AFP to investigate and assess possible breaches of the CEA, and it is recognised by the AEC that, short of the AEC invoking its injunctive powers under section 383 of the CEA, offences during the election period are unlikely to be prosecuted in time to remedy any perceived immediate damage to the electoral process.

7.2 However, any such extended organisational model for an Election Complaints Authority, responsible for the immediate resolution of all election complaints under the CEA during the election period, with the assistance of the AFP only as necessary in serious cases, should not be so modelled as to displace the proper role of the Director of Public Prosecutions and the courts in the electoral process.

7.3 Whereas such an Election Complaints Authority would be able to obtain immediate compliance with the law in most cases, by for example ordering the removal of offending political advertising from the newspapers or the airwaves, or by obtaining court injunctions in some circumstances, prosecutions would only be undertaken in due course with the advice of the Director of Public Prosecutions, and it would always be available to citizens to challenge the results of an election in the Court of Disputed Returns during the statutory 40 day period following the return of the writs.

8. South Australian Experience

8.1 The AEC is aware that this JSCEM is giving serious consideration to some form of regulation in relation to the content of political advertising and accordingly the AEC suggested consideration of section 113 of the Electoral

Act 1985 (South Australia) as a less onerous alternative to the repealed section 329(2) of the CEA.

8.2 Under section 113(1) of the South Australian Electoral Act 1985, it is an offence for a person to authorise, cause or permit the publication of an electoral advertisement which contains a statement purporting to be a statement of fact and the statement is inaccurate and misleading to a material extent. The section applies to advertisements published by any means including radio and television. It is a defence for the defendant to prove that he or she took no part in determining the contents of the advertisement, and that he or she could not reasonably be expected to have known that the statement was inaccurate and misleading. The penalty in the case of a natural person is $1,000 and in the case of a body corporate $10,000.

8.3 Section 113(1) was recently considered in the case of Cameron v Becker (1995) 64 SASR 238 which involved an appeal to the Full Court of the Supreme Court of South Australia. The Court held that:

> (a) Section 113 is directed only to statements of fact. It has no application to expressions of opinion. Further, it applies only to electoral advertisements, which restricts its application to advertisements calculated to affect the result of an election.
>
> (b) The statutory defence would ordinarily only be available to a small class of persons, such as printers and publishers of newspapers and the proprietors of radio and television stations. However there is nothing in the subject matter of section 113 which would indicate the preclusion of the common law defence expounded in Proudman v Dayman (1941) 67 CLR 536, being a defence of honest and reasonable mistake of fact.
>
> (c) The constitutional free speech defence failed because the limitation imposed by section 113 is manifestly proportionate to the legitimate object of ensuring that what is represented as factual material published in political advertisements is accurate and not misleading.

8.4 The South Australian law was therefore found to be constitutionally valid by the South Australian Supreme Court, but there is no guarantee that an appeal from this decision to the High Court, had it proceeded, might not have produced a different result. As has been noted previously by the AEC, section 113 has only been before the courts on this one instance, and this is a very limited experience upon which to base such a fundamental change to the federal electoral process.

8.5 The experience of the South Australian Electoral Commission in implementing this law may be instructive. To avoid any perception of bias in invoking section 113, the South Australian Electoral Commissioner will only act upon formal written complaints, and prosecutions after the election will not proceed without the advice of the Crown Solicitor. If such a law were to be enacted federally, and in the absence of an Election Complaints Authority as

outlined above, the same cautionary measures would be applied by the AEC, with the Director of Public Prosecutions substituting for the Crown Solicitor.

8.6 In a Bill now before the South Australian Parliament, amendments are proposed to section 113 of the South Australian Electoral Act to provide the Electoral Commissioner with the power, not formerly available to him, to apply for court injunctions and orders in relation to advertising offences.

8.7 The proposed amendments to the South Australian electoral law would increase the powers of the South Australian Electoral Commissioner to control the content of political advertising within the timeframe of the election period, by seeking injunctions from the court in relation to advertising offences, a course already notionally available to the AEC through section 383 of the CEA. However, the AEC's concerns about public perceptions of political bias in the application of the law remain, and are not satisfied by these latest developments in South Australia.

9. Conclusion

9.1 The establishment of an independent Election Complaints Authority with strong coercive powers of investigation, and with the authority to require compliance with the law by making orders and issuing warnings on its own authority, as well as being able to seek injunctions through the courts, would go a considerable way towards meeting the concerns of this JSCEM that complaints during the election period, including any that might arise from new legislation in relation to truth in political advertising, are dealt with efficiently and speedily. It would also meet the concerns of the AEC that its public reputation for political neutrality not be compromised in any way by the enactment of any law to regulate the content of political advertising.

9.2 If such a model Election Complaints Authority were to be considered further by the JSCEM, the AEC suggests that formal confirmation be obtained from the Attorney-General's Department and the Director of Public Prosecutions that an Electoral Complaints Authority would conform with overall Commonwealth policy on the administration of the law.