Online political communication—does this post need to be authorised?

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‘Spoken by J Jones. Authorised by S Smith, Canberra.’ This familiar phrase, spoken rapidly at the end of a TV ad, is a common feature of Australian elections, and is an example of an authorisation statement required by law to allow voters to know the source of the advertising. While these statements have traditionally been found on political advertising on TV, radio and in newspapers, recent changes to the law have expanded the range of communications considerably, with social media, internet video and streaming music now covered (but not sky writing or graffiti).

The authorisation requirements are specified by Part XXA of the Commonwealth Electoral Act 1918, Schedule 2 of the Broadcasting Service Act 1992 and associated legislative instruments. The recent changes were created by the Electoral and Other Legislation Amendment Act 2017 and with the exception of some similar provisions which were in place for the 2017 same-sex marriage postal survey, have not yet applied for a national election.

The new requirements are complex and have many inclusions and exclusions, and failure to include the required details may lead to a civil penalty of currently up to $25,200.

What communication is regulated?

The authorisation requirements apply to certain forms of electoral communication, which is defined by the Australian Electoral Commission (AEC) as:

a matter communicated, or intended to be communicated, for the dominant purpose of influencing the way electors vote in a federal election. This includes, but is not limited to, a communication that expressly promotes or opposes a candidate, political party, member or Senator.

The AEC notes that this doesn’t only apply to communication during an election period; however the AEC will give a higher priority to investigating non-compliance when an election is near. The electoral advertising ‘blackout’ period from the Wednesday before the election, where no electoral advertising may be broadcast, does not apply to social media.
Generally, electoral communication only requires authorisation if it has been paid for (such as a promoted tweet, a search advertisement, or a TV ad), if it is a promotional item (such as a flyer, sticker, poster or how-to-vote card), or if it is communicated by or on behalf of a disclosure entity and is intended to affect voting in a federal election.

Candidates, parties and their associated entities are all disclosure entities, as are political campaigners and third parties (organisations or people who have incurred significant electoral expenditure). In addition, people or organisations who have donated more than the disclosure threshold (currently $13,800) to a political party, political campaigner or third party are also disclosure entities, and their electoral communication will need to carry the required particulars.

While most people don’t buy election ads on TV, the new requirement for authorisation by donors (albeit donors who have donated a substantial sum of money) for electoral communication on forums such as social media may be a surprise to some people.

Certain exemptions apply to the authorisation requirements, including for personal communications, for the reporting of news, for satirical, artistic or academic purposes, for clothing, and for opinion polling. Additionally, communication by a Commonwealth public official, in that person’s capacity as an official, is not electoral matter.

**Authorising social media content**

Whereas in previous elections the law was somewhat unclear as to the extent that social media posts required authorisation, having been written long before social media existed, the new laws explicitly include social media posts, bulk text messages, and recorded phone messages (robocalls).

The rules also have a number of specific requirements for authorisation of different types of communication. Social media posts, for example, must have the required details at the end of the message, or if there is insufficient room, in an image in the post or at a website accessed through a URL in the post (authorisation details in a Facebook or Twitter bio will also generally be sufficient, according to the AEC). Phone calls (and robocalls) must have the details at the start of the message, and streamed music (such as Spotify ads) at the end of the music. Specific details can be found on the AEC’s website.

**Enforcing the new rules**

Investigation of breaches and enforcement of penalties is the responsibility of the AEC. The AEC may apply for injunctions in relation to breaching the authorisation provisions, but as a first step the AEC will usually ask the person who has posted the material, or the organisation displaying the material, to take it down. If the election is the target of another country’s disinformation campaign, however, this may prove less effective, and advertising hosted outside of Australia has proved problematic for the AEC. The AEC has an online complaint form where voters can lodge complaints about the authorisation of electoral communication.

In a report, the Joint Standing Committee on Electoral Matters had noted that Facebook was not adequately applying the authorisation rules, and was not responding to the AEC’s inquiries about the source of advertising in a timely manner. More recently, however, the
AEC has stated that it has good relationships with major social media platforms. In statements to Senate Estimates in April 2019 the Electoral Commissioner stated:

We're already working with Facebook and Twitter. We've met them and we've found them to be very responsive to date. To be fair to them, they've been incredibly responsive to us. Previously we thought they were not so responsive and now they appear to be. We also did a party briefing in Canberra recently for political parties where Facebook and Twitter came along, for example. We're engaging with them.

Less is known about the AEC's visibility of platforms such as China-based WeChat, which is likely to be a source of energetic campaigning.

Twitter has stated that it is undertaking to increase the transparency of the source of electoral advertising and Facebook has banned election ads from foreign entities from the day after the federal election was called.

Due to the newness of the authorisation provisions there have been no enforcement actions for breaches to date, so it is not known how high a priority the AEC will place on fines, as opposed to encouraging compliance, or its capacity to police the flood of communications associated with a federal election.

While it seems unlikely that unaware members of the public will face big fines from the AEC for their political Facebook posts, voters, donors and campaigners should familiarise themselves with the new rules.