

19 September 2019

Submission to the Joint Standing Committee on Electoral Matters inquiry into an all aspects of the conduct of the 2019 Federal Election and matters related thereto

Dear Committee

Thank you for the invitation to make a submission.

I am an Associate Professor of Constitutional Law at Monash University.

I propose that the *Australian Consumer Law's* prohibition on deceptive and misleading advertising be extended to apply to political advertisements.

There has been much recent commentary about political parties and others releasing electoral advertisements that are deceptive or misleading, and public commentary that political players should be subject to the same civil misleading or deceptive advertising rules that apply to businesses.

The time has come to subject political advertisements to the prohibition on misleading or deceptive advertising.

PROPOSAL

A new section 18A should be inserted into the *Australian Consumer Law* as follows:

18A Misleading or deceptive electoral matter

1. A person must not authorise or permit the publication of electoral matter to which Part XXA of the *Commonwealth Electoral Act 1918* applies; and which
 - (a) contains a statement purporting to be a statement of fact; and
 - (b) the statement purporting to be a statement of fact is misleading or deceptive or is likely to mislead or deceive.
2. A person does not contravene sub-section (1) if:
 - (a) The person took no part in determining the content of the electoral matter, and
 - (b) The person could not reasonably be expected to have known that the statement was misleading or deceptive or was likely to mislead or deceive.

Key features of my proposal are:

Limited and clear scope of operation: the prohibition on misleading or deceptive political advertising would apply only to material that is already required by law to carry an “authorised by ...” statement.

Clear legal standards: the concept ‘misleading or deceptive or likely to mislead or deceive’ is well developed and well understood. It has been operating in Australian law for decades.

Importantly, the concept is not about ‘true’ or ‘false’. For example, opinions and puffery are not misleading or deceptive.

Any arguments that misleading or deceptive advertising standards could not reasonably be applied to electoral matter that is required to carry “authorised by ...” statements are arguments that are equally applicable to commercial advertising. Such arguments are not accepted by government or the community in the commercial advertising context, and equally should not be accepted in this context.

Applicable to publishers: the prohibition on *permitting* the publication of misleading or deceptive political advertising would apply to publishers such as Facebook and Twitter but only if they could reasonably have been expected to know that the political advertisement is misleading or deceptive. This is consistent with current South Australian law.

This is important in the modern era because sometimes the author of electoral advertisements may not be known: where a publisher such as Facebook becomes aware that ‘fake news’ advertisements are on their platforms the publisher should face civil consequences for failing to remove the advertisement once it becomes aware of the problem.

Civil penalties rather than criminal penalties: the prohibition on misleading or deceptive political advertising would be a civil prohibition in the same way that current misleading or deceptive commercial advertising prohibitions are civil prohibitions. There are no criminal penalties like exist under the similar South Australian law.

Enforceable by the Australian Competition and Consumer Commission: including the provision in the *Australian Consumer Law* has the effect that the ACCC will be the body charged with enforcing the law. The ACCC is the body with extensive experience expertise in enforcing current deceptive and misleading advertising laws. There is no reason why the ACCC would be incapable of enforcing that same prohibition applying to political advertising.

I proposed a version of the prohibition on misleading or deceptive political advertising during a presentation at an Electoral Regulation Research Network event attended by academics and electoral commission officers earlier this year. At that event, electoral commission officers expressed a reluctance to be

involved in enforcing any such law out of fear that electoral commissions lack the necessary expertise and resources.

BACKGROUND

Current South Australian law

South Australian law currently has a criminal offence of deceptive or misleading political advertising. Section 113 of the *Electoral Act 1985* (SA) is as follows:

113—Misleading advertising

- (1) This section applies to advertisements published by any means (including radio or television).
- (2) 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.

Maximum penalty:

- (a) if the offender is a natural person—\$5 000;
 - (b) if the offender is a body corporate—\$25 000.
- (3) However, it is a defence to a charge of an offence against subsection (2) to establish that the defendant—
 - (a) took no part in determining the content of the advertisement; and
 - (b) could not reasonably be expected to have known that the statement to which the charge relates was inaccurate and misleading.

The courts have held that the South Australian law does not breach the implied freedom of political communication: *Cameron v Becker* (1995) 64 SASR 238. The Full Court of the Supreme Court of South Australia said:

“Whilst this legislation does interfere with the freedom to engage in political discourse, it does so for the protection of the fundamental right, which is that an elector is not only to be as widely informed as the elector and any candidate would wish, but also that the elector is not lead by deceit or misrepresentation into voting differently from that which the elector would have done if the elector had not been misinformed.”

Current federal law

Federal law currently has a criminal offence of misleading or deceiving a voter as to the mechanics of casting a vote. Section 329 of the Commonwealth Electoral Act 1918 (Cth) is as follows:

239 – Misleading or deceptive publications etc.

- (1) A person shall not, during the relevant period in relation to an election under this Act, print, publish or distribute, or cause, permit or authorize to be printed, published or distributed, any matter or thing that is likely to mislead or deceive an elector in relation to the casting of a vote.

- (4) A person who contravenes subsection (1) commits an offence punishable on conviction:
- (a) if the offender is a natural person--by imprisonment for a period not exceeding 6 months or a fine not exceeding 10 penalty units, or both; or
 - (b) if the offender is a body corporate--by a fine not exceeding 50 penalty units.
- (5) In a prosecution of a person for an offence against subsection (4) by virtue of a contravention of subsection (1), it is a defence if the person proves that he or she did not know, and could not reasonably be expected to have known, that the matter or thing was likely to mislead an elector in relation to the casting of a vote.

This provision has a very narrow operation. It applies only to the mechanics of voting, such as how to fill in the ballot paper.

Previous federal law prohibiting misleading or deceptive political advertising

The *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) inserted the following provision into the *Commonwealth Electoral Act 1918* (Cth):

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.

In 1984, the provision was repealed.

CONCLUDING REMARKS

The principal aim of my proposal is not to see political parties and others subject to regulatory enforcement action by the ACCC or pay civil penalties. Rather, the aim is to bring about cultural change.

I trust this submission is of assistance.

Yours sincerely

Luke Beck