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19 September 2019

Senator the Hon. James McGrath  
Chair of Joint Standing Committee on Electoral Matters  
Parliament House  
Canberra ACT 2600

Dear Chair,

Re: Inquiry into and report on all aspects of the conduct of the 2019 Federal Election and matters related thereto - Truth in Political Advertising

We write to you to ask that as part of its current inquiry into the 2019 Federal Election, the Committee consider investigating options to ensure a minimum factual basis in political advertising.

As the Committee is likely aware, false and misleading claims propagated during recent elections have generated a great deal of public interest in safeguarding the integrity of our political system. According to a national ReachTEL poll conducted following the 2019 Federal Election, a majority of Australian voters want tougher truth in political advertising laws with 87.7 per cent of respondents calling for change.

This is a critically important issue as the potential impact of misleading or false statements made in the course of electioneering are undoubtedly plentiful. Misleading and dishonest campaigns have an adverse effect on the public interest, divert attention from substantive issues, and may even distort electoral outcomes. To make matters worse, corrective advertising seeking to clarify matters is often ineffectual and disseminated less widely than the original misleading advertisement.

The Electoral Act does not require truth in electoral advertising. The Australian Electoral Commission is unable to act to stop misleading and deceptive conduct during elections. The AEC can only act in relation to conduct which affects the process of casting a vote.

In addition, through a number of decisions, in particular *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court has recognised an implied right of political communication in the Constitution.

The question of whether Australian Parliaments should enact truth in political advertising laws is not a new one. In fact, the Commonwealth Parliament considered the idea in the 1980s, and until 2002 Free TV Australia (then known as the Federation of Australian Commercial Television Stations or FACTS) heard complaints against, and did not permit, misleading political advertising under the *Trade Practices Act (1974)*. Post 2002 no further action was taken over the role of “untruthful” advertising having received legal advice that the Act did not regulate *political advertising*. FACTS subsequently decided that it would no longer seek to substantiate statements made in political advertisements nor would it consider complaints brought to them concerning the accuracy of statements made.

Since that time, Australians have been subject to particularly insidious scare campaigns such as “Mediscare” which have sought political profit at the expense of truth and the integrity of our political system. Australians should be casting their vote based off genuine and factual information.

Whilst we can debate concerning competing definitions of “truth”, everyone can agree that an objective fact-checker and minimum factual basis can elevate the national conversation concerning issues that matter to Australians and cut through the fake-news, fake-advertising, and fake-political campaigning that demeans us all.

This request is not without precedent: South Australia has adopted truth in political advertising laws without major issue. Section 113 of SA’s *Electoral Act 1985* makes it an offence to authorise or cause to be published electoral advertisements that are materially inaccurate and misleading. Although, the SA Electoral Commission is at times uncomfortable with its role as adjudicator of the truth, the South Australian example proves that factual accuracy in political advertising laws are possible without using a statutory body as the arbiter.

New Zealand too has national regulation of truth in political advertising, in this case conducted by its advertising standards body. This system has been in existence for decades, and over this time has successfully dealt with complicated questions of truth with nuance and transparency.

In addition to New Zealand, U.K. and Canada both have similar provisions. Section 91 of the Canada Elections Act has a similar provision by engaging directly with false statements made with the intention of influencing election results or are of a political nature.’ The

At a time when the confidence of Australians in our political system is at critically low levels we must take decisive action to defend the integrity of democracy in our country and act with the moral determination and courage that the Australian people expect of us.

In 2002 the Senate Finance and Public Administration Committee recommended that ‘some mechanism should be in place to address concerns about improper practices during election campaigns’.

In a report presented to the South Australian State Electoral Office by Dean Jaensch he makes the argument that in an age where “All sectors of the economy which relate to consumers are bound by strict laws in terms of product quality and product advertising.”

there should also be “constraint on similar activities of candidates, groups and parties in the electoral process.” There is extensive legislation in place to ‘for powerful constraints on the business, financial and retail sectors in regard to consumer protection’ yet ‘the political arena remained a matter of caveat emptor.’

It is unacceptable that misleading customers is against the law but misleading voters is at best a legal grey-space: at worst not provided for at all.

In order to help combat the confidence-deficit in democracy, taking a clear stand against misinformation is critical.

Whilst the South Australian example gives a good indication as to what is possible; any provision in favour of truth in political advertising must balance concerns related to freedom of speech. A Commonwealth law would need to be designed so as to ensure it does not breach the constitutionally implied freedom of political communication.

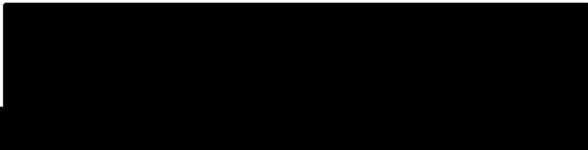
Further, we need to create safeguards against any legislation ensuring truth in political advertising being wielded as a political tool to shut-down debate or undermine candidates and parties following due process.

Whilst finding the balance is not an easy task, as it stands today there is little protection for voters. This is at a time when we need a robust debate concerning this country’s future more than ever, a conversation grounded in facts and genuine dialogue not political grand-standing and chronic misinformation campaigns.

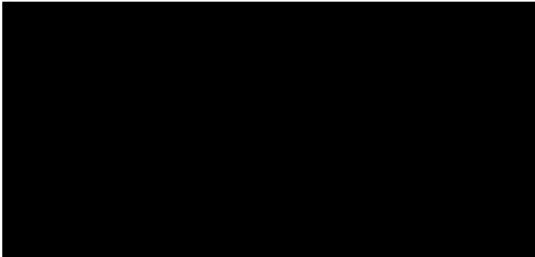
Finally, technology is rapidly developing that allows people to literally put words in other people’s mouths and promulgate the video of it on social media before anyone can correct the record. Given this, it is important to create a legal framework for dealing with this now.

In order for Australia to keep up with international best practice and build confidence in our democratic systems we strongly urge that the Joint Standing Committee on Electoral Matters investigates options to ensure truth in political advertising.

Kind regards,



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