ELECTORAL MATTERS COMMITTEE
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PARLIAMENT OF VICTORIA

ELECTORAL MATTERS COMMITTEE **INQUIRY INTO THE ELECTORAL ACT 2002 (VIC) RELATING TO MISLEADING OR DECEPTIVE POLITICAL ADVERTISING** FEBRUARY 2010 5

ELECTORAL MATTERS COMMITTEE

INQUIRY INTO THE PROVISIONS OF THE *ELECTORAL ACT 2002* (VIC) RELATING TO MISLEADING OR DECEPTIVE POLITICAL ADVERTISING

FEBRUARY 2010

5TH REPORT TO PARLIAMENT

Inquiry into the provisions of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising

Report to Parliament

Electoral Matters Committee

February 2010

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Committee information

Functions of the Committee

The Electoral Matters Committee is a Joint Investigatory Committee of the Parliament of Victoria. The Committee comprises seven Members of Parliament drawn from both Houses.

The powers and responsibilities of the Committee are determined by the *Parliamentary Committees Act 2003*. The functions of the Committee, as defined by Section 9A, are, if so required or permitted under this Act, to inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with—

- The conduct of parliamentary elections and referendums in Victoria;
- The conduct of elections of Councillors under the *Local Government Act 1989*; and
- The administration of, or practices associated with, the *Electoral Act 2002* and any other law relating to electoral matters.

Matters are referred to the Committee either by resolution of the Council or the Assembly or by Order of the Governor in Council. The *Parliamentary Committees Act 2003* also enables a Joint Investigatory Committee to inquire into and report to Parliament on any annual report or other document relevant to its functions and which have been laid before either House of Parliament.

Committee members

Mr Robin Scott MP (Chair from 1 February 2010)
Mr Michael O'Brien MP (Deputy Chair)
Hon Candy Broad MLC
Hon Christine Campbell MP
Mr Philip Davis MLC
Mr Adem Somyurek MLC (Chair until 10 December 2009)
Mr Murray Thompson MP

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Terms of Reference

On 1 April 2009, the Electoral Matters Committee received terms of reference from the Legislative Council to inquire, consider and report no later than 28 February 2010 on —

1. The deliberate misleading of the electors in the 28 June 2008 Kororoit by-election, whereby a pamphlet authorised by the Secretary of the Australian Labor Party was distributed that claimed "A vote for Les Twentyman is a vote for the Liberals" contributing, in the opinion of the Victorian Electoral Commissioner, to "an undesirable trend for candidates to take advantage or build on community misunderstandings of preferential voting with confusing statements"; and
2. As the Victorian Electoral Commissioner has suggested in his Report on the Kororoit District By-election held on 28 June 2008, whether the *Electoral Act 2002* (Vic) should be amended to improve the operation of the misleading provisions of the Act so that such abuses are more likely to be successfully prosecuted.

Acknowledgements

The Electoral Matters Committee would like to thank Mignon Turpin for her editing work and Max Robinson and Lauren Mooney of Max.Creative Pty Ltd for the cover design.

Chair's Foreword

The Electoral Matters Committee ("the Committee") is pleased to present this report to the Victorian Parliament on whether the provisions of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising should be amended.

This inquiry emanated from a complaint about a pamphlet authorised by the then State Secretary of the Australian Labor Party (Victorian Branch), Stephen Newnham, for the Kororoit District by-election held on 28 June 2008. The pamphlet contained the statement "A vote for Les Twentyman is a vote for the Liberals".

As a consequence, the Victorian Electoral Commissioner in his report to Parliament on the Kororoit District by-election, tabled in Parliament on 3 February 2009, suggested the Parliament may wish to consider whether the provisions of the Act relating to misleading or deceptive political advertising require amendment. The Committee subsequently received the terms of reference for this inquiry from the Legislative Council on 1 April 2009.

The conclusion best highlights much of the Committee's work and resultant findings. The Committee has determined to not support the majority of the proposals put forward by inquiry participants relating to misleading or deceptive political advertising:

> While the Committee acknowledges the limitations of the current provisions in the *Electoral Act 2002* (Vic), the Committee was not convinced that many of the proposed measures put to the Committee ... would improve the regulation of misleading or deceptive political advertising.
>
> The Committee was concerned that expanded measures to regulate misleading or deceptive political advertising would have implementation difficulties and increase the risk of a more litigious approach to elections and electoral law.
>
> The Committee is reluctant for the Victorian Electoral Commissioner to have an expanded role monitoring, reviewing and investigating breaches of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising. In addition, the Committee does not support the establishment of a separate agency for compliance purposes. The Committee was also concerned that the subjective nature of political discourse would make it difficult for any compliance agency to define and determine what is a fact, opinion or comment.

A number of inquiry participants noted the complexity of the issues under consideration. It is worth noting the evidence provided to the Committee by Mr Phil Cleary:

> I am the first to admit that this is not an easy question to resolve. I would not be looking at the Parliament or looking at this committee and condemning the committee for not being able to resolve the issue satisfactorily, because it is very complex in that we are going to talk about ideas and matters of opinion, and in a robust political system we do want that. But I think this might be no more than a starting point for a proper discussion about political life which will be valuable. And if the issue is not

> resolved by this committee, maybe at another time this will have laid the ground work for further discussion. The fact that we have this discussion occurring is the starting point and a good thing.[1]

Professor Jock Given, another witness also stated:

> I am very wary of enhanced, expanded legislative obligations which would make it an offence of some kind for members of Parliament or candidates for office to engage in conduct that might mislead or be regarded as misleading or deceptive. … I think we need to allow that space to stay as open as possible, because the consequences of trying to step in are even more troubling.[2]

During the course of the inquiry the wider issue of accountability, transparency and accessibility was raised. The Committee developed a recommendation which aims to improve accessibility of how-to-vote cards for political parties, candidates and electors.

On behalf of the Committee, I would like to thank all those who provided submissions and appeared before the Committee to give evidence. The Committee was pleased with the wide range of inquiry participants, which included political parties and candidates, electoral administrators, associations, academics and interest individuals.

I would like to express my gratitude to the former Chair, Mr Adem Somyurek MLC, Deputy Chair, Mr Michael O'Brien MP and fellow Committee members for their commitment to the inquiry. The Committee members worked well together to consider the measures proposed by inquiry participants. Given the political nature of this inquiry, however, the Committee have been unable to agree on some aspects of the final report. Three members of the Committee have attached a minority report.

I would also like to take this opportunity to acknowledge the Committee secretariat for their work on this inquiry. I would like to thank the secretariat's Executive Officer, Mr Mark Roberts, Dr Natalie Wray, the principal researcher for this inquiry, together with Ms Kate Woodland and Mr Nathaniel Reader who provided valuable administrative support to the Committee.

Robin Scott MP

Chair

Electoral Matters Committee

25 February 2010

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1 Phil Cleary, *Transcript of evidence*, Melbourne, 18 August 2009, pp.4-5.

2 Professor Jock Given, *Transcript of evidence*, Melbourne, 18 August 2009, pp.2, 5.

Recommendation

Recommendation 1: The Victorian Electoral Commission publish on its website registered how-to-vote cards during the election period.

List of Tables and Figures

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Abbreviations

AANA	Australian Association of National Advertisers
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
ACT	Australian Capital Territory
AEC	Australian Electoral Commission
ALP	Australian Labor Party
ANZSOG	Australian and New Zealand School of Government
AO	Officer of the Order of Australia
APPC	Association of Professional Political Consultants
ASA	Advertising Standards Authority (NZ)
AUD	Australian Dollars
BCAP	Broadcast Committee of Advertising Practice (UK)
Cth	Commonwealth
CAP	Committees of Advertising Practice (UK)
CEA	*Commonwealth Electoral Act 1918* (Cth)
CSO	Crown Solicitor's Office
EARC	Electoral and Administrative Review Commission (Qld)
ECA	Election Complaints Authority
EPIC	Electronic Privacy Information Center (USA)
FTC	Federal Trade Commission (USA)
Hon	Honourable
HTV	How-to-vote (card)
HTVC	How-to-vote card
ICCPR	International Covenant on Civil and Political Rights
IDEA	(International) Institute for Democracy and Electoral Assistance

JSCEM	(Commonwealth Parliament's) Joint Standing Committee on Electoral Matters
JSCER	(Commonwealth Parliament's) Joint Standing Committee on Electoral Reform
LCARC	(Queensland Parliament's) Legal, Constitutional and Administrative Review Committee
LGRA	Local Government Reports of Australia
MLA	Member of the Legislative Assembly
MLC	Member of the Legislative Council
MMS	Multimedia Messaging Service
MP	Member of Parliament
NSW	New South Wales
NT	Northern Territory
NZ	New Zealand
OAM	Medal of the Order of Australia
OECD	Organisation for Economic Co-operation and Development
OSCE	Organization for Security and Co-operation in Europe
QC	Queen's Counsel
Qld	Queensland
SA	South Australia
SC	Senior Counsel
SMS	Short Message Service
SNP	Scottish National Party
Tas	Tasmania
UK	United Kingdom
USA	United States of America
VCAT	Victorian Civil and Administrative Tribunal
VEC	Victorian Electoral Commission

Vic	Victoria
WA	Western Australia

Chapter
1

Chapter 1: Introduction

1.1 This chapter examines the scope, context and conduct of the inquiry into whether the provisions of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising should be amended. The first section, Scope of the inquiry, sets the parameters by outlining the terms of reference and relevant definitions, case law and a legislative and human rights framework. The second section provides an overview of the Kororoit District by-election and the third section summarises the conduct of the inquiry. The chapter concludes with an outline of the chapters comprising the body of this report.

Scope of the inquiry

Terms of reference

1.2 On 1 April 2009, the Electoral Matters Committee ("the Committee") received terms of reference from the Legislative Council to inquire, consider and report no later than 28 February 2010—

1. On the deliberate misleading of the electors in the 28 June 2008 Kororoit by-election, whereby a pamphlet authorised by the Secretary of the Australian Labor Party was distributed that claimed "A vote for Les Twentyman is a vote for the Liberals" contributing, in the opinion of the Victorian Electoral Commissioner, to "an undesirable trend for candidates to take advantage or build on community misunderstandings of preferential voting with confusing statements"; and
2. As the Victorian Electoral Commissioner has suggested in his Report on the Kororoit District by-election held on 28 June 2008, whether the *Electoral Act 2002* (Vic) should be amended to improve the operation of the misleading provisions of the Act so that such abuses are more likely to be successfully prosecuted.[3]

[3] David Davis MLC, Member for Southern Metropolitan Region, *Parliamentary debates*, Parliament of Victoria, Legislative Council, Melbourne, 1 April 2009, p.1716.

Definitions

Political advertising

1.3 The terms of reference focus on political advertising, otherwise known as election campaign material, which helps candidates and political parties communicate directly with electors.[4] Sally Young, an academic specialising in political advertising in Australia noted its importance:

> [P]olitical advertising is now central to the conduct, if not the results, of modern election campaigns.[5]

1.4 A definition of political advertising provided by Sally Young noted three main contexts within which advertising can be considered "political":

> First, there is government advertising used to promote or explain government policies or programs. … Second, there are the advertisements placed by lobby groups and private interests (such as unions, business leaders and 'issue' groups) that are designed to influence public opinion and persuade politicians. Third, the term 'political advertising' is most commonly used to refer to *the advertisements produced by political parties and individual candidates that are shown during election campaigns in order to persuade voters to vote for them.*[6] (Sally Young's emphasis)

1.5 The focus of this inquiry is on the latter form of political advertising.

Electoral matter

1.6 The terms of reference directed the Committee to political advertising in the form of a pamphlet authorised by the State Secretary of the Australian Labor Party (ALP) (Victorian Branch) during the Kororoit District by-election. According to the *Electoral Act 2002* (Vic), this is also known as "electoral matter":

> (1) In this Act, *electoral matter* means matter which is intended or likely to affect voting in an election.
>
> (2) Without limiting the generality of the definition of *electoral matter*, matter is to 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—
>
> (a) the election; or
>
> (b) the Government, the Opposition, a previous Government or a previous Opposition, of the State; or
>
> (c) the Government, the Opposition, a previous Government or a previous Opposition, of the Commonwealth or any other State or a Territory of the Commonwealth; or
>
> (d) a member or a former member of the Parliament or the Parliament of the Commonwealth, any other State or a Territory of the Commonwealth; or

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4 Sarah Miskin and Richard Grant, *Political advertising in Australia*, Department of Parliamentary Services, Parliament of Australia, Canberra, 29 November 2004, p.4.

5 Sally Young, "Spot on: The role of political advertising in Australia", Australian Journal of Political Science, vol.37, no.1, March 2002, p.93.

6 Sally Young, "Spot on: The role of political advertising in Australia", Australian Journal of Political Science, vol.37, no.1, March 2002, p.82.

(e) a political party, a branch or division of a political party or a candidate in the election; or

(f) an issue submitted to, or otherwise before, the electors in connection with the election.[7]

Publish and printed

1.7 Other definitions integral to this inquiry include "publish" and "printed". The *Electoral Act 2002* (Vic) defines these as follows:

- Publish means publish by any means including by publication on the Internet; and
- Printed electoral material means an advertisement, handbill, pamphlet or notice that contains electoral matter.[8]

Legislative framework

1.8 The terms of reference directed the Committee to examine whether the provisions of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising should be amended.

1.9 The *Electoral Act 2002* (Vic) is Victoria's principal electoral legislation. Division 6 of the *Electoral Act 2002* (Vic) deals with electoral matter. Section 84 focuses on misleading or deceptive electoral matter. The Act stipulates that:

(1) A person must not during the relevant period—

(a) print, publish or distribute; or

(b) cause, permit or authorise 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 the vote of the elector.

Penalty: In the case of a natural person, 60 penalty units or 6 months imprisonment;

In the case of a body corporate, 300 penalty units.

(2) A person must not during the relevant period—

(a) print, publish or distribute; or

(b) cause, permit or authorise to be printed, published or distributed—

an electoral advertisement, handbill, pamphlet or notice that contains a representation or purported representation of a ballot-paper for use in that election that is likely to induce an elector to mark the elector's vote otherwise than in accordance with the directions on the ballot-paper.

Penalty: In the case of a natural person, 60 penalty units or 6 months imprisonment;

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7 *Electoral Act 2002* (Vic) s.4.

8 *Electoral Act 2002* (Vic) s.3. Electoral law in other states also provides a similar definition for "publish". For example, the misleading voters provision in the *Electoral Act 1992* (Qld) s.163(4) states that "publish includes publish on the internet, even if the internet site on which the publication is made is located outside Queensland."

In the case of a body corporate, 300 penalty units.

(3) In a prosecution of a person for an alleged offence against subsection (1) or (2), it is a defence if the person proves that the person—

(a) did not know; and

(b) could not reasonably be expected to have known—

that the matter or thing was likely to mislead an elector when casting the elector's vote.[9]

1.10 The Committee noted that the misleading or deceptive provisions provided a narrow interpretation of what constitutes misleading or deceptive electoral matter because it relates only to the casting of the vote i.e. the process of obtaining, marking and depositing a ballot paper.

Case law

1.11 A number of inquiry participants referred the Committee to the key case in this field, *Evans v Crichton-Browne*, which was heard by the High Court of Australia in 1981.[10]

1.12 Mr Evans, an Australian Democrats candidate for the Senate in Western Australia "challenged the validity of the election of Noel Ashley Crichton-Browne to the Senate as a senator for the State of Western Australia … at the election held on 18th October 1980."[11]

1.13 Mr Evans argued that political advertising by the Liberal Party had breached the then paragraph 161(e) of the *Commonwealth Electoral Act 1918* (Cth) which prohibited "printing, publishing, or distributing any electoral advertisement, notice, handbill, pamphlet, or card containing any untrue or incorrect statement intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his vote." [12]

1.14 The principal question in the *Evans v Crichton-Browne* case is whether the statements, including the statement "that a vote for the Australian Democrats could be a vote for the Labor Party", could be said to have been "intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his vote".[13]

1.15 The meaning of the words "casting of his vote" was the key to determining whether the statement was misleading or not. The written judgement of the *Evans v Crichton-Browne* case provided a definition of "cast a vote":

---

9 *Electoral Act 2002* (Vic) s.84.

10 Hall & Thompson on behalf of Les Twentyman, *Submission*, no.4, p.1; Port Phillip Greens, *Submission*, no.5, p.2; Democratic Audit of Australia, *Submission*, no.6, pp.2-3; Liberty Victoria, Victorian Council for Civil Liberties, *Submission*, no.7, p.1; Victorian Electoral Commission, *Submission*, no.8, p.6; William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.25; Australian Electoral Commission, *Submission*, no.11, p.2; Stephen Newnham, State Secretary, Australian Labor Party (Victorian Branch), *Transcript of evidence*, Melbourne, 18 August 2009, p.2; Mark Polden, *Transcript of evidence*, Melbourne, 18 August 2009, p.2.

11 *Evans v Crichton-Browne* [1981] HCA 14; (1981) 147 CLR (18 March 1981) at 1.

12 *Evans v Crichton-Browne* [1981] HCA 14; (1981) 147 CLR (18 March 1981) at 6.

13 *Evans v Crichton-Browne* [1981] HCA 14; (1981) 147 CLR (18 March 1981) at 2.

> The phrase "cast a vote" has a well defined meaning – "to deposit (a voting paper or ticket); to give (a vote)" (Oxford English Dictionary); "to deposit (a ballot) formally or officially; give a vote" (Websters International Dictionary). It does not include "to decide for whom to vote". The use of this phrase in s.161(e) suggests that the Parliament is concerned with misleading or incorrect statements which are intended or likely to affect an elector when he seeks to record and give effect to the judgment which he has formed as to the candidate for whom he intends to vote, rather than with statements which might affect the formation of that judgment.[14]

1.16 The High Court of Australia has read down the words "cast a vote" so as to restrict its meaning. The High Court's written judgment explained:

> [T]he framers of a law designed to prevent misrepresentation or concealment which may affect the political judgment of electors must consider also the importance of ensuring that freedom of speech is not unduly restricted, especially during an election campaign, and the practical difficulties that might result if an election were liable to invalidation on the ground that statements made in the interests of candidates were found in subsequent litigation to be untrue or incorrect.[15]
>
> [and]
>
> It can be seen that the result of many elections might be rendered uncertain if any untrue or incorrect statement of fact, opinion, belief or intention might have the effect of invalidating the election if the statement was intended or likely to mislead or improperly interfere with any elector in the formation of his political judgment.[16]

1.17 The judgment of the High Court of Australia was that the statement was not intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his vote. The written judgment noted:

> [W]e can see nothing in the context provided by the Act as a whole, or in the general considerations of policy upon which the petitioners relied, which warrants a departure from the natural meaning of the words … we hold, refer to the act of recording or expressing the political judgment which the elector has made rather than to the formation of that judgment. It would no doubt be too narrow to regard the casting of the vote as the mere act of putting the paper in the ballot-box - the words would appear to refer to the whole process of obtaining and marking the paper and depositing it in the ballotbox.[17]

Human rights framework

International law

1.18 The International Covenant on Civil and Political Rights (ICCPR) is a treaty which commits its signatories to respect the civil and political rights of individuals. Australia ratified the ICCPR on 13 November 1980. The section of the ICCPR which is relevant to the inquiry is section 19(2) which establishes that:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of

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14 *Evans v Crichton-Browne* [1981] HCA 14; (1981) 147 CLR (18 March 1981) at 9.
15 *Evans v Crichton-Browne* [1981] HCA 14; (1981) 147 CLR (18 March 1981) at 12.
16 *Evans v Crichton-Browne* [1981] HCA 14; (1981) 147 CLR (18 March 1981) at 12.
17 *Evans v Crichton-Browne* [1981] HCA 14; (1981) 147 CLR (18 March 1981) at 13.

> frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[18]

1.19 The ICCPR, or any other treaty, do not directly impact on Australian domestic law. However, in *Dietrich* v *The Queen*, Chief Justice Mason and Justice McHugh considered the impact of the ICCPR on Australian law:

> Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australia unless and until specific legislation is passed implementing the provision.[19]

1.20 However, treaties may influence the development of the common law:

> The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the ICCPR brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[20]

1.21 The High Court of Australia, in *Minister for Immigration and Ethnic Affairs* v *Teoh*, noted a further indirect impact of treaties:

> [R]atification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention.[21]

1.22 Australia has affirmed the importance of freedom of expression by signing the ICCPR.

Common law

1.23 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("the Charter") was enacted "to protect and promote human rights" in Victoria.[22] Freedom of expression is a right established under section 15 of the Charter:

> (1) Every person has the right to hold an opinion without interference.
>
> (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—
>
> (a) orally; or
>
> (b) in writing; or

---

18 Office of the United Nations Commissioner for Human Rights, "International Covenant on Civil and Political Rights". Article 19(2). Retrieved from http://www.hrweb.org/legal/cpr.html on 24 February 2010.

19 *Dietrich* v *The Queen* (1992) 177 CLR 292 at 305.

20 *Mabo* v *Queensland (No. 2)* (1992) CLR 292, per Brennan J at 305.

21 *Minister for Immigration and Ethnic Affairs* v *Teoh* (1995) 128 ALR 353, per Mason CJ and Deane J at 365; and per Toohey J at 374.

22 *Charter of Human Rights and Responsibilities Act 2006 (*Vic) s.1.

(c) in print; or

(d) by way of art; or

(e) in another medium chosen by him or her.

(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—

(a) to respect the rights and reputation of other persons; or

(b) for the protection of national security, public order, public health or public morality.[23]

1.24 The Commonwealth Constitution or Victorian Constitution does not expressly provide for a right to freedom of expression. However, the High Court of Australia recognised an implied freedom of political communication in its decisions in the 1992 cases *Nationwide News Pty Ltd v Wills* and *Australian Capital Television Pty Ltd v Commonwealth*. In *Nationwide News*, High Court Judges Deane and Toohey JJ explained the implied freedom as follows:

> [T]he central thesis of the doctrine [of representative government] is that the powers belong to, and are derived from, the governed, that is to say, the people of the Commonwealth. The repositories of governmental power under the Constitution hold them as representatives of the people under a relationship between representatives and represented, which is a continuing one. The doctrine presupposes an ability of represented and representatives to communicate information, needs, views, explanations and advice. It also presupposes an ability of the people of the Commonwealth as a whole to communicate, among themselves, information and opinions about matters relevant to the exercise and discharge of governmental powers and functions on their behalf.
>
> It follows from what has been said above that there is to be discerned in the doctrine of representative government which the Constitution incorporates an implication of freedom of communication and opinions about matters relating to the government of the Commonwealth.[24]

1.25 In *Australian Capital Television*, High Court Judge Mason CJ described the freedom as follows:

> The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act. ... Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives.[25]

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23 *Charter of Human Rights and Responsibilities Act 2006 (*Vic) s.15.

24 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72-73.

25 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138.

1.26 The implied freedom of political communication was further broadened in two cases in 1994. In *Theophanous v Herald & Weekly Times Ltd* the definition of political communication was widened to include:

> [A]ll speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.[26]

1.27 The majority of the High Court of Australia in *Theophanous* also recognised a constitutional defence to defamation:

> I would hold that the effect of the constitutional implication is to preclude completely the application of State defamation laws to impose liability in damages upon the citizen for the publication of statements about the official conduct or suitability of a member of the Parliament or other holder of high Commonwealth office.[27]

1.28 This reasoning was applied to *Stephens v West Australian Newspapers Ltd.*[28]

1.29 In 1996 the implied freedom of political communication was reconsidered in *McGinty v Western Australia*. McHugh J criticised the development of implied freedoms from a doctrine of representative democracy:

> I regard the reasoning in *Nationwide News, Australian Capital Television, Theophanous* and *Stephens* in so far as it invokes an implied principle of representative democracy as fundamentally wrong and as an alteration of the Constitution without the authority of the people.[29]

1.30 In 1997, the High Court of Australia in *Lange v Australian Broadcasting Corporation* reviewed the implied freedom of political communication:

> Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that members of the House of Representatives and the Senate shall be "directly chosen by the people" of the Commonwealth and the States, respectively. …
>
> That being so, ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or governmental matter which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power. …
>
> However, the freedom of communication which the Constitution protects is not absolute. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution. The freedom of communication required by ss 7 and 24 and reinforced by the sections concerning responsible government and the amendment of the Constitution operates as a restriction on legislative power. However, the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government of

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26 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 14. Retrieved from http://www.austlii.edu.au/au/cases/cth/HCA/1994/46.html on 15 December 2009.

27 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 34.

28 *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

29 *McGinty v Western Australia* (1996) 186 CLR 140 at 33.

> the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that end.[30]

1.31 *Lange* also rejected the constitutional defence established in *Theophanous*.[31]

1.32 In summary, the High Court of Australia currently recognises a freedom of political communication but the freedom is subject to the operation of representative and responsible government set out in the Constitution.

Stakeholders

1.33 The Committee identified the main stakeholders for this inquiry as being registered candidates at the Kororoit District by-election, registered political parties in Victoria, members of parliament, electoral administrators, media organisations, research institutes, non-government organisations and the public.

Kororoit District by-election

Overview

1.34 The Kororoit District by-election was held on 28 June 2008 following the resignation of the sitting member, the Hon Andre Haermeyer MP, Member for Kororoit District, on 2 June 2008.[32]

1.35 Kororoit District is a metropolitan electorate, approximately 13 kilometres west of Melbourne and is characterised by residential, industrial and commercial development.[33] Figure 1.1 illustrates the District's boundaries and area.

1.36 Based on the results of the 2006 Victorian state election, Kororoit District is the third safest Labor seat in Victoria.[34]

1.37 Four political parties and two independent candidates contested the Kororoit District by-election. The ALP (Victorian Branch), Australian Greens (Victoria), Citizens Electoral Council of Australia (Victorian Branch) and the Liberal Party of Australia (Victorian Division) each nominated a candidate. Two independent candidates also nominated: Les Twentyman and Tania Walters.[35]

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30 *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 at 112.

31 *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96.

32 Victorian Electoral Commission, *Report on the Kororoit District By-election held on 28 June 2008*, Victorian Electoral Commission, Melbourne, January 2009, p.5.

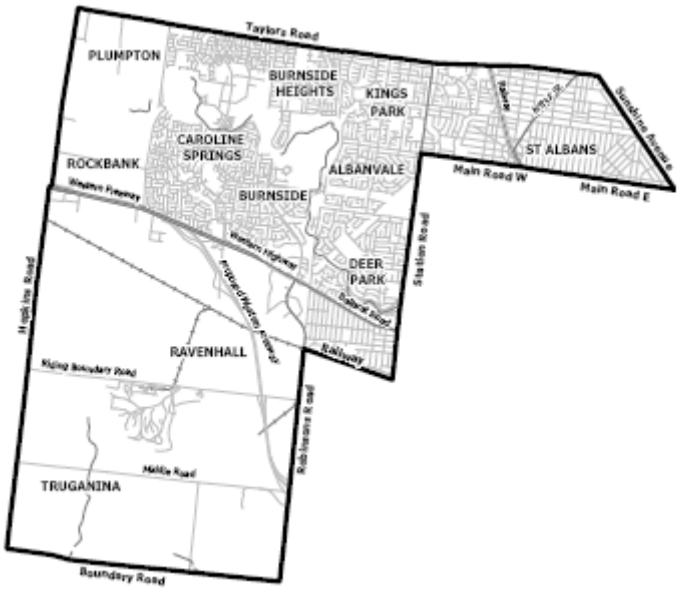
33 Bella Lesman, *Kororoit state electoral district: Snapshot*, Parliamentary Library, Parliament of Victoria, Melbourne, D-Brief, no.3, July 2008, p.1.

34 Victorian Electoral Commission, *Report to Parliament on the 2006 Victorian state election*, Victorian Electoral Commission, Melbourne, July 2007, p.111.

35 Victorian Electoral Commission, *Report on the Kororoit District By-election held on 28 June 2008*, Victorian Electoral Commission, Melbourne, January 2009, p.5.

1.38 The elected candidate Marlene Kairouz (ALP) polled 58.96 per cent of the two candidate preferred votes.[36]

Figure 1.1: Map of Kororoit District



Source: Victorian Electoral Commission, *Report on the Kororoit District By-election held on 28 June 2008*, Victorian Electoral Commission, Melbourne, January 2009, p.6.

Issue arising from the by-election

1.39 The Victorian Electoral Commission (VEC) is required "to report to each House of Parliament within 12 months of the conduct of each election on the administration of that election".[37] The *Report on the Kororoit District by-election held on 28 June 2008* was tabled in the Legislative Assembly and the Legislative Council on 3 February 2009.[38] At the public hearing, Steve Tully, Victorian Electoral Commissioner noted:

> The VEC ... has a responsibility in reporting to the Parliament ... and in raising relevant matters in its reports that may be useful to the Parliament to consider.[39]

1.40 The Victorian Electoral Commissioner brought to the Parliament's attention the issue of misleading or deceptive political advertising. The report stated that the VEC had received a complaint from Les Twentyman's campaign

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36 Victorian Electoral Commission, *Report on the Kororoit District By-election held on 28 June 2008*, Victorian Electoral Commission, Melbourne, January 2009, p.3.

37 *Electoral Act 2002* (Vic) s.8(2)(b). The VEC has other responsibilities including "the administration of the enrolment process and the conduct of parliamentary elections and referendums in Victoria" (*Electoral Act 2002* (Vic) s.8(1)). See Section 8 of the *Electoral Act 2002* (Vic) for a list of the responsibility and functions of the VEC.

38 Legislative Assembly, *Votes and proceedings*, No.103, Parliament of Victoria, Melbourne, 3 February 2009, p.549; Legislative Council, *Minutes of proceedings*, No.104, Parliament of Victoria, Melbourne, 3 February 2009, p.586.

39 Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, p.2.

manager on 27 June 2008 about a pamphlet authorised by Stephen Newnham,[40] the then State Secretary of the ALP.[41] The pamphlet was letterbox dropped in the final days of the election campaign and distributed at voting centres on election day.[42]

1.41 The complainant alleged that a pamphlet, which bore the statement "A vote for Les Twentyman is a vote for the Liberals", contravened the misleading or deceptive provisions in the *Electoral Act 2002* (Vic).[43] A copy of the pamphlet can be found at Figure 1.2. The VEC's submission to the Committee elaborated on the reasons the complainant believed the pamphlet was misleading:

> The campaign manager complained that the wording of the pamphlet was a deliberate untruth and liable to mislead the electorate, because in fact Mr Twentyman's how-to-vote card advised voters to give their second preference to the Greens candidate, their third preference to the Labor candidate and their fourth to the Liberal [candidate].[44]

1.42 Media reports about the alleged misleading pamphlet first appeared in Victorian and Australia-wide newspapers on 26 June 2008.[45]

1.43 Given that the *Electoral Act 2002* (Vic) does not proscribe an immediate remedy for alleged misleading or deceptive political advertising, the Committee was informed that the next stage of the investigation involved the VEC seeking submissions from "those directly involved with this particular complaint" together with legal advice.[46]

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40 Stephen Newnham resigned as State Secretary of the ALP (Victorian Branch) at a special meeting of the ALP's administrative committee on 15 September 2009. See Paul Austin & David Rood, "Outgoing campaign aide backs Brumby", *The Age*, 16 September 2009, p.7.

41 Victorian Electoral Commission, *Report on the Kororoit District By-election held on 28 June 2008*, Victorian Electoral Commission, Melbourne, January 2009, p.13; Victorian Electoral Commission, *Submission*, no.8, p.2.

42 Hall & Thompson on behalf of Les Twentyman, *Submission*, no.4, p.2; John Ferguson, "Stooge claim anger", *Herald Sun*, First edition, 26 June 2008, p.21; Rick Wallace, "ALP in by-election slump", *The Australian*, 26 June 2008, p.2; Paul Austin, "Labor liberal with the truth as a matter of preference", *The Age*, First edition, 27 June 2008, p.2.

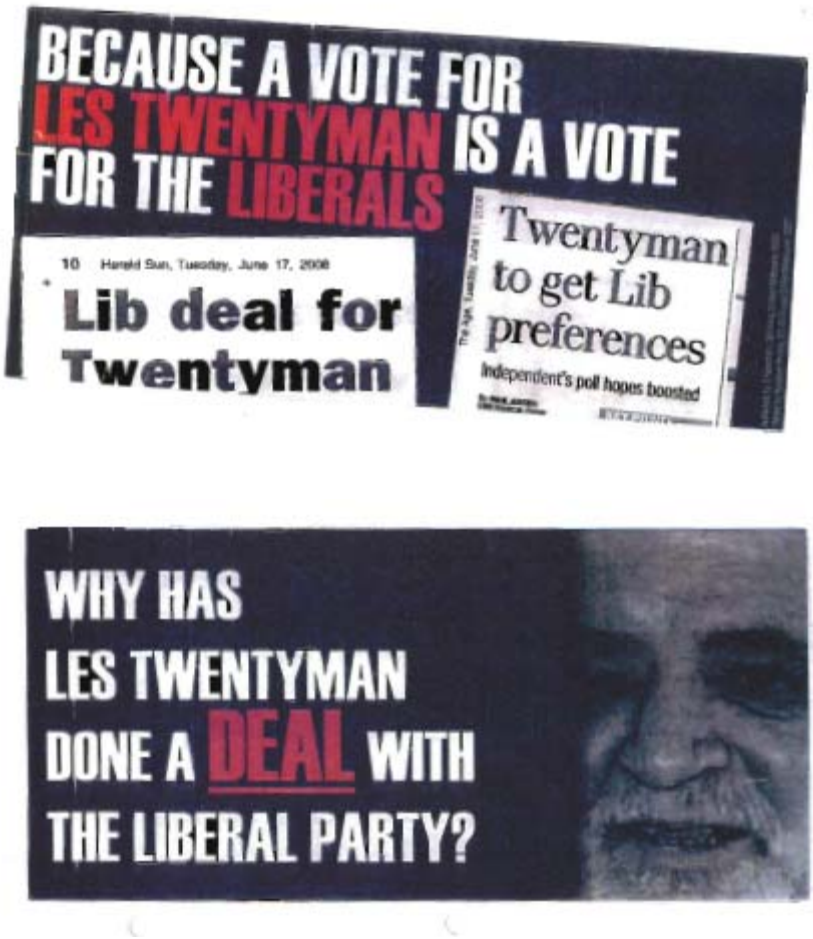
43 Victorian Electoral Commission, *Report on the Kororoit District By-election held on 28 June 2008*, Victorian Electoral Commission, Melbourne, January 2009, p.13; Victorian Electoral Commission, *Submission*, no.8, p.2.

44 Victorian Electoral Commission, *Submission*, no.8, p.2.

45 John Ferguson, "Stooge claim anger", *Herald Sun*, First edition, 26 June 2008, p.21; Rick Wallace, "ALP in by-election slump", *The Australian*, 26 June 2008, p.2; Paul Austin, "Labor liberal with the truth as a matter of preference", *The Age*, First edition, 27 June 2008, p.2; John Ferguson and Geraldine Mitchell, "Labor tactics 'crass', *Herald Sun*, First edition, 27 June 2008, p.21; David Rood (with Michelle Grattan), "Brumby denies ALP 'misleading' Kororoit voters", *The Age*, First edition, 27 June 2008, p.2.

46 Victorian Electoral Commission, *Report on the Kororoit District By-election held on 28 June 2008*, Victorian Electoral Commission, Melbourne, January 2009, p.13.

Figure 1.2: Pamphlet "A vote for Les Twentyman is a vote for the Liberals"



Source: Pamphlet authorised by the State Secretary of the Australian Labor Party (Victorian Branch) for the Kororoit District by-election held on 28 June 2008.

1.44 In its report to Parliament, the VEC reported that the statement was deemed to be misleading but did not breach the misleading or deceptive provisions in the *Electoral Act 2002* (Vic):

> Legal opinion is that the pamphlet is misleading in its suggestion of an affiliation or agreement between Mr Twentyman and the Liberal Party. Further, on current case law, it is likely to be construed as misleading electors in the formation of their judgement about their preferred candidate. However, in Victoria, the law has been interpreted to contemplate that the misleading provisions of the *Electoral Act 2002* only apply to the actual casting of the vote. Therefore, although the electors' views about who they would vote for may have been affected by the pamphlet, it does not clearly mislead electors in the casting of their vote and is consequently unlikely to be able to be successfully prosecuted. [47]

[47] Victorian Electoral Commission, *Report on the Kororoit District By-election held on 28 June 2008*, Victorian Electoral Commission, Melbourne, January 2009, p.13.

1.45 The VEC's position was also confirmed at the public hearing. Steve Tully, Victorian Electoral Commissioner, noted that this view has been expressed in the VEC's *Report to Parliament on the Kororoit District by-election* and the VEC's written submission to the Committee.[48]

Was there an arrangement?

1.46 The nature of election campaigns provides a starting point for the Committee's inquiry into whether the provisions of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising should be amended. In his submission the Victorian Electoral Commissioner characterised election campaigns as follows:

> Campaigns are conducted for high stakes, in an atmosphere of high emotion. Participants are convinced of their own superiority, and tend to be predisposed to believe the worst of their opponents. There is an overriding need to win over the voters, an important part of which is convincing the voters that one's opponents are suspect and dishonest. With these imperatives, it is very easy to resort to hyperbole, and for candidates to be outraged at opponents' attacks. [49]

1.47 The Committee heard different opinions from inquiry participants about the political strategy used by the ALP (Victorian Branch) at the Kororoit District by-election. In response to questions by Michael O'Brien MP, Deputy Chair of the Committee and Member for Malvern, Stephen Newnham informed the Committee that he believed that the statement on the pamphlet was an "absolute statement of fact":[50]

> In our view there was clearly an arrangement between the Liberal Party and Les Twentyman. They preferenced him no. 2 on their how-to-vote card. … In our view we have told people the truth about an arrangement we believe exists between your party [Liberal Party] and Les Twentyman, and we were informing the electors of Kororoit about that arrangement.[51]

1.48 In evidence before the Committee, Phil Cleary, who worked on Les Twentyman's campaign, denied there was an arrangement between Les Twentyman and the Liberal Party. Rather he indicated that the Liberal Party preferencing Les Twentyman before the Labor Party in the Kororoit District by-election is "standard practice":

> It is ridiculous to claim that because one of the major parties puts a third party – an Independent – before other people on its ticket that a deal has been struck. It is standard practice in elections for the major parties to put Independents ahead of each other.[52]

1.49 The Committee did not receive evidence from the Liberal Party relating to this inquiry.

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48 Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, pp.4-5.

49 Victorian Electoral Commission, *Submission*, no.8, pp.8-9.

50 Stephen Newnham, State Secretary, Australian Labor Party (Victorian Branch), *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

51 Stephen Newnham, State Secretary, Australian Labor Party (Victorian Branch), *Transcript of evidence*, Melbourne, 18 August 2009, pp.2,5.

52 Phil Cleary, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.

Impact of the pamphlet

1.50 Some inquiry participants offered their views on the impact of the statement "A vote for Les Twentyman is a vote for the Liberals". In a submission from Dennis Galimberti, a lawyer representing Les Twentyman, the effect of the pamphlet was noted:

> The conduct of the Secretary of the Australian Labor Party ("ALP") in authorizing and distributing the pamphlet "A Vote for Les Twentyman is a Vote for the Liberals", was clearly designed by the ALP to mislead voters so that when they were forming their judgement as to whom they would vote for, they would be influenced against voting for Twentyman, believing that in effect it would be a vote for the Liberals. This pamphlet was handed to electors by representatives of the ALP outside the polling booths on election day. Electors who clearly demonstrated an intention to vote for Twentyman reformed their judgement when they were handed a pamphlet and told that "A Vote for Twentyman was effectively a vote for the Liberals".[53]

1.51 At the public hearing, Michael O'Brien MP, Deputy Chair and Member for Malvern asked Phil Cleary about the impact of the pamphlet. Mr Cleary replied:

> We cannot empirically quantify the impact. How are we going to know that? That could be disputed, but we have to go by political history. We have to base it on anecdotal references, and I discovered anecdotally that there was much concern from people based on this leaflet. ... Mr Newnham knows why he put that out, because it would scare people and would not allow Mr Twentyman the opportunity to ventilate those issues in a public forum, so I say look at the tactics. The tactics will tell you a story about why it was put out. You do not put the leaflet out if you do not think it is effective, so the Labor Party thought it was effective, so let us just stand by Labor. They think it was effective enough to do it. Therefore, it probably had an impact, and secondly, the anecdotal evidence was that people were genuinely frightened, and, as I said in this submission, these are people who were predominantly going to vote against the Liberal Party.[54]

1.52 The VEC indicated that the political strategy used at the Kororoit District by-election is problematic because it impacts on electors' understandings of the voting system:

> Such statements, that a vote for one candidate or party is a vote for someone else, are effectively exploiting community misunderstanding of how preferential voting works. Despite the VEC's and AEC's efforts, strong anecdotal evidence suggests that a high proportion of voters are not confident about how the preferences they mark on ballot papers translate into election results. Misunderstandings are likely to be especially prevalent in electorates with concentrations of voters who are not proficient in English. In these circumstances, it is tempting for a party to promote the message that a vote for one party will somehow turn into a vote for another.[55]

1.53 The Committee noted that the concerns of the VEC were included in the terms of reference.[56]

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53 Hall & Thompson on behalf of Les Twentyman, *Submission*, no.4, p.2.

54 Phil Cleary, *Transcript of evidence*, Melbourne, 18 August 2009, pp.3-4.

55 Victorian Electoral Commission, *Submission*, no.8, p.9.

56 Point 1 of the terms of reference noted that the statement contributed "in the opinion of the Victorian Electoral Commissioner, to 'an undesirable trend for candidates to take advantage or build on community misunderstandings of preferential voting with confusing statements'".

1.54 A substantial proportion of the population living in Kororoit District are from a culturally and linguistically diverse background. Approximately 44 per cent of residents were born overseas; the five most common countries of birth being Vietnam, Malta, Philippines, Former Yugoslav Republic of Macedonia and Croatia.[57] The 2006 census data also indicated that in Kororoit District 53 per cent of residents speak a language other than English at home[58] and 10 per cent of residents either do not speak English or do not speak English well.[59]

1.55 In addition, the VEC was concerned that the political strategy used at the Kororoit District by-election may form a benchmark and be repeated for future election campaigns:

> [T]he … statement ["A vote for Les Twentyman is a vote for the Liberals"] will form a benchmark for political advertising and could give rise to a number of matters, particularly in relation to elections for the Legislative Council (in which group voting tickets list preferences for all candidates).[60]

1.56 Just over a year since the Kororoit District by-election took place, the Victorian Premier, the Hon John Brumby MP acknowledged criticism of some aspects of the ALP's campaign:

> I think the campaign team and the state secretary in the future will need to be cognisant and will need to take into account any of the views that have been expressed by the electoral commissioner.[61]

1.57 Nevertheless, at the public hearing, Stephen Newnham, the then State Secretary of the ALP (Victorian Branch) noted:

> I would run this strategy again if the by-election was being held tomorrow. … I think it is a legitimate political strategy, and I stand by it 110 per cent.[62]

1.58 At the public hearing, Philip Davis MLC, Member for Eastern Victoria and a Committee member, asked Phil Cleary for his view about Stephen Newnham's comment that it was a "legitimate political strategy". Phil Cleary noted:

> If that is a legitimate political strategy, then nothing matters anymore. There is nothing virtuous about the body politic. It is all about deceit. … If Mr Newnham says it is a legitimate practice, I will just repeat: that debases the political process, not on the basis of the cut and thrust of politics, or robust opinions or critiquing someone's ideas or actions, but on the basis of the fact that what was stated in Kororoit was a lie.[63]

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57 Australian Bureau of Statistics, *2006 Census table: Country of Birth of Person (full classification list) by Sex - Kororoit (Western Metropolitan)*. Retrieved from www.abs.gov.au on 9 September 2009.

58 Australian Bureau of Statistics, *2006 Census table: Language Spoken at Home by Sex - Kororoit (Western Metropolitan)*. Retrieved from www.abs.gov.au on 9 September 2009.

59 Australian Bureau of Statistics, *2006 Census table: Proficiency in Spoken English/Language by Age by Sex - Kororoit (Western Metropolitan)*. Retrieved from www.abs.gov.au on 9 September 2009.

60 Victorian Electoral Commission, *Submission*, no.8, p.2.

61 Hon John Brumby MP cited in Paul Austin, "Brumby promises fair election fight after rebuke over Kororoit", *The Age*, 30 July 2009, p.10.

62 Stephen Newnham, State Secretary, Australian Labor Party (Victorian Branch), *Transcript of evidence*, Melbourne, 18 August 2009, pp.2-3.

63 Phil Cleary, *Transcript of evidence*, Melbourne, 18 August 2009, p.7.

Similar cases in Victoria

1.59 The complaint about the pamphlet at the Kororoit District by-election and its implications was the impetus for this inquiry. However, the Committee noted that this was not the first time there had been a complaint made about misleading or deceptive political advertising; nor is the alleged practice limited to a sole political party or candidate. The Victorian Electoral Commissioner noted:

> We reiterate that our major concern is statements made in relation to preferences and statements that a vote for one candidate is a vote for another. We also note that this is not a behaviour confined to one particular political party. There is evidence in Australia of a number of parties using that as a tactic to make a statement.[64]

1.60 The Hon Candy Broad MLC, Member for Northern Victoria and Committee member, in speaking to the members of the Legislative Council about the current reference said:

> For a motion to be put before the house which in some way claims that what occurred in the Kororoit by-election is somehow way out of line with a whole series of incidents ... in relation to prior elections and that have involved both the Liberal and National parties is approximating having the hide of an elephant.[65]

1.61 The Hon Candy Broad MLC provided details to the members of the Legislative Council about two complaints concerning allegedly misleading material which were lodged with the VEC at the 2006 Victorian state election:

> The VEC's report on the 2006 Victorian state election refers to two complaints concerning misleading material that were received and referred to the Victorian Government Solicitor's office for advice. Those complaints concerned, firstly, material authorised by Mr Luke O'Sullivan for The Nationals, although Mr O'Sullivan did not identify his affiliation with The Nationals in that material. That pamphlet claimed that a vote for Mr Craig Ingram, the Independent candidate for East Gippsland, was a vote for Labor. Secondly, there were complaints concerning television advertisements and online advertising that claimed that a vote for Mr Russell Savage, the Independent candidate for Mildura, was a vote for Labor.[66]

1.62 Independent Member for Gippsland East, Craig Ingram MP, in a newspaper article, noted:

> These tactics that Labor's used in Kororoit look like they've come straight out of the National Party campaign manual. ... The Liberals should be careful of opening up this issue, because there are skeletons on both sides of politics.[67]

1.63 The VEC received 103 complaints about political parties or candidates at the 2006 Victorian state election, "34 of which related to allegedly false or

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64 Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.

65 Hon Candy Broad MLC, member for Northern Victoria and Committee member, *Parliamentary debates*, Parliament of Victoria, Legislative Council, Melbourne, 1 April 2009, p.1719.

66 Hon Candy Broad, member for Northern Victoria and Committee member, *Parliamentary debates*, Parliament of Victoria, Legislative Council, Melbourne, 1 April 2009, p.1719.

67 Craig Ingram MP cited in Paul Austin, "Libs 'hypocritical' over dirty tricks accusations", *The Age*, First edition, 13 March 2009, p.8.

misleading material". More recently, at the 2008 Victorian local government elections, "61 of 223 written complaints were about false or misleading material."[68]

1.64 The issue of alleged misleading or deceptive political advertising is not isolated to Victoria. The Western Australian Electoral Commissioner, Warwick Gately, in his submission to the Committee noted that:

> The concerns of the Victorian Electoral Commissioner, Mr Stephen Tully identified in your terms of reference are also applicable to Western Australia. The Commission, particularly during election campaigns, has to deal with many complaints that relate to misleading, deceptive and defamatory statements and publications.[69]

Conduct of the inquiry

Submissions

1.65 The Committee advertised the inquiry terms of reference and called for submissions in *The Age* and the *Herald-Sun* on Saturday, 4 July 2009. The Committee also wrote to targeted stakeholders inviting them to lodge a submission. The closing date for submissions was 3 August 2009; late submissions were also received and accepted.

1.66 The Committee received 13 written submissions and 1 supplementary submission from a range of stakeholders including interested individuals (5), electoral administrators (3), political parties (1), candidates (1), associations (2) and a research centre (1). All submissions are displayed on the Committee's website at http://www.parliament.vic.gov.au/emc. A list of submissions can be found at Appendix 1.

1.67 The Committee wrote to several organisations requesting further information to assist the Committee with its deliberations. The Committee received correspondence from a number of organisations including the Tasmanian Electoral Commission, Elections Canada, the United Kingdom's (UK) Association of Professional Political Consultants and New Zealand's (NZ) Chief Electoral Office.

1.68 Correspondence was received from several organisations and individuals that were formally invited to lodge a submission advising the Committee of their decision not to participate in the inquiry.

Public hearings

1.69 A number of individuals and organisations were invited to elaborate on their written submissions at a public hearing held at Parliament House on Tuesday, 18 August 2009.

1.70 The Committee heard evidence from 13 witnesses, two of whom participated via teleconference. A list of witnesses can be found at Appendix 2.

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68 Victorian Electoral Commission, *Submission*, no.8, p.8.

69 Western Australian Electoral Commission, *Submission*, no.3, p.1.

1.71 The Committee published the transcripts of evidence on the Committee's website at http://www.parliament.vic.gov.au/emc.

Analysis

1.72 Thematic analysis was conducted to identify issues in the submissions and transcripts of evidence.

1.73 Secondary data including legislation, case law, parliamentary reports, electoral commission reports and newspaper articles supplemented the evidence gathered. This report incorporates the main findings of the Committee.

Feedback on inquiry

1.74 Many inquiry participants were grateful for the opportunity to speak directly with the Committee at the public hearing and elaborate on their submission.[70] The Victorian Electoral Commissioner noted:

> We raised these matters, and we are pleased that the Parliament has taken on the issue of misleading advertising. We think it is timely for an inquiry such as this to consider those provisions. The VEC believes that Victoria's misleading advertising laws have been tested and that it is very much an opportune time for the Parliament to consider whether any variation is required.[71]

Outline of the report

1.75 Chapter 2 provides a regulatory framework to the inquiry by defining misleading or deceptive political advertising in Victoria, examining mechanisms that regulate misleading or deceptive political advertising in Victoria and discussing related parliamentary inquiries in Australia.

1.76 Chapter 3 gives an overview of the current misleading or deceptive provisions in Australian legislation and international jurisdictions including Canada, NZ, the UK and the United States of America (USA).

1.77 Chapter 4 outlines inquiry participants' support for amending the *Electoral Act 2002* (Vic) and opposition to it. The chapter also reports on the proposed non-legislative and legislative measures to regulate misleading or deceptive political advertising in Victoria.

1.78 Chapter 5 considers the issues surrounding prosecution, enforcement and penalties. In particular, this chapter examines the proposed independent agencies to regulate misleading or deceptive political advertising in Victoria, powers of the returning officer, regulatory period, defences, legal representation and penalties.

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70 Michael Pearce SC, President, Liberty Victoria, Victorian Council for Civil Liberties, *Transcript of evidence*, Melbourne, 18 August 2009, p.2; Ann Birrell, Co-convenor, Port Phillip Greens, *Transcript of evidence*, Melbourne, 18 August 2009, p.2; Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, p.2.

71 Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, p.2.

1.79 Chapter 6 discusses other considerations including the *Charter of Human Rights and Responsibilities Act 2006* (Vic), harmonisation of electoral law, the media, the 2008 local government elections and extension to other electoral laws.

1.80 Chapter 7 concludes the report and discusses the Committee's main findings and the recommendation.

Chapter
2

Chapter 2: Overview of regulatory arrangements and parliamentary inquiries

2.1 This chapter examines current arrangements that regulate misleading or deceptive political advertising in Victoria including electoral law, defamation law, broadcasting and communication law, codes and professional standards, voting on election day and the media.

2.2 As noted in Chapter 1, the issue of misleading or deceptive political advertising is regulated by the *Electoral Act 2002* (Vic). It would appear that in Victoria all other misleading or deceptive electoral matter, unrelated to the casting of the vote, is 'regulated' by the law of defamation and the court of public opinion.

2.3 The second half of Chapter 2 provides an historical overview of related parliamentary inquiries in Australia from 1983 to the current day. This discussion will illustrate that truth in political advertising has been thoroughly investigated by parliamentary committees over the years. Parliamentary committees generally have been reluctant to recommend expanded measures to regulate truth in political advertising.

Mechanisms that regulate misleading or deceptive political advertising in Victoria

2.4 This section discusses a number of mechanisms that regulate misleading or deceptive political advertising in Victoria. These include:

- Electoral law;
- Defamation law;
- Broadcasting and communication law and standards;
- Voting on election day;
- The media; and
- Parliamentary privilege.

Electoral law

2.5 The *Electoral Act 2002* (Vic) is the primary legislation responsible for the regulation of misleading or deceptive electoral matter in Victoria.

2.6 This inquiry is concerned about the content of electoral matter. As noted in Chapter 1, section 4 of the *Electoral Act 2002* (Vic) defines electoral matter as:

> (1) … matter which is intended or likely to affect voting in an election.
>
> (2) Without limiting the generality of the definition of *electoral matter*, matter is to 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—
>
> (a) the election; or
>
> (b) the Government, the Opposition, a previous Government or a previous Opposition, of the State; or
>
> (c) the Government, the Opposition, a previous Government or a previous Opposition, of the Commonwealth or any other State or a Territory of the Commonwealth; or
>
> (d) a member or a former member of the Parliament or the Parliament of the Commonwealth, any other State or a Territory of the Commonwealth; or
>
> (e) a political party, a branch or division of a political party or a candidate in the election; or
>
> (f) an issue submitted to, or otherwise before, the electors in connection with the election.[72]

2.7 As noted in Chapter 1, section 84 of the *Electoral Act 2002* (Vic) stipulates the parameters and penalties for the printing, publishing or distribution of misleading or deceptive electoral matter from the day the writ is issued until 6 pm on election day:

> (1) A person must not during the relevant period—
>
> (a) print, publish or distribute; or
>
> (b) cause, permit or authorise 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 the vote of the elector.
>
> Penalty: In the case of a natural person, 60 penalty units or 6 months imprisonment;
>
> In the case of a body corporate, 300 penalty units.
>
> (2) A person must not during the relevant period—
>
> (a) print, publish or distribute; or
>
> (b) cause, permit or authorise to be printed, published or distributed—
>
> an electoral advertisement, handbill, pamphlet or notice that contains a representation or purported representation of a ballot-paper for use in that election that is likely to induce an elector to mark the elector's vote otherwise than in accordance with the directions on the ballot-paper.
>
> Penalty: In the case of a natural person, 60 penalty units or 6 months imprisonment;

[72] *Electoral Act 2002* (Vic) s.4.

> In the case of a body corporate, 300 penalty units.
>
> (3) In a prosecution of a person for an alleged offence against subsection (1) or (2), it is a defence if the person proves that the person—
>
> (a) did not know; and
>
> (b) could not reasonably be expected to have known—
>
> that the matter or thing was likely to mislead an elector when casting the elector's vote.[73]

2.8 Misleading or deceptive political advertising is defined by the *Electoral Act 2002* (Vic) as "any matter or thing that is likely to mislead or deceive an elector in relation to the casting of the vote of the elector".[74]

2.9 As discussed in Chapter 1, the key legal case in determining what is misleading or deceptive electoral matter is *Evans v Crichton-Browne*. The written judgment of the *Evans v Crichton-Browne* case stated:

> The phrase "cast a vote" has a well defined meaning – "to deposit (a voting paper or ticket); to give (a vote)" (Oxford English Dictionary); "to deposit (a ballot) formally or officially; give a vote" (Websters International Dictionary). It does not include "to decide for whom to vote". The use of this phrase … suggests that the Parliament is concerned with misleading or incorrect statements which are intended or likely to affect an elector when he seeks to record and give effect to the judgment which he has formed as to the candidate for whom he intends to vote, rather than with statements which might affect the formation of that judgment.[75]

2.10 What is misleading or deceptive electoral matter is determined by judicial review; the Supreme Court acting as the Court of Disputed Returns.[76]

2.11 The misleading or deceptive electoral matter provisions do not provide for the regulation of political advertising which may affect the formation of electors' judgments. The Victorian Electoral Commission (VEC) noted that the judgment "may have contributed to a feeling that anything goes".[77]

2.12 Other general rules related to the regulation of political advertising contained in the *Electoral Act 2002* (Vic) include format and presentation requirements of electoral matter:

- Section 83: any political advertisement, handbill, pamphlet or notice must carry the name and address of the person who authorised it, and where the advertisement is not in a newspaper, it must also include the name and place of business of the printer or publisher.[78]
- Section 85: The word "advertisement" must be printed as a headline in any political advertisement which appears in a newspaper.[79]

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73 *Electoral Act 2002* (Vic) s.84.
74 *Electoral Act 2002* (Vic) s.84.
75 *Evans v Crichton-Browne* [1981] HCA 14; (1981) 147 CLR (18 March 1981) at 9.
76 *Electoral Act 2002* (Vic) Part 8.
77 Victorian Electoral Commission, *Submission*, no.8, p.8.
78 *Electoral Act 2002* (Vic) s.83.
79 *Electoral Act 2002* (Vic) s.85.

- Section 86: Any newspaper, circular or pamphlet containing an article, report, letter or other matter containing electoral matter must carry the author's name and address.[80]

Defamation law

2.13 Defamation law is also relevant to the regulation of misleading or deceptive political advertising.[81] If an election candidate believes that the candidate has been defamed, he or she may seek redress under the *Defamation Act 2005* (Vic).

2.14 The *Defamation Act 2005* (Vic) came into operation on 1 January 2006. The objects of the Act are:

> (a) [T]o enact provisions to promote uniform laws of defamation in Australia; and
>
> (b) [T]o ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance; and
>
> (c) [T]o provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter; and
>
> (d) [T]o promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter.[82]

2.15 The *Defamation Act 2005* (Vic) does not provide a statutory definition of defamation and instead relies on the common law definition.

2.16 In the case of Les Twentyman, the Committee heard in evidence that if he believed he was misrepresented and defamed during the Kororoit District by-election campaign, he was able to seek redress and sue.[83] However, the Committee noted that there are barriers to seeking redress given the law of defamation has been characterised as complex and unpredictable and defamation actions as very costly and difficult to defend.[84]

2.17 Mark Polden, an inquiry participant and former John Fairfax Holdings Limited in-house counsel, noted that the primary difference between electoral law and defamation law is that under the *Electoral Act 2002* (Vic) the prosecution must provide that the "thing in question was likely to mislead or deceive" whereas under the *Defamation Act 2005* (Vic), the "material published is presumed to be false".[85]

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80 *Electoral Act 2002* (Vic) s.86.

81 Australian Government, *Electoral reform green paper: Strengthening Australia's democracy*, Department of Prime Minister and Cabinet, Canberra, September 2009, p.144.

82 *Defamation Act 2005* (Vic) s.3.

83 Mark Polden, *Transcript of evidence*, Melbourne, 18 August 2009, p.6.

84 Arts Law Centre of Australia, "The law of defamation: For material published after 1 January 2006", Sydney, 2006. Retrieved from http://www.artslaw.com.au/legalinformation/Defamation/DefamationLawsAfterJan06.asp on 19 October 2009.

85 Mark Polden, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.

2.18 The intersection of defamation law and political speech was noted by inquiry participants, in particular, Mark Polden.[86] Although the issue of implied freedom of political communication was discussed in Chapter 1, it is relevant to briefly revisit the issue here. The Committee noted the information available from the Parliament of New South Wales with regards to defamation and political communication:

- There is no right to political communication but State and Federal Parliaments are not able to legislate to unreasonably restrict it.
- Each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia.
- That interest gives rise to a defence of qualified privilege for such communication against defamation, although such a defence may be defeated if the publication is unreasonable or actuated by malice.[87]

2.19 Another piece of Victorian legislation, the *Wrongs Act 1958* (Vic) which codifies the law relating to wrongs, is applicable to the law of defamation. Part 1 of the *Wrongs Act 1958* (Vic) relates to criminal defamation and Section 10 of Part 1 makes it an offence for a person to publish false defamatory libel.[88] The Act stipulates that:

(1) Every person who maliciously publishes any defamatory libel knowing the same to be false shall be liable to imprisonment for a term of not more than two years and to pay such fine as the court awards.

(2) Every person who maliciously publishes any defamatory libel shall be liable to fine or imprisonment or both as the court may award such imprisonment not to exceed the term of one year.[89]

2.20 While criminal libel exists under the *Wrongs Act*, prosecution is rare.[90]

Broadcasting and communication law and standards

2.21 Parts 1 and 2 of Schedule 2 of the *Broadcasting Services Act 1992* (Cth) sets out the requirements for the format and presentation of political advertisements broadcast in Australia. The Act calls for broadcasters to:[91]

- Give reasonable opportunities for the broadcasting of election matter to all political parties contesting the election;[92]

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86 Mark Polden, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.

87 Parliament of New South Wales, "Defamation and the right to political communication". Retrieved from http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/PRIV03 on 19 October 2009.

88 Libel is the publication of defamatory matter in permanent form such as in a printed format (i.e. newspaper, book).

89 *Wrongs Act 1958* (Vic) s.10.

90 Kieran Dolin, *A critical introduction to law and literature*, Cambridge University Press, Cambridge, 2007, p.60.

91 A broadcaster is defined in the *Broadcasting Services Act 1992* (Cth) as "(a) a commercial television broadcasting licensee; or (b) a commercial radio broadcasting licensee; or (c) a community broadcasting licensee; or (d) a subscription television broadcasting licensee; or (e) a person providing broadcasting services under a class licence."

- Not broadcast a political advertisement on TV or radio from the end of Wednesday before the polling day until the close of the poll on polling day;[93] and
- Provide a "written and authorised" tag containing the name of the political party or person, the town, city or suburb in which the party or person is based, and the name of the speaker heard in the broadcast to accompany the broadcast.[94]

2.22 The *Spam Act 2003* (Cth) regulates commercial email and electronic messages, including short message service (SMS) and multimedia messaging service (MMS). The Act stipulates that:

- Unsolicited commercial electronic messages must not be sent.
- Commercial electronic messages must include information about the individual or organisation who authorised the sending of the message.
- Commercial electronic messages must contain a functional unsubscribe facility.
- Address-harvesting software must not be supplied, acquired or used.
- An electronic address list produced using address-harvesting software must not be supplied, acquired or used.[95]

2.23 However subject to the provisions of the *Spam Act 2003* (Cth) registered political parties are exempt from the prohibition of sending unsolicited commercial electronic messages.[96]

2.24 The Australian Communications and Media Authority (ACMA) is Australia's regulator for broadcasting, the internet, radio communications and telecommunications. However ACMA is not responsible for:

- Making or administering rules about the authorisation of electoral advertisements – this is regulated by the Australian Electoral Commission and relevant state legislation; or
- Election or political matter appearing on the internet (unless that material is prohibited content, potential prohibited content or unsolicited commercial electronic messaging); or
- Determining whether an election or political advertisement is misleading or untrue; or
- Dealing with complaints about false or defamatory statements about the personal character or conduct of a candidate.[97]

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92 *Broadcasting Services Act 1992* (Cth) s.3 of Schedule 2.
93 *Broadcasting Services Act 1992* (Cth) s.3A of Schedule 2.
94 *Broadcasting Services Act 1992* (Cth) s.4(2) of Schedule 2.
95 *Spam Act 2003* (Cth) s.3.
96 *Spam Act 2003* (Cth) s.3 of Schedule 1.
97 Australian Communication and Media Authority, *Fact sheet: Broadcasting and communication of political and election matter*, Australian Government, Canberra, September 2007, p.3. Retrieved from http://www.acma.gov.au/WEB/STANDARD/pc=PC_91819 on 5 January 2010.

2.25 There are no legal or industry checks on the truthfulness of statements made in political advertisements broadcast on television, radio or the internet. The Federation of Australian Commercial Television Stations (now known as Free TV Australia) received advice in 2002 that the *Trade Practices Act 1974* (Cth) does not regulate political advertisements.[98] As a result, current industry professional standards or codes of conduct rarely, if at all, mention the regulation of political advertising. For example, the Commercial Television Industry Code of Practice only mentions political advertising in Clause 5.8 which requires a licensee to supply "an hourly summary of political advertising", only when additional minutes other than what is proscribed, have been utilised.[99] The codes administered by Commercial Radio Australia including *Broadcasting Services (Commercial Radio Advertising) Standard 2000* and the *Commercial Radio Codes of Practice* do not mention the regulation of political advertising.[100] Similarly, political electronic advertising is not regulated by the Internet Industry Association's code of practice.[101]

Table 2.1: Prohibited calling times for telemarketing calls

Day	Time telemarketing calls prohibited
Weekdays	Before 9.00 am or after 8.00 pm
Saturday	Before 9.00 am or after 5.00 pm
Sunday	Calls prohibited
National public holidays	Calls prohibited

Source: Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007; Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard Variation (No. 1) 2007.

2.26 In relation to political advertising via telemarketing, a registered political party, an independent member of parliament, or a person who is a candidate for election for parliament, legislative assembly or local governing body may make a telemarketing call to an Australian telephone number registered on

98 Annabel Crabb, "Parties escape lie test", *The Age*, 22 November 2002, p.8.

99 Free TV Australia, "Commercial Television Industry Code of Practice", 1 January 2010. Retrieved from http://www.freetv.com.au/media/Code_of_Practice/2010_Commercial_Television_Industry_Code_of_Practice.pdf on 5 January 2010.

100 Commercial Radio Australia, "Broadcasting Services (Commercial Radio Advertising) Standard 2000". Retrieved from http://203.63.5.202/files/uploaded/file/Regulation/standard_2000.pdf on 5 January 2010. This code ensures that "advertising is clearly distinguishable from all other programs." Commercial Radio Australia, "Commercial Radio Codes of Practice", September 2004. Retrieved from http://203.63.5.202/files/uploaded/file/Regulation/Commercial%20Radio%20Codes%20of%20Practice%20-%20September%202004.pdf on 5 January 2010.

101 Internet Industry Association, "Codes of practice". Retrieved from http://www.iia.net.au/index.php/codes-of-practice.html on 5 January 2010.

the Do Not Call Register.[102] Nevertheless, they must comply with the *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007* in relation to prohibited calling times. Telemarketing calls can be made on weekdays and Saturdays only. Table 2.1 sets out when telemarketing research calls must not be made.

2.27 The Advertising Standards Bureau administers a national system of advertising self-regulation through the Advertising Standards Board and the Advertising Claims Board. Both boards make their determinations on complaints involving truth, accuracy and legality of advertising under appropriate sections of the Code of Ethics, as prescribed by the Australian Association of National Advertisers (AANA).[103] One of the key principles of the AANA Code of Ethics is that "Advertising or Marketing Communications shall not be misleading or deceptive or be likely to mislead or deceive."[104] However, the AANA Code of Ethics administered by the Advertising Standards Bureau does not mention political advertising.[105]

Voting on election day

2.28 In a modern democracy, it is the electorate, at the ballot box, who express what they think of the government, in particular its election campaign and policy performance. This sentiment is acknowledged by politicians including Senator John Faulkner, the then Special Minister of State, who in a speech about transparency and accountability in 2008 noted that "the ultimate accountability is to the public through the ballot box".[106]

2.29 Two inquiry participants also noted that misleading or deceptive matter may be regulated at the ballot box.[107] Electors who are dissatisfied with a government, political party, or a candidate's election campaign or question a government, political party or a candidate's honesty and integrity can "discipline" the candidate or party at an election by not voting for them.

2.30 Members of parliamentary committees, albeit in majority or minority reports, have indicated their support of electors regulating misleading or deceptive political advertising at the ballot box. The Commonwealth Parliament's Joint

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102 The *Do Not Call Register Act 2006* (Cth) s.3 provides that "unsolicited telemarketing calls must not be made to a number registered on the Do Not Call Register." The Act also contains remedies for breaches of the Act.

103 Advertising Standards Bureau, "Overview", 2006. Retrieved from http://www.adstandards.com.au/pages/page13.asp on 4 December 2009.

104 Australian Association of National Advertisers, "AANA Code of ethics", no date. Retrieved from http://www.adstandards.com.au/pages/page16.asp pm 4 December 2009.

105 Advertising Standards Bureau, "Australian Association of National Advertisers' Code of Ethics". Retrieved from http://www.adstandards.com.au/pages/images/AANA_ethicscode_web.pdf on 5 January2010.

106 Senator John Faulkner, Cabinet Minister and Special Minister of State, "Transparency and accountability: Our agenda", 30 October 2008. Retrieved from http://www.smos.gov.au/speeches/2008/sp_20081030.html on 12 October 2009.

107 Howard Whitton, Visiting Fellow, ANZSOG Institute of Governance, *Transcript of evidence*, Melbourne, 18 August 2009, p.4; Michael Pearce SC, President, Liberty Victoria, Victorian Council for Civil Liberties, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.

Standing Committee on Electoral Matters (JSCEM) in its majority report into the conduct of the 1993 federal election and matters related thereto noted:

> Voters, using whatever assistance they see fit from the media and other sources, remain the most appropriate arbiters of the worth of political claims.[108]

2.31 A minority report, included in a Queensland parliamentary committee report on truth in political advertising, similarly argued:

> [T]he ballot box and the electors are the only practical and proper tribunal to determine the worth of election promises, undertakings and comment by candidates. … There is no doubt that the electorate will punish what it perceives to be inaccurate or misleading advertising. There is no need for legislation to create a deterrent to such advertising.[109]

2.32 These views pick up the notion that electoral sovereignty lies with the electorate. However, the Committee was of the view that lack of access to information can impede voters making informed decisions on election day. The amount, type and timing of election related information may influence voting on election day.

2.33 Although some inquiry participants acknowledged the principle of justice at the ballot box, others were sceptical of the effectiveness of this mechanism in the regulation of misleading or deceptive political advertising. Julian Burnside AO QC noted:

> The usual response to this is that the way to discipline politicians whose standards fall below what is acceptable is to vote them out. Yet the number of dismal performers in political office suggests that the acceptable standard must be fairly low. Elections tend to be fought on a narrow range of issues and to be decided on an even narrower range. Only in a lean year will the personal honesty of a politician be a deciding factor.[110]

2.34 Senator Michael Macklin, in his minority report in the *Second report* of the Commonwealth Parliament's Joint Select Committee on Electoral Reform (JSCER) in 1984 was similarly sceptical:

> The Majority Report also argues that the electorate will reward or punish political parties for the truth or falsity of their advertising. … The majority of citizens do not have access to sufficient documentation to enable them to arrive at a reasonable judgment concerning whether or not the advertisement is false or misleading.[111]

2.35 The point that Senator Macklin is making is that electors may not be informed enough to "discipline" candidates, political party and Governments.

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108 Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1993 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, November 1994, p.109.

109 Darryl Briskey MLA, Hon Glen Milliner MLA and Ken McElligott MLA, "Dissenting statement" included in Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, p.60.

110 Julian Burnside AO QC, *Submission*, no.12, p.1.

111 Senator Michael J. Macklin, "Dissenting report", p.46 included in Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984.

Dr Sally Young, a member of the Democratic Audit of Australia who specialises in political communication noted that the:

> [I]deal voter attends meetings, asks questions, reads policy papers and party manifestos, and makes an informed choice of candidates by weighing up the pros and cons of each. … But the ideal voter is a fiction.[112]

2.36 However, analysis by James Surowiecki, a financial journalist with *The New Yorker*, provided a different view. Surowiecki in his book, *The wisdom of crowds: Why the many are smarter than the few*, noted that crowds of non-experts (i.e. a voter) seemed to be collectively smarter than individual experts (i.e. an "ideal voter") or even small groups of experts.[113]

The media

2.37 The media, through its reporting of political advertising, is another mechanism which may regulate misleading or deceptive political advertising.

2.38 The media is known as the "fourth estate".[114] The notion is derived from the old English idea that there are three estates: the Lords Spiritual,[115] the Lords Temporal[116] and the House of Commons.[117] As a result:

> The fourth estate as a respondent to the first three estates rests on the idea that media's function is to act as a guardian of the public interest and as a watchdog of the activities of government.[118]

2.39 The fourth estate was described by Thomas Carlyle, British essayist and historian in his book on *On heroes, hero-worship and the heroic in history*:

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112 Sally Young, "A century of political communication in Australia, 1901-2001", *Journal of Australian Studies*, no.87, 2003, p.109.

113 James Surowiecki, *The wisdom of crowds: Why the many are smarter than the few*, Doubleday, New York, 2004.

114 *Compact Oxford English Dictionary*, Third edition, Oxford University Press, Oxford, 2005, p.397

115 A description of the Lords Spiritual can be found on the UK Parliament website: "The lords spiritual were the bishops and abbots. Not many abbots, the heads of religious houses, were ever summoned to Parliament and most who were never attended. After Henry VIII abolished all the monasteries between 1536 and 1539 these posts no longer even existed. But the two archbishops and 19 bishops, later increased to 24 bishops, were all summoned to every Parliament from 1305 until they were excluded from Parliament in 1642, only to be restored there in 1661. They still sit in the House today." Retrieved from http://www.parliament.uk/about/livingheritage/evolutionofparliament/birthofparliament/overview/medieval.cfm on 16 October 2009.

116 A description of the Lords Temporal can be found on the UK Parliament website: "In the early Middle Ages the lords temporal consisted of only a small number of earls and a much larger number of barons, of whom only about a third were summoned to any individual Parliament. The first reference to the nobility as peers comes from 1321 and suggests that already by that time they saw themselves as a coherent group, accountable only to each other. By the middle of the 15th century the lords had been further divided into five ranks, in descending order: dukes, marquesses, earls, viscounts, and barons." Retrieved from http://www.parliament.uk/about/livingheritage/evolutionofparliament/birthofparliament/overview/medieval.cfm on 16 October 2009.

117 The House of Commons is the lower house, or "people's house" of the UK Parliament.

118 Donna L. Quesinberry, "The fourth estate", North 46, July 2005. Retrieved from http://www.authorsden.com/visit/viewwork.asp?id=29014 on 16 October 2009.

> [British statesman Edmund] Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a *Fourth Estate* more important far than they all. It is not a figure of speech, or a witty saying; it is a literal fact,—very momentous to us in these times. Literature is our Parliament too.[119]

2.40 Phil Cleary, an inquiry participant, noted the important role of guardian and watchdog the media can play in regulating misleading or deceptive political advertising.[120] The Port Phillip Greens in their submission noted that this is problematic for a candidate "with less access to the media who is up against a candidate or party with significant financial resources."[121]

Parliamentary privilege

2.41 Parliamentary privilege does not regulate misleading or deceptive political advertising published during election campaigns. However parliamentary privilege does protect members' speeches in Parliament at all times. In Victoria this privilege to members of parliament is accorded by Part II, Division 2 of the *Constitution Act 1975* (Vic).[122] This privilege extends only to things said in the House. Repeating them outside the Chamber does not attract the privilege.[123]

2.42 The Legislative Assembly and the Legislative Council have established Privileges Committees to examine and report to their respective Houses on breaches of parliamentary privilege. Associate Professor Ken Coghill supported that:

> [E]ach House should vigorously encourage a culture in which no member uses parliamentary privilege to engage in misleading or deceptive conduct. This culture should be supported by reference of such conduct to the Privileges Committee for examination and report and meaningful action against offending behaviour.[124]

2.43 The right of reply, a parliamentary process, also provides a mechanism for individuals to officially respond to remarks made about them in a parliamentary debate.[125]

2.44 Qualified privilege protects the publication of things said in parliament under parliamentary privilege provided it is done in a fair and accurate manner. Qualified privilege is available to the media and others, with the exception of the member or members whose remarks are being reported.

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119 Thomas Carlyle, *On heroes, hero-worship and the heroic in history*, 1841. Retrieved from http://www.gutenberg.org/files/1091/1091-h/1091-h.htm on 16 October 2009.

120 Phil Cleary, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

121 Port Phillip Greens, *Submission*, no.5, p.4.

122 *Constitution Act 1975* (Vic) ss.19, 19A.

123 Harry Evans, editor, *Odgers' Australian Senate Practice*, Twelfth edition, Department of the Senate, Canberra, 2008, p.44. In regard to the repetition of parliamentary statements it was noted that: "While statements made in the course of, or for purposes of or incidental to, parliamentary proceedings are protected by parliamentary privilege, the repetition of such statements not in those contexts is not so protected. Questions have arisen about what constitutes repetition, and the extent to which reference may be made to a protected statement to establish the meaning of an unprotected statement." Retrieved from http://www.aph.gov.au/SENATE/pubs/odgers/chap0214.htm on 22 December 2009.

124 Associate Professor Ken Coghill, *Submission*, no.2, p.3.

125 Legislative Assembly of Victoria Standing Order 227; Legislative Council of Victoria Standing Order 22.02.

Related inquiries in Australia

2.45 This section discusses parliamentary inquiries which have reported on truth in political advertising. It will illustrate that false, misleading or deceptive political advertising has been a recurrent topic for investigation in Australian parliaments over the past 25 years, in particular parliamentary committees of the Commonwealth Parliament and the Queensland Parliament.

Commonwealth

2.46 The Parliament of the Commonwealth of Australia has conducted numerous parliamentary investigations into the regulation of misleading or deceptive political advertising. This section will summarise the findings and recommendations of a number of parliamentary committee inquiries from 1983 to the current day.

The first report

2.47 The first report of the Commonwealth Parliament's JSCER was tabled in September 1983. The report discussed statutory provisions concerning broadcasting of political matter and standards of government political advertising. The report contained 132 recommendations and many of these were adopted and included in the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) which came into force in February 1984.[126] One of the recommendations pertained to laws concerning political advertising:

> 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-
>
> (a) that is untrue; and
>
> (b) that is, or is likely to be, misleading or deceptive.[127]

2.48 Penalties for breaching this section was in the case of a natural person a fine not exceeding $1,000 or imprisonment for not more than 6 months or both, or in the case of a body corporate a fine not exceeding $5,000.[128]

2.49 An aggrieved candidate or an Electoral Commission could also seek an injunction from the Supreme Court of the relevant state to prevent a breach of the *Commonwealth Electoral Act 1918* (Cth).[129]

The second report

2.50 The second report of the Commonwealth Parliament's JSCER was tabled in August 1984. Although JSCER agreed that fair advertising was a desirable

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126 The Commonwealth Electoral Legislation Amendment Bill 1983 (Cth) was introduced into the House of Representatives on 2 November 1983. The Bill was passed by the House of Representatives on 10 November 1983 and by the Senate with amendments on 2 December 1983. The amendments were agreed to by the House of Representatives on 6 December 1983.

127 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) s.161(2).

128 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) s.161(4).

129 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) s.209(A).

objective, it was not possible to achieve such fairness by legislation for the following reasons:

- Long lead times would create particular difficulties for a party seeking to reply to an advertisement from another party. The attacking advertisement will have the necessary lead time to go through whatever clearance is required, but an immediate reply would not be possible;[130]
- The Committee was particularly concerned to establish the criteria which would be adopted by a Court to determine whether a political advertisement was "true";[131]
- [Complications would arise because a statement has] to be both untrue and misleading or deceptive;[132]
- Particular difficulties are likely to arise when the alleged untrue statement is a statement concerning future events, rather than existing facts;[133]
- Great difficulty in divorcing statements of fact from statements of opinions. … On this view a wide range of electoral advertisements could be capable of being caught;[134]
- It is undesirable, both from the point of view of the courts, and the participants of the electoral process, to require the courts to enter the political arena in this way;[135]
- Great difficulties would be encountered by a Court which seeks to define "untrue and misleading" statements;[136]
- Many legitimate assertions which may be expected in the cut and thrust of an election campaign could become the subject of injunction proceedings;[137]
- The possibility of candidates seeking injunctions to prevent publication of advertisements from an opposing political party was of concern;[138] [and]
- The injunction remedy could cause grave injustice to political parties or candidates and could disrupt the normal political process, if available at the suit of any candidate.[139]

130 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.16.

131 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.17.

132 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.19.

133 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.19.

134 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.20.

135 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.21.

136 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.22.

137 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.23.

138 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.23.

2.51 As a result of the above reasons, the Commonwealth Parliament's JSCER concluded that:

> [E]ven 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) [161(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.[140]

2.52 JSCER's report included a dissenting report by Senator Michael Macklin, an extract of which follows:

> There is a solid ground for there to be some controls on political advertising. Information is the lifeblood of a democracy and a citizen must rely to a large extent on the media for such information. A large amount of this information available during election periods comes from political parties and candidates by way of political advertisements. It is not a private matter, therefore, but rather a matter of community concern that a voter may be misled into forming a political judgment by an advertisement which is untrue and misleading or deceptive.[141]

2.53 The section of the *Commonwealth Electoral Act 1918* (Cth) dealing with truth in political advertising was repealed in October 1984 by the *Electoral and Referendum Amendment Act 1984* (Cth).

Inquiry into the conduct of the 1993 federal election and matters related thereto

2.54 The Commonwealth Parliament's JSCEM tabled its *Report of the inquiry into the conduct of the 1993 federal election and matters related thereto* in November 1994. The JSCEM reviewed section 329(2) of the *Commonwealth Electoral Act 1918* (Cth) which was repealed in 1984 and concluded:

> While several submissions to the 1993 election inquiry debated the issue of "truth" in political advertising, none provided an argument to convince a majority of the Committee that legislation would be more workable now than when subsection 329(2) was repealed in 1984. As such, 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.[142]

2.55 Although these views were similar to that of the Commonwealth Parliament's JSCER, the report also included two minority reports. The first minority report by David Connolly MP, Senator Nicholas Minchin, Senator

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139 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.26.

140 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.27.

141 Senator Michael J. Macklin, "Dissenting report", p.45 included in Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984.

142 Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1993 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, November 1994, p.109.

John Tierney and Michael Cobb MP, and supported by Senator Chamarette, recommended that "the former section 329(2) of the *Electoral Act*, which prohibited misleading political advertising, be reinstated."[143] The second minority report by Senator Meg Lees noted that:

> While the Australian Democrats accept that political advertising promotes "intangibles, ideas, policies and images" (see page 108) this is not unlike advertising for many commercial "products" and services which are subject to the criterion of "truth". ... The Australian Democrats contend that perceived problems in achieving "truth" in adverting [sic] have been over-emphasised. As a result the community's view of politicians is that they cannot be trusted to tell the truth. This issue will need to be seriously addressed if the public's cynicism is not to be further deepened.[144]

2.56 The findings in this JSCEM report were also cited as one of the reasons the House of Representatives rejected the "truth in advertising" provision included in the Electoral and Referendum Amendment Bill 1995 (Cth); the provision was similar to section 329(2) which was repealed in 1984.[145] Other reasons the Bill was rejected were the findings stated in the Commonwealth Parliament's JSCEM's *Second report* and doubt about the constitutionality of a proposed restriction on freedom of political communication. However, the Bill lapsed when the Commonwealth Parliament was dissolved for the 1996 federal election.

Inquiry into "push polling" and the defamation of candidates

2.57 The Commonwealth Parliament's JSCEM inquired into "push polling" (the conduct of a telephone opinion poll with the purpose of influencing the respondent's views) and defamation of candidates during the 37th Parliament (May 1993 to January 1996). The JSCEM published 20 submissions and took evidence at six public hearings.[146]

2.58 At a public hearing the issue of truth in political advertising and the Electoral and Referendum Amendment Bill 1995 (Cth) was discussed between Senator Nicholas Minchin and Gary Gray, the then National Secretary of the Australian Labor Party:

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143 David Connolly MP, Senator Nicholas Minchin, Senator John Tierney & Michael Cobb MP, "Dissenting report", p. 164 included in Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1993 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, November 1994.

144 Senator Meg Lees, "Dissenting report" pp.168-169 included in Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1993 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, November 1994.

145 Frank Walker MP, Member for Robertson, *Votes and proceedings*, Parliament of Australia, House of Representatives, Canberra, 30 November 1995, p.4206. Retrieved from http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=;db=CHAMBER;group=;holdingType=;id=chamber%2Fhansardr%2F1995-11-30%2F0049;orderBy=date-eFirst;page=0;query=(Dataset%3Ahansardr%20SearchCategory_Phrase%3A%22house%20of%20representatives%22)%20Date%3A30%2F11%2F1995%20Decade%3A%221990s%22;querytype=;rec=0;resCount=Default on 14 October 2009.

146 Joint Standing Committee on Electoral Matters, Parliament of the Commonwealth of Australia, "Committee activities (inquiries and reports)". Retrieved from http://www.aph.gov.au/house/committee/em/reports.htm on 20 October 2009.

> Senator Minchin — The Labor Party rejects the proposition of a truth in advertising law. I do not know whether that would deal with push polling of itself but you have denied the parliament the opportunity to have a misleading advertising provision. If that is pushed to one side, how do we deal with push polling in a legislative sense?
>
> Mr Gray — I think we deal with a legislative facility which allows for the ensuring of accuracy in political statements. We had a meeting today of our state Labor parliamentary leaders to discuss among other things this issue. We have come to a national Labor position which is in support of truth in advertising and in support of, at national level, some legislative facility that ensures the accuracy of political statements. I will make this point. I know that there is legislation before the Senate right now-
>
> Senator Minchin — It has passed the Senate.
>
> Mr Gray — I am sorry; it is on its way to the House of Representatives right now. But I do not think it is enough. The reason I do not think it is enough and the reason that our Labor leaders today did not think it was enough is that there should be a uniform approach to it. The laws which apply to truth in advertising federally should be the same as the laws which apply to truth at state level. Our agreement today was to encourage a process which allowed for a common law across all states and territories and the federal jurisdiction to ensure that we have a system of truth in advertising which can be applied across the board.[147]

2.59 The JSCEM was dissolved for the 1996 federal election and consequently did not report to the Parliament on any findings or recommendations.

Inquiry into the conduct of the 1996 federal election and matters related thereto

2.60 The Commonwealth Parliament's JSCEM reported that during the 1996 federal election the Australian Electoral Commission (AEC) received complaints about alleged false electoral matter.[148] As part of its inquiry, the JSCEM investigated possible sanctions against misleading advertising including section 113 of South Australia's *Electoral Act 1985* (SA) and a *Trade Practices Act 1974* (Cth) style provision. The JSCEM also received evidence which proposed a separate statutory organisation to enforce sanctions.[149]

2.61 Although the JSCEM agreed with its predecessors that "the old section 329(2) is not the proper mechanism for enforcing 'truth' in political advertising",[150] it indicated in principle support for a *Trade Practices Act 1974* (Cth) style provision:

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147 Uncorrected transcript of evidence, 16 October 1995 cited in Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, p.8.

148 Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1996 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 1997, p.81.

149 Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1996 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 1997, pp.81-85.

150 Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1996 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 1997, p.82.

> If some of the misleading statements made during elections were instead made in private enterprise, the perpetrators would most likely find themselves prosecuted under the *Trade Practices Act*. There is no valid reason for not applying similar principles to the factual content of election advertising.[151]

2.62 However, the JSCEM indicated a preference for section 113 of the South Australian *Electoral Act 1985* (SA) being incorporated into the *Commonwealth Electoral Act 1918* (Cth) and making the AEC responsible for assessing and referring complaints to the Director of Public Prosecutions.[152] The JSCEM recommended:

> [T]hat the *Electoral Act* and the *Broadcasting Act* be amended to prohibit, during election periods, "misleading statements of fact" in electoral advertisements published by any means.[153]

2.63 The Commonwealth Government did not support the recommendation. It gave a number of reasons for its decision:

> The Government firmly believes that political advertising should be truthful in its content. However, any legislation introduced to enforce this principle would be difficult to enforce and could be open to challenge. Previous Committees have found that it was not possible to legislate to control political advertising and that voters, using whatever assistance they see fit from the media and other sources, remain the most appropriate arbiters of the worth of political claims.[154]

Inquiry into the conduct of the 1998 federal election and matters related thereto

2.64 The Commonwealth Parliament's JSCEM again received submissions and heard evidence at public hearings on its inquiry into the conduct of the 1998 federal election and matters related thereto about truth in political advertising. The JSCEM noted that the Government did not support amending legislation to prohibit misleading statements of fact in political advertisements published during the election period and consequently did not make any recommendations.[155]

2.65 A minority report was also included. The Australian Democrats Senators Andrew Bartlett and Andrew Murray argued that political advertising in Australia must be better controlled. The Senators recommended that the preferable method of regulation of political advertising is by legislation:

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151 Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1996 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 1997, p.83.

152 Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1996 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 1997, p.84.

153 Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1996 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 1997, p.85.

154 Australian Government, *Government response to Joint Standing Committee on Electoral Matters Report "The 1996 federal election"*, Parliament of Australia, Canberra, April 1998. Retrieved from http://www.aph.gov.au/House/committee/em/elec/govtresp.htm on 15 October 2009.

155 Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1998 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 2000, pp.42-43.

- The *Commonwealth Electoral Act* should be amended to prohibit inaccurate or misleading statements of fact which are likely to deceive or mislead;
- The above amendments should be modelled on the South Australian legislation, which has worked effectively since its introduction, is limited to election periods, and excludes election material other than advertisements.[156]

Inquiry into the Electoral Amendment (Political Honesty) Bill 2000

2.66 The then Senator Andrew Murray of the Australian Democrats introduced the Electoral Amendment (Political Honesty) Bill 2000 (Cth) into the Senate on 10 October 2000. This Bill sought to amend the *Commonwealth Electoral Act 1918* (Cth) to prohibit political advertising that is misleading to a material extent. Senator Murray stated in the second reading speech that the Bill, if enacted, would:

> [R]equire political advertising to meet similar standards of probity and honesty as commercial advertising must meet under the *Trade Practices Act*.[157]

2.67 The Bill was referred to the Senate Finance and Public Administration Legislation Committee on 29 November 2000 by the Senate Selection of Bills Committee. The terms of reference for the inquiry were:

> To examine the effectiveness of the bills in meeting community expectations for the monitoring and enforcement of electoral and parliamentary standards; whether the bills meet international standards of accountability; and the practicality of the proposed mechanisms.[158]

2.68 The Senate Finance and Public Administration Legislation Committee reported on the Electoral Amendment (Political Honesty) Bill 2000 (Cth) on 29 August 2002.[159] Chapter 5 of the report was devoted to truth in political advertising and considered the current regulation of Commonwealth political advertising, previous consideration of truth in political advertising, evidence to this inquiry and other issues including the definition of material to be

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156 Senator Andrew Bartlett and Senator Andrew Murray, "Minority report" p.168 included in Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1998 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 2000.

157 Senator Andrew Murray, Charter of Political Honesty Bill 2000 and Electoral Amendment (Political Honesty) Bill 2000, Second Reading speech, *Senate Hansard*, 10 October 2000, p.18198.

158 Senate Selection of Bills Committee, *Senate Hansard*, 29 November 2000, p.20140.

159 On 29 November 2000 the Senate referred the Charter of Political Honesty Bill 2000 (Cth) and the Electoral Amendment (Political Honesty) Bill 2000 (Cth) to the Finance and Public Administration Legislation Committee for inquiry and report by 24 May 2001. On 5 December 2000 the Senate referred the Provisions of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000 (Cth) and the Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No.2] (Cth) to the Finance and Public Administration Legislation Committee for inquiry and report. The reference on the four bills was readopted on 21 March 2002 for inquiry and report by 27 June 2002. See *Senate Hansard,* 29 November 2000, p.20140 and 5 December 2000, p. 20672.

prohibited under the Bill, reversal of onus of proof, appropriateness of penalties, orders to publish and headings to political advertisements.[160]

2.69 The Senate Finance and Public Administration Legislation Committee considered the Bill and summarised the differences between the *Trade Practices Act* model from other proposals seeking to regulate political advertising:

> - There is an implied guarantee in the Constitution of freedom of discussion on political matters;
> - Political advertising is different from commercial advertising in that it is only one of a wide range of strategies by which political parties seek to persuade voters to support them. ... It is somewhat artificial to seek only to regulate political advertising in an election period while leaving untouched the other means of communication which may have equally significant effects on voters;
> - Regulation of misleading advertising under the *Trade Practices Act* is by way of civil remedies only, such as damages and injunctions, whereas criminal offences are proposed to regulate political advertising; [and]
> - The timeframe in which action may be taken to remedy misleading corporate advertising is usually much longer than an election period, when remedial action must be available very quickly in order to make the laws effective.[161]

2.70 The Senate Finance and Public Administration Legislation Committee recommended that the "Electoral Amendment (Political Honesty) Bill 2000 [2002] not proceed because in its current form it does not present an effective or workable solution to prevent dishonest political advertising."[162] Instead it was suggested that:

> [T]he JSCEM could take a more active role in scrutinising this particular aspect of the election phase. While no penalty as such would result from this process, the resultant public exposure of impropriety in the JSCEM's report may have the effect of changing undesirable practices.[163]

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160 Senate Finance and Public Administration Legislation Committee, *Charter of Political Honesty Bill 2000 [2002], Electoral Amendment (Political Honesty) Bill 2000 [2002], Provisions of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000, Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2],* Parliament of the Commonwealth of Australia, Canberra, August 2002.

161 Senate Finance and Public Administration Legislation Committee, *Charter of Political Honesty Bill 2000 [2002], Electoral Amendment (Political Honesty) Bill 2000 [2002], Provisions of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000, Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2],* Parliament of the Commonwealth of Australia, Canberra, August 2002, p.92.

162 Senate Finance and Public Administration Legislation Committee, *Charter of Political Honesty Bill 2000 [2002], Electoral Amendment (Political Honesty) Bill 2000 [2002], Provisions of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000, Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2],* Parliament of the Commonwealth of Australia, Canberra, August 2002, p.93.

163 Senate Finance and Public Administration Legislation Committee, *Charter of Political Honesty Bill 2000 [2002], Electoral Amendment (Political Honesty) Bill 2000 [2002], Provisions of the Government Advertising (Objectivity, Fairness and Accountability) Bill*

2.71 The then Senator Andrew Murray commented that he would "be supportive of any reasonable recommendations … [and] carefully consider the recommendations … with a view to refining the bills."[164]

2.72 Since then the Electoral Amendment (Political Honesty) Bill 2000 (Cth), in its various forms, has languished on the Senate's notice paper for three parliamentary terms.[165]

Inquiry into the conduct of the 2001 federal election and matters related thereto

2.73 The Commonwealth Parliament's JSCEM considered the regulation of the factual content of political advertising as part of its inquiry into the 2001 federal election and matters related thereto. The JSCEM agreed with findings from the JSCEM's inquiry into the 1998 federal election and matters related thereto:

> [T]hat any regulation of 'truth' in political debate would be unwise and unworkable, particularly if the AEC were the body appointed to undertake such regulation.[166]

2.74 Senators Andrew Bartlett and Andrew Murray of the Australian Democrats disagreed with the majority report on this issue and again recommended that:

> The *Commonwealth Electoral Act* should be amended to prohibit inaccurate or misleading statements of fact in political advertising, which are likely to deceive or mislead.[167]

Inquiry into the conduct of the 2004 federal election and matters related thereto

2.75 The Commonwealth Parliament's JSCEM investigated truth in political advertising, difficulties associated with establishing fact and truthfulness in

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2000, Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2], Parliament of the Commonwealth of Australia, Canberra, August 2002, p.93.

164 Senate Finance and Public Administration Legislation Committee, *Charter of Political Honesty Bill 2000 [2002], Electoral Amendment (Political Honesty) Bill 2000 [2002], Provisions of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000, Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2],* Parliament of the Commonwealth of Australia, Canberra, August 2002, p.131.

165 The Electoral Amendment (Political Honesty) Bill 2000 (Cth) lapsed on the dissolution of the 39th Parliament. On 13 February 2002, after the commencement of the 40th Parliament, the Bill was restored to the Notice Paper. It was then introduced into the Senate on 27 March 2003 as the Electoral Amendment (Political Honesty) Bill 2003 (Cth) yet again lapsed on the dissolution of the 40th Parliament. It has been restored to the Notice Paper on two occasions since then, on 17 November 2004 and 14 February 2008. See Senator Vicki Bourne, Senator for New South Wales, Business, Consideration of Legislation, *Senate Hansard*, 13 February 2002, p.200; Senator Lyn Allison, Senator for Victoria, Business, Consideration of Legislation, *Senate Hansard*, 17 November 2004, p.110; Senator Andrew Bartlett, Senator for Queensland, Business, Consideration of Legislation, *Senate Hansard*, 14 February 2008, p.351.

166 Joint Standing Committee on Electoral Matters, *Report of the conduct of the 2001 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 2003, p.133.

167 Senator Andrew Bartlett and Senator Andrew Murray, "Supplementary remarks", p.298 included in Joint Standing Committee on Electoral Matters, *Report of the conduct of the 2001 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 2003.

television political advertising. The JSCEM's view remained unchanged from previous reports. It maintained:

> [T]here is a high risk that the introduction of so-called "truth" legislation would traverse the implied freedom of political speech underpinning the democratic principles which govern our electoral processes.[168]

2.76 In supplementary remarks, Senator Andrew Murray again reinforced the Australian Democrats' view on the need to regulate political advertising in Australia:

> The *Commonwealth Electoral Act* should be amended to prohibit inaccurate or misleading statements of fact in political advertising, which are likely to deceive or mislead.[169]

Inquiry into the conduct of the 2007 federal election and matters related thereto

2.77 The report into the conduct of the 2007 federal election and matters related thereto did not include commentary on truth in political advertising in its majority report. However the issue was noted by Senator Bob Brown of the Australian Greens in a minority report. He noted that:

> [T]he committee has failed to tackle truth in advertising, in particular, the lack of contemporaneous regulation and penalties for parties, groups or individuals who knowingly lie or distort the truth in advertisements and publications about candidates and their policies during election campaigns.[170]

Commonwealth electoral reform green paper 2009

2.78 The Australian Government's electoral reform green paper, entitled *Strengthening Australia's Democracy*, provided a historical context to legislative arrangements regarding truth in political advertising in Australia. In particular, the green paper highlighted the work done by parliamentary committees in the investigation of the workability and unworkability of section 113 of the *South Australian Electoral Act 1985* (SA) and the *Trade Practices Act 1974* (Cth).[171]

2.79 The Australian Government invited stakeholders to lodge submissions in response to the green paper and its discussion points. Relevant to this inquiry, the discussion point is "should 'truth in advertising' laws be

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168 Joint Standing Committee on Electoral Matters, *Report of the conduct of the 2004 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, October 2005, p.309.

169 Senator Andrew Murray, "Supplementary remarks", p.409 included in Joint Standing Committee on Electoral Matters, *Report of the conduct of the 2004 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, October 2005.

170 Senator Bob Brown, "Dissenting report", p. 335 included in Joint Standing Committee on Electoral Matters, *Report of the conduct of the 2007 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 2009.

171 Australian Government, *Electoral reform green paper: Strengthening Australia's democracy*, Department of Prime Minister and Cabinet, Canberra, September 2009, pp.153-157.

introduced? If so, what form should such laws take?"[172] Submissions closed on 27 November 2009. To date the white paper has yet to be released.

2.80 In February 2010, the Victorian Government, in its *Annual statement of Government intentions*, noted that:

> The Electoral Matters Committee will ... evaluate the outcomes of the Commonwealth Government's electoral reform process when it becomes available and will report to Parliament with recommendations for Victoria. The Government will consider the recommendations and respond accordingly.[173]

Queensland

2.81 Dialogue about truth in political advertising has taken place in Queensland since the early 1990s. This section will summarise the activities of the Electoral and Administrative Review Commission (EARC), the Queensland Parliament's Legal, Constitutional and Administrative Review Committee (LCARC) and the Queensland Government.

Electoral and Administrative Review Commission inquiries

2.82 EARC, a statutory authority, was established by the *Electoral and Administrative Review Act 1989 (*Qld). EARC was responsible for inquiring and reporting to Parliament on issues relating to the electoral system, public administration and the Parliament.[174] Two of its reports recommended controls over political advertising be imposed.[175] EARC ceased operation in 1993 having completed its role as recommended in the Fitzgerald Report.[176]

Inquiry into truth in political advertising

2.83 The Queensland Parliament's LCARC tabled its report on *Truth in political advertising* in December 1996.

2.84 LCARC concluded that it was possible and desirable to legislate to make better provision for misleading or deceptive political advertising. In particular, LCARC focused on the "aspirational and deterrent effect" of the legislation.[177] As a result LCARC considered a number of possible

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172 Australian Government, *Electoral reform green paper: Strengthening Australia's democracy*, Department of Prime Minister and Cabinet, Canberra, September 2009, p.160.

173 Victorian Government, *Annual statement of Government intentions*, Melbourne, February 2010, p.74.

174 *Electoral and Administrative Review Act 1989 (*Qld).

175 Electoral and Administrative Review Commission, *Report on the review of the Elections Act 1983-1991 and related matters*, Brisbane, December 1991, Chapter 11; Electoral and Administrative Review Commission, *Report on investigation of public registration of political donations, public funding of election campaigns and related issues*, Brisbane, June 1992, Chapter 5.

176 Queensland State Archives, "Electoral and Administrative Review Commission", Queensland Government, Brisbane, 2004-2006. Retrieved from http://www.archivessearch.qld.gov.au/Search/AgencyDetails.aspx?AgencyId=2223 on 14 October 2009.

177 Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, p.28. Retrieved from

legislative amendments. LCARC explored whether the experience of section 52 of the *Trade Practices Act 1974* (Cth) or section 113 of the *Electoral Act 1985* (SA) would address concerns regarding truth in political advertising legislation.[178]

2.85 In consideration of the *Trade Practices Act*, LCARC recognised that because political communication is protected by the Constitution, political advertising is different from commercial advertising.[179]

2.86 On the other hand, LCARC was confident that legislation preventing misleading and inaccurate statements of fact in political advertising "would be an acceptable and proportional intrusion" on the constitutional freedom. LCARC agreed that "a provision similar to s.113 of the *Electoral Act* (South Australia) should be introduced in Queensland."[180] LCARC based its decision on the following:

> The Committee notes that s.113 of the *SA Act* has only been tested before a court on one occasion. Nonetheless the section has been judicially tested to some extent in terms of its constitutional validity. The Committee is persuaded that s.113 of the South Australian Act is more likely to be considered valid in constitutional terms. However, of more significance, the Committee concurs with the views of the Australian Electoral Commission that the South Australian provision is a more objectively determinable section and would be easier to administer than the former Commonwealth provision.[181]

2.87 Not all members of LCARC were of the same opinion. A minority report by Darryl Briskey MLA, Hon Glen Milliner MLA and Ken McElligott MLA was included in the report. These members stated in principle support for truth in political advertising but observed that the introduction of a section 113 style provision into the *Electoral Act 1992* (Qld) would not solve core problems identified by the Commonwealth Parliament's JSCER:

> It is also our firmly held belief that any attempt to regulate truth in political advertising will result in the abuse of that legislation for political purposes. Essentially, such legislation would create more problems than it would solve. We believe that the proposed legislation will be used to disrupt election campaigns by litigation and will threaten to drag both the Electoral Commission and the Courts into the political arena.[182]

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http://www.parliament.qld.gov.au/view/committees/LCARC.asp?SubArea=reports#content on 16 October 2009.

178 Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, pp.11-14, 18-25.

179 Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, p.24.

180 Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, pp.29, 30.

181 Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, p.30.

182 Darryl Briskey MLA, Hon Glen Milliner MLA and Ken McElligott MLA, "Dissenting statement" included in Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, p.59.

2.88 These members believed that the ballot box and electors are the "the only practical and proper tribunal to determine the worth of election promises, undertakings and comment by candidates".[183]

2.89 Denver Beanland MLA, the then Attorney-General and Minister for Justice, responded to LCARC's recommendations in December 1996, May 1997 and October 1997. The then Attorney-General and Minister for Justice advised that he needed more time to consider the recommendations as a result of the complex and controversial nature of the issues of the inquiry, as well as the committee divisions.[184] In March 1998 the Queensland Premier, Hon Rob Borbridge MP wrote to LCARC advising that the Government has "determined to introduce relevant legislation into Parliament during the forthcoming Parliamentary session [which will in] substance, reflect and adopt the recommendations contained in your Committee's Report."[185]

2.90 The Electoral Amendment Bill 1999 (Qld) was introduced into the Queensland Parliament on 23 March 1999. The Bill was then referred to LCARC on 1 December 1999.[186] LCARC tabled its report in Parliament on 11 April 2000. The Chair's Foreword provided an explanation for LCARC's decision to support the principle of truth in political advertising and consider measures other than legislation to achieve truth in political advertising:

> While the committee supports the principle of truth in political advertising, the committee observes from its previous work that, in practice, formulating a general provision that effectively and appropriately ensures truth in political advertising appears difficult. Instead, the committee believes that more effective mechanisms aimed at preventing the misleading of voters can be introduced.
>
> While there are particular legislative devices that may be put in place to minimise the prospect of voters being misled, there are limits to which this can realistically be achieved without creating a substantive change to our liberal democratic system. This system is premised upon the capacity of its individual participants and institutions to engage in robust debate which tests ideas, ideals, policies and practices. Within this system it is therefore desirable that other fundamental ingredients such as, on the one hand, trust and integrity and, on the other hand, skills

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183 Darryl Briskey MLA, Hon Glen Milliner MLA and Ken McElligott MLA, "Dissenting statement" included in Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, p.60.

184 Denver Beanland MLA, Attorney-General and Minister for Justice, *Correspondence*, 16 October 1997, p.1; Denver Beanland MLA, Attorney-General and Minister for Justice, *Correspondence*, 22 May 1997, p.1; Denver Beanland MLA, Attorney-General and Minister for Justice, *Correspondence*, 19 December 1996, p.1. Retrieved from http://www.parliament.qld.gov.au/view/committees/LCARC.asp?SubArea=responses on 16 October 2009.

185 Rob Borbridge MLA, Queensland Premier, *Correspondence*, 3 March 1998, p.1. Retrieved from http://www.parliament.qld.gov.au/view/committees/LCARC.asp?SubArea=responses on 16 October 2009.

186 Legislative Assembly, *Bills Update 1999*, Parliament of Queensland, Brisbane, 21 December 1999, p.2. Retrieved from http://www.parliament.qld.gov.au/view/historical/tabledPapers.asp?SubArea=bills on 30 October 2009.

> of critical analysis and judgment be engendered rather than resort to radical actions that are practically impossible to implement.[187]

2.91 The second reading of the Electoral Amendment Bill 1999 (Qld) was defeated in the Queensland Parliament on 12 April 2000.[188]

Review into integrity and accountability in Queensland

2.92 In August 2009 the Queensland Government published a discussion paper which explored how to strengthen or improve the operation of Queensland's integrity and accountability framework. The paper outlined the legislative framework that governs the behaviour of key decision makers including members of parliament, policies and guidelines that set standards of integrity and accountability, mechanisms to investigate and report unacceptable behaviour and sanctions.[189] The Government received 208 submissions and conducted two question and answer forums and eight regional forums.[190]

2.93 Analysis of the review indicated that the issue of misleading or deceptive political advertising was not canvassed in the discussion paper. Consequently the evidence gathered via submissions and forums did not consider this issue. It was also noted that while the discussion paper examined the standards of integrity and accountability for the Parliament, the Executive and the public sector, it did not include the conduct of election candidates.

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187 Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *The Electoral Amendment Bill 1999*, Parliament of Queensland, Brisbane, April 2000, p.iii.

188 Legislative Assembly, *Bills Update 2000*, Parliament of Queensland, Brisbane, 24 November 2000, p.1. Retrieved from http://www.parliament.qld.gov.au/view/historical/tabledPapers.asp?SubArea=bills on 30 October 2009.

189 Queensland Government, *Integrity and accountability in Queensland*, Department of the Premier and Cabinet, Brisbane, August 2009.

190 Queensland Government, "Integrity and accountability review". Retrieved from http://www.premiers.qld.gov.au/community-issues/open-transparent-gov/integrity-and-acountability-review.aspx on 19 October 2009.

Chapter
3

Chapter 3: Comparative approaches

3.1 This chapter provides an overview of the comparative legislative approaches taken by the Australian Commonwealth, state and territory governments on the regulation of misleading or deceptive political advertising. Each jurisdiction has addressed the issue separately and framed laws slightly differently. However, the effect of the legislative approaches taken by each government is, with the exception of South Australia and to a lesser extent Tasmania, very similar.[191]

3.2 The second part of this chapter considers how misleading or deceptive political advertising is regulated in Canada, New Zealand (NZ), the United States of America (USA) and the United Kingdom (UK). There is also discussion about the incidence of misleading or deceptive political advertising in some of these jurisdictions.

Australian legislation

Victoria

3.3 The *Electoral Act 2002* (Vic) is Victoria's principal electoral legislation. Section 84 deals with misleading or deceptive electoral matter:

> (1) A person must not during the relevant period—
>
> (a) print, publish or distribute; or
>
> (b) cause, permit or authorise 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 the vote of the elector.
>
> Penalty: In the case of a natural person, 60 penalty units or 6 months imprisonment;
>
> In the case of a body corporate, 300 penalty units.
>
> (2) A person must not during the relevant period—
>
> (a) print, publish or distribute; or
>
> (b) cause, permit or authorise to be printed, published or distributed—
>
> an electoral advertisement, handbill, pamphlet or notice that contains a representation or purported representation of a ballot-paper for use in that

191 Please see Appendix 3 for a summary of electoral law pertaining to misleading or deceptive electoral matter.

> election that is likely to induce an elector to mark the elector's vote otherwise than in accordance with the directions on the ballot-paper.
>
> Penalty: In the case of a natural person, 60 penalty units or 6 months imprisonment;
>
> In the case of a body corporate, 300 penalty units.
>
> (3) In a prosecution of a person for an alleged offence against subsection (1) or (2), it is a defence if the person proves that the person—
>
> (a) did not know; and
>
> (b) could not reasonably be expected to have known—
>
> that the matter or thing was likely to mislead an elector when casting the elector's vote.[192]

3.4 As noted in Chapters 1 and 2 of this report, Australian courts, and by consequence, the respective electoral commissioners, have viewed that a person has engaged in misleading or deceptive political advertising, only if it affects the actual casting of an elector's ballot:

> In *Evans v Crichton-Browne*, the High Court held that the words 'in or in relation to the casting of his vote' in section 161(e) of the *Commonwealth Electoral Act* were limited to the 'act of recording or expressing the political judgement which the elector has made rather than to the formation of that judgement'. .... If interpreted in the same way as section 161(e), they would only relate to statements that affect the actual physical casting of a person's vote and not to statements that affect the formation of a political judgement by the elector.[193]

3.5 The Committee received evidence comparing Victorian legislation to legislation in other Australian jurisdictions. The Victorian Electoral Commission's (VEC) submission noted that:

> Although the provisions vary, the common element for eight jurisdictions is that the misleading matter must be in relation to the casting of the elector's vote, or words to that effect. The wording of the Victorian provision is very close to the Commonwealth's. In contrast, the South Australian legislation makes it an offence to publish an advertisement that "contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent". These differences have had profound effects on how courts, electoral administrators and protagonists in elections have interpreted the legislation.[194]

3.6 The Hon Candy Broad MLC, Member for Northern Victoria and Committee member also identified that the Victorian legislation is similar to the legislative requirements of other Australian jurisdictions.[195]

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192 *Electoral Act 2002* (Vic) s.84.

193 George Williams, *Truth in political advertising legislation in Australia*, Department of Parliamentary Services, Parliament of Australia, Canberra, Research Paper 13 1996-1997. Retrieved from http://www.aph.gov.au/library/pubs/rp/1996-97/97rp13.htm on 12 November 2009.

194 Victorian Electoral Commission, *Submission*, no.8, p.6.

195 Hon Candy Broad MLC, Member for Northern Victoria and Committee member noted that "Victoria's approach, I think it is reasonable to characterise based on this submission [VEC's], is very close to the approaches of the Australian Electoral Commission and New South Wales to these matters," cited in Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

Commonwealth

3.7 The *Commonwealth Electoral Act 1918* (Cth) is Australia's principal electoral legislation. Section 329 deals with misleading or deceptive publications:

> (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) is guilty of an offence punishable on conviction:
>
> (a) if the offender is a natural person—by a fine not exceeding $1,000 or imprisonment for a period not exceeding 6 months, or both; or
>
> (b) if the offender is a body corporate—by a fine not exceeding $5,000.
>
> (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.
>
> Note: A defendant bears a legal burden in relation to the defence in subsection (5) (see section 13.4 of the Criminal Code).
>
> (6) In this section, publish includes publish by radio or television.[196]

3.8 The Committee received evidence on the scope of the provision's powers. The Australian Electoral Commission's (AEC) submission stated:

> Section 329 of the Commonwealth Act contains a limited power to address "misleading and deceptive" electoral advertising that operates after the writs for an election have been issued up until polling day. However, the High Court of Australia in the cases of Evans v Crichton-Browne (1981) 147 CLR 169 and Webster v Deahm (1993) 116 ALR 222 commented that this power is not aimed to regulate the content of political messages directed at influencing the choice of preferred candidates or parties by voters, but merely to regulate publications and broadcasts that are directed at influencing the way in which a ballot paper is actually marked.[197]

3.9 The VEC's submission also referred to the AEC's *Electoral Backgrounder* on political advertising to illustrate the intent of the provision:

> The Australian Parliament has determined that the Act should not regulate the content of political messages contained in electoral advertising: rather, the intent of the Act is to ensure electors are informed about the source of political advertising, and to ensure that political advertising does not mislead or deceive electors about the way in which a vote must be cast. Accordingly, the AEC has no role or responsibility in deciding whether political messages published or broadcast in relation to a federal election are true or untrue. [198]

3.10 As discussed in Chapter 2, the *Commonwealth Electoral Act 1918* (Cth) previously contained a provision dealing with "untrue" political advertising

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196 *Commonwealth Electoral Act 1918* (Cth) s.329.

197 Australian Electoral Commission, *Submission*, no.11, pp.1-2.

198 Australian Electoral Commission, *Electoral Backgrounder No.15: Electoral advertising*, Updated August 2007, paragraph 6 and 7 cited in Victorian Electoral Commission, *Submission*, no.8, p.8.

(former subsection 161(2)) but this was repealed in 1984. Inquiry participants, including Professor Brian Costar, Co-ordinator of the Democratic Audit of Australia, provided evidence on the reasons the provision was repealed:

> I think it is important to go back … and note that we had an attempt to achieve what might be intended today as long ago as 1983 and 1984 in the federal jurisdiction. When the Joint Standing Committee on Electoral Reform reported and the then Hawke government legislated in 1983 for a major renovation of the *Commonwealth Electoral Act* [*1918* (Cth)], there was a truth in electoral advertising component, which went beyond the casting of the vote requirement that we have all talked about. Those regulations or sections of the act were never tested because they were repealed before the next election, which was in 1984.
>
> I think it is important to go to that second report of what was then called the Joint Select Committee on Electoral Reform, which is now the Joint Standing Committee on Electoral Matters, and look at the legal advice that it got from Michael McHugh QC,[199] and the reasons that were set out in that report as to why this was an unsound aspiration, if you like, to put into legislation and why it was repealed. It has to be said that the Australian Democrats at the time were not convinced of the reasons. They might not have used this term, but they were alleging cartelisation — that the two big parties were ganging up on little parties. … There have been other attempts. The Democrats federally have introduced legislation; it has not been proceeded with for various reasons.[200]

3.11 Despite the repeal of the provision relating to truth in political advertising, the Australian Democrats introduced a number of private members' bills in successive parliaments.[201] In 2007 the Australian Democrats Senator Andrew Murray introduced a private members Bill entitled Electoral (Greater Fairness of Electoral Processes) Bill 2007. Senator Murray stated:

> [The] bill proposes legislative solutions to prohibit inaccurate or misleading statements of fact in political advertising. Its effect is to require that advertising material meets similar standards of probity and honesty as commercial advertising

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199 The Joint Standing Committee on Electoral Reform was particularly concerned to establish the criteria which would be adopted by a Court to determine whether a political advertisement was "true". To assist the Committee in this task the Attorney-General and Mr Michael McHugh QC were invited to give evidence to the Committee relating to the experience of courts in interpreting the prohibition of "misleading or deceptive" conduct in s.52 of the *Trade Practices Act*. See Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, pp.17-19.

200 Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, p.2.

201 The Electoral Amendment (Political Honesty) Bill 2000 (Cth) lapsed on the dissolution of the 39th Parliament. On 13 February 2002, after the commencement of the 40th Parliament, the Bill was restored to the Notice Paper. It was then introduced into the Senate on 27 March 2003 as the Electoral Amendment (Political Honesty) Bill 2003 (Cth) yet again lapsed on the dissolution of the 40th Parliament. It has been restored to the Notice Paper on two occasions since then, on 17 November 2004 and 14 February 2008. See Senator Vicki Bourne, Senator for New South Wales, Business, Consideration of Legislation, *Senate Hansard*, 13 February 2002, p.200; Senator Lyn Allison, Senator for Victoria, Business, Consideration of Legislation, *Senate Hansard*, 17 November 2004, p.110; Senator Andrew Bartlett, Senator for Queensland, Business, Consideration of Legislation, *Senate Hansard*, 14 February 2008, p.351.

> must meet under the *Trade Practices Act*. The bill also places restrictions on government advertising during the caretaker period.[202]

3.12 This 2007 private member's Bill replaced the previous Electoral Amendment (Political Honesty) Bill. Senator Murray described the intention of the Electoral Amendment (Political Honesty) Bill as follows:

> The bill deals with truth in political advertising. Its effect is to require political advertising to meet similar standards of probity and honesty as commercial advertising must meet under the *Trade Practices Act*. The bill prohibits political advertising that is inaccurate and misleading to a material extent.[203]

3.13 The private member's Bill was an attempt to harmonise Commonwealth legislation with section 113 of the South Australian *Electoral Act 1985* (SA), which refers to statements of fact which are "inaccurate and misleading to a material extent".[204] The legislation was similar in nature to that introduced by Senator Murray in 2000. However being a private members' Bill, the Bill lapsed at the conclusion of the parliament.[205]

South Australia

3.14 The *Electoral Act 1985* (SA) is South Australia's principal electoral legislation. Section 113 deals with misleading electoral 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:
>
> If the offender is a natural person--$1 250;
>
> If the offender is a body corporate--$10 000.
>
> (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

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202 Senator Andrew Murray, Senator for Western Australia, Electoral (Greater Fairness of Electoral Processes) Bill 2007, *Parliamentary debates*, Commonwealth Parliament of Australia, Canberra, 1 March 2007, p.17. Retrieved from on http://www.aph.gov.au/hansard/senate/dailys/ds010307.pdf 10 February 2010.

203 Senator Andrew Murray, Senator for Western Australia, Electoral Amendment (Political Honesty) Bill 2003, *Parliamentary debates*, Commonwealth Parliament of Australia, Canberra, 27 March 2003, p.10323. Retrieved from http://www.aph.gov.au/hansard/senate/dailys/ds270303.pdf on 23 November 2009.

204 Senator Andrew Murray, Senator for Western Australia, Electoral Amendment (Political Honesty) Bill 2003, *Parliamentary debates*, Commonwealth Parliament of Australia, Canberra, 27 March 2003, p.10323.

205 The Electoral Amendment (Political Honesty) Bill 2000 (Cth) lapsed on the dissolution of the 39th Parliament. On 13 February 2002, after the commencement of the 40th Parliament, the Bill was restored to the Notice Paper. It was then introduced into the Senate on 27 March 2003 as the Electoral Amendment (Political Honesty) Bill 2003 (Cth) yet again lapsed on the dissolution of the 40th Parliament. It has been restored to the Notice Paper on two occasions since then, on 17 November 2004 and 14 February 2008.

> (b) could not reasonably be expected to have known that the statement to which the charge relates was inaccurate and misleading.
>
> (4) If the Electoral Commissioner is satisfied that an electoral advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent, the Electoral Commissioner may request the advertiser to do one or more of the following:
>
> (a) withdraw the advertisement from further publication;
>
> (b) publish a retraction in specified terms and a specified manner and form,
>
> (and in proceedings for an offence against subsection (2) arising from the advertisement, the advertiser's response to a request under this subsection will be taken into account in assessing any penalty to which the advertiser may be liable).
>
> (5) If the Supreme Court is satisfied beyond reasonable doubt on application by the Electoral Commissioner that an electoral advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent, the Court may order the advertiser to do one or more of the following:
>
> (a) withdraw the advertisement from further publication;
>
> (b) publish a retraction in specified terms and a specified manner and form.[206]

3.15 As noted by the VEC in its submission, South Australian legislation takes a different approach to other Australia jurisdictions to regulate misleading or deceptive political advertising.[207]

3.16 In evidence before the Committee, Mr Steve Tully, the Victorian Electoral Commissioner, who was previously the Electoral Commissioner of South Australia, provided examples where prosecutions have been successful under the South Australian legislation:

> I rely on the law, which has been tested in a court in South Australia, that says that if a statement is inaccurate or misleading to a material extent, then it is an offence. In my view there was an almost identical case that went to a Court of Disputed Returns in South Australia before Judge Prior in which it was alleged that that statement misled electors into believing that if they voted for a Democrat or an Independent, it was going to be a vote for Labor. The judge decided that that statement was misleading to a material extent. He believed there was a breach of the legislation and said that at the time it could have been open to the court to set the election result aside because of that breach.
>
> Subsequently I took the matter to a magistrates court and the party concerned pleaded guilty to misleading advertising. I should add that the judge had said that in his view the margin was so great that it was not likely to affect the outcome of the result.
>
> That judgement was later overturned in the Featherston matter where Justice Bleby said that misleading advertising in itself could not lead to an election being set aside. So in terms of that case there is no doubt in my mind that had that advertisement

206 *Electoral Act 1985* (SA) s.113.

207 Victorian Electoral Commission, *Submission*, no.8, p.6.

> occurred in South Australia it would have been prosecuted successfully as a misleading advertisement. But in Victorian law it relates to the casting of the vote, and that is the critical issue that affected my judgement as to whether there was an offence or not. In that case I relied, as did the Victorian government solicitor and as did every other submitter that I have read, on *Evans v. Crichton-Browne*, which goes into some detail when talking about the casting of the vote.
>
> Evans was the Democrat candidate, and Crichton-Browne was the Liberal candidate who claimed that a vote for one was a vote for something else. So there were similar circumstances. It is the way the laws operate.[208]

3.17 Inquiry participants provided a great deal of commentary regarding section 113 of the *Electoral Act 1985* (SA). At the Committee's public hearings, Committee member Mr Robin Scott MP raised with Mr Tully the matter of administrative issues associated with the operation and enforcement of section 113:

> Mr Tully - I was the South Australian commissioner when the law was introduced and for the subsequent election after that, so for two elections under that particular legislation, which went further and actually involved the electoral commissioner in making decisions about whether, prima facie, material was misleading or not. If on the face of it it looked like it was, the commissioner had the authority to ask for the authoriser of the advertisement to print a retraction and to identify the font size and the words to be used in that retraction.
>
> That was administratively testing. Everybody wanted to complain about everything. Some of the wider examples that I have given you earlier came to the fore, where they were not misleading to a material extent. People were saying, 'We did not overspend by $5 million; it was only $3.8 million'. That is not material. So there was a tremendous amount of administrative work that went into that, particularly the first election.
>
> Following the first election there were successful prosecutions made, and subsequently there have not been any since.
>
> I think once everybody got used to how the law operated there was more acceptance of how the misleading advertising provisions could be worked with. Since that time there has been a change of registered officers in the major parties in South Australia, and I think there was a bit of rediscovery about what the law is all about. I suspect that is the case, because in the second election I conducted there issues had settled quite considerably.
>
> But you are absolutely right. The administrative overhead for not only the commission but also the parties in generating the material was enormous. I am not at all suggesting that that part of the model be followed. It is there as an option, but it clearly involves the commissioner in the hurly-burly of the debate making decisions on the spot and on the run as to whether material is misleading or not. I think Professor Costar in his submission has made his views known on that particular legislation.
>
> There are difficulties. There are practical difficulties with that model, but the impact has been that there have been no prosecutions since the first round, so there has been a modification of behaviour. I suspect that modification of behaviour could have been achieved in other ways, and I have put some of those suggestions to you.

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208 Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

> Mr Scott — I noted in the example you gave during the Frome by-election — and I am not particularly aware of the day-to-day cut and thrust of South Australian politics — there was a large number of complaints. Could it be that where there is a system of complaint that is available, that process itself becomes part of the political process?
>
> Mr Tully — It does. [209]

3.18 The Committee heard further evidence regarding the issues associated with the South Australian legislation. Professor Brian Costar noted:

> I would like to turn to the South Australian case. … [A]t first glance the South Australian jurisdiction seems promising in that it seeks to impugn statements of factual inaccuracy. ….. to take Mr Tully's point, if you had 300 people in this room and put that view about what facts are to them, they would be sceptical. There is a common-sense view of what a fact is. Unfortunately that common-sense view is not supported by the social science literature, and it has not been supported for half a century, really.
>
> Remember that if we proceed down the South Australian path, in my opinion it has two major problems. One is it involves the electoral commissioner in making judgements about electoral material, and I think Mr Tully was being gentle in saying that it created administrative difficulties. It was obviously a mess. I do not see any reason why that would not happen again. It has the potential to draw the electoral commissioner into political debate. As we all know, a major and important positive feature of our electoral system, unlike some others, is that the electoral commissions are totally impartial.
>
> It then raises the fact debate — the notion that here on one side we have these very solid things called facts and over here we have these other things called opinions, attitudes, predictions, values and whatever, and they are easily separable. I suggest that they are not, and if this became justiciable then I think some of the social science literature might be exhumed and all sorts of arguments put forward about 'What is a fact?', 'How can it be factually accurate or inaccurate?' and so on and so forth.
>
> Just to take the upper house case, my view would be that Mr Tully is right that at the moment anybody can say anything about preferences in the upper house and probably not be inaccurate. That is because of the nature of the electoral system in the upper house, the issue of cascading preferences and so on, which I am sure you do not want to be bored with. But that is the truth. Preferences can elect candidates who a voter does not want elected, despite the fact that they marked their ballot paper in such a way. However, my view of it is that that would still be permissible under the South Australian regime, because it could not be disproved. You cannot know because of the multiple throwings, as they call them, of recounts and counts and whatever. I think the last person in one region got elected on the 172nd count. Who knows where preferences are flying in all that? You could reasonably defend a pre-election statement that a vote for the DLP was a vote for the Communist Party. I do not think you can disprove that in a court.[210]

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209 Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, pp.8-9.

210 Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, pp.2-3.

3.19 Mark Polden, an inquiry participant and former John Fairfax Holdings Limited in-house counsel, also provided commentary on the application and effect of the South Australian legislation:

> The Victorian Electoral Commission neatly summarises the current position ... noting that in most of Australia the restricted scope of the misleading advertising provisions allow for robust debate that can lead to dissemination of statements that are misleading, while in South Australia, the effect of the broadly worded section 113 of the *Electoral Act* ... proscribes publication of any electoral advertisement which contains purported statements of fact which are misleading.
>
> That is an offence subject to a reverse offence defence if the defendant establishes a lack of involvement in determining the content of the advertisement and lack of constructive knowledge of its inaccuracy. The VEC has noted that in South Australia, the problem would appear to be that that broader section risks embroiling the electoral commissioner in what are essentially political battles.[211]

3.20 The Committee also sourced the Electoral Commission SA's views about the administrative implications of enforcing section 113. In a report on the Frome District by-election which was tabled in the South Australian Parliament on 14 July 2009, the South Australian Electoral Commissioner stated her preference for the relevant legislation to be repealed:

> The Electoral Commissioner is of the strong opinion that if the onerous burden of determining whether electoral material was misleading to a material extent was removed from legislation, the office would be in a better position to monitor the content of electoral material based on accuracy alone while maintaining the integrity of electoral comments. It would also afford the Commissioner and her staff the opportunity to focus on administering the provisions of the act in relation to the conduct of elections.[212]

3.21 The South Australian legislation is explored further in Chapter 4 of this report, but the Electoral Commissioner's comments are significant given the potential for change to the electoral legislation of South Australia.

Tasmania

3.22 The *Electoral Act 2004* (Tas) is Tasmania's principal electoral legislation. Section 197 deals with misleading or deceptive electoral matter:

> A person must not -
>
> (a) print, publish or distribute, or permit or authorise the printing, publishing or distribution of, any printed electoral matter that is intended to, is likely to or has the capacity to mislead or deceive an elector in or in relation to the recording of his or her vote; or
>
> (b) publish on the internet, or permit or authorise the publishing on the internet of, any electoral matter that is intended to, is likely to or has the capacity to mislead or deceive an elector in or in relation to the recording of his or her vote; or
>
> (c) broadcast on radio or television, or permit or authorise the broadcasting on radio or television of, any electoral matter that is

211 Mark Polden, *Transcript of evidence*, Melbourne, 18 August 2009, pp.2-3.

212 Electoral Commission SA, *Election report: Frome by-election 17 January 2009*, Electoral Commission SA, Adelaide, 2009, p.22.

> intended to, is likely to or has the capacity to mislead or deceive an elector in or in relation to the recording of his or her vote.
>
> Penalty: Fine not exceeding 200 penalty units or imprisonment for a term not exceeding 6 months, or both.[213]

3.23 Tasmanian legislation, although essentially the same in effect as the rest of Australia, with the exception of South Australia, does have another element to it. Section 196 of the *Electoral Act 2004* (Tas) deals with candidate names not to be used without authority:

> (1) A person must not between the issue of the writ for an election and the close of poll at that election print, publish or distribute any advertisement, "how to vote" card, handbill, pamphlet, poster or notice which contains the name, photograph or a likeness of a candidate or intending candidate at that election without the written consent of the candidate.[214]

3.24 The application of such a law in Victoria may have obviated the use of Les Twentyman's face and name on the pamphlet "A vote for Les Twentyman is a vote for the Liberals." This is evidenced in correspondence to the Committee dated 7 October 2009, from the Tasmanian Electoral Commissioner, Mr Bruce Taylor, who stated:

> Had a pamphlet such as the "A vote for Les Twentyman" been printed, published or distributed in Tasmania during the election period, it appears that it may well have breached section 196 of the Act as it contained the name and photograph of Mr Twentyman, presumably without his consent.[215]

3.25 Mr Taylor further stated that:

> This type of restriction has been in operation at Tasmanian parliamentary elections for many years, with a similar, although slightly less broad provision being contained in the previous *Electoral Act 1985*.[216]

3.26 Mr Taylor advised that the:

> [P]rovision may initially have been introduced at least in part to discourage the use of 'How to Vote cards', which may cause confusion amongst electors due to the use of Robson Rotation of candidates names on ballot papers. The *Local Government Act 1993* (Tas) was recently amended to provide that a similar restriction applies at Tasmanian local government elections.[217]

3.27 Mr Taylor also provided some examples of some recent prosecutions:

> There have been two relatively recent prosecutions of persons under the equivalent section of the former *Electoral Act 1985*.
>
> In 2004 a person was successfully prosecuted for distributing pamphlets which contained the name of a candidate without the written consent of that candidate. One of the arguments the defendant sought to rely upon was that of freedom of

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213 *Electoral Act 2004* (Tas) s.197.

214 *Electoral Act 2004* (Tas) s.196.

215 Bruce Taylor, Tasmanian Electoral Commissioner, Tasmanian Electoral Commission, *Correspondence*, 7 October 2009, p.1.

216 Bruce Taylor, Tasmanian Electoral Commissioner, Tasmanian Electoral Commission, *Correspondence*, 7 October 2009, p.1.

217 Bruce Taylor, Tasmanian Electoral Commissioner, Tasmanian Electoral Commission, *Correspondence*, 7 October 2009, p.1.

communication on matters of government and politics. The magistrate was of the view that while the restriction contained in the Electoral Act does not effectively burden this freedom of communication, the provision is –

> "reasonably appropriate and adapted to serving a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government."

At the 2002 House of Assembly elections, a candidate pleaded guilty to a charge … namely that he had distributed 3000 'how to vote cards' containing the names of four other candidates (from his own party) without having obtained their written consent.

In both cases, while the defendants were found guilty and pleaded guilty respectively, convictions were not recorded on the basis that they undertook not to commit any offence under the Electoral Act for a particular period.[218]

New South Wales

3.28 The *Parliamentary Electorates and Elections Act 1912* (NSW) is New South Wales' principal electoral legislation. Section 151A deals with printing false information:

> (1) Any person who:
>
> (a) prints, publishes or distributes any "how to vote" card, electoral advertisement, notice, handbill, pamphlet or card containing any representation of a ballot paper or any representation apparently intended to represent a ballot paper, and having thereon any directions intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his or her vote,
>
> (b) prints, publishes or distributes any "how to vote" card, electoral advertisement, notice, handbill, pamphlet or card containing any untrue or incorrect statement intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his or her vote, or
>
> (c) prints, publishes or distributes any "how to vote" card, electoral advertisement, notice, handbill, pamphlet or card using:
>
> (i) the name, an abbreviation or acronym of the name or a derivative of the name of a party respectively included in the Register of Parties kept under Part 4A (or a name or abbreviation resembling such a name, abbreviation, acronym or derivative) in a way that is intended or likely to mislead any elector, or
>
> (ii) the word "Independent" and the name or an abbreviation or acronym of the name or a derivative of the name or a party respectively included in that Register in a way that suggests or indicates an affiliation with that party,
>
> shall be liable:

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218 Bruce Taylor, Tasmanian Electoral Commissioner, Tasmanian Electoral Commission, *Correspondence*, 7 October 2009, pp.1-2.

> (d) if the person is a corporation--to a penalty not exceeding 50 penalty units, or
>
> (e) in any other case--to a penalty not exceeding 10 penalty units or to imprisonment for a period not exceeding 6 months, or both.
>
> (2) Subsection (1) shall not prevent the printing, publishing or distributing of any "how to vote" card, not otherwise illegal, which contains instructions [on] how to vote for any particular candidate or candidates, so long as those instructions are not intended or likely to mislead any elector in or in relation to the casting of his or her vote.
>
> (3) Subsection (1) (c) (ii) does not apply in a case where the word "Independent" is included in the name of the party as registered in the Register of Parties.[219]

3.29 The VEC's submission referred the Committee to the New South Wales Electoral Commission's pamphlet *Electoral advertising for the 2008 Local Government elections*. The pamphlet sets out the scope of provision 151(A) of the *Parliamentary Electorates and Elections Act 1912* (NSW):

> The laws regulating electoral advertising are not designed to regulate the content of political messages. They are designed to ensure amongst other things:
>
> 1. That the identities of those responsible for political advertisements are revealed to voters and that those who may have a legitimate interest in responding to such advertisements are able to do so; and
>
> 2. That political advertisers do not mislead or deceive voters in the casting of their vote. 'The casting of their vote' refers to the act of voting itself, not the political judgments motivating a vote.[220]

3.30 A private member's Bill entitled Parliamentary Electorates and Elections Amendment (Truth in Advertising) Bill was introduced by opposition member Donald Page MP (The Nationals) on 28 June 2007 with the intent to create a truth in political advertising provision.[221] The Bill was based on the truth in political advertising measures of the *Electoral Act 1985* (SA) and Senator Andrew Murray of the Commonwealth Parliament's private member's Bill. However, the Bill was defeated in the New South Wales Parliament on 26 June 2008.[222]

Queensland

3.31 The *Electoral Act 1992* (Qld) is Queensland's principal electoral legislation. Section 163 deals with misleading voters:

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219 *Parliamentary Electorates and Elections Act 1912* (NSW) s.151A.

220 New South Wales Electoral Commission, *Electoral advertising for the 2008 local government elections in NSW*, NSW Electoral Commission, Sydney, July 2008, p.2, cited in Victorian Electoral Commission, *Submission*, no.8, p.8.

221 See Item 3: Parliamentary Electorates and Elections Amendment (Truth in Advertising) Bill, *Votes and proceedings*, Legislative Assembly, Sydney, 28 June 2007, p.210.

222 The question was put and the House was divided (Ayes 36/Noes 46). See Item 26: Parliamentary Electorates and Elections Amendment (Truth in Advertising) Bill, *Votes and proceedings*, Legislative Assembly, Sydney, 26 June 2008, p.844. Retrieved from http://www.parliament.nsw.gov.au/prod/la/lapaper.nsf/0/5DD0A86434565055CA257474002EEADB/$File/079-VAP-S.doc on 23 November 2009.

> (1) A person must not, during the election period for an election, print, publish, distribute or broadcast anything that is intended or likely to mislead an elector in relation to the way of voting at the election.
>
> Maximum penalty--40 penalty units.
>
> (2) A person must not for the purpose of affecting the election of a candidate, knowingly publish a false statement of fact regarding the personal character or conduct of the candidate.
>
> Maximum penalty--40 penalty units.
>
> (3) A person must not, during the election period for an election, print, publish, distribute or broadcast by television any representation or purported representation of a ballot paper for use in the election if it is likely to induce an elector to vote other than in accordance with this Act.
>
> Maximum penalty--40 penalty units.
>
> (4) In this section--
>
> publish includes publish on the internet, even if the internet site on which the publication is made is located outside Queensland.[223]

3.32 Queensland's *Electoral Act 1992* (Qld) is similar in effect to that of the rest of Australia in terms of misleading or deceptive political advertising.

3.33 A code of conduct for election candidates is another mechanism which promotes the regulation of misleading or deceptive political advertising. The Queensland Parliament adopted a code of conduct for election candidates on 9 September 2003.[224] The purpose of the Code is:

> (a) To maintain public confidence in the electoral process by promoting conditions conducive to the conduct of free and fair elections; and
>
> (b) To provide general guidance to candidates on what is fair and reasonable conduct in elections, thereby ensuring candidates know what is required of them.
>
> The code applies to all candidates for state elections (independents and candidates endorsed by parties).[225]

3.34 The code of conduct is further discussed in Chapter 4 and a copy of the code can be found at Appendix 4.

3.35 The Queensland Government is currently conducting a review on how Queensland's integrity and accountability system could be improved and strengthened.[226] The review was briefly discussed in Chapter 2. A

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223 *Electoral Act 1992* (Qld) s.163.

224 Draft code of conduct for election candidates, *Hansard*, Legislative Assembly, Brisbane, 9 September 2003, p.3329. Retrieved from http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2003/030909HA.PDF on 23 November 2009.

225 Extract from the Legislative Assembly (Queensland) *Votes and Proceedings* no.128, 9 September 2003, p.1187 cited in Legislative Assembly of Queensland, *Code of ethical standards*, Parliament of Queensland, Brisbane, September 2004, p.65. Retrieved from http://www.parliament.qld.gov.au/view/committees/documents/MEPPC/other/ethicalStandards/Code04.pdf on 20 October 2009.

226 Queensland Government, "Integrity and accountability review", 2009. Retrieved from http://www.premiers.qld.gov.au/community-issues/open-transparent-gov/integrity-and-acountability-review.aspx on 24 November 2009.

submission responding to the Queensland Government's Discussion Paper on *Integrity and Accountability in Queensland* lodged by the Queensland National Liberal Party noted, amongst other things, the omission of truth in political advertising in its review.[227]

Western Australia

3.36 The *Electoral Act 1907* (WA) is Western Australia's principal electoral legislation. Section 191A deals with misleading or deceptive publications:

> (1) A person shall not, during the relevant period in relation to an election, print, publish or distribute, or cause, permit or authorise 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 the elector's vote.
>
> Penalty: $1 000.
>
> (2) A person shall not, during the relevant period in relation to an election, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, an advertisement, handbill, pamphlet or notice that contains a representation or purported representation of a ballot paper for use in that election that is likely to induce an elector to mark his ballot paper otherwise than in accordance with the directions on the ballot paper.
>
> Penalty: $1 000.
>
> (3) In a prosecution of a person for an offence against subsection (1), it is a defence if the person proves that he 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 the elector's vote.
>
> (4) In this section —
>
> publish includes publish by radio or television or by electronic communication;
>
> relevant period, in relation to an election, means the period commencing on the day that notice of issue of the writ for the election is published in the Government Gazette pursuant to section 65 and ending at the latest time on polling day at which an elector in the State could enter a polling booth for the purpose of casting a vote in the election.[228]

3.37 In correspondence with the Committee, the Western Australian Electoral Commission advised that:

> [T]he Western Australian and Victorian legislation deal with these matters (misleading, deceptive and defamatory) statements in a similar fashion.
>
> The concerns of the Victorian Electoral Commissioner, Mr Stephen Tully identified in your terms of reference are also applicable to Western Australia. The Commission, particularly during election campaigns, has to deal with many complaints that relate to misleading, deceptive and defamatory statements and publications.

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227 Liberal National Party, *Submission*, No.140, A response to the Integrity and Accountability in Queensland discussion paper. Retrieved from http://www.premiers.qld.gov.au/community-issues/open-transparent-gov/submissions/submissions-121-140/lnp.aspx on 23 November 2009.

228 *Electoral Act 1907* (WA) s.191A.

> Currently, the Commission is undertaking a major review of its electoral legislation and will consider these issues.[229]

3.38 The Committee noted with interest that the Western Australian Electoral Commission is undertaking a major review of electoral legislation and will consider such issues as those on which the Committee is focussing.

Australian Capital Territory

3.39 The *Electoral Act 1992* (ACT) is the Australian Capital Territory's principal electoral legislation. Section 297 deals with misleading or deceptive electoral matter:

> (1) A person shall not disseminate, or authorise to be disseminated, electoral matter that is likely to mislead or deceive an elector about the casting of a vote.
>
> Maximum penalty: 50 penalty units, imprisonment for 6 months or both.
>
> (2) It is a defence to a prosecution for an offence against subsection (1) if it is established that the defendant did not know, and could not reasonably be expected to have known, that the electoral matter was likely to mislead or deceive an elector about the casting of a vote.[230]

3.40 The *Electoral Act 1992* (ACT) also takes a very similar approach to Victoria in this matter. In the ACT Electoral Commission's report on the ACT Legislative Assembly election 2008, the Commission recommended various matters to the Assembly for legislative consideration. Other than recommending that the offence of defamation of a candidate in the *Electoral Act 1992* (ACT) be repealed, the issue of truth in political advertising was not one of the matters recommended for legislative change.[231]

Northern Territory

3.41 The *Electoral Act* (NT) is the Northern Territory's principal electoral legislation. Section 298 deals with false or misleading statements:

> (1) A person must not, in an electoral paper, make a statement that is false or misleading in a material particular.
>
> Penalty: If the offender is a natural person – 100 penalty units or imprisonment for 6 months.
>
> If the offender is a body corporate – 500 penalty units.
>
> (2) It is a defence to a prosecution for an offence against subsection (1) if it is established the defendant did not know, and could not reasonably be expected to have known, that the relevant statement was false or misleading in a material particular.
>
> (3) It is enough for a complaint against a person for an offence against subsection (1) to state the statement was, without specifying which, "false or misleading" to the person's knowledge.[232]

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229 Western Australian Electoral Commission, *Submission*, no.3, p.1.

230 *Electoral Act 1992* (ACT) s.297.

231 Australian Capital Territory Electoral Commission, *Report on the ACT Legislative Assembly election 2008*, ACT Electoral Commission, Canberra, 2009, p.52.

232 *Electoral Act* (NT) s.287.

3.42 The Committee noted that the Northern Territory *Electoral Act* stated the issue of truth in political advertising differently to that of the other Australian jurisdictions. The Northern Territory's provision is similar to that of South Australia's section 113, given that there is no specific mention in relation to the "casting of the vote" of the elector.

International jurisdictions

3.43 The Committee conducted international investigations in Canada, USA and the UK in August and September 2008 as part of its inquiries into political donations and disclosure and voter participation and informal voting.[233] The Committee also travelled to New Zealand in February 2009 to gather further evidence for the two inquiries.

3.44 The Kororoit District by-election took place in June 2008 and as the Committee did not receive its terms of reference from the Legislative Council to inquire into matters arising from the by-election until April 2009, the Committee did not include consideration of this inquiry whilst overseas.

3.45 Nevertheless the Committee wrote to many of the organisations it visited overseas and is pleased that a number of those organisations responded to the Committee's request for information on matters relating to misleading or deceptive political advertising.

Canada

Electoral law

3.46 The Committee received evidence from Elections Canada, an independent, non-partisan agency that reports directly to Parliament. Elections Canada is responsible for conducting federal elections, by-elections or referendums, administering the political financing provisions of the *Canada Elections Act*, monitoring compliance, enforcing electoral legislation, conducting voter education and information programs, providing support to the independent boundaries commissions, conducting research and testing electronic voting processes for future use during electoral events.[234]

3.47 The *Canada Elections Act 2000* (Canada) is Canada's principal electoral legislation. In correspondence with the Committee, Elections Canada advised that:

> [G]enerally speaking, the *Canada Elections Act 2000* does not purport to control or restrict what may be said during an electoral period. The content of electoral

233 For information about the Committee's international investigations see Electoral Matters Committee, *Report on international investigations into political donations and disclosure and voter participation and informal voting*, Parliament of Victoria, Melbourne, December 2008.

234 Elections Canada, "Our mandate", last updated 24 January 2008. Retrieved from http://www.elections.ca/content.asp?section=eca&document=index&dir=man&lang=e on 24 November 2009.

> advertising is not regulated. The Act is subject to the Canadian Charter of Rights and Freedoms which protects the right to freedom of expression.[235]

3.48 Elections Canada further advised that the exception to the general approach is section 91 of the Act:

> No person shall, with the intention of affecting the results of an election, knowingly make or publish any false statement of fact in relation to the personal character or conduct of a candidate or prospective candidate.[236]

Case law

3.49 Elections Canada provided examples to the Committee about the judicial outcomes of legal cases which tested section 91 of the *Canada Elections Act 2000* (Canada). In the case *The Commissioner of Canada Elections v Shannon Jones*, Ms Jones who was a campaign manager of a liberal candidate at the federal election of 2000 was acquitted of all charges arising out of a prosecution under section 91 of the *Canada Elections Act 2000* (Canada).[237] The Judge, in his ruling said:

> The charge is that no person shall with the intention of affecting the result of an election, knowingly make or publish any false statement of fact in relation to the personal character or conduct of a candidate or perspective candidate. I do not find that any of the references of these brochures, pamphlets or whatever they are described as, amount to a false statement of fact in relation to the personal character of Mr. Goldring or his conduct. They are simply allegations with regard to his attendance in the House of Commons. It is likely that they are inaccurate. It is not established beyond a reasonable doubt that what was said was said knowingly, was made knowingly or was published knowingly. It seems to me that when one decides to become involved in politics and to run for public office; that one had not better be too thin skinned. That if you are going to put yourself forward it seems to me that you should be prepared to accept criticism whether you think that criticism is fair or unfair or otherwise.[238]

3.50 In a case emanating from the 2006 Canadian federal election:

> [A] former activist for the Conservative Party [Alan Clarke] put out a flyer ... suggesting that [the National Democratic Party candidate Sid] Ryan had links to terrorists. [Mr] Ryan filed a complaint with Elections Canada under Section 91 of the *Canada Elections Act*, which prohibits any individual from attempting to influence the

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235 William H Corbett, Commissioner of Canada Elections, Elections Canada, *Correspondence*, 25 August 2009, p.1.

236 Section 91 of the Canada Elections Act was cited in William H Corbett, Commissioner of Canada Elections, Elections Canada, *Correspondence*, 25 August 2009, p.1.

237 Pamphlets were distributed during the campaign alleging that Mr Goldring, the Alliance Candidate, "had the worst attendance record in the House of Commons, only 53 percent. If you only showed up for work 53 percent of the time, you would be fired. Give Mr Goldring his pink slip, vote for Sue Olsen and the Liberal team". The *Commissioner of Canada Elections v Shannon Jones* at 236.

238 Extract from the decision of the Alberta Provincial Court in The *Commissioner of Canada Elections v Shannon Jones* at 238, included in William H Corbett, Commissioner of Canada Elections, Elections Canada, *Correspondence*, 25 August 2009.

> outcome of an election by making allegations about a candidate that are known to be false.[239]

3.51 Mr Ryan did not win the seat and commenced civil proceedings claiming damages for defamation against Mr Clarke. Elections Canada laid criminal charges against Mr Clarke. The judge in this latter case ruled that:

> The *Act* makes it an offence to knowingly make false statements about the personal character or conduct of a candidate for the purpose of affecting a general election. In this regard, it is the person's intent that matters; the Crown need not prove that the impugned conduct did, in fact, affect the general election. It follows that a person is not guilty of violating the *Act* in any of the circumstances; (1) if the statement is true, (2) if the person did not know the statement was false, or (3) if the person knowingly made the false statement for a purpose other than affecting the general election.
>
> [I]t is not surprising that the defendant's actions [wherein he distributed a leaflet that asserted Mr Ryan, the candidate, associated with criminals and terrorists] upset Mr Ryan and attracted the attention of Elections Canada. Nevertheless, whatever else may be said about his statements, I [the judge] find that the Crown has not proven the defendant intended to affect the general election. That being an essential element of the offence, the defendant is found not guilty.[240]

Canadian Code of Advertising Standards

3.52 The *Canadian Code of Advertising Standards* "has been developed to promote the professional practice of advertising" and is largely industry self-regulated. The *Code* sets the criteria for acceptable advertising and "forms the basis upon which advertising is evaluated in response to consumer, trade or special interest group complaints".[241]

3.53 There are a number of definitions of advertising defined in the Code including "advocacy advertising", "government advertising", "political advertising" and "election advertising":

- "Advocacy advertising" is defined as "advertising" which presents information or a point of view bearing on a publicly recognized controversial issue.
- "Government advertising" is defined as "advertising" by any part of local, provincial or federal governments, or concerning policies, practices or programs of such governments, as distinct from "political advertising" and "election advertising."
- "Political advertising" is defined as "advertising" appearing at any time regarding a political figure, a political party, a political or government policy or issue, or an electoral candidate.
- "Election advertising" includes "advertising" about any matter before the electorate for a referendum, "government advertising" and "political

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239 CUPE, "Elections Canada begins trial against former activist for the Conservative Party regarding alleged defamation of Sid Ryan", 1 April 2008. Retrieved from http:cupe.ca/elections/Elections_Canada_beg on 28 January 2010.

240 *Her Majesty the Queen and Alan Clarke* at 3 and 4 included in William H Corbett, Commissioner of Canada Elections, Elections Canada, *Correspondence*, 25 August 2009.

241 Advertising Standards Canada, "Canadian code of advertising standards", 2007. Retrieved from http://www.adstandards.com/end/Standards/canCodeOfStandards.aspx#overview on 28 January 2010.

> advertising," any of which advertising is communicated to the public within a time-frame that starts the day after a vote is called and ends the day after the vote is held. In this definition, a "vote" is deemed to have been called when the applicable writ is issued.[242]

3.54 Exclusions to political and election advertising are stated in the Code, as follows:

> Canadians are entitled to expect that 'political advertising' and 'election advertising' will respect the standards articulated in the *Code*. However it is not intended that the *Code* govern or restrict the free expression of public opinion or ideas through 'political advertising' or 'election advertising', which are excluded from the application of this *Code*.[243]

Conflict of Interest and Ethics Commissioner

3.55 The Office of the Conflict of Interest and Ethics Commissioner was created as part of Canada's *Federal Accountability Act* (Canada). The Commissioner is an Officer of Parliament with the following mandate set out in the *Parliament of Canada Act* (Canada):

- To support the House of Commons in governing the conduct of its Members. Under the direction of the Standing Committee on Procedure and House Affairs, the Commissioner is responsible for administering the Conflict of Interest Code for Members of the House of Commons (the Member's Code).
- To administer the *Conflict of Interest Act* for public office holders. Public office holders are ministers, parliamentary secretaries, and full and part-time ministerial staff and advisors, Governor in Council and ministerial appointees (deputy ministers, heads of agencies and Crown corporations, members of federal boards and tribunals).[244]

3.56 The Commissioner "provides confidential advice to public office holders and Members of Parliament about how to comply with the [*Conflict of Interest*] Act [(Canada)] and the Member's Code respectively. The Commissioner is also mandated to provide confidential advice to the Prime Minister about conflict of interest and ethics issues."[245]

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242 Advertising Standards Canada, "Canadian code of advertising standards", 2007. Retrieved from http://www.adstandards.com/end/Standards/canCodeOfStandards.aspx#definitions on 28 January 2010.

243 Advertising Standards Canada, "Canadian code of advertising standards", 2007. Retrieved from http://www.adstandards.com/end/Standards/canCodeOfStandards.aspx#exclusions on 28 January 2010.

244 Office of the Conflict of Interest and Ethics Commissioner, "About the office", Last updated 31 July 2008. Retrieved from http://ciec-ccie.gc.ca/Default.aspx?pid=8&lang=en on 12 November 2009.

245 Office of the Conflict of Interest and Ethics Commissioner, "About the office", Last updated 31 July 2008. Retrieved from http://ciec-ccie.gc.ca/Default.aspx?pid=8&lang=en on 12 November 2009.

New Zealand

Electoral law

3.57 The New Zealand Parliament's Justice and Electoral Committee in its report on the Electoral Amendment Bill (No. 2) proposed amendments to the Bill arsing out its inquiry into the 1999 NZ General Election as follows:

> It will be a corrupt practice for a candidate knowingly to make a statement containing untruths in the two days before an election, for the purpose of influencing the vote. This will provide an incentive against any candidate attempting to sway voters by spreading false information so late in the election that the media, other candidates or parties are unable to test it in time to respond.[246]

3.58 In 2002, New Zealand's *Electoral Act 1993* (NZ) was amended with the insertion of section 199A which deals with publishing false statements to influence voters. The amendment stated:

> Every person is guilty of a corrupt practice who, with the intention of influencing the vote of any elector, at any time on polling day before the close of the poll, or at any time on any of the 2 days immediately preceding polling day, publishes, distributes, broadcasts, or exhibits, or causes to be published, distributed, broadcast, or exhibited, in or in view of any public place a statement of fact that the person knows is false in a material particular.[247]

3.59 To date there have been no prosecutions under section 199A of New Zealand's *Electoral Act 1993*.

Advertising Standards Authority Codes of Advertising Practice

The New Zealand Advertising Standards Authority (ASA) is a self-regulatory body comprising advertising industry entities. The three main objectives of the authority are:

- To seek to maintain at all times and in all media a proper and generally acceptable standard of advertising and to ensure that advertising is not misleading or deceptive, either by statement or by implication.
- To establish and promote an effective system of voluntary self-regulation in respect to advertising standards.
- To establish and fund an Advertising Standards Complaints Board.

> To these ends the ASA introduces and amends Codes of Practice. These have been developed for specific categories of advertising where they are considered necessary. Where appropriate the Codes have been developed in consultation with industry, consumer groups and government departments.[248]

3.61 The relevant codes in this instance are those dealing with Advocacy Principles and Ethics. An examination of recent complaints to the authority relating to advocacy issues, and in particular complaints on Labour Party

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246 New Zealand Justice and Electoral Committee, 'Electoral Amendment Bill (No. 2)', in New Zealand House of Representatives, *2001 Reports of Select Committees*, New Zealand Government, 2002, p.889.

247 *Electoral Act 1993* (NZ) s.199A.

248 Advertising Standards Authority (NZ), "Advertising Standards Authority Inc.", no date. Retrieved from http://www.asa.co.nz/asainc.php on 23 November 2009.

and National Party advertisements, shows that the vast majority were ruled as having "no grounds to proceed".[249]

3.62 In a recent ruling relating to a political party (08/579), the Chairman ruled that the following provisions of the ASA codes were relevant in considering the complaint:

> Code of Ethics
>
> Rule 2: Truthful Presentation - Advertisements should not contain any statement or visual presentation or create an overall impression which directly or by implication, omission, ambiguity or exaggerated claim is misleading or deceptive, is likely to deceive or mislead the consumer, makes false and misleading representation, abuses the trust of the consumer or exploits his/her lack of experience or knowledge. (Obvious hyperbole, identifiable as such, is not considered to be misleading).
>
> Rule 11: Advocacy Advertising - Expression of opinion in advocacy advertising is an essential and desirable part of the functioning of a democratic society. Therefore such opinions may be robust. However, opinion should be clearly distinguishable from factual information. The identity of an advertiser in matters of public interest or political issue should be clear.[250]

3.63 The ruling, in part, went on to state:

> ... [t]he advertisement, which was for a political party, was by definition an advocacy advertisement, and thereby Rule 11 of the Code of Ethics was applicable. The overriding premise in Rule 11 said: "Expression of opinion in advocacy advertising is an essential and desirable part of the functioning of a democratic society." It further said that "such opinions may be robust".[251]

United States of America

Electoral law

3.64 Any examination of misleading or deceptive political advertising in the USA is somewhat tempered by the provision of the first amendment to the United States constitution which essentially guarantees free speech.

3.65 An article entitled *Deceptive Practices 2.0: Legal and policy responses* noted the three different categories of laws relating to false statements:

> Almost all states have laws that prohibit false statement regarding elections, and these laws generally fall within three categories.

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249 The Advertising Standards Authority (NZ) cited "no grounds to proceed" in the following decisions: 05/312, 05/452, 05/460, 07/001, 07/030, 07/134, 08/404, 08/536, 08/537, 08/570, 08/578, 08/579, 05/220, 05/289, 05/291 and 05/332. See http://www.asa.co.nz/index.php for details.

250 Advertising Standards Authority (NZ), *Chairman's Ruling* (08/579), Complainant: S Clarke, Advertisement: New Zealand Labour Party, 6 November 2008, pp.1-2. Retrieved from http://203.152.114.11/decisions/08/08579.doc on 28 January 2010.

251 Advertising Standards Authority (NZ), *Chairman's Ruling* (08/579), Complainant: S Clarke, Advertisement: New Zealand Labour Party, 6 November 2008, p.2. Retrieved from http://203.152.114.11/decisions/08/08579.doc on 28 January 2010.

> *Laws focused on process:* These laws typically prohibit the dissemination of false information relating to registration qualifications, election day identification requirements, polling place locations, and other procedural matters affecting the vote. For example, the Virginia statute makes it a misdemeanour to "knowingly communicate false election information to a registered voter about the time, date, or place of voting" and "to knowingly communicate false information concerning the voter's precinct, polling place, or a voter registration status." VA CODE ANN. § 24.2-1005.1.
>
> *Laws focused on substance:* These laws typically prohibit the dissemination of false information about candidates or issues, rather than election or vetoing procedures. The Alaska and Wisconsin statutes both prohibit a person from knowingly making a false statement about a candidate that is intended to, or actually does, affect an election. ALASKA STAT. § 15.56.14; WIS. STAT. §12.05.
>
> *Laws applicable to both process and substance:* The strongest state laws relating to false statements are those that are broadly applicable to false statements relating to an election, whether it be the procedural issues involved or the substantive issues relating to the candidate or ballot measures. For example, Louisiana law prohibits the distribution or transmission of an "oral, visual, or written material containing a false statement about a candidate…or proposition," La. Rev. Stat. Ann. §18:1463, as well as false information about any matter of "voting or…registration." *Id.*§18:1461: §18:1461.1. [252]

Incidence of misleading or deceptive publications

3.66 The literature also cites a number of examples of misleading or deceptive publications distributed at elections:

> In the last several election cycles, "deceptive practices" have been perpetrated in order to suppress voting and skew election results. Usually targeted at minorities and in minority neighbourhoods, deceptive practices are the intentional dissemination of false or misleading information about the voting process with the intent to prevent an eligible voter from casting a ballot. … Historically, deceptive practises have taken the form of flyers distributed in a particular neighbourhood: more recently, with the advent of new technology "robocalls" have been employed to spread misinformation. Now, the fear is deceptive practices 2.0: false information dissemination via the Internet, email and other new media.[253]

3.67 Examples of such deceptive behaviour, in particular in the 2004 presidential election, included fliers which read:

- "If you've already voted in any election this year, you can't vote in the presidential election; … If you violate any of the these laws, you can get ten years in prison and your children will get taken away from you." …

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252 Common Cause, The Lawyers Committee for Civil Rights Under Law and the Century Foundation, *Deceptive practices 2.0: Legal and policy responses*, Common Cause, Washington, no date, p.5. Retrieved from http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/DECEPTIVE_PRACTICES_REPORT.PDF on 23 November 2009.

253 Common Cause, The Lawyers Committee for Civil Rights Under Law and the Century Foundation, *Deceptive practices 2.0: Legal and policy responses*, Common Cause, Washington, no date, p.3.

- [F]alsely informed voters that, to cut down on long lines, Republicans would vote on November 2 and Democrats would vote on November 3 – the day after the election. …
- In Ohio, a so-called 'Urgent Advisory' memo on phony Board of Elections letterhead warned voters that if they were registered by the NAACP, America Coming Together, the Kerry campaign, or their local Congressional campaign, they were disqualified and would not be able to vote until the next election.[254]

3.68 More recently, "automated calls, known as robo-calls in the world of political campaigns, have been the weapon of choice":

- Robo-calls reportedly warned voters to bring photo identification to the polls or they would not be allowed to vote.
- Automated telephone calls telling voters their polling places had been changed and giving incorrect polling place information.
- Registered voters receiving phone calls in the days before the election claiming that their registrations were cancelled and that if they tried to vote they would be arrested.
- Robo-calls informing voters that their polling locations had been moved, although none of the locations had changed.[255]

3.69 Other examples have emerged using email and other electronic means, including:

- Sending emails that appear to come from legitimate sources, such as a campaign office, an elections office, a party or a non-profit organisation, but which contain false information about the voting time, place or process, or claim that a poll site has been moved.
- Using spy-ware to collect information on a voter and his or her online behaviour to better target deceptive emails.
- Appropriating website names that are one letter off from the official name – a typo domain or "cousin domain" – that appear to be an official site, and posting phoney information.
- Pharming – hacking into domain name system servers and changing the Internet addresses to redirect users from an official to a bogus site with bad information on it.[256]

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254 Common Cause, The Lawyers Committee for Civil Rights Under Law and the Century Foundation, *Deceptive practices 2.0: Legal and policy responses*, Common Cause, Washington, no date, p.3.

255 Common Cause, The Lawyers Committee for Civil Rights Under Law and the Century Foundation, *Deceptive practices 2.0: Legal and policy responses*, Common Cause, Washington, no date, p.3.

256 Common Cause, The Lawyers Committee for Civil Rights Under Law and the Century Foundation, *Deceptive practices 2.0: Legal and policy responses*, Common Cause, Washington, no date, p.3.

3.70 These tactics have already been used to spread false information about candidates in elections. At the 2008 USA Presidential Elections Barack Obama was the most prominent target of these attacks.[257]

3.71 Recent examples of deceptive campaign practices in the USA are contained in the Electronic Privacy Information Center's (EPIC) report entitled *E-Deceptive Campaign Practices Report: Internet Technology & Democracy 2.0*. Such examples include false statements about:

- Polling times;
- The date of the election;
- Voter identification rules;
- Or the eligibility requirements for voters who wish to cast a ballot.[258]

3.72 The report stated that:

> Historically, disinformation and misinformation efforts intended to suppress voter participation have been systemic attempts to reduce voter participation among low-income, minority, young, disabled, and elderly voters. Deceptive techniques deployed in the 2004 and 2006 general elections relied upon telephone calls, ballot challenges, direct mail, and canvass literature drops. Some voters were told they would face arrest if they attempted to vote and had outstanding parking tickets or were behind on child support payments.
>
> EPIC identified electronic deceptive campaign tactics as a high priority in 2008 [in the Presidential Election]. The incidence of electronic deceptive campaign practices in 2008 included:
>
> - A series of bogus e-mails sent to Florida residents on the state's Voter Registration Verification Law, which erroneously informed voters that a no match against state databases would result in disqualification in voting.
> - Automated calls to North Carolina female voters misinforming them regarding their voter registration status; and
> - Rumours and e-mails to Prince George's County, Maryland voters that claimed that voter registration rules bar participation of those with home foreclosures.[259]

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257 Common Cause, The Lawyers Committee for Civil Rights Under Law and the Century Foundation, *Deceptive practices 2.0: Legal and policy responses*, Common Cause, Washington, no date, p.3.

258 Electronic Privacy Information Center and the Century Foundation, *E-deceptive campaign practices report: Internet technology & democracy 2.0*, Electronic Privacy Information Center and the Century Foundation, 20 October 2008, p.4. Retrieved from http://votingintegrity.org/pdf/edeceptive_report.pdf on 23 November 2009.

259 Electronic Privacy Information Center and the Century Foundation, *E-deceptive campaign practices report: Internet technology & democracy 2.0*, Electronic Privacy Information Center and the Century Foundation, 20 October 2008, pp.4-5. Retrieved from http://votingintegrity.org/pdf/edeceptive_report.pdf on 23 November 2009.

United Kingdom

Electoral law

3.73 Principal electoral legislation including the *Electoral Administration Act 2006* (UK) and the *Political Parties, Elections and Referendums Act 2000* (UK) do not contain provisions regarding misleading or deceptive political advertising.

3.74 Section 106 of the *Representation of the People Act 1983* (UK) provides for the offence of false statements as to candidates and attracts a maximum fine of £5,000 (~AUD9,500).[260] Section 106 stipulates that:

> (1) A person who, or any director of any body or association corporate which—
>
> (a) before or during an election,
>
> (b) for the purpose of affecting the return of any candidate at the election,
>
> makes or publishes any false statement of fact in relation to the candidate's personal character or conduct shall be guilty of an illegal practice, unless he can show that he had reasonable grounds for believing, and did believe, that statement to be true.
>
> (2) A candidate shall not be liable nor shall his election be avoided for any illegal practice under subsection (1) above committed by his agent other than his election agent unless—
>
> (a) it can be shown that the candidate or his election agent has authorised or consented to the committing of the illegal practice by the other agent or has paid for the circulation of the false statement constituting the illegal practice; or
>
> (b) an election court find and report that the election of the candidate was procured or materially assisted in consequence of the making or publishing of such false statements.
>
> (3) A person making or publishing any false statement of fact as mentioned above may be restrained by interim or perpetual injunction by the High Court or the county court from any repetition of that false statement or of a false statement of a similar character in relation to the candidate and, for the purpose of granting an interim injunction, prima facie proof of the falsity of the statement shall be sufficient.
>
> (5) Any person who, before or during an election, knowingly publishes a false statement of a candidate's withdrawal at the election for the purpose of promoting or procuring the election of another candidate shall be guilty of an illegal practice.
>
> (6) A candidate shall not be liable, nor shall his election be avoided, for any illegal practice under subsection (5) above committed by his agent other than his election agent.
>
> (7) In the application of this section to an election where a candidate is not required to have an election agent, references to an election agent shall be omitted and the reference in subsection (6) above to an illegal practice

[260] *Representation of the People Act 1983* (UK) s.106.

> committed by an agent of the candidate shall be taken as a reference to an illegal practice committed without the candidate's knowledge and consent.[261]

3.75 It is the aggrieved candidate's responsibility to investigate cases of alleged false statements of fact and take such action that the candidate considers necessary including recourse to the courts. The returning officer's responsibility is to refer any alleged voting offences to the police for investigation and consideration of any prosecution.[262]

3.76 A person making or publishing any false statement of fact may be restrained by an interim or perpetual injunction by the High Court or the County Court from any repetition of that false statement or of a false statement of a similar character in relation to the candidate. Otherwise it is up to the individual candidate, or the political party he or she is representing, to publish rebuttal material to "set the record straight" if statements are made with which a candidate disagrees.[263]

3.77 Political parties are banned from paying for political advertising in the broadcast media i.e. television and radio. Party political broadcasts are the only opportunity for political parties to engage the electorate.[264] An emerging issue is online video advertising which side-steps the ban on paid for broadcast political advertising which is currently unregulated.[265]

Electoral Commission (UK) report: Political advertising

3.78 In 2004 the Electoral Commission (UK) released a report entitled *Political advertising*. An examination of the Commission's report reveals that many of the matters currently under consideration by this Committee and previously by other parliamentary committees around Australia, as detailed in Chapter 2 of this report, resonated with the Electoral Commission (UK) in determining their findings and recommendations.

3.79 The press release which publicised the release of the Electoral Commission's report summarised the recent history of the regulation of political advertising in the UK:

> Political advertising aimed at influencing voters in elections or referendums has been exempt from the British Code of Advertising, Sales Promotion and Direct Marketing since October 1999. Although the [United Kingdom's] Committee on Standards in

261 *Representation of the People Act 1983* (UK) s.106.

262 Portsmouth City Council, "Local and Parliamentary Elections: Statements concerning Candidates and Political Parties", 27 February 2006. Retrieved from www.portsmouth.gov.uk/media/sc20051100r_item5.pdf on 26 November 2009.

263 Portsmouth City Council, "Local and Parliamentary Elections: Statements concerning Candidates and Political Parties", 27 February 2006. Retrieved from www.portsmouth.gov.uk/media/sc20051100r_item5.pdf on 26 November 2009.

264 A party political broadcast (also known as party election broadcast or party conference broadcast) are allocated broadcast slots across the traditional terrestrial television channels whereby a political party will be given approximatly five minutes to broadcast.

265 Jacob Rowbottom, "Political advertising and the broadcast media", *Cambridge Law Journal*, vol.67, no.3, November 2008, p.453.

> Public Life recommended in 1998 that political parties adopt a code of their own, no progress towards such a code has been made.[266]

3.80 The report itself noted the debates for and against the regulation of political advertising:

> While some [respondents] argued it would be in the public interest for political advertising to be subject to some form of self-regulation, others stated that a code would constitute an infringement on freedom of political expression and result in the curtailment of genuine political debate.[267]

3.81 The main issues which were considered by the Electoral Commission during its inquiry included:

- [I]t was freedom of expression that provoked by far the most discussion among respondents to our paper. The lack of legislative or self-regularity control of the content of political advertising in other comparable countries, even though self-regulation of other advertising is common, is a clear reflection of the high importance attached to protecting free speech.[268]
- All advertising is subject to some specific statutory controls such as those on libel, incitement and copyright. We [the Electoral Commission] do not consider that any further statutory regulation of the content of political advertising could be justified given the importance of free political expression.[269]
- [T]here is a much higher degree of subjectivity involved in political advertising than other advertising, with appeals very often based on opinion, conjecture and values. ... Clauses such as those relating to truthfulness, honesty, comparisons and denigration are problematic, and the obligation in respect of substantiation of claims has never applied to political advertising.[270]
- A system considering complaints is unlikely to deliver sufficiently prompt adjudications to be of any value.[271]
- A requirement that advertising copy go through some form of pre-clearance is impractical.[272]

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266 Electoral Commission (UK), "The Electoral Commission publishes report on political advertising", 28 June 2004. Retrieved from http://www.electoralcommission.org.uk/news-and-media/news-releases/electoral-commission-media-centre/news-releases-reviews-and-research/the-electoral-commission-publishes-report-on-political-advertising on 24 November 2009.

267 Electoral Commission (UK), *Political advertising: Report and recommendations*, Electoral Commission, London, June 2004, p.11.

268 Electoral Commission (UK), *Political advertising: Report and recommendations*, Electoral Commission, London, June 2004, p.11.

269 Electoral Commission (UK), *Political advertising: Report and recommendations*, Electoral Commission, London, June 2004, p.12.

270 Electoral Commission (UK), *Political advertising: Report and recommendations*, Electoral Commission, London, June 2004, p.13.

271 Electoral Commission (UK), "The Electoral Commission publishes report on political advertising", 28 June 2004. Retrieved from http://www.electoralcommission.org.uk/news-and-media/news-releases/electoral-commission-media-centre/news-releases-reviews-and-research/the-electoral-commission-publishes-report-on-political-advertising on 24 November 2009.

- A sufficiently independent adjudicatory body would need to be appointed with significant resources to ensure enforcement of a code.[273]
- The intense scrutiny of election campaigns by the media, and especially the opportunity for consumers [sic] to deliver their own verdict on polling day, already provide incentive for political parties and campaign groups to steer clear of advertising that may be perceived by some to mislead or offend. Political advertisers overstepping the mark would run the risk of punishment through media criticism, through rival parties capitalising on any 'mistake' and ultimately rejection at the polls.[274]
- The [Electoral] Commission is concerned that a regulatory system for political advertising might be more susceptible to spurious claims and allegations than the system for commercial advertising.[275]

3.82 The report cited the views of political parties. For example, the Conservative Party was quoted in the report as follows:

- If electors are unhappy with the tone of political advertising they are well placed to voice that disapproval and withdraw their support for any political party engaging in such behaviour. In this context, self regulation already exists;[276]
- We believe that the likely abuse of the regulation of political advertising would create a constant stream of negative publicity for the whole political process. Such controversy would generate more cynicism among the public than would exist without additional regulation.[277]

3.83 In terms of political agreement to the implementation of any codes or legislative provisions relating to political advertising, the report stated that in:

> [R]esponse to our [the Electoral Commission's] consultation from political parties, it is clear that there is not this minimum level of support. Although the Liberal Democrats and Plaid Cymru have indicated that they would welcome a code in principle, there has been silence or resistance from other major parties. In particular the Labour Party, despite promptings, did not respond to our consultation and the Conservative Party has stated that it would not be willing to commit to adhering to a code. In

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272 Electoral Commission (UK), "The Electoral Commission publishes report on political advertising", 28 June 2004. Retrieved from http://www.electoralcommission.org.uk/news-and-media/news-releases/electoral-commission-media-centre/news-releases-reviews-and-research/the-electoral-commission-publishes-report-on-political-advertising on 24 November 2009.

273 Electoral Commission (UK), "The Electoral Commission publishes report on political advertising", 28 June 2004. Retrieved from http://www.electoralcommission.org.uk/news-and-media/news-releases/electoral-commission-media-centre/news-releases-reviews-and-research/the-electoral-commission-publishes-report-on-political-advertising on 24 November 2009.

274 Electoral Commission (UK), *Political advertising: Report and recommendations*, Electoral Commission, London, June 2004, p.16.

275 Electoral Commission (UK), *Political advertising: Report and recommendations*, Electoral Commission, London, June 2004, p.22.

276 Electoral Commission (UK), *Political advertising: Report and recommendations*, Electoral Commission, London, June 2004, p.16.

277 Electoral Commission (UK), *Political advertising: Report and recommendations*, Electoral Commission, London, June 2004, p.23.

> addition, the SNP [Scottish National Party] and most other parties that might be expected to undertake significant advertising campaigns failed to respond.[278]

3.84 As a consequence the UK Electoral Commissioner, Glyn Mathias, concluded that:

> For a code of practice to succeed, whether statutory or voluntary, it will require the support and co-operation of political advertisers as well as a robust and workable system to operate under. We have found no compelling evidence that these aims are either practical or achievable and so are recommending that no code be introduced at present.[279]

3.85 In its report the Electoral Commission (UK) "recognised that there are competing arguments with respect to the principle of a code. However there is much greater consensus on the extent of the practical difficulties that would need to be addressed in order for any code on political advertising to be workable."[280] The Electoral Commission (UK) found these difficulties would be "formidable".[281]

3.86 The Commission "acknowledged the evident desire among many political advertisers … to uphold high standards of advertising and to foster public confidence in the political process …and [the Electoral Commission (UK)] urge political advertisers to be guided by the principle … 'that all marketing communications should be prepared with a sense of responsibility to consumers and society'".[282]

Incidence of misleading or deceptive publications

3.87 The Electoral Commission (UK) has also published a document entitled *Guidance on preventing and detecting electoral malpractice*. Its purpose "is designed to alert police forces to issues that may arise in the run up to polling day, polling day itself and at related events" and also to manage instances where such malpractice may occur.[283]

3.88 The report noted that "occurrences of electoral malpractice are relatively rare"; however as could be expected "such occurrences often attract

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278 Electoral Commission (UK), *Political advertising: Report and recommendations*, Electoral Commission, London, June 2004, pp.26-27.

279 Electoral Commission (UK), "The Electoral Commission publishes report on political advertising", 28 June 2004. Retrieved from http://www.electoralcommission.org.uk/news-and-media/news-releases/electoral-commission-media-centre/news-releases-reviews-and-research/the-electoral-commission-publishes-report-on-political-advertising on 24 November 2009.

280 Electoral Commission (UK), *Political advertising: Report and recommendations*, Electoral Commission, London, June 2004, p.30.

281 Electoral Commission (UK), *Political advertising: Report and recommendations*, Electoral Commission, London, June 2004, p.30.

282 Electoral Commission (UK), *Political advertising: Report and recommendations*, Electoral Commission, London, June 2004, p.31.

283 Electoral Commission (UK), *Guidance on preventing and detecting electoral malpractice*, Electoral Commission, London, March 2009 (updated May 2009), p.1.

considerable media attention".[284] The report also states that the "risk of electoral malpractice may be greater where:

- [T]here is greater opportunity to influence the outcome of an election; for example fewer votes are needed to win a seat at a local government election compared to a UK Parliamentary election;
- [T]here is a community with limited language or literacy skills who may be more vulnerable to deception or less likely to realise their vote has been stolen.[285]

3.89 The Electoral Commission (UK) report on *Allegations of electoral malpractice at the May 2008 elections in England and Wales* (April 2009) stated that the "2008 elections were the first time there had been systemic monitoring of allegations of electoral malpractice reported to police during an election period". The report examined the extent and nature of allegations recorded by police forces across England and Wales relating to the 2008 elections.[286]

3.90 The report noted that "in 2008 there were no allegations of electoral malpractice reported on the scale of the elections in 2004 and 2005" and 81 percent of cases examined in the 2008 elections required no further action by the police.[287]

3.91 At the May 2008 elections there were four recorded cases of an offence relating to false statements as to candidates. However in three of those cases no further action was taken and in the fourth case the matter is unresolved or awaiting Crown Prosecution Service advice.[288]

284 Electoral Commission (UK), *Guidance on preventing and detecting electoral malpractice*, Electoral Commission, London, March 2009 (updated May 2009), p.1.

285 Electoral Commission (UK), *Guidance on preventing and detecting electoral malpractice*, Electoral Commission, London, March 2009 (updated May 2009), p.2.

286 Electoral Commission (UK), *Allegations of electoral malpractice at the May 2008 elections in England and Wales*, Electoral Commission, London, April 2009, p.1.

287 Electoral Commission (UK), *Allegations of electoral malpractice at the May 2008 elections in England and Wales*, Electoral Commission, London, April 2009, p.2.

288 Electoral Commission (UK), *Allegations of electoral malpractice at the May 2008 elections in England and Wales*, Electoral Commission, London, April 2009, p.11.

Chapter

4

Chapter 4: Proposed measures to regulate misleading or deceptive political advertising

4.1 As discussed in Chapter 1, this inquiry emanated from a complaint about a pamphlet authorised by the then State Secretary of the Australian Labor Party (ALP – Victorian Branch), Stephen Newnham, for the Kororoit District by-election. As a consequence, the Victorian Electoral Commissioner, in his report to Parliament on the Kororoit District by-election, suggested the Parliament may wish to consider whether the misleading provisions of the Act require amendment.[289]

4.2 This chapter provides a summary of the proposed measures to regulate misleading or deceptive political advertising at Victorian state parliamentary elections. The majority of the measures were put forward by inquiry participants either at the public hearing or via submissions. The other measures were considered by the Committee after investigating the effectiveness of electoral law in other jurisdictions.

4.3 This chapter begins with a discussion of inquiry participants' views on whether to support or oppose amending the *Electoral Act 2002* (Vic).

Support for amending the *Electoral Act 2002* (Vic)

Inquiry participants' views

4.4 Some inquiry participants clearly stated a wish to amend the *Electoral Act 2002* (Vic) to make better provision for the regulation of misleading or deceptive political advertising.[290] Extracts from transcripts of evidence and submissions indicated that inquiry participants desired change:

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289 Victorian Electoral Commission, *Report on the Kororoit District By-election held on 28 June 2008*, Victorian Electoral Commission, Melbourne, January 2009, p.13.

290 Nance Budge, *Submission*, no.1; Associate Professor Ken Coghill, *Submission*, no.2; Hall & Thompson on behalf of Les Twentyman, *Submission*, no.4; Liberty Victoria, Victorian Council for Civil Liberties, *Submission*, no.7; William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9; Julian Burnside AO QC, *Submission*, no.12; Phil Cleary, *Transcript of evidence*, Melbourne, 18 August 2009.

> I feel very strongly that the *Electoral Act 2002* should be amended to safeguard against the corruption of any advertising in by-elections for any state, local government or federal elections.[291]
>
> The electorate, the Parliament and the Victorian Electoral Commission … should devise legislation to outlaw these kinds of practices.[292]
>
> It is submitted that it is only appropriate that such an amendment be made to the *Electoral Act*.[293]

4.5 There were a number of reasons inquiry participants supported amending the *Electoral Act 2002* (Vic). Some inquiry participants felt that attributes such as truth, honesty and integrity were lacking in the election campaigns of some political contestants and in the political landscape in general.[294] Other inquiry participants put forward the following reasons to amend the *Electoral Act 2002* (Vic):

- It is not possible to modify the Victorian Law vis a vis defamation;[295]
- The timing of the publication and distribution of electoral matter, in particular during the final days of the election campaign, suggests that the aggrieved candidate has no meaningful opportunity to remedy the matter;[296]
- There is no remedy to overturn the election result;[297]
- The publication and distribution of misleading or deceptive electoral matter is increasing;[298]
- The Crichton-Browne judgment may have contributed to a feeling that "anything goes" in election campaigns;[299] and
- There is an undesirable trend for candidates to take advantage or build on community misunderstandings of preferential voting.[300]

4.6 Some inquiry participants were concerned that the pamphlet authorised by the then State Secretary of the ALP (Victorian Branch) which stated that "A vote for Les Twentyman is a vote for the Liberals" was a particularly problematic type of misleading or deceptive political advertising. At the public hearing, Steve Tully, the Victorian Electoral Commissioner noted:

> The VEC's major issue at this stage relates to preferences and statements that a vote for one candidate is in fact a vote for someone else. Again, personal experience

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291 Nance Budge, *Submission*, no.1, p.1.
292 Phil Cleary, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.
293 Hall & Thompson on behalf of Les Twentyman, *Submission*, no.4, p.1.
294 Phil Cleary, *Transcript of evidence*, Melbourne, 18 August 2009; Nance Budge, *Submission*, no.1.
295 William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.5.
296 Michael Pearce SC, President, Liberty Victoria, Victorian Council for Civil Liberties, *Transcript of evidence*, Melbourne, 18 August 2009, pp.2-3.
297 William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.6.
298 William Robert Jacomb (Jennifer Belinda Jacomb), *Transcript of evidence*, Melbourne, 18 August 2009, p.4.
299 Victorian Electoral Commission, *Submission*, no.8, p.8.
300 Victorian Electoral Commission, *Report on the Kororoit District By-election held on 28 June 2008*, Victorian Electoral Commission, Melbourne, January 2009, p.13.

> reveals that many people interpret such statements very literally and that some people also believe that an informal vote, for whatever reason, ends up with whoever the government of the day is.[301]

4.7 Professor Brian Costar, Co-ordinator of the Democratic Audit of Australia agreed with the Victorian Electoral Commissioner at the public hearing. He noted that the majority of electors would not have a sound understanding of preferential voting.[302]

4.8 The Victorian Electoral Commissioner was also concerned that preferences and statements that a vote for one candidate may be a vote for someone else are problematic in relation to the Legislative Council elections:

> I am here to look into the future and to say that in upper house elections you can almost say whatever you want — that a vote for Labor is a vote for whoever, or a vote for Liberal is a vote for anyone you want it to be, and it could be practically true. What I think is enormously important and what the VEC strives to do with every elector is to say that it is the way you cast your vote and you make your preferences that makes your vote count. That is the critical issue in a preferential system. If you move to optional preferential, it may not be so important. But when every vote will end up possibly with a major party it is incredibly important that people understand their preferences.[303]

4.9 Inquiry participants believed that it was possible to amend the *Electoral Act 2002* (Vic) to make better provision for the regulation of misleading or deceptive political advertising. The measures proposed by inquiry participants are discussed in the sections on non-legislative and legislative measures. One inquiry participant, Ann Birrell, Co-convenor, Port Phillip Greens, identified that there may be a number of measures which the Committee may wish to consider:

> I tend to think that there is no silver bullet here. You are going to have to do a bit of this and a bit of that, and there may be a role for tightening the legislation and a greater role for more test cases to perhaps indicate to the community where the lines are.[304]

4.10 Another inquiry participant, Phil Cleary, indicated that this inquiry may not resolve the issues but is a discussion worth having:

> I am the first to admit that this is not an easy question to resolve. I would not be looking at the Parliament or looking at this committee and condemning the committee for not being able to resolve the issue satisfactorily, because it is very complex in that we are going to talk about ideas and matters of opinion, and in a robust political system we do want that. But I think this might be no more than a starting point for a proper discussion about political life which will be valuable. And if the issue is not

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301 Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.

302 Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

303 Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, p.7.

304 Ann Birrell, Co-convenor, Port Phillip Greens, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

> resolved by this committee, maybe at another time this will have laid the ground work for further discussion.[305]

Discussion

4.11 The Committee noted that six interested individuals, one political party and one organisation stated it was desirable to amend the *Electoral Act 2002* (Vic) to make better provision for the regulation of misleading or deceptive political advertising.[306]

4.12 Similar views to those expressed by these inquiry participants have been identified by past parliamentary committees. For example, the Queensland Parliament's Legal, Constitutional and Administrative Review Committee (LCARC) in its inquiry into truth in political advertising tabled in December 1996 noted that:

> The Committee firmly believes that Parliament must set standards. Legislators cannot shirk their responsibility by claiming the issue to be "too hard to administer". There are numerous offences in law which are difficult to detect, prosecute and punish. The criminal law is littered with these sort of offences. The offences of perjury and conspiracy are easily identifiable examples. However, no-one would reasonably suggest that these offences be removed from the *Criminal Code* on the basis that they are difficult to enforce.
>
> Parliament sets standards for the commercial community. Parliament demands that the commercial community not mislead consumers. How then can Parliament not demand that candidates seeking election to Parliament not mislead electors?
>
> How can the community have faith in their elected representatives if those same representatives fail to at least set the standard that they will not lie or misrepresent facts during an election campaign?[307]

4.13 LCARC concluded and recommended the following:

> The Committee is of the opinion that it is possible to legislate in respect of truth in political advertising.
>
> The Committee is of the opinion that matters concerning political advertising are not too vague or controversial to be the subject of legislation.
>
> The Committee believes that there is insufficient difference between political advertising and commercial advertising so as to prevent legislating in respect of the former.
>
> The Committee recommends that truth in political advertising legislation be introduced in Queensland.[308]

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305 Phil Cleary, *Transcript of evidence*, Melbourne, 18 August 2009, pp.4-5.

306 The category of 'interested individuals' include: Nance Budge, *Submission*, no.1; Associate Professor Ken Coghill, *Submission*, no.2; Hall & Thompson on behalf of Les Twentyman, *Submission*, no.4; William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9; Julian Burnside AO QC, *Submission*, no.12; Phil Cleary, *Transcript of evidence*, Melbourne, 18 August 2009. The category of 'political party' includes: Port Phillip Greens, *Submission*, no.5. The category of 'organisations' include: Liberty Victoria, Victorian Council for Civil Liberties, *Submission*, no.7.

307 Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, p.28.

4.14 However as noted in Chapter 2, truth in political advertising legislation introduced into the Queensland Parliament was defeated on 12 April 2000.[309]

4.15 The Commonwealth Parliament's Joint Select Committee on Electoral Reform's (JSCER) *Second report*, in which it agreed that it was not possible to achieve fairness in political advertising by legislation, also included a dissenting report by Senator Michael Macklin. The following extract from the dissenting report noted a similar view to inquiry participants on the governing of political advertising:

> There is a solid ground for there to be some controls on political advertising. Information is the lifeblood of a democracy and a citizen must rely to a large extent on the media for such information. A large amount of this information available during election periods comes from political parties and candidates by way of political advertisements. It is not a private matter, therefore, but rather a matter of community concern that a voter may be misled into forming a political judgment by an advertisement which is untrue and misleading or deceptive.[310]

Opposition to amending the *Electoral Act 2002* (Vic)

Inquiry participants' views

4.16 Several inquiry participants, for different reasons, did not support amending the provisions of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising.[311] The reasons included: the law being clear, unintended consequences, the nature of election campaigns and definitional difficulties. These are discussed over the following pages.

Law is clear

4.17 Stephen Newnham, the then State Secretary of the ALP (Victorian Branch) opposed amending the *Electoral Act 2002* (Vic) because he believed the law was already clear and there was no need for change:

> The law as enunciated by the High Court is very clear, and there is no need for change. As has been indicated in the submissions by the commissioner earlier today, the law as it currently reads is very clear about the fact that any misleading provisions only relate to the casting of a vote. ... In our view section 329 of the

308 Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, pp.28-29.

309 Legislative Assembly, *Bills Update 2000*, Parliament of Queensland, Brisbane, 24 November 2000, p.1. Retrieved from http://www.parliament.qld.gov.au/view/historical/tabledPapers.asp?SubArea=bills on 30 October 2009.

310 Senator Michael J. Macklin, "Dissenting report", p.45 included in Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984.

311 Democratic Audit of Australia, *Submission*, no.6; Stephen Newnham, State Secretary, Australian Labor Party (Victorian Branch), *Transcript of evidence*, Melbourne, 18 August 2009; Professor Jock Given, *Transcript of evidence*, Melbourne, 18 August 2009.

> *Commonwealth Electoral Act* reflects section 84 of the Victorian *Electoral Act 2002*, and there is therefore no need to change law. That is our position in summary.[312]

Unintended consequences

4.18 Two inquiry participants opposed amending the *Electoral Act 2002* (Vic) because of the unintended consequences of widening the provisions. Professor Brian Costar and Professor Jock Given were both wary about expanded measures proposed by inquiry participants:

> If it is going to be achieved by way of some form of sanction — probably a legal sanction — how can that be achieved without creating unintended consequences that are more negative, more disruptive and more problematic than the problem that we set out to solve?[313]

> [M]y broad position is I am very wary of enhanced, expanded legislative obligations which would make it an offence of some kind for members of Parliament or candidates for office to engage in conduct that might mislead or be regarded as misleading or deceptive. ... I think we need to allow that space to stay as open as possible, because the consequences of trying to step in are even more troubling.[314]

4.19 Furthermore Emeritus Professor Colin Hughes noted that amending the *Electoral Act 2002* (Vic) to create an offence would be unworkable. His view was grounded in the decision by the Commonwealth Parliament's JSCER's *Second report* in 1984:

> I have no doubt whatsoever that the decision taken by the JSCER in 1984 to repeal such a step was correct. It would have been unworkable, and could only bring other restraining provisions of the Act into disrepute by association.[315]

4.20 This argument was also noted by the Democratic Audit of Australia in its submission to the Committee.[316]

Nature of election campaigns

4.21 Further, Professor Brian Costar and Professor Jock Given believed that the Australian electorate understands the nature of election campaigns and a statement such as "A vote for Les Twentyman is a vote for the Liberals" is part of political rhetoric:

> [I]t is often said the Australian electorate is very cynical ... about politics and politicians. That cynicism might be more positive than negative — that is, that people know this is a tough contest. You do not go along to a Collingwood-Carlton match expecting to attend the ballet. People know what is going on. It is an election campaign.[317]

> It is the kind of stuff that we understand socially and culturally; people say that kind of stuff all the time. We deal with it; we can handle that. It seems to me when I hear a

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312 Stephen Newnham, State Secretary, Australian Labor Party (Victorian Branch), *Transcript of evidence*, Melbourne, 18 August 2009, p.2.

313 Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, p.2.

314 Professor Jock Given, *Transcript of evidence*, Melbourne, 18 August 2009, pp.2, 5.

315 Emeritus Professor Colin Hughes, *Submission*, no.13, p.1.

316 Democratic Audit of Australia, *Submission*, no.6, pp.4-5.

317 Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

> politician say, 'A vote for this party is really a vote for that party', or 'A vote for this party led by person X is actually a vote for leader Y because we know they have got a deal to hand over power', that those are kinds of things we deal with socially and culturally.[318]

Definitional difficulties

4.22 Other inquiry participants opposed amending the *Electoral Act 2002* (Vic) because of the difficulty involved with defining, differentiating and interpreting what is a fact, opinion, comment and in turn, what is true and false. This conundrum was noted by the Democratic Audit of Australia:

> It then raises the fact debate — the notion that here on one side we have these very solid things called facts and over here we have these other things called opinions, attitudes, predictions, values and whatever, and they are easily separable. I suggest that they are not, and if this became justiciable then I think some of the social science literature might be exhumed and all sorts of arguments put forward about 'What is a fact?', 'How can it be factually accurate or inaccurate?' and so on and so forth.[319]

4.23 Mark Polden, an inquiry participant and former John Fairfax Holdings Limited in-house counsel agreed with the Democratic Audit of Australia that the "fact-comment distinction is an extraordinarily slippery one".[320] This was also noted by Associate Professor Ken Coghill and Michael O'Brien MP, Deputy Chair of the Committee and member for Malvern in dialogue at the public hearing:

> Mr O'Brien — Governments and oppositions will always approach the same issue from different points of view. Oppositions will make things out to be worse than some might say they are; governments will always make things out to be better than some might say they are. Those are differences of opinion.
>
> Assoc. Prof. Coghill — And differences of interpretation of agreed facts.
>
> Mr O'Brien — That is right, but sometimes even the facts are not agreed. [321]

4.24 The issue of the differences in opinions and interpretations of facts was clearly illustrated at the public hearing when Phil Cleary and Stephen Newnham made presentations to the Committee about the pamphlet "A vote for Les Twentyman is a vote for the Liberals". Phil Cleary claimed that:

> Steve Newnham knows that what he put on that leaflet was not a fact, and he would have gone into the election knowing that.[322]

4.25 However, Stephen Newnham, the then State Secretary of the ALP (Victorian Branch) maintained that:

> [O]ur view is that this material was an absolute statement of truth, and we were informing the electors of Kororoit about that arrangement. Other people can have a different view. Essentially other people have different opinions about this issue.[323]

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318 Professor Jock Given, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

319 Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, p.3. In the Democratic Audit of Australia's submission, p.7, the work of David Easton, a political scientist, and Martin Rein, a sociologist, are referred to.

320 Mark Polden, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

321 Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

322 Phil Cleary, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

Discussion

4.26 The Committee noted that one political party, one interested individual and one academic organisation opposed amending the provisions of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising.[324]

4.27 The concern of the Democratic Audit of Australia, Professor Jock Given and Emeritus Professor Colin Hughes in the widening of the current provisions was noted. To put these inquiry participants' views in context, the Committee referred to the work of the Commonwealth Parliament's JSCER on the standards of political advertising. In 1983, section 329(2), which made it an offence to print, publish or distribute "untrue" political advertising, was enacted:

> 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 –
>
> (a) that is untrue; and
>
> (b) that is, or is likely to be, misleading or deceptive.[325]

4.28 However, the JSCER, in its *Second report*, recommended that the section on truth in advertising be repealed from the *Commonwealth Electoral Act 1918* (Cth).[326] Six months later in 1984 it was repealed as being unworkable.[327]

4.29 A number of the reasons cited by JSCER were also put forward by inquiry participants for this inquiry, as discussed in the preceding section. The JSCER decided this provision was unworkable based on the following reasons, as described in its *Second report*:

- Long lead times would create particular difficulties for a party seeking to reply to an advertisement from another party. The attacking advertisement will have the necessary lead time to go through whatever clearance is required, but an immediate reply would not be possible;[328]
- The Committee was particularly concerned to establish the criteria which would be adopted by a Court to determine whether a political advertisement was "true";[329]

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323 Stephen Newnham, State Secretary, Australian Labor Party (Victorian Branch), *Transcript of evidence*, Melbourne, 18 August 2009, p.6.

324 Democratic Audit of Australia, *Submission*, no.6; Stephen Newnham, State Secretary, Australian Labor Party (Victorian Branch), *Transcript of evidence*, Melbourne, 18 August 2009; Professor Jock Given, *Transcript of evidence*, Melbourne, 18 August 2009.

325 *Commonwealth Electoral Act 1918* (Cth) s.329(2).

326 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.27.

327 Australian Electoral Commission, *Supplementary submission to the Commonwealth Parliament's Joint Standing Committee on Electoral Matters implementation of truth in political advertising*, Canberra, 14 November 1996, p.4.

328 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.16.

329 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.17.

- [Complications would arise because a statement has] to be both untrue and misleading or deceptive;[330]
- Particular difficulties are likely to arise when the alleged untrue statement is a statement concerning future events, rather than existing facts;[331]
- Great difficulty in divorcing statements of fact from statements of opinions. … On this view a wide range of electoral advertisements could be capable of being caught;[332]
- [I]t is undesirable, both from the point of view of the courts, and the participants of the electoral process, to require the courts to enter the political arena in this way;[333]
- Great difficulties would be encountered by a Court which seeks to define "untrue and misleading" statements;[334]
- Many legitimate assertions which may be expected in the cut and thrust of an election campaign could become the subject of injunction proceedings;[335]
- The possibility of candidates seeking injunctions to prevent publication of advertisements from an opposing political party was of concern;[336] [and]
- The injunction remedy could cause grave injustice to political parties or candidates and could disrupt the normal political process, if available at the suit of any candidate.[337]

4.30 The reasons put forward by the Commonwealth Parliament's JSCER still resonate today. In 2007 Michelle Grattan, an Australian political journalist, in her delivery of the Kenneth Myer Lecture noted the problems associated with the banning of political advertising:

> Advertising is a form of political expression and stopping it would be simply another curb on freedom of speech. Nor can I see that federal rules for truth in advertising would do much more than lead to endless disputes and a mammoth bureaucracy.[338]

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330 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.19.

331 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.19.

332 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.20.

333 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.21.

334 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.22.

335 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.23.

336 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.23.

337 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.26.

338 Michelle Grattan, "Is politics still a vocation?", Kenneth Myer Lecture, National Library of Australia, Canberra. 9 August 2007. Retrieved from http://www.nla.gov.au/friends/KennethMyerLecture2007.html on 10 November 2009.

Non-legislative measures

4.31 This section of the chapter deals with non-legislative measures considered by the Committee as part of its investigation on whether the provisions of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising should be amended.

4.32 The non-legislative measures considered by the Committee were suggested by inquiry participants. The non-legislative measures considered are as follows:

- Education;
- Code of conduct; and
- Test case.

Education

Inquiry participants' views

4.33 Associate Professor Ken Coghill, former Member and Speaker of the Victorian Legislative Assembly and currently the Director of the Monash Governance Research Unit, Monash University, appeared before the Committee as a private individual. Associate Professor Coghill recommended the Committee consider the role of education as a non-legislative measure to regulate misleading or deceptive political advertising.[339]

4.34 Associate Professor Coghill suggested the education of political parties and candidates about ethical standards and legislative provisions in relation to misleading or deceptive political advertising. In his submission, he noted:

> The VEC should adopt a strategy orientated to the prevention of misleading and deceptive conduct including actively engaging and educating political parties and candidates in the ethical standards and legal provisions affecting the nature and content of electoral matters. [340]

4.35 At the public hearing, the Victorian Electoral Commissioner did not comment on Associate Professor Coghill's suggestion.

4.36 The pamphlet which sparked this inquiry related to a statement about preferences and inquiry participants noted the prevalence of community misunderstandings about preferential voting and proportional representation.[341] One proposed measure to mitigate these factors was suggested by Associate Professor Ken Coghill, who advocated that "the VEC should take a more active role in educating citizens in the operation and effects of the voting systems for election to each House."[342]

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339 Associate Professor Ken Coghill, *Submission*, no.2, p.2.

340 Associate Professor Ken Coghill, *Submission*, no.2, p.2.

341 Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, p.4; Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, p.8.

342 Associate Professor Ken Coghill, *Submission*, no.2, p.2.

4.37 The Victorian Electoral Commissioner, Steve Tully outlined the Victorian Electoral Commission's (VEC) commitment to educating electors about how votes are calculated:

> My concerns in a nutshell are that it is important that every elector understands that it is their marks on the ballot paper that determine where their preferences go. That is the crucial part for me. That is the crucial part of all of our education and public information programs.[343]

Discussion

4.38 The Committee noted that Associate Professor Ken Coghill was the only inquiry participant to suggest education of candidates, political parties and electors as a strategy to improve the regulation of misleading or deceptive political advertising.

4.39 The Committee did not receive evidence from political parties regarding the training they provide to candidates contesting elections and by-elections. However, the Committee discussed internal training programs for candidates conducted by political parties.

4.40 The Committee considered a number of issues associated with the provision of training for political parties and candidates.[344] The Committee considered the role of the VEC in this matter. However, given the *Electoral Act 2002* (Vic) states that the VEC is responsible for the administration of the enrolment process and the conduct of parliamentary elections and referendums in Victoria,[345] the Act does not specifically require the VEC to provide education to political parties and candidates.[346] The Committee also considered the Parliament as a possible provider of this education strategy. However, the *Constitution Act 1975* (Vic) prescribes that Parliament is a legislature with the responsibility of making, amending and repealing laws. The Act does not prescribe the Parliament to educate officials of political parties or candidates.[347]

4.41 Electoral education, voter participation and preferential voting have been considered by the Committee in its past inquiries.[348] In the Committee's

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343 Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, p.7.

344 However, two recent Victorian parliamentary committee inquiries have investigated training for members of Parliament in parliamentary behaviour, ethics and conflicts of interest. See Public Accounts and Estimates Committee, *Report on strengthening government and parliamentary accountability in Victoria*, Parliament of Victoria, Melbourne, April 2008, p.41; Law Reform Committee, *Review of the Members of Parliament (Register of Interests) Act 1978*, Parliament of Victoria, Melbourne, December 2009, pp.88, 90.

345 *Electoral Act 2002* (Vic) s.8(1).

346 *Electoral Act 2002* (Vic) s.8 stipulates the responsibilities and functions of the VEC. Education and training of political parties and candidates is not prescribed as a responsibility of the VEC.

347 *Constitution Act 1975* (Vic) s.15 establishes the Parliament and s.16 stipulates the legislative power of Parliament.

348 Electoral education was discussed in the following reports: Electoral Matters Committee, *Inquiry into voter participation and informal voting*, Parliament of Victoria, Melbourne, July 2009; Electoral Matters Committee, *Inquiry into the conduct of the 2006 Victorian state election*, Parliament of Victoria, Melbourne, June 2008.

report on voter participation and informal voting, the Committee noted the ongoing work of the VEC in educating electors about enrolment and voting and recommended strategies to improve electors' understanding of proportional representation.[349] In particular, the VEC's *Passport to Democracy* program is a short course for Victorian secondary school students, focused on electoral education within the context of young people's lives and issues that are important to them. The full preferential count method used to elect members of the Victorian Legislative Assembly and the proportional representation count method used for the Victorian Legislative Council is taught to students.[350]

4.42 The Committee believes that the electoral education provided by the VEC may assist in mitigating community misunderstandings of preferential voting. The Committee also supports the VEC educating electors about the system of preferential voting and that the voter has the power to control where his or her preferences are directed.

Code of conduct for political parties and candidates

Inquiry participants' views

4.43 A code of conduct for political parties and candidates was suggested by the VEC, Emeritus Professor Colin Hughes and the Australian and New Zealand School of Government's (ANZSOG) Institute of Governance as a non-legislative measure to regulate misleading or deceptive political advertising.[351]

4.44 At the public hearing the Victorian Electoral Commissioner noted that a code of conduct could list the types of protocols and statements political parties and candidates could make.[352]

4.45 Howard Whitton, Visiting Fellow with the ANZSOG Institute of Governance provided evidence to the Committee on the efficacy of codes of conduct in regulating the conduct of candidates for election to public office. He indicated there are two objectives of a code of conduct:

1. To ensure that the electorate is in a position of informed consent in relation to the candidates. The informed consent objective implies honesty on the part of candidates; and

2. To ensure that the electoral process enhances public confidence in democratic institutions.[353]

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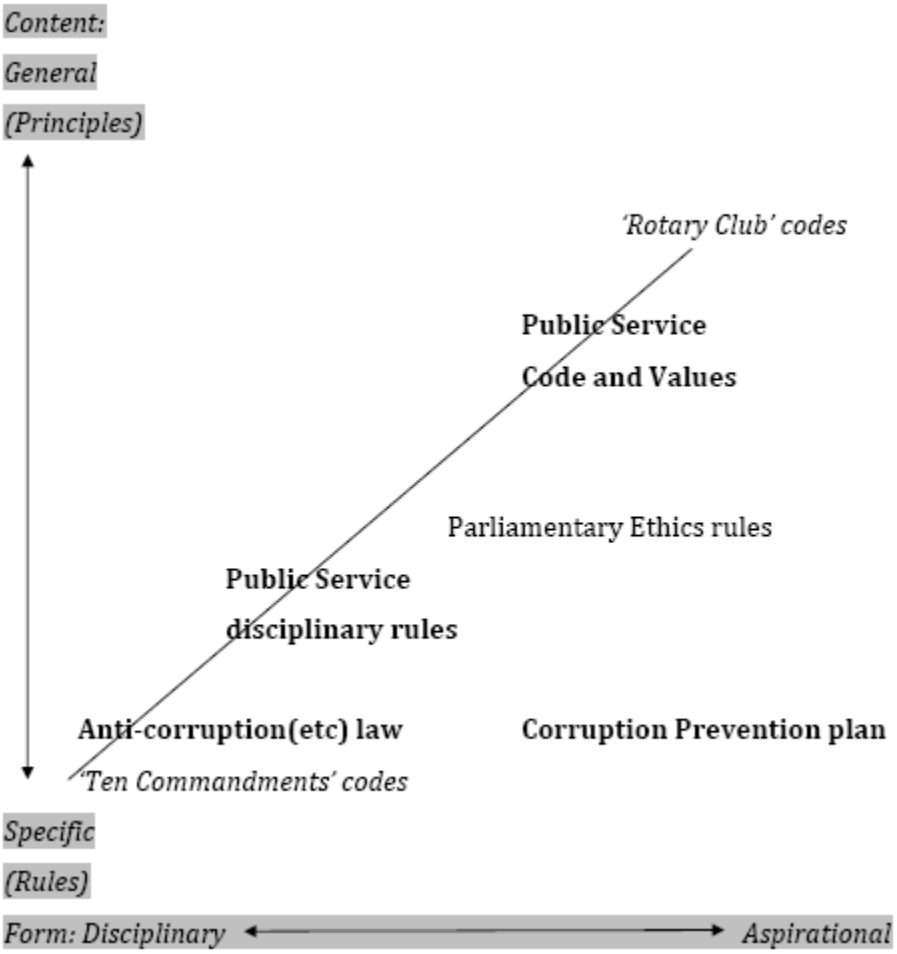
349 An entire chapter of the Electoral Matters Committee report on its *Inquiry into voter participation and informal voting* was devoted to electoral engagement and education in Victoria.

350 Electoral Matters Committee, *Inquiry into voter participation and informal voting*, Parliament of Victoria, Melbourne, July 2009, pp.124-125.

351 Victorian Electoral Commission, *Submission*, no.8, p.11; Howard Whitton, Visiting Fellow, ANZSOG Institute of Governance, *Transcript of evidence*, Melbourne, 18 August 2009, pp.2-5; Emeritus Professor Colin Hughes, *Submission*, no.13, p.1.

352 Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.

Figure 4.1: Types of codes of conduct



Source: Supplementary information provided at the public hearing by Howard Whitton, Visiting Fellow, ANZSOG Institute of Governance, 18 August 2009, p.3.

4.46 The Committee heard from Mr Whitton about the different types of codes of conduct and the basis of modern codes of conduct:

> 'Rotary Club' or 'Ten Commandments' codes, which set out broad ethical principles, and 'Justinian' codes which seek to provide a specific rule of conduct for every foreseeable significant situation likely to arise for a person who is subject to the code's provisions. Increasingly, considerable overlap of the two forms can be found in modern codes, where general principles are combined with specific rules.[354]

4.47 Figure 4.1 sets out a matrix of the characteristics and the different types of codes of conduct. For example, 'Rotary Club' codes of conduct tend to be 'aspirational' and focus on excellence, responsibility and professionalism. 'Rotary Club' codes of conduct are considered to be "strategically strong, potentially, but harder to enforce precisely because of the generality of the

353 Howard Whitton, Visiting Fellow, ANZSOG Institute of Governance, *Transcript of evidence*, Melbourne, 18 August 2009, pp.4-5.

354 Supplementary information provided at the public hearing by Howard Whitton, Visiting Fellow, ANZSOG Institute of Governance, 18 August 2009, p.1.

principles which they enjoin." 'Disciplinary' codes of conduct contain a set of rules which focus on avoiding punishment which make the code strategically weak but easier to enforce.[355]

4.48 Howard Whitton also spoke to the Committee about the types of training required for effective implementation of any code:

> Broadly, disciplinary codes require training in recognising the range of situations which will trigger a given rule, and the procedures required in response to those situations when they arise. Aspirational codes require training in flexible, principles-based, higher-order thinking, to enable strategic problem solving in situations where more than one 'good' may apply, or the choice to be made is not simply one between 'right' and 'wrong' conduct.[356]

4.49 The Committee was interested in how a breach of the code of conduct could be dealt with, in particular what penalties could be attached to a breach of the code, in relation to any alleged misleading or deceptive political advertising. Howard Whitton responded noting the complexity of the issue:

> It depends what the misleading conduct is. The preliminary remark I would like to make is that we are looking here at the class of persons who are either members of Parliament [or] who are not Members because the Parliament has been prorogued prior to a[n] actual election. … Members in that capacity are in effect ordinary citizens until such time as the election result is declared. So there is a preliminary question of jurisdiction. How do you apply any sort of code other than by statutory requirement — a legal obligation — to ordinary citizens? The other class of persons of interest here are ordinary citizens who are seeking election for the first time, and the same question applies.[357]

4.50 He then provided the Committee with a variety of penalty options to consider when enforcing a code of conduct:

> Penalties, as I say, depend logically on what the offence is, what the "misleading conduct" is. In some countries, for example in Ireland, there is a requirement that members of Parliament declare their prescribed assets and interests within six months of being elected. If they fail to do so, the penalty is automatic. The relevant act simply provides that they are disqualified from eligibility to be a member, and they are automatically excluded from the Parliament simply by failing to provide their assets declaration.
>
> That is one kind of self-enforcing penalty which requires no discretion through a further process or judgement call, either of which is possibly open to politicisation by a party in control of the relevant parliamentary committee or whatever the mechanism is. Automatic sanctions are, I think, preferable in general terms.
>
> The other kind of sanction which I think is often overlooked is the sanction available to the electorate. I was participating in a workshop for the OECD [Organisation for Economic Co-operation and Development] in Eastern Europe amongst new countries emerging out of Communism and coming to the EU system for the first time, and the concern of the delegates was the quality of parliamentary candidates. This is really a

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355 Supplementary information provided at the public hearing by Howard Whitton, Visiting Fellow, ANZSOG Institute of Governance, 18 August 2009, p.1.

356 Supplementary information provided at the public hearing by Howard Whitton, Visiting Fellow, ANZSOG Institute of Governance, 18 August 2009, p.1.

357 Howard Whitton, Visiting Fellow, ANZSOG Institute of Governance, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.

> comment about the way in which the party ticket system works in the EU, but nevertheless, their concern was that there should be some independent statutory agency to vet the "quality", whatever that might mean, of the candidates presenting themselves for election. …
>
> [D]elegates from Western countries, and the US in particular; their response was, 'Why would you need such a mechanism? If you don't like the quality of a candidate presented, don't vote for them: the ultimate sanction'.
>
> I think that is a relevant thing to bear in mind when it comes to Australia's electoral system where in the last days before voting day, it is possible that a candidate might present information — let's be neutral — to the electorate which another candidate finds unacceptable or damaging or alleges is dishonest or whatever. At that point you might consider some formal mechanism and an institution with powers to investigate and so forth, but the objection to that process is that it all takes too long.[358]

4.51 Howard Whitton stated his preference for a self-enforcing code of conduct. He noted that a self-enforcing code of conduct would essentially require "candidates voluntarily and publicly saying, 'I will comply in my conduct of my election campaign with these principles and objectives for the purposes of encouraging public confidence in the integrity of the electoral process, and I expect others to do likewise'."[359] He also noted the difficulties associated with this method of enforcement:

> The self-enforcing code, I think, is the preferable mechanism, but it relies upon citizens taking enough notice of what is going on to form a view about whether unacceptable conduct has occurred, and as a result to impose the sanction of voting for someone else on election day. The problem with that approach generally, though, is that in our country, which has strong party dominance of politics, at the end of the day people generally vote for a party rather than a specific candidate. There are obviously exceptions to this, but the party is the focus. Individual infractions of a particular candidate tend to become irrelevant on voting day.[360]

4.52 Emeritus Professor Colin Hughes preferred that a code of conduct be enforced by an outside party:

> "Enforcement" of the Code would be only by making a statement that the statement was untrue or the activity unfair. It would be made by a small body representing both the parties and the media, and it would be advisable for that body to have statutory protection against defamation … and be excluded from judicial review for expedition. Working back from that, it probably would be necessary to provide nominal statutory recognition of the body, say by the responsible Minister having power to designate a body chosen by that process to discharge those functions having those protections.[361]

4.53 The issue of which agency should be responsible for enforcement is discussed at length in Chapter 5.

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358 Howard Whitton, Visiting Fellow, ANZSOG Institute of Governance, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

359 Howard Whitton, Visiting Fellow, ANZSOG Institute of Governance, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

360 Howard Whitton, Visiting Fellow, ANZSOG Institute of Governance, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

361 Emeritus Professor Colin Hughes, *Submission*, no.13, p.1.

4.54 At the public hearing Philip Davis MLC, Committee member and Member for Eastern Victoria, asked the Victorian Electoral Commissioner for his view regarding a code of conduct and sanctions. The Electoral Commissioner responded saying:

> I would think that it would be a code of expectation that would be available to commentators and to the media, and that if there were any breach, the commentators or media would be able to draw attention to that breach, so it would be regulated in that way. … I would say that the code is there and that people follow it, and that if they do not follow it in their campaigns, they are called to account for it. It would become part of the political debate and a test of the policies or of the character of the person who is allegedly breaching the code. … I think that what tends to happen is that if you have a code, you have something that is concrete and formal that everyone can read and everyone can agree to, whereas at the moment there is no such document or charter, so people will keep pressing the boundaries.[362]

4.55 Professor Brian Costar, Co-ordinator of the Democratic Audit of Australia noted the difficulties associated with attaching sanctions to a code of conduct:

> Firstly, who imposes the sanction? Not the electoral commissioner. So then it has to be some court. Is it a current court? Is it a special court? What sort of a court? How long does it take? And we are talking about an election campaign. It is heating up, getting close to the poll. Will people make frivolous complaints as the commissioner said happens now and happens everywhere. I guess most of the complaints electoral commissioners get during campaigns never see the light of day because they are simply not based on any section of the act on which you can operate. [363]

4.56 Emeritus Professor Colin Hughes, a former Australian Electoral Commissioner, provided advice on how a code of conduct could be developed[364] and he supported the Committee requesting advice from the International Institute for Democracy and Electoral Assistance (IDEA).[365]

4.57 Phil Cleary, an inquiry participant, did not argue for an introduction of a code of conduct. However, he did stipulate a preference for establishing a "framework":

> We do need a framework that at least makes a statement about what we think is proper in an election, and even if you set up a framework based on good ideas and intentions and it can be manipulated, so be it, but at least you have made an effort and you have improved the status and the standing of the body politic, and that would be a good thing.[366]

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362 Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

363 Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

364 Emeritus Professor Colin Hughes noted: "The drafting/adoption process could be taken through the Electoral Matters Committee, or a sub-committee that co-opted nominees from the major parties and media and one chosen by the other members of the Parliament. The latter course may be marginally preferable." Emeritus Professor Colin Hughes, *Submission*, no.13, p.1.

365 Emeritus Professor Colin Hughes, *Submission*, no.13, p.1.

366 Phil Cleary, *Transcript of evidence*, Melbourne, 18 August 2009, p.7.

Discussion

4.58 The Committee noted that one electoral authority, one academic organisation and one academic suggested a code of conduct as a non-legislative measure to regulate misleading or deceptive political advertising.[367]

4.59 The Committee considered a code of conduct which lists the types of protocols and statements political parties and candidates could make, as suggested by the VEC. The Committee noted that in 1984, the Commonwealth Parliament's JSCER's *Second report* concluded that there would be "great difficulties" in defining misleading or deceptive statements.[368]

4.60 Currently, the *Members of Parliament (Register of Interests) Act 1978* (Vic) includes a code of conduct for members of Parliament.[369] The code states that members of the Victorian Parliament are obliged to observe a range of standards covering confidential information, receipt of financial benefits, avoidance of conflict of interest and ad hoc disclosure.[370] However, the code of conduct does not apply to members of parliament during a general election campaign period nor does it apply to political parties and candidates. This is not unusual as a survey of codes of conduct in Australian and selected overseas parliaments reported that parliaments have tended to adopt codes of conduct for members or ministers rather than candidates.[371]

4.61 However, Queensland has a code of conduct for election candidates, including independents and candidates endorsed by political parties, included in its *Code of ethical standards*. The code, which was endorsed by the Queensland Parliament on 9 September 2003, is voluntary except for

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367 Victorian Electoral Commission, *Submission*, no.8, p.11; Howard Whitton, Visiting Fellow, ANZSOG Institute of Governance, *Transcript of evidence*, Melbourne, 18 August 2009, pp.2-5; Emeritus Professor Colin Hughes, *Submission*, no.13, p.1.

368 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.22.

369 The Victorian Parliament's Law Reform Committee tabled its report into the review of the *Members of Parliament (Register of Interests) Act 1978* on 9 December 2009. The report investigated the effectiveness of the code of conduct applicable to members of the Victorian Parliament. The code sets out some basic standards of behaviour expected of them and is a component of the *Members of Parliament (Register of Interests) Act 1978* (Vic). The Law Reform Committee reported that the code was not well known or accessible, was showing its age and its impact was limited due to lack of enforcement. The Law Reform Committee made a number of recommendations including modernising the code of conduct and including a new statement of values. See Law Reform Committee, *Review of the Members of Parliament (Register of Interests) Act 1978*, Parliament of Victoria, Melbourne, December 2009, pp. 19, 25, 42.

370 *Members of Parliament (Register of Interests) Act 1978* (Vic) s.3.

371 Deidre McKeown, "A survey of codes of conduct in Australian and selected overseas parliaments", Parliamentary Library, Parliament of Australia, Canberra, 15 June 2006, updated 19 July 2006. Retrieved from http://www.aph.gov.au/library/INTGUIDE/POL/conduct.htm on 8 October 2009.

paragraph (e).[372] Candidates who breach the code of conduct "risk disfavour in the electorate".[373] A copy of the code can be found at Appendix 4.

4.62 The Committee referred to information on a voluntary or self-enforcing code of conduct from the International IDEA report, *Code of conduct for political parties campaigning in democratic elections*. This report provided reasons for introducing a voluntary code of conduct, how parties could negotiate a consensus on the text of the code of conduct with political parties and the core provisions of a code of conduct.[374]

4.63 The Committee regards the adherence by political parties to norms of ethical conduct, particularly during election campaigns, as a vital part of electoral democracy.

Test case

Inquiry participants' views

4.64 Two inquiry participants indicated that a test case may be one approach the Committee may wish to consider alongside other measures.[375] A test case is defined as a "lawsuit brought to establish a legal principle or right or to establish a precedent".[376]

4.65 Liberty Victoria believed a test case could clarify the scope of the interpretation of *Evans v Crichton-Browne* that confines misleading or deceptive political advertising to the actual casting of the vote (physical act of marking the ballot paper):

> It is not entirely clear whether *Evans v Crichton-Browne* does dictate such a narrow interpretation of s 84, as the Court said (obiter dicta) at 205 that s 161(e) might apply to "a statement that a person who wished to support a particular party should vote for a particular candidate, when that candidate in fact belonged to a rival party." Nor was the Court in expressing its actual decision at 204 definitive that s 161 was only concerned with "statements which are intended or likely to affect an elector when he seeks to record and give effect to the judgment which he has formed as to the candidate for whom he intends to vote, rather than with statements which might affect the formation of that judgment." Nevertheless courts and tribunals in Victoria have tended to assume that *Evans v Crichton-Browne* does require that s 84 of the Act be confined to cases of misleading conduct in relation to the physical marking of the ballot paper: see, e.g., *Balogh v Municipal Electoral Tribunal* [2007] VCAT

372 Paragraph (e) of the Legislative Assembly of Queensland's *Code of ethical standards* states that the purpose of the code is to "avoid conduct which is contrary to state or Commonwealth law including but not limited to Racial and religious vilification offences under the *Anti-Discrimination Act 1991*, Official misconduct under the *Crime and Misconduct Act 2001*, Criminal Code offences and *Electoral Act 1992* offences."

373 Legislative Assembly of Queensland, *Code of ethical standards*, Parliament of Queensland, Brisbane, September 2004, p.31.

374 International IDEA, *Code of conduct for political parties campaigning in democratic elections*, International IDEA, Stockholm, 1999. The report can be found at http://www.idea.int/publications/coc_campaigning/

375 Ann Birrell, Co-convenor, Port Phillip Greens, *Transcript of evidence*, Melbourne, 18 August 2009, p.5; Michael Pearce SC, President, Liberty Victoria, Victorian Council for Civil Liberties, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

376 Peter E Ngyh and Peter Butt (eds), *Butterworths Concise Australian legal dictionary*, Second edition, Butterworths, Sydney, 1998, p.427.

> [Victorian Civil and Administrative Tribunal] 1955. In New South Wales a less restrictive approach has been taken: *Consadine v Strathfield Municipal Council* (1981) 44 LGRA [Local Government Reports of Australia] 435. The Government could sponsor a test case to seek a reconsideration of whether s 84 is confined in the way that has been assumed. It is at least arguable that s 18 of the *Charter of Human Rights and Responsibilities Act 2006* (the right to participate in public life) justifies a wider interpretation of s 84 than has previously been adopted. However, there is no certainty about the outcome of such a test case nor even when an appropriate case might emerge. [377]

4.66 However, at the public hearing Michael Pearce SC, President of Liberty Victoria, indicated that a legislative amendment may be preferable than a test case.[378]

4.67 At the public hearing Mark Polden commented on Liberty Victoria's proposal of a test case. Given that Liberty Victoria, along with other inquiry participants, proposed to make it an offence to mislead an elector in the formation of their vote, Mark Polden noted:

> One submission from Liberty Victoria suggests the possibility of a test case, noting that the High Court's suggestion that the equivalent section 329 of the *Commonwealth Electoral Act* [*1918* (Cth)] might catch a statement that a person who wished to support a particular party should vote for a particular candidate when that candidate in fact belonged to a rival party. It might be argued that the Kororoit pamphlet comes close to that line. There are other arguments available from the scheme of the Victorian act, which differs markedly from its commonwealth equivalent in that the relevant provision in the Victorian act — that is, section 84 — does not fall, as is the case with section 329 of the commonwealth act, within the part dealing with electoral offences. That would be a consideration in favour of adopting the course proposed by Liberty Victoria and running a test case. My view, however, is that given the strength of the High Court's remarks in *re Crichton-Browne*, in particular at paragraph 12 … as to the importance of freedom of speech and the practical difficulties which might result from a more expansive reading of the section, together with the fact that it creates a criminal offence and that the decision in *re Crichton-Browne* has been followed by Justice Mary Gaudron in the High Court sitting as the Court of Disputed Returns in *Webster v Deahm* … it seems unlikely that the challenge would succeed. That is my view on the suggestion by Liberty Victoria that perhaps one might explore this by way of a challenge. [379]

Discussion

4.68 Given that the Committee's inquiry terms of reference directed the Committee to examine whether the provisions of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising should be amended, only two inquiry participants, one political party and the other a civil liberties organisation, supported a test case.

4.69 Research by academics specialising in Australian electoral law have noted the value of electoral test cases:

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377 Liberty Victoria, Victorian Council for Civil Liberties, *Submission*, no.7, pp.1-2.

378 Michael Pearce SC, President, Liberty Victoria, Victorian Council for Civil Liberties, *Transcript of evidence*, Melbourne, 18 August 2009, pp.2, 5.

379 Mark Polden, *Transcript of evidence*, Melbourne, 18 August 2009, p.2.

> [T]he common law test may yet have value where electoral legislation is silent, or in unanticipated circumstances. Most Australian legislation ultimately leaves the question of remedies to the judge's discretion: that is, remedies are to be granted on whatever grounds the judge thinks "just and sufficient," given the "real justice," or "substantial merits and good conscience," of the case.[380] It is not surprising that many judges look to precedent, including the common law, to guide such a broad remedial discretion.[381]

4.70 On the other hand, these researchers also noted the result of the uncertainties associated with electoral law disputes:

> [I]n many electoral law disputes there will be uncertainty about the level and onus of proof, the applicability of the common law, and the availability of judicial review. On an uncertain legal basis like this, political careers—indeed whole governments in an era of hung parliaments—can stand or fall. The situation is aggravated because Courts of Disputed Returns work under very hurried time frames, and judges have broad discretion as to what evidence to admit. The net result is that the rule of law may be less entrenched in disputed elections than Australians care to believe.[382]

4.71 The Committee's terms of reference does not include the scope for mounting such a test case.[383]

Legislative measures

4.72 This section of the chapter deals with legislative measures considered by the Committee as part of its investigation on whether the provisions of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising should be amended.

4.73 The legislative measures considered by the Committee were drawn from inquiry participants and comparative legislation. The legislative measures considered are as follows:

- Offence to mislead an elector in the formation of their vote;
- Offence to use a candidate's name, photo or likeness without written consent;
- Statement to accompany political advertisements relating to preferences;
- Trade Practices Act style provision;

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380 *Commonwealth Electoral Act 1918* (Cth), ss.360 & 364.

381 Graeme Orr, Bryan Mercurio and George Williams "Australian electoral law: A stocktake", *Election Law Journal*, vol.2, no.3, 2003, p.388.

382 Graeme Orr, Bryan Mercurio and George Williams "Australian electoral law: A stocktake", *Election Law Journal*, vol.2, no.3, 2003, p.389.

383 Section 9A(1) of the *Parliamentary Committees Act 2003* (Vic) stipulates "The functions of the Electoral Matters Committee are, if so required or permitted under this Act, to inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with- (a) the conduct of parliamentary elections and referendums in Victoria; (b) the conduct of elections of Councillors under the *Local Government Act 1989*; (c) the administration of, or practices associated with, the *Electoral Act 2002* and any other law relating to electoral matters."

- Registration of political party logos; and
- Monitoring and/or review of electoral matter.

4.74 No inquiry participants put forward the idea of amending the *Electoral Act 2002* (Vic) to incorporate a sunset clause or provision. However, the Committee noted its benefits in relation to trialling or piloting a law. A sunset clause is often common in laws which are deemed controversial or may potentially curtail civil liberties. In this case, a sunset clause would cause a provision/s to automatically expire at a date prescribed by Parliament. Consequently, the Committee agreed that the proposed measures be considered in light of a sunset clause or provision.

Offence to mislead an elector in the formation of their vote

Inquiry participants' views

4.75 The most commonly held view of inquiry participants to regulate misleading or deceptive political advertising was to make it an offence to mislead an elector in the formation of their vote.[384] Some of these inquiry participants indicated that the current provision – section 84 of the *Electoral Act 2002* (Vic) – was too limited in scope.[385]

4.76 Dennis Galimberti, on behalf of Les Twentyman OAM, a candidate at the Kororoit District by-election, noted that:

> [I]t is submitted that the *Electoral Act* ought to be amended in such a manner as to create a criminal offence which extends to statements (described or characterised as misleading or deceptive) and which are likely to influence the "political judgement" of an elector.[386]

4.77 Associate Professor Ken Coghill did not comment on the measure in his original submission. However, at the public hearing, Associate Professor Coghill indicated that he had given the matter more consideration:

> As I understand the effect of the act at the moment, it really only applies to influencing a decision made at the time of casting a vote — in other words, in the polling booth — whereas the matters before the committee seem to me to relate to misleading, or attempts to influence … voters in deciding how they will later cast their vote in the polling booth. It seems to me that in those circumstances it is important that the legislation be strengthened to confirm that it applies to attempts to influence voters in deciding how they will cast their vote, rather than simply how they actually do cast their vote at the time of voting in the polling booth. That is the first and most important threshold strengthening I would see. Complementing that, in my view there should be a provision making it clear that an intention to mislead a voter in that way is an offence, and in the same sense it should be an offence to recklessly publish

384 Hall & Thompson on behalf of Les Twentyman, *Submission*, no.4, pp.1-2; Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.2; William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.11; Liberty Victoria, Victorian Council for Civil Liberties, *Submission*, no.7, p.2.

385 Hall & Thompson on behalf of Les Twentyman, *Submission*, no.4, pp.1-2; Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.2; William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.11; Liberty Victoria, Victorian Council for Civil Liberties, *Submission*, no.7, p.2.

386 Hall & Thompson on behalf of Les Twentyman, *Submission*, no.4, p.2.

misleading material which may have the effect of influencing how a voter decides to cast their vote.[387]

4.78 William (Jennifer) Jacomb, an inquiry participant, also proposed that misleading an elector in the formation of their intent to vote should be made an offence. William (Jennifer) Jacomb also advised the Committee that sections 83 and 84 of the *Electoral Act 2002* (Vic) should be amended.[388] For example, section 83 should be amended to include the addition of two new clauses which appear in bold:

(1) A person must not print, publish or distribute or cause, permit or authorise to be printed, published or distributed, an electoral advertisement, handbill, pamphlet or notice unless-

(a) the name and address of the person who authorised the electoral advertisement, handbill, pamphlet or notice appears at its end; and

(b) in the case of an electoral advertisement, handbill, pamphlet or notice that is printed or published otherwise than in a newspaper, the name and place of business of the printer or publisher appears at its end.

Penalty: In the case of a natural person, 10 penalty units; In the case of a body corporate, 50 penalty units.

(2) For the purposes of subsection (1)(b), a person who makes copies for distribution of an electoral advertisement, handbill, pamphlet or notice that is published on the Internet is deemed to be the printer of those copies.

(3) Subsection (1) does not apply in relation to-

(a) a car sticker, an item of clothing, lapel button, lapel badge, fridge magnet, pen, pencil or balloon; or

(b) an article included in a prescribed class of articles.

(4) Nothing in subsection (3)(a) is to be taken, by implication, to limit the generality of regulations that may be made by virtue of subsection (3)(b).

(5) Anything that will mislead a substantive number of electors in the formation of their intent to vote is an offence.

Penalty: In the case of a natural person, 300 penalty units; In the case of a body corporate, 3000 penalty units.

(6) Anything that will mislead a substantive number of electors in the formation of their intent to vote is an offence if determined by the Court of Disputed Returns to have tainted the election result or likely to have tainted the result will be grounds for ordering fresh elections.[389]

4.79 William (Jennifer) Jacomb also proposed amending section 84 as follows. The amendment appears in bold and makes it an offence to mislead or deceive an elector in the formation of their vote for a given candidate:

(1) A person must not during the relevant period-

(a) print, publish or distribute; or

387 Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.2.
388 William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.11.
389 William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, pp.13-14.

(b) cause, permit or authorise 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 the vote of the elector **or the formation of the intent to vote for a given candidate by the elector.**

Penalty: In the case of a natural person, 300 penalty units or 6 months imprisonment; In the case of a body corporate, 3000 penalty units.

(2) A person must not during the relevant period-

(a) print, publish or distribute; or

(b) cause, permit or authorise to be printed, published or distributed- an electoral advertisement, handbill, pamphlet or notice that contains a representation or purported representation of a ballot-paper for use in that election that is likely to induce an elector to mark the elector's vote otherwise than in accordance with the directions on the ballot-paper.

Penalty: In the case of a natural person, 60 penalty units or 6 months imprisonment; In the case of a body corporate, 300 penalty units.[390]

4.80 Liberty Victoria's submission stated the organisation's support for making it an offence to mislead an elector in the formation of their vote:

> Liberty supports amendments to s 84 of the *Electoral Act 2002* to prohibit clear and serious cases of misleading or deceptive conduct influencing the decision by a voter about who to vote for. … It is at least arguable that s 18 of the *Charter of Human Rights and Responsibilities Act 2006* (the right to participate in public life) justifies a wider interpretation of s 84 than has previously been adopted.[391]

4.81 At the public hearing, Michael Pearce SC, President of Liberty Victoria, stipulated three criteria that should be satisfied to qualify misleading an elector in the formation of their vote as an offence:

> [T]hree elements of what we would like to see in an amendment that would make out an offence for contravention … of an amended section 84: that the misleading or deceptive conduct is serious; that it would reasonably be expected to influence voters in deciding who to vote for; and that there was no reasonably practical opportunity for the adversely affected person or party to counter it.[392] In those circumstances where these three elements are met, we think it ought to be an offence.[393]

4.82 Several inquiry participants directed the Committee to section 113 of the *Electoral Act 1985* (SA) as a point of reference for drafting an

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390 William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.14.

391 Liberty Victoria, Victorian Council for Civil Liberties, *Submission*, no.7, pp.1-2.

392 Michael Pearce SC clarified the factors which may influence the interpretation of 'reasonable opportunity' at the public hearing. These included the timing of the distribution or publication of electoral matter and the resources available to the aggrieved party. See Michael Pearce SC, President, Liberty Victoria, Victorian Council for Civil Liberties, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

393 Michael Pearce SC, President, Liberty Victoria, Victorian Council for Civil Liberties, *Transcript of evidence*, Melbourne, 18 August 2009, pp.2-3.

amendment.[394] The Committee noted that section 113(2) of the *Electoral Act 1985* (SA) deals with misleading advertising published by any means (including radio or television). The provision makes it an offence to mislead an elector in the formation of their vote:

> 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:
>
> If the offender is a natural person—$1,250;
>
> If the offender is a body corporate—$10,000.[395]

4.83 The Committee was advised of the advantages and disadvantages of the misleading advertising provision in the *Electoral Act 1985* (SA). For example, evidence relating to Professor Brian Costar's view on this issue is noted in Chapter 3.[396] Attributes noted by inquiry participants in support of section 113 included:

- It limits restrictions to 'statement(s) of fact'; [397]
- It partly addresses the injunction problem by empowering the Electoral Commissioner (acting on advice from the Solicitor-General or the Crown Solicitor) rather than the courts to handle complaints in the first instance – but see section 113(5) which gives the Supreme Court ultimate authority;[398]
- [I]t seems that the legislation has tended to discourage participants from making claims as statements of fact;[399] and
- [R]edress for misleading material.[400]

4.84 However, inquiry participants also noted their concerns about any amendments based on section 113 of the *Electoral Act 1985* (SA):

- [D]ubious assumptions as to the nature of 'facts'. In general discourse facts are seen as bits of objective reality immune from 'corruption' by values, assumptions, premises or bias. This view is not supported by the weight of the social science literature;[401]
- [E]ncourage more participants to lodge complaints about false or misleading advertising;[402]
- [C]omplaints raised appeared to degenerate into a "tit for tat" distraction; [403]

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394 Liberty Victoria, Victorian Council for Civil Liberties, *Submission*, no.7, p.2; Hall & Thompson on behalf of Les Twentyman, *Submission*, no.4, p.2.

395 *Electoral Act 1985* (SA) s.113.

396 Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, pp.2-3.

397 Democratic Audit of Australia, *Submission*, no.6, p.6.

398 Democratic Audit of Australia, *Submission*, no.6, p.6.

399 Victorian Electoral Commission, *Submission*, no.8, p.9.

400 Victorian Electoral Commission, *Submission*, no.8, p.10.

401 Democratic Audit of Australia, *Submission*, no.6, pp.6-7.

402 Victorian Electoral Commission, *Submission*, no.8, p.10

403 Victorian Electoral Commission, *Submission*, no.8, p.10.

- Giving the Electoral Commissioner the power to 'request' advertisers to withdraw the advertisement or to publish a retraction runs the risk of compromising the impartiality of that office;[404]
- [T]o judicialise this matter would be a retrograde step;[405]
- I believe that there is a real possibility that a section modelled on South Australian section 113 — or worse, Western Australian section 183 — would risk being struck down as not being reasonably adapted to serve the undoubtedly legitimate end of protecting the electoral process, in that it might well be seen as placing an excessive burden on freedom of political speech, particularly if it did not differentiate between fact and comment and particularly if it took in without discrimination all persons, including re-publishers such as newspapers;[406]
- [C]reating unintended consequences;[407]
- [U]nlikely to succeed in taking us closer to that goal without compromising other goals.[408]
- It has the potential to draw the electoral commissioner into political debate. As we all know, a major and important positive feature of our electoral system, unlike some others, is that the electoral commissions are totally impartial; [409] and
- [T]he Electoral Commissioner can become embroiled in political battles, risking the public perception of the Commissioner's impartiality and distracting the Commissioner from the conduct of elections. [410]

4.85 Mark Polden commented on the issues which may arise if the provision is widened to make it an offence to mislead an elector in the formation of their vote. Discussing hypothetically the impact this would have on the ruling on the pamphlet distributed by the ALP at the Kororoit District by-election, he said:

> If a prescription applied only as South Australian section 113 does to publication of statements of fact, which are things purporting to be statements of fact but which are inaccurate or misleading, I would expect an argument to be raised that in fact that big headline on the pamphlet ['A vote for Les Twentyman is a vote for the Liberals'] is not a statement of fact; it is a comment.[411] … I raise it only to show the kinds of Jesuitical summaries that are likely to be engaged in if the prescription is widened. One would expect that kind of argument to be taken as a defence. Equally one might expect an

404 Democratic Audit of Australia, *Submission*, no.6, p.8.
405 Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.
406 Mark Polden, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.
407 Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, p.2.
408 Professor Jock Given, *Transcript of evidence*, Melbourne, 18 August 2009, p.2.
409 Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.
410 Victorian Electoral Commission, *Submission*, no.8, p.10.
411 Patrick Milmo QC, Richard Parkes QC, Godwin Busuttil, Adam Speker (editors), *Gatley on Libel and Slander*, 10th edition, Sweet & Maxwell, London, December 2005, page 296, paragraph 12.10: "It is clear that a comment may consist of an inference or deduction of fact; that is, the author can assert, as his comment, on facts stated or referred to in what he publishes, some other fact, the existence of which he infers or deduces from those facts."

> argument be raised that the Kororoit pamphlet should be understood as referring to a prediction — that is, although it is a vote for the Liberals, it will effectively be a vote for the Liberals because the sitting Labor member will potentially lose the seat, thus one less member to make up government, and as such is the prediction. There are questions there as to whether that prediction in turn implies a statement of present facts. That is more in the area of practices law that you get into those kind of questions. The point is simply to illustrate that one can very quickly get into fairly deep water with a section which endeavours to prescribe matters of that kind.[412]

Discussion

4.86 Inquiry participants who advocated making it an offence to mislead an elector in the formation of their vote as a way of regulating misleading or deceptive political advertising were from a variety of stakeholder groups including an independent candidate, an academic, an interested individual and an organisation.[413] Other inquiry participants who did not advocate for the offence also contributed to the discussion.[414]

4.87 Section 113 of the *Electoral Act 1985* (SA) has been tested in the courts. In *Cameron v Becker*, the Supreme Court of South Australia dismissed an appeal against a conviction of the State Secretary of ALP (South Australian Branch). It was held that an ALP political advertisement which was published on 8 November 1993 and contained the statement "The fact is the [Dean] Brown Liberals have stated that any school with less than three hundred students will be subject to closure" was inaccurate and misleading. The Supreme Court also rejected the claim that section 113 breached an implied constitutional right of freedom of communication:

> 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.[415]

4.88 In *State Electoral Office v Pigott* the then State Director and Campaign Manager of the Liberal Party of South Australia pleaded guilty to breaches of section 113 of the *Electoral Act 1985* (SA) at the 1997 South Australian state election as a result of an advertisement on preferences.[416]

4.89 In *King v Electoral Commissioner*, which was heard by the Supreme Court of South Australia, the judgment was that a Liberal Party advertisement issued

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412 Mark Polden, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

413 Hall & Thompson on behalf of Les Twentyman, *Submission*, no.4, pp.1-2; Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.2; William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.11; Liberty Victoria, Victorian Council for Civil Liberties, *Submission*, no.7, p.2.

414 Democratic Audit of Australia, *Submission*, no.6; Victorian Electoral Commission, *Submission*, no.8; Mark Polden, *Transcript of evidence*, Melbourne, 18 August 2009; Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009; Professor Jock Given, *Transcript of evidence*, Melbourne, 18 August 2009.

415 *Cameron v Becker* SCGRG 95/42 Judgment No. 5149 (1995); 64 SASR 238 (1995); SASC 5149 (5 July 1995) at 30.

416 *State Electoral Office v Pigott*, Magistrates Court (15 December 1998), 98/8658.

at the 1997 South Australian state election with "(words to the effect) 'a vote for an Independent was a vote for the Labor Party'" had breached section 113 of the *Electoral Act 1985* (SA).[417] The written judgment was as follows:

> The statement of fact identified in the advertisements that is inaccurate and misleading to a material extent is the statement that thanks to preferences a vote for an Independent candidate or a Democrat meant that the Labor Party's leader, Mr Rann, became Premier. That statement was inaccurate because it is incorrect. A vote for either an Independent or a Democrat does not "Give You" Mr Rann as Premier. The statement is also misleading because it gives the impression that preferences will automatically flow to Labor when, of course, they are dependent upon the will of a voter who may give preferences as he or she chooses, or in accordance with a voting ticket or card of a candidate. In the District of Davenport no Independent or Democrat candidate gave a second preference to the Labor candidate. It was not correct to give the impression that a vote for Independent or Democrat candidates automatically saw votes flowing to Labor. The 9 October advertisement was deceptive. The inaccurate and misleading statement of fact was inaccurate and misleading to a substantial or significant extent. On that basis breaches of s113 are made out. [418]

4.90 The issues which were explored in *King v Electoral Commissioner* are similar to those raised in regard to the pamphlet authorised by the State Secretary of the ALP (Victorian Branch) at the Kororoit District by-election. At the public hearing the Victorian Electoral Commissioner informed the Committee:

> [T]here is no doubt in my mind that had that advertisement occurred in South Australia it would have been prosecuted successfully as a misleading advertisement.[419]

4.91 Support to make it an offence to mislead an elector in the formation of their vote as a way of regulating misleading or deceptive political advertising was shared by others in the Australian community. A political party, The Australian Greens, supported the introduction of legislation to ensure truth in advertising. As part of the electoral reform green paper process, it was noted that:

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417 The advertisement began with the heading: ""THIS ELECTION IS CLOSE". It then conveyed the message that a vote for any one of a Labor candidate, or, "Thanks to preferences", an Independent candidate or a Democrat candidate gave voters Mr Rann. A photograph of the Leader of the Labor Party, Mr Rann, appeared below the words "GIVES YOU". Those words were below the references to votes for a Labor candidate or an Independent or Democrat candidate. All of those words were inside a black arrow, pointing to the photograph of Mr Rann. To the left of that photograph was a smaller photograph. It was of a former premier, Mr Bannon, with Mr Rann. Below that photograph was the statement that "Mr Rann was a key Minister and adviser during the State Bank disaster years". The advertisement concluded with the exhortation or plea, "Put Labor Last"." This advertisement appeared in the *Adelaide Advertiser* on 9 October 1997. A second advertisement appeared in *The Advertiser* on 10 October 1997. Advertisements were also placed in two other newspapers circulating in the Davenport District.

418 *King v Electoral Commissioner* SCGRG 97/1670 Judgment No. 6557 (1998) 72; SASR 172 [1998]; SASC 7071 (5 March 1998).

419 Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

> The Greens advocate amendment to the *Commonwealth Electoral Act* to make it an offence to authorise or publish an advertisement purporting to be a statement of fact when the statement is inaccurate and misleading to a material extent, similar to legislation introduced in South Australia.[420]

4.92 The Australian Greens support was also noted in Senator Bob Brown's dissenting report included with the Commonwealth Parliament's Joint Standing Committee on Electoral Matters (JSCEM) report into the 2007 federal election and matters related thereto.[421]

4.93 There was also evidence against making it an offence to mislead an elector in the formation of their vote. The Committee noted evidence provided to the Commonwealth Parliament's Senate Finance and Public Administration Legislation Committee in 2002 by Andy Becker, a former South Australian Electoral Commissioner. The report noted:

> He stated that he did not believe the South Australian legislation had had any appreciable effect on the nature of electoral advertising in the State. Instead, he considered that the legislation opened up opportunities for individual candidates to disrupt the electoral process by lodging nuisance complaints.[422]

4.94 The South Australian Electoral Office, in its election report on the 2006 South Australian state parliamentary election held on 18 March 2006, noted that out of 80 formal complaints received about election matters, 32 (40 per cent) were complaints about inaccurate or misleading material.[423] The number of formal complaints received regarding the 2006 South Australian state election was less than the number of complaints recorded at the 2002 South Australian state election. At the 2002 South Australian state election 109 formal complaints were lodged and 53 (48 per cent) of these complaints were about inaccurate or misleading material.[424] No complaint actions were pursued following the 2006 or 2002 South Australian state elections.[425]

4.95 More recently, the South Australian Electoral Commission in its report to the South Australian Parliament on the Frome by-election held on 17 January 2009 provided an overview of the management of the by-

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420 The Australian Greens, *Submission*, no.32, p.3 to the *Electoral reform green paper: Donations, Funding and expenditure*, Department of the Prime Minister and Cabinet, Canberra, 23 February 2009.

421 Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2007 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 2009, p.336.

422 Senate Finance and Public Administration Legislation Committee, *Charter of Political Honesty Bill 2000 [2002], Electoral Amendment (Political Honesty) Bill 2000 [2002], Provisions of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000, Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2],* Parliament of the Commonwealth of Australia, Canberra, August 2002, p.88.

423 State Electoral Office South Australia, *Election report: South Australian election 18 March 2006*, State Electoral Office South Australia, Rose Park, 2006, p.46.

424 State Electoral Office South Australia, *Election report: South Australian election 9 February 2002*, State Electoral Office South Australia, Rose Park, 2003, p.42.

425 State Electoral Office South Australia, *Election report: South Australian election 9 February 2002*, State Electoral Office South Australia, Rose Park, 2003, p.42; State Electoral Office South Australia, *Election report: South Australian election 18 March 2006*, State Electoral Office South Australia, Rose Park, 2006, p.46.

election, its processes and outcomes. With regards to the post-election investigation of complaints, the Electoral Commission noted:

> The majority of these complaints, relating to inaccurate and misleading information, were referred to the CSO [Crown Solicitor's Office] for advice and to investigate the validity of the claims. Senior legal staff at CSO spent considerable time in assessing and researching each complaint based on the information provided to determine whether the statements made were inaccurate and misleading to a material extent and a breach of the Act.
>
> More often than not the response provided by CSO determined that the statements in question could not be proven to be misleading to a material extent.
>
> It was noted that the complaints raised appeared to degenerate into a "tit for tat" distraction and the Commissioner's role was one of frustration in dealing with an extremely high workload that diverted attention away from managing the election. In particular, on Thursday 14 January, a ream of paperwork some 22-25 cm high was delivered to the Commissioner in the form of supporting documentation.
>
> Recommendation
>
> With the high volume of complaints lodged for potential breaches of the Act at the by-election, coupled with a very similar situation at the 2006 State election, it is recommended that section 113 of the Act be amended to remove the "misleading to a material extent" component.
>
> The Electoral Commissioner is of the strong opinion that if the onerous burden of determining whether electoral material was misleading to a material extent was removed from legislation, the office would be in a better position to monitor the content of electoral material based on accuracy alone while maintaining the integrity of electoral comments. It would also afford the Commissioner and her staff the opportunity to focus on administering the provisions of the Act in relation to the conduct of elections.[426]

4.96 The Committee regards the definitional difficulties with establishing truth and opinion and the politicisation of the electoral commissioner as a hindrance to their role as administrators of elections. The Committee notes the comments and concerns of a former and current South Australian Electoral Commissioner and inquiry participants regarding the effect of section 113 of the *Electoral Act 1985* (SA).[427] The issue of the electoral commission being responsible for enforcing the misleading or deceptive political advertising provisions is discussed in detail in Chapter 5.

Offence to use candidate's name, photo or likeness without written consent

Inquiry participants' views

4.97 The Committee did not receive any evidence or submissions on making it an offence to use candidate's names, photo or likeness without written consent. The Committee was alerted to the provision from a transcript of evidence

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426 Electoral Commission SA, *Election report: Frome by-election 17 January 2009*, Electoral Commission SA, Adelaide, 2009, p.22.

427 The Committee noted four positive attributes and ten concerns were accredited to section 113 of the South Australian *Electoral Act 1985* (SA) by inquiry participants.

from a roundtable discussion held as part of the Commonwealth Parliament's JSCEM inquiry into the 2007 federal election and matters related thereto.[428]

Discussion

4.98 The *Electoral Act 2004* (Tas) makes it an offence to use a candidate's name, photo or likeness without permission:

> Any person must not between the issue of the writ for an election and the close of poll at that election print, publish or distribute any advertisement, "how-to-vote" [HTV] card, handbill, pamphlet, poster or notice which contains the name, photograph or a likeness of a candidate or intending candidate at that election without the written consent of the candidate.
>
> Penalty: Fine not exceeding 300 penalty units or imprisonment for a term not exceeding 12 months, or both.[429]

4.99 In correspondence with the Committee, the Tasmanian Electoral Commissioner noted how the pamphlet "A vote for Les Twentyman is a vote for the Liberals" would have been interpreted under the *Electoral Act 2004* (Tas):

> Had a pamphlet such as the "A vote for Les Twentyman" pamphlet been printed, published or distributed in Tasmania during the election period, it appears that it may well have breached section 196 of the Act as it contained the name and photograph of Mr Twentyman, presumably without his consent.[430]

4.100 The Committee's main concern with this offence was that it may contravene the implied right of freedom of speech, including the freedom of communication on matters of government and politics. The Committee noted that the magistrate in the Tasmanian case *Taylor v McLean* was of the view that while the restriction contained in the Act does effectively burden this freedom of communication, the provision is:

> [R]easonably appropriate and adapted to serving a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[431]

4.101 There have been no recent cases of prosecution in Tasmania.[432]

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428 Senator Bob Brown cited in Joint Standing Committee on Electoral Matters, *Proof Committee Hansard*, Parliament of the Commonwealth of Australia, Canberra, 16 April 2009, p.EM26. Retrieved from http://www.aph.gov.au/house/committee/em/elect07/hearings.htm on 8 October 2009.

429 *Electoral Act 2004* (Tas) s.196(1).

430 Bruce Taylor, Tasmanian Electoral Commissioner, Tasmanian Electoral Commission, *Correspondence*, 7 October 2009, p.1.

431 *Bruce Charles Taylor v Scott McLean*, 9 June 2004, p.8 included with the Bruce Taylor, Tasmanian Electoral Commissioner, Tasmanian Electoral Commission, *Correspondence*, 7 October 2009.

432 The Tasmanian Electoral Commissioner advised that "while the defendants were found guilty and pleaded guilty respectively, convictions were not recorded on the basis that they undertook not to commit any offence under the Electoral Act for a particular period." See Bruce Taylor, Tasmanian Electoral Commissioner, Tasmanian Electoral Commission, *Correspondence*, 7 October 2009, p.2.

4.102 The Committee is of the view that the introduction of the Tasmanian provision prohibiting the use of a candidate's name, photo or likeness without their permission during the election period would unduly hinder the ability of political parties and candidates to critique opposing parties and candidates, which is an important part of the electoral process.

Statement to accompany political advertisements relating to preferences

Inquiry participants' views

4.103 Given that this inquiry arose because of an allegedly misleading statement related to the effect of preferences, the VEC proposed that a possible solution may be to amend the *Electoral Act 2002* (Vic):

> [T]o require election advertisements relating to preferences to contain a statement that voters themselves determine their own preferences when they number the ballot paper. Statements about the effect of preferences might also be brought within the scope of the "misleading" provisions of the Act. [433]

4.104 At the public hearing the Victorian Electoral Commissioner elaborated on the statements which would be required to appear on political advertisements:

> [T]he VEC is of the view that if there were to be any statement regarding preferences, it be mandatory to include on that particular voting advertisement that for lower house districts preferences are allocated in the way that the voter allocates them and that for upper house regions above-the-line preferences follow the party's preferences but below-the-line preferences are allocated in the way the voter allocates them, and that on all how-to-vote material that makes any references to preferences those statements be required.[434]

Discussion

4.105 The VEC suggested the Committee consider a legislative amendment to the *Electoral Act 2002* (Vic) to "require election advertisements relating to preferences to contain a statement that voters themselves determine their own preferences when they number the ballot paper."[435]

4.106 As noted in Chapter 2, the printing and publication of political advertisements, handbills, pamphlets or notices already requires a statement which includes the name and address of the person who authorised it. Furthermore, where the advertisement is not in a newspaper, it must also include the name and place of business of the printer or publisher.[436]

4.107 The Committee is of the view that a statement which would appear on a political advertisement that states that voters themselves determine their own preferences when they number the ballot paper may have potential unintended consequences, limiting the effectiveness of any such measure.

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433 Victorian Electoral Commission, *Submission*, no.8, pp.10-11.

434 Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.

435 Victorian Electoral Commission, *Submission*, no.8, pp.10-11.

436 *Electoral Act 2002* (Vic) s.83.

The Committee instead believes the VEC should continue to educate the voting public on preferential voting.

Trade Practices Act style provision

Inquiry participants' views

4.108 The *Trade Practices Act 1974* (Cth) is the principal legislation which promotes competition and fair trading and provides for consumer protection.[437] Section 52(1) of the *Trade Practices Act 1974* (Cth) prohibits misleading or deceptive conduct:

> A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.[438]

4.109 One inquiry participant, Julian Burnside AO QC, an Australian barrister and human rights and refugee advocate, noted the significance of the provision. In his submission he argued:

> [S]ection 52 [of the *Trade Practices Act 1974* (Cth)] introduced a new norm of corporate behaviour. It changed the landscape of commercial dealings and quickly became the commonest cause of action in the Federal court. It has been replicated in Fair Trading Acts of a number of States, where it applies to individuals.[439]

4.110 Julian Burnside AO QC proposed that the *Electoral Act 2002* (Vic) should be amended so that misleading or deceptive electoral conduct be prohibited either during an election period or at all times:

> One is to make it an offence for a politician to engage in conduct which is misleading or deceptive, in their capacity as a politician, in connection with an election. This is a limited approach, but it is better than the present situation. It is notorious that politicians make outrageously misleading statements in connection with elections. That is the time when their misleading conduct most obviously distorts the political process. However a better approach is to make it an offence for a politician to engage in conduct which is misleading or deceptive, in their capacity as a politician, whenever that conduct occurs. This would catch all conduct whether in connection with an election or not.[440]

4.111 Julian Burnside AO QC proposed that the penalties for breaching the provision should include "fines or disqualification from office or, in extreme cases, gaol."[441] The issue of penalties is discussed further in Chapter 5.

4.112 Michael O'Brien MP, Deputy Chair of the Committee and Member for Malvern, asked Michael Pearce SC, President of Liberty Victoria to respond to the views of Julian Burnside AO QC, who was an immediate past President of Liberty Victoria. Michael Pearce's response was:

> I understand his view, but it is not the official view of Liberty Victoria. … [W]e see some serious difficulties. That really does move the line a very long way, and we think too far. We think it needs to move a little way but not quite as far as that.[442]

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437 *Trade Practices Act 1974* (Cth) s.2 stipulates the objective of the Act.
438 *Trade Practices Act 1974* (Cth) s.52(1).
439 Julian Burnside AO QC, *Submission*, no.12, p.1.
440 Julian Burnside AO QC, *Submission*, no.12, p.2.
441 Julian Burnside AO QC, *Submission*, no.12, p.3.

4.113 Professor Jock Given was also cautious about amending the *Electoral Act 2002* (Vic) to incorporate *Trade Practices Act* style provisions. Professor Given contended that there must be room in the electoral landscape for socially and culturally acceptable political speech:

> If we think about how different areas of law deal with this in, say, trade practices — I know some are suggesting we have trade practices-style provisions here — the law there does not catch what lawyers would call puffery, so it does not catch the advertiser who claims they have the best coffee in Melbourne. It is the kind of stuff that we understand socially and culturally; people say that kind of stuff all the time. We deal with it; we can handle that. It seems to me when I hear a politician say, 'A vote for this party is really a vote for that party', or 'A vote for this party led by person X is actually a vote for leader Y because we know they have got a deal to hand over power', that those are the kinds of things we deal with socially and culturally. I think we want to be generous about allowing that kind of speech to occur. Even though in practice some of it might be inaccurate, misleading, wrong-headed, all of that, we have got to allow it to happen.[443]

4.114 Associate Professor Ken Coghill agreed with Julian Burnside's position with regard to treating political and commercial advertising similarly:

> I have read the submission of Mr Julian Burnside, and I think he makes a very powerful case, a well-argued case, that there is no reason for treating information in the political arena any differently to that … caught by the *Trade Practices Act*. He makes the point that the courts are very experienced now in dealing with misleading and deceptive conduct falling within the *Trade Practices Act*, and I am persuaded by his argument that the courts could similarly deal with information in the political arena.[444]

4.115 However, Associate Professor Ken Coghill did not agree with Julian Burnside's proposal of regulating political speech all the time.

> I am confining my comments to the election period; I am not having regard to what might or might not apply between electoral periods.[445]

4.116 The issue of changed circumstances which may falsify statements was discussed at the public hearing. Associate Professor Ken Coghill noted:

> I do think that there is a genuine issue to be addressed in terms of changed circumstances. … I think that the changed circumstances are a different matter in that you can look at what the available facts were, let us say in this case during the election period, and it is then possible to demonstrate that those facts or the further events which unfolded have changed the circumstances and that that is a sound basis for a change of policy.[446]

4.117 However, Associate Professor Ken Coghill was concerned about the misrepresentation of factual information:

> What does worry me is where there is evidence before a candidate or a political party that something should or should not occur — in other words, factual information which should contribute to policy — which is misused or misrepresented in the

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442 Michael Pearce SC, President, Liberty Victoria, Victorian Council for Civil Liberties, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

443 Professor Jock Given, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

444 Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.2.

445 Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

446 Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

> determination of policy announced at an election. I think that there is a serious problem there, which again goes to the heart of the legitimacy of the political system and people's confidence in it.[447]

4.118 Associate Professor Ken Coghill responded to a hypothetical put forward by Deputy Chair of the Committee, Michael O'Brien MP, in a supplementary submission. The hypothetical question was how a government should be dealt with if it was elected on a promise which it later reneged on. Associate Professor Coghill responded as follows:

> I argue that the appropriate penalty should be at the discretion of the court. If it is established that the offence distorted the democratic will of the people, then it should be open to the court to protect the public interest in the integrity of the political system. If that requires a re-election in one or more instances, then it should be within the powers of the Court of Disputed Returns to so order.[448]

Discussion

4.119 The Committee noted that the *Trade Practices Act 1974* (Cth) does not regulate the content of political advertising.

4.120 While only one inquiry participant strongly supported amending the *Electoral Act 2002* (Vic) to include a *Trade Practices Act* style provision,[449] other inquiry participants including two academics and a civil liberties organisation commented on the suggestion.[450]

4.121 This proposed measure has been previously discussed at the Australian Government's 2020 Summit held on 19 and 20 April 2008 at Parliament House, Canberra. The Summit's final report stated that the creation of a *Trade Practices Act 1974* (Cth) section 52 "misleading or deceptive conduct" offence for politicians was raised as a way of reforming political culture in Australia.[451] The Government response to the Australia 2020 Summit stated that the creation of a *Trade Practices Act 1974* (Cth) section 52 offence for politicians was not supported because "politicians are accountable to the public at elections every three years."[452]

4.122 The Committee does not recommend the incorporation of a *Trade Practices Act* style provision into the *Electoral Act 2002* (Vic) relating to political advertising. The Committee's view is based on the complexity of establishing "truth", as discussed earlier in this chapter. In addition, the Commonwealth Government rejected a proposed *Trade Practices Act* style

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447 Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

448 Associate Professor Ken Coghill, *Submission*, no.2, supplementary, p.2.

449 Julian Burnside AO QC, *Submission*, no.12.

450 Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, pp.2,5; Professor Jock Given, *Transcript of evidence*, Melbourne, 18 August 2009, p.4; Michael Pearce SC, President, Liberty Victoria, Victorian Council for Civil Liberties, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

451 Commonwealth of Australia, "The future of Australian governance", *Australia 2020 Summit: Final report*, Canberra, May 2008, p.324. Retrieved from http://www.australia2020.gov.au/final_report/index.cfm on 28 September 2009.

452 Commonwealth of Australia, "The future of Australian governance", *Responding to the Australia 2020 Summit*, Canberra, April 2009, p.235. Retrieved from http://www.australia2020.gov.au/response/index.cfm on 28 September 2009.

provision to be included in the *Commonwealth Electoral Act 1918* (Cth) at the Australia 2020 Summit because the accountability of politicians is tested at elections.[453] The Committee also shares this view and is concerned that such a provision would lead to a more litigious approach to electoral law.

Registration of political party logos

Inquiry participants' views

4.123 An issue that arose as part of the inquiry process was the alleged misappropriation of a political party's branding. Ann Birrell, Co-convenor of the Port Phillip Greens, informed the Committee that at the 2008 local government elections in Victoria, a rival candidate used a distinctive green triangle on his HTV card, a symbol used by the Australian Greens and known in the community as such. The Committee was told that the HTV card confused and potentially mislead voters.[454]

4.124 At the public hearing Michael O'Brien MP, Deputy Chair of the Committee and Member for Malvern inquired as to why the Australian Greens had not gone down the path of trade marking its symbol. Ann Birrell responded and noted the complexity of the issue:

> We have not gone down the path of the trademark issue. I am not sure why, but I assume it is probably the sort of reason of rigidity, that this is an area which is best left to courts to look at the more general thing about misleading and deceptive conduct. When it amounts to significantly serious amount of deception, then action should be taken. I would not like to see all the big parties registering all the different colours and shapes and names ... because there are probably ways to mislead and deceive people there, too. I tend to think that there is no silver bullet here.[455]

4.125 The Victorian Electoral Commission informed the Committee about the statutory requirements the VEC must comply with in terms of the registration of political parties. The VEC also advised of a provision which was proposed in South Australia to address this issue:

> Issues relating to party registration are policy matters including the number of members required for registration, party names and abbreviations and party logos. Section 47 of the *Electoral Act* currently requires the Commission to refuse application on certain grounds relating to the proposed party name. Registered Party names/or abbreviations are printed on ballot papers – candidates from non-registered parties do not have an affiliation next to their name on the ballot paper.
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> At one time, the South Australian parliament considered prohibiting the use of registered party names or part of a registered party name on election material. It was proposed that this was to prevent independent candidates calling themselves

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453 Commonwealth of Australia, "The future of Australian governance", *Responding to the Australia 2020 Summit*, Canberra, April 2009, p.235. Retrieved from http://www.australia2020.gov.au/response/index.cfm on 28 September 2009.

454 Port Phillip Greens, *Submission*, no.5, p.2.

455 Ann Birrell, Co-convenor, Port Phillip Greens, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

> independent liberals etc. in their advertising material. The proposed provision was a "sticking point" and in the end no legislation was passed.[456]

Discussion

4.126 The Committee explored this issue in light of the registration of political parties. Registration enables political parties to reserve an electoral name. Eligibility of electoral names is determined by the VEC in Victoria, and in some cases by the judiciary. For example, in *Woollard and Australian Electoral Commission and Liberal Party of Australia (WA Division) Inc* it was ruled by the Administrative Appeals Tribunal that "liberals for forests" should be registered as a political party:

> The relevant resemblance in this case must be found between the proposed name "liberals for forests" and the name of the Liberal Party of Australia or any of its State divisions or the registered abbreviation "Liberal". There is a resemblance deriving from the use of the word "liberals". This resemblance is limited. It is entirely related to the generic term "liberal" used in each party's name and, in the case of the Liberal Party of Australia, and its State Divisions, in their registered abbreviations.
>
> The term "liberals for forests" is a combination of words emphasising a specific issue and describing a party by a name different from that of the Liberal Party of Australia or any of its State divisions. It may be that some persons will draw the inference that members of "liberals for forests" are former members or have some affiliation with the Liberal Party of Australia or one of its State divisions. It is unlikely that any elector, seeing the two names on a ballot paper, will draw the conclusion that "liberals for forests" is a political party related to the Liberal Party of Australia or any of its State divisions. In this case, the possibility that the name "liberals for forests" could be mistaken for the registered name "Liberal Party of Australia (WA Division) or the abbreviation "Liberal" is, in the opinion of the Tribunal, not such as is "likely" to occur in the sense explained earlier, namely that there is a real chance that it will occur. Similarly, the possibility that an elector confronted with the two names on a ballot paper would be in a state of uncertainty as to whether one was the other is not such as to amount to a likelihood. It is not accepted that there is any real risk that the name "liberals for forests" will be confused with or mistaken for the name "Liberal Party of Australia" or the name "Liberal".[457]

4.127 The Committee acknowledged that a political party's name and logo is central to the party's identity. Guided by the precedent set by *Woollard and Australian Electoral Commission and Liberal Party of Australia (WA Division) Inc*, the Committee agreed that it is unlikely that the Port Phillip Greens would be successful in mounting a challenge against a rival candidate's use of the distinctive green triangle on the HTV card.

4.128 The Committee considered that a measure to reduce the potential for the misappropriation of branding may be to require political parties to register a logo with the electoral authority at the time of registration. The electoral authority could then simultaneously lodge a trade mark application for a political party's electoral name and logo with IP Australia.

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456 Liz Williams, Deputy Victorian Electoral Commissioner, Victorian Electoral Commission, *Correspondence*, 16 December 2009, pp.1-2.

457 *Woollard and Australian Electoral Commission and Liberal Party of Australia (WA Division) Inc* [2001] AATA at 45-46.

4.129 The Committee noted that the Commonwealth Parliament's JSCEM in its report into the conduct of the 1998 federal election and matters related thereto explored the issue of trade mark law. The JSCEM recommended that the registration fee for political parties be increased to $5,000 to cover costs associated with advertising and lodging a trade mark application with the Trade Marks Office.[458] The Government response to this recommendation was support in principle provided a fee accompanied an application for party registration or a change to either the registered name or the registered abbreviation of a political party.[459]

4.130 Australian trade mark law is based on the *Trade Marks Act 1995* (Cth) and is Commonwealth law. As a result, the registration of political party logos is a Commonwealth electoral issue and the responsibility of the Commonwealth Parliament.

Monitoring and/or review of electoral matter

Inquiry participants' views

4.131 Associate Professor Ken Coghill was the only participant who argued that an agency, in particular the VEC, should actively monitor electoral matter.[460] In his submission, Associate Professor Coghill noted that:

> Political parties and candidates should be required to email copies of all electoral matters (i.e. any matter or thing printed published or distributed intended to influence the casting of the votes of electors) to the VEC ... with the first publication or use of the electoral matter. [461]

4.132 Associate Professor Coghill clarified that this did not include political advertising that is broadcast.[462] He also anticipated that political parties and candidates should be able to meet this requirement:

> With the sort of information technology we have in Victoria there would not be a candidate or a political party or a political organisation incapable of providing that material directly by email to the electoral commission at the time of its first publication.[463]

4.133 At the public hearing, Philip Davis MLC, Committee member and Member for Eastern Victoria noted that requiring the VEC to receive electoral matter printed, published and distributed by political parties and candidates and then in turn, to monitor this electoral matter, would be a very large task.[464] In response, Associate Professor Coghill noted "the receipt of it is a very

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458 Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1998 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 2000, p.137.

459 Australian Government, *Government response to Joint Standing Committee on Electoral Matters Report "The 1998 federal election"*, Parliament of Australia, Canberra, 1 March 2001, p.20.

460 Associate Professor Ken Coghill, *Submission*, no.2, p.2.

461 Associate Professor Ken Coghill, *Submission*, no.2, p.2.

462 Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

463 Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.

464 Philip Davis MLC, Committee member and Member for Eastern Victoria cited in Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

simple electronic matter". Although he admitted it would require the VEC to have additional staff to receive and monitor the electoral matter, he said:

> [W]hat I am asserting is that the integrity of the political system is far more important than issues about a few additional people being employed for the period of an election.[465]

4.134 The Hon Candy Broad MLC, Committee member and Member for Northern Victoria noted that in her experience, political parties devote a large amount of resources to closely scrutinise political advertising, especially material for television advertising. The Hon Candy Broad MLC was concerned that if this approach was adopted, it may be problematic for some political parties which may be under-resourced to meet this obligation.[466]

4.135 Some inquiry participants did not support Associate Professor Coghill's view that the VEC should receive and monitor electoral matter. At the public hearing, the Victorian Electoral Commissioner indicated his reluctance to regulate misleading or deceptive political advertising.[467] This was not unexpected as the Australian Electoral Commission (AEC) advised that the Commonwealth Parliament had taken a similar approach in deciding the AEC's roles in these matters:

> The Federal Parliament has determined that the AEC has no role to play in deciding whether political messages published or broadcast in relation to a federal election are true or untrue.[468]

4.136 Other inquiry participants also held concerns about the risks involved with the VEC being responsible for receiving and monitoring electoral matter.[469] These issues are discussed further in Chapter 5.

4.137 Phil Cleary noted that it is "not an easy question to resolve" when asked by the Hon Candy Broad MLC, Committee member and Member for Northern Victoria, whether the VEC should have a role making judgements about the content of election material.[470]

Discussion

4.138 The VEC is not responsible for the registration of all electoral matter. However, the VEC is responsible for the registration of HTV cards.[471] For a HTV card to be registered, the Electoral Commissioner must be satisfied that the card has met the requirements outlined in section 79(2) of the

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465 Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

466 Hon Candy Broad MLC, Committee member and Member for Northern Victoria cited in Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.6.

467 Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, pp.6-7.

468 Australian Electoral Commission, *Submission*, no.11, p.1.

469 Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, pp.2-3; Emeritus Professor Colin Hughes, *Submission*, no.13, p.1.

470 Phil Cleary, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

471 *Electoral Act 2002* (Vic) s.77 and s.78.

Electoral Act 2002 (Vic).[472] The Electoral Commissioner may refuse to register a HTV card if a HTV card:

> (a) [I]s likely to mislead or deceive an elector in casting the vote of the elector;
>
> (b) [I]s likely to induce an elector to mark the vote of the elector otherwise than in accordance with the directions on the ballot-paper; or
>
> (c) [C]ontains offensive or obscene material.[473]

4.139 The Committee notes that the Victorian Electoral Commissioner is reluctant to regulate misleading or deceptive political advertising. The Commonwealth Parliament has taken a similar view of the Australian Electoral Commission's role. The Committee shares the view that the Victorian Electoral Commissioner should not have an expanded role in the receipt and monitoring of political advertising from political parties and independent candidates.

4.140 The issue of an agency enforcing electoral law in relation to misleading or deceptive political advertising will be discussed in Chapter 5.

472 *Electoral Act 2002* (Vic) s.79(2).
473 *Electoral Act 2002* (Vic) s.79(3).

Chapter
5

Chapter 5: Enforcement issues

5.1 This chapter examines proposed mechanisms to enforce the misleading or deceptive political advertising provisions in Victoria. The chapter begins with a discussion of the independent agencies proposed by inquiry participants, either at the public hearing or via submissions, to enforce the misleading or deceptive political advertising provisions. The chapter also discusses issues including the powers of the returning officer, the proposed regulatory period, defences, legal representation and penalties.

Independent agencies to enforce misleading or deceptive political advertising provisions in Victoria

Victorian Electoral Commissioner

Inquiry participants' views

5.2 The Victorian Electoral Commission (VEC) appoints one member as the Victorian Electoral Commissioner. The Victorian Electoral Commissioner has the "functions, powers and duties delegated to the Electoral Commissioner by the Commission."[474] The primary responsibilities of the Electoral Commissioner are to administer the enrolment process, conduct parliamentary elections and referendums in Victoria and administer the *Electoral Act 2002* (Vic).[475]

5.3 Inquiry participants noted the advantages and disadvantages of the VEC as a possible agency responsible for enforcing the misleading or deceptive political advertising provisions of the *Electoral Act 2002* (Vic).

5.4 Associate Professor Ken Coghill stated a preference for the VEC to enforce the provisions and proposed that:

> - The Electoral Matters Committee should explore and develop a system for ensuring that the Parliament appropriates sufficient resources to enable the VEC to fulfil its functions, including access to funds to meet contingencies such as investigations of alleged offences. Alternatively, the Committee may prefer to recommend that this issue be referred for inquiry by the Public Accounts and Estimates Committee.[476]

474 *Electoral Act 2002* (Vic) s.16(1)(b).
475 *Electoral Act 2002* (Vic) s.8.
476 Associate Professor Ken Coghill, *Submission*, no.2, p.2.

- The VEC should have access to sufficient resources to investigate and prosecute alleged offences. [477]

5.5 Other inquiry participants did not support Associate Professor Coghill's view that the VEC be responsible for the enforcement of the misleading or deceptive provisions of the *Electoral Act 2002* (Vic). These inquiry participants, including the VEC, maintained that the Electoral Commissioner should not be involved in political debate. The views of these inquiry participants are discussed below.

5.6 At the public hearing Steve Tully, Victorian Electoral Commissioner, noted the VEC's reluctance to be the adjudicator and enforcer of any proposed misleading or deceptive provisions added to the *Electoral Act 2002* (Vic):

> I am reluctant to get involved in the political debate. I think the position is clear. … The VEC maintains a position of not making any comment to any media. We treat all complaints seriously, we correspond with the person being complained about and the complainant, and we do not enter into any public debate. Because that will happen [if the VEC is responsible for investigation and prosecution]: the commissioner will be forced into the hurly-burly of the debate and be seen as being a sympathiser to one side or the other. We purely make no comment. We do our job but do not enter into media or public debate.[478]

5.7 Given that the Victorian Electoral Commissioner was the first witness to appear before the Committee at the public hearing, several inquiry participants noted the views of the Victorian Electoral Commissioner during their presentations to the Committee. For example, Stephen Newnham, the then State Secretary of the Australian Labor Party (ALP – Victorian Branch) noted:

> As you saw today the commissioner has no appetite for being the judge and adjudicator of these disputes; none at all.[479]

5.8 In its submission the Australian Electoral Commission (AEC) advised that the Commonwealth Parliament has held a similar view to the AEC's roles in these matters and by association the VEC's views:

> The Federal Parliament has determined that the AEC has no role to play in deciding whether political messages published or broadcast in relation to a federal election are true or untrue.[480]

5.9 Professor Brian Costar and Emeritus Professor Colin Hughes also shared this view. Professor Costar, Co-ordinator of the Democratic Audit of Australia, commented on the perceived problems with the South Australian model which gives the South Australian Electoral Commissioner responsibility for determining what is misleading political advertising during the election period:

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477 Associate Professor Ken Coghill, *Submission*, no.2, p.2.

478 Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of evidence*, Melbourne, 18 August 2009, pp.7, 9.

479 Stephen Newnham, State Secretary, Australian Labor Party (Victorian Branch), *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

480 Australian Electoral Commission, *Submission*, no.11, p.1.

> Remember that if we proceed down the South Australian path, in my opinion it has two major problems. One is it involves the electoral commissioner in making judgements about electoral material, and I think Mr Tully [Victorian Electoral Commissioner] was being gentle in saying that it created administrative difficulties. It was obviously a mess. I do not see any reason why that would not happen again. It has the potential to draw the electoral commissioner into political debate. As we all know, a major and important positive feature of our electoral system, unlike some others, is that the electoral commissions are totally impartial. … My reluctance in this is the general issue that electoral commissions and commissioners should not be drawn into these things.[481]

5.10 Emeritus Professor Colin Hughes, the AEC's first Australian Electoral Commissioner (1984-1989) noted:

> I would be loath to bring existing statutory officers such as the Auditor-General, the Ombudsman or the Electoral Commissioner into a solution as a "deciding" person for it would only diminish their value for what they already do.[482]

5.11 Mark Polden concurred with this view identifying that the Electoral Commissioner risks becoming embroiled in essentially political battles.[483]

Discussion

5.12 The Committee noted that the issue of making an electoral commission responsible for the enforcement of any proposed measures to regulate misleading or deceptive political advertising has been considered by previous parliamentary committees. The work of the Commonwealth Parliament's Joint Select Committee on Electoral Matters (JSCEM) into regulating political advertising, which was investigated as part of the inquiry into the 1993 federal election and matters related thereto, reported that:

> The Committee [JSCEM] 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.[484]

5.13 In contrast, in its report of the inquiry into the 1996 federal election and matters related thereto, the Commonwealth Parliament's JSCEM proposed the AEC be responsible for assessing political advertising:

> The AEC should be responsible for assessing whether there is sufficient evidence to refer complaints to the DPP [Department of Public Prosecutions], as is the case with other offence provisions in the Electoral Act. If necessary, the AEC should be provided with additional resources to enable it to fulfil this new responsibility.[485]

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481 Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, pp.2-3, 4.

482 Emeritus Professor Colin Hughes, *Submission*, no.13, p.1.

483 Mark Polden, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.

484 Joint Standing Committee on Electoral Matters, *Report on the inquiry into the conduct of the 1993 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, November 1994, p.109.

485 Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1996 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 1997, p.84.

5.14 Electoral commissions have consistently argued that if it was given the responsibility to enforce misleading or deceptive political advertising provisions, it would impair its reputation for neutrality and capacity to conduct elections.[486] The South Australian Electoral Commissioner, in her report into the Frome by-election on 17 January 2009, which was tabled on 14 July 2009 in the South Australian Parliament noted the administrative difficulties associated with being responsible for investigation and prosecution:

> The Electoral Commissioner is of the strong opinion that if the onerous burden of determining whether electoral material was misleading to a material extent was removed from legislation, the office would be in a better position to monitor the content of electoral material based on accuracy alone while maintaining the integrity of electoral comments. It would also afford the Commissioner and her staff the opportunity to focus on administering the provisions of the Act in relation to the conduct of elections.[487]

5.15 The Committee notes the views of the Victorian Electoral Commissioner, the South Australian Electoral Commissioner and the Commonwealth Parliament.

5.16 The Committee is reluctant for the Victorian Electoral Commissioner to have an expanded role monitoring, reviewing and investigating breaches of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising.

Courts

Inquiry participants' views

5.17 Several inquiry participants raised the issue of the courts as an enforcer of the misleading or deceptive political advertising provisions in Victoria.

5.18 Two inquiry participants, Julian Burnside AO QC and Associate Professor Ken Coghill held the view that given the courts' experience with enforcing the *Trade Practices Act 1974* (Cth), the courts could effectively determine what is misleading or deceptive political advertising.[488]

5.19 Stephen Newnham, the former State Secretary of the ALP (Victorian Branch) stated that the courts would be the only body which should be able to make decisions about misleading or deceptive political advertising, if this role was not given to the electoral commission. Nevertheless, Mr Newnham was concerned about the implications of criminalising political and public debate.[489]

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486 Australian Electoral Commission, *Supplementary submission to the Commonwealth Parliament's Joint Standing Committee on Electoral Matters inquiry into the 1996 federal election and matters related thereto*, Canberra, 14 November 1996, pp.5-6.

487 Electoral Commission SA, *Election report: Frome by-election 17 January 2009*, Electoral Commission SA, Adelaide, 2009, p.22.

488 Julian Burnside AO QC, *Submission*, no.12, p.1; Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.2.

489 Stephen Newnham, State Secretary, Australian Labor Party (Victorian Branch), *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

5.20 Two inquiry participants, Michael Pearce SC, President of Liberty Victoria and Professor Brian Costar, Co-ordinator of the Democratic Audit of Australia, were concerned about the courts deciding the outcome of elections. For example, Michael Pearce SC stated a preference for the courts not to be involved:

> I think it would be very undesirable if we went down the path that the Americans often go down of having elections decided by judges rather than by voters. Let us say a candidate is found to have committed an offence against section 84 and is fined but holds his or her seat as a result. The recourse then is at the ballot box next time around, and the voting public can pass judgement next time around. I think that is preferable to handing the job over to the courts to decide the outcome of elections.[490]

5.21 Professor Brian Costar shared a similar view to Michael Pearce SC:

> One of the great features of the Australian electoral system is that it is rarely in the courts, which I think is a good thing. By contrast, the American electoral system is basically created and uncreated in the courts, which is one of the reasons why its electoral systems are in the mess they are in. I think we should keep as much as we can. I know there are some issues like courts of disputed returns and there are occasionally things like the Roach case over the right of prisoners to vote and so on, and the evidence and the Crichton-Browne case that has been cited, but comparatively Australia settles its electoral differences either on the hustings or in the Parliament. It does not settle them largely in the courts. I think that is a good thing, and I think to judicialise this matter would be a retrograde step.[491]

Discussion

5.22 The Committee notes that the issue of making the courts responsible for the enforcement of the misleading or deceptive provisions of political advertising has been considered by previous parliamentary committees. The Commonwealth Parliament's Joint Select Committee on Electoral Reform (JSCER) was concerned in its *Second report* about the involvement of the courts:

- The Committee was particularly concerned to establish the criteria which would be adopted by a Court to determine whether a political advertisement was "true";[492]
- It is undesirable, both from the point of view of the courts, and the participants of the electoral process, to require the courts to enter the political arena in this way;[493]
- Great difficulties would be encountered by a Court which seeks to define "untrue and misleading" statements;[494] [and]

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490 Michael Pearce SC, President, Liberty Victoria, Victorian Council for Civil Liberties, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.

491 Professor Brian Costar, Co-ordinator, Democratic Audit of Australia, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.

492 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.17.

493 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.21.

- The injunction remedy could cause grave injustice to political parties or candidates and could disrupt the normal political process, if available at the suit of any candidate.[495]

5.23 The Committee notes that the culture of Australian politics is to settle differences of opinion during political discourse.

Independent statutory tribunal or Election Ombudsman

Inquiry participants' views

5.24 An inquiry participant, Emeritus Professor Colin Hughes, suggested the Committee consider establishing an independent statutory tribunal to enforce the misleading or deceptive electoral provisions in Victoria:

> I would be loath to bring existing statutory officers such as the Auditor-General, the Ombudsman or the Electoral Commissioner into a solution as a "deciding" person for it would only diminish their value for what they already do. On the other hand, it might be possible to have someone, or a small group say three, chosen and designated to issue statements … [that the statement was untrue or the activity unfair] and have their activities serviced by staff seconded temporarily from one of the statutory office-holders, but not from the Electoral Commission which could not spare them.[496]

5.25 Otherwise, Emeritus Professor Colin Hughes suggested the Committee consider appointing an Election Ombudsman "who could make statements about the correctness or fairness of material introduced to the campaign."[497]

Discussion

5.26 An independent statutory organisation to regulate political advertising has been investigated previously by parliamentary committees. The Commonwealth Parliament's JSCEM, in its report on the 1996 federal election, cited evidence from the AEC which advocated for the introduction of a separate statutory organisation – an Election Complaints Authority (ECA) – to enforce any proposed sanctions:

> [Such an organisation] could be created with its own functions and powers under the CEA [*Commonwealth Electoral Act 1918* (Cth)], 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. 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 [and] 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.[498]

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494 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.22.

495 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.26.

496 Emeritus Professor Colin Hughes, *Submission*, no.13, p.1.

497 Emeritus Professor Colin Hughes, *Submission*, no.13, p.1.

498 Australian Electoral Commission's submission, pp.S1970-1 cited in Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1996 federal*

5.27 The Commonwealth Parliament's JSCEM did not agree with the AEC's view. The JSCEM believed that the AEC had "overstated" its concerns regarding compromising its neutrality. The JSCEM's view was based on the State Electoral Office in South Australia administering truth-in-advertising provisions capably and without compromising its neutrality. As a result, the JSCEM concluded that the establishment of a separate statutory organisation to enforce sanctions was unnecessary.[499]

5.28 However as noted earlier, the Electoral Commission South Australia (formerly known as the State Electoral Office South Australia) in its report into the Frome by-election on 17 January 2009 which was tabled on 14 July 2009 in the South Australian Parliament noted an opposing view:

> The Electoral Commissioner is of the strong opinion that if the onerous burden of determining whether electoral material was misleading to a material extent was removed from legislation, the office would be in a better position to monitor the content of electoral material based on accuracy alone while maintaining the integrity of electoral comments. It would also afford the Commissioner and her staff the opportunity to focus on administering the provisions of the Act in relation to the conduct of elections.[500]

5.29 Given the evidence received by the Committee and in particular the work of previous parliamentary committees, the Committee does not support the establishment of a separate compliance agency to regulate political advertising or the appointment of an Election Ombudsman.

Media

Inquiry participants' views

5.30 The media was suggested as a possible agency to assist in the enforcement of the misleading or deceptive electoral provisions in Victoria. Inquiry participant Emeritus Professor Colin Hughes, referred the Committee to the American news television program, *The NewsHour with Jim Lehrer*, in which media specialists from the Annenberg School of Journalism and Professor Larry Sabato of the University of Virginia comment on elections and proposed legislation.[501]

5.31 Emeritus Professor Hughes further noted that "requiring the media to give space or time risks a challenge to the validity of the scheme as a whole or any particular action, but asking them to donate voluntarily raises the risk of being given a corner among the classifieds."[502]

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election and matters related thereto, Parliament of the Commonwealth of Australia, Canberra, June 1997, p.84.

499 Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1996 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 1997, p.84.

500 Electoral Commission SA, *Election report: Frome by-election 17 January 2009*, Electoral Commission SA, Adelaide, 2009, p.22.

501 Emeritus Professor Colin Hughes, *Submission*, no.13, p.1.

502 Emeritus Professor Colin Hughes, *Submission*, no.13, p.2.

Discussion

5.32 The Committee recognised the work of previous parliamentary committees on this issue. The Commonwealth Parliament's JSCER noted the following problems with the media being responsible for regulation of misleading or deceptive electoral provisions:

> - By requiring the media to decide which advertisements will or will not be allowed would attract accusations of partisanship; ... [and]
> - It would be unreasonable to expect the media to decide whether to accept or reject "misleading" political advertisements.[503]

5.33 The freedom to receive and communicate information without interference is a fundamental element of Australian democracy. The Committee acknowledges that the media plays a significant role in generating political debate during election campaigns which assists the public to form a view of who to vote for.

Self-regulation

Inquiry participants' views

5.34 The Committee received correspondence from the Association of Professional Political Consultants (APPC), which is the self-regulatory body for the United Kingdom's (UK) public affairs professionals.[504] The APPC's three main roles are:

> - To ensure transparency and openness by maintaining a register of political consultants;
> - To enforce high standards by requiring members to adhere to a code of conduct; [and]
> - To promote understanding of the public affairs sector, and the contribution made by political consultants to a properly functioning democracy, amongst politicians, the media and others.[505]

5.35 The APPC included in its correspondence its code of conduct which regulates the activities of political consultants and its rules on complaints, determinations and disciplinary rules and procedures.[506] The APPC's code of conduct applies the following principles:

> The Code of Conduct applies the principles that political consultants should be open and transparent in their dealings with parliamentarians or representatives of institutions of government; and that there should be no financial relationship between them. APPC members are determined to act at all times with the highest standards

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503 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, pp.12-13.

504 Mary Shearer, Secretary, Association of Professional Political Consultants, *Correspondence*, 15 September 2009.

505 Association of Professional Political Consultants, "Association of Professional Political Consultants", 2006. Retrieved from http://www.appc.org.uk/ on 3 December 2009.

506 Mary Shearer, Secretary, Association of Professional Political Consultants, *Correspondence*, 15 September 2009.

> of integrity and in a professional and ethical manner reflecting the principles applied by this Code.[507]

5.36 The APPC is also responsible for investigating complaints against members and to take appropriate disciplinary action in the event that the code of conduct has been breached.[508]

5.37 Similarly, The American Association of Political Consultants has a Code of ethics which its members must pledge to adhere to. One of the standards of practice is related to misleading or deceptive political strategies:

> I will refrain from false or misleading attacks on an opponent or member of his or her family and will do everything in my power to prevent others from using such tactics.[509]

5.38 The Committee noted there are other associations which have similar roles and responsibilities as the APPC. These include: The International Association of Political Consultants, The American Association of Political Consultants, The Association of Latin American Political Consultants, The European Association of Political Consultants and The Asia Pacific Association of Political Consultants.

Discussion

5.39 As discussed in Chapter 2, there are no legal or industry checks on the truthfulness of statements made in political advertisements broadcast on television and the radio or published in print or on the internet.

5.40 The Committee acknowledged the work of previous parliamentary committees on self-regulation. In 1984 the Commonwealth Parliament's JSCER considered whether industry regulation should be encouraged and concluded that:

- [I]t would require the media and the advertising industry to decide what amounts to political truth; ... [and]
- Legislatures have found that it has been necessary to supplement self-regulation with statutory standards in the field of advertising of consumer products.[510]

5.41 The Committee recognises there are benefits associated with having effective industry self-regulation, including the flexibility of self-regulatory codes of conduct that enable the regulator to deal quickly and efficiently with any breaches of the code.

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507 "Code of Conduct" p.1 included in Mary Shearer, Secretary, Association of Professional Political Consultants, *Correspondence*, 15 September 2009.

508 "Complaints, determination and disciplinary rules and procedures" included in Mary Shearer, Secretary, Association of Professional Political Consultants, *Correspondence*, 15 September 2009.

509 The American Association of Political Consultants, "Code of ethics", no date. Retrieved from http://www.theaapc.org/about/code/ on 3 December 2009.

510 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.13.

Powers of the Returning Officer/Election Manager

Inquiry participants' views

5.42 The Returning Officer is responsible for the management of a local government election and is impartial and independent. However, "the Returning Officer has no legislative authority to investigate breaches of the LGA [*Local Government Act 1989* (Vic)]."[511] The equivalent at a state election or by-election is an Election Manager.[512]

5.43 William (Jennifer) Jacomb was the only inquiry participant to propose amending the *Electoral Act 2002* (Vic) to require "the Returning Officer to uphold the law as a mandatory responsibility, not a discretionary responsibility."[513] William (Jennifer) Jacomb referred to the legal case of *Balogh v Municipal Electoral Tribunal and Victorian Electoral Commission* in which Derek Balogh, an unsuccessful candidate for the Grasslands Ward in the general election for the Brimbank City Council on 26 November 2005 disputed the validity of the election on the grounds that:

- [T]wo of the successful candidates, Troy Atanasovski and Ken Capar allegedly breached s 55A of the [Local Government] Act by publishing or distributing material that was likely to mislead or deceive a voter in relation to the casting of his or her vote. The misleading or deceptive conduct was that Atanasovski and Capar claimed or implied through this material that they were the official endorsed candidates of the ALP, when the ALP was not endorsing any candidate;
- Capar used the term "Community Labor" in his election material, such term being a registered business name of Joseph Long, and without Capar having Long's permission;
- Capar's father acted as a scrutineer, when ineligible to do so because he was a candidate in a simultaneous election in another ward;
- [D]uring the campaign, and on election day, the Returning Officer allegedly failed to take appropriate action to prevent misleading or deceptive conduct by Atanasovski and Capar in relation to their election material, and in relation to other breaches of the Act.[514]

5.44 During these legal proceedings, Derek Balogh brought into question the powers of the Returning Officer. He argued that:

> [I]n effect that the Returning Officer had not acted sufficiently to maintain and enforce order and keep the peace at the voting centre, nor had he exercised his power to

511 Victorian Electoral Commission, *Report of local government electoral activity 2008-2009, Part 1, Report of the conduct of the 2008 local government elections*, Victorian Electoral Commission, Melbourne, October 2009, p.4.
512 *Electoral Act 2002* (Vic) s.18.
513 William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.8.
514 *Balogh v Municipal Electoral Tribunal and VEC (*General) [2007] VCAT 1955 (27 August 2007) at 5.

> arrest without warrant those reasonably suspected of committing an offence against the Act on election day.[515]

5.45 William (Jennifer) Jacomb's submission suggested that the powers of the Returning Officer could be made mandatory by amending sections 8(1) and 9 of the *Electoral Act 2002* (Vic). The proposed amendments appear in bold:

> 8 Responsibility and functions of the Commission
>
> (1) The Commission is responsible for the administration of the enrolment process and the conduct of parliamentary elections and referendums in Victoria. **During the election period it is responsible for upholding the *Electoral Act*, and if necessary, arresting without warrant any person reasonably suspected of committing an offence under the Act under Sections 83 and 84 and furthermore removing material from within 400 metres of a polling place reasonably suspected of breaching sections 83 and 84 of the *Electoral Act*. The intent of Parliament in the exercise of this responsibility is mandatory on the Commission.**[516]
>
> 9 Powers of the Commission
>
> (1) Subject to this Act, the Commission has power to do all things necessary or convenient to be done for or in connection with the performance of its responsibilities and functions. **During the election period it has also such power responsible for upholding the *Electoral Act*, and if necessary, arresting without warrant any person reasonably suspected of committing an offence under the Act under Sections 83 and 84 and furthermore removing material from within 400 metres of a polling place reasonably suspected of breaching sections 83 and 84 of the *Electoral Act*. The intent of Parliament in the exercise of this responsibility and power is mandatory on the Commission.**[517]

5.46 The VEC commented on the proposed amendment to the powers of the Returning Officer:

> The primary responsibility of the returning officer/election manager is to ensure that voting and counting during an election are conducted in an orderly and transparent manner. The legislation currently provides a mechanism to address breaches of the Act. It should be noted that a breach of the legislation may have no impact on the outcome of the election. Alleged breaches of the misleading provisions of electoral legislation often end up in court after an election. These cases usually involve extensive investigation and are not straight forward. It would be unreasonable to expect the returning officer/election manager to determine these disputes during the election period. Indeed most could involve taking evidence from the Premier or Leader of the Opposition. The existing provisions that allow for candidates and parties to seek an injunction via the courts is appropriate.[518]

Discussion

5.47 The Committee notes that the issue of the powers and responsibilities of the Returning Officer had been raised previously in the Committee's inquiry into

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515 *Balogh v Municipal Electoral Tribunal and VEC (*General) [2007] VCAT 1955 (27 August 2007) at 55.

516 William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.16.

517 William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.18.

518 Liz Williams, Deputy Victorian Electoral Commissioner, Victorian Electoral Commission, *Correspondence*, 16 December 2009, p.1.

the conduct of the 2006 Victorian state election and matters related thereto.[519]

5.48 The Committee notes that Magistrate Michael Smith in *Balogh v Victorian Electoral Commissioner* was also of the opinion that the provisions relating to the Returning Officer's powers should be clarified. Magistrate Michael Smith stated:

> [T]he returning officer either during the election period or on polling day would not in my view be required to exercise such power in respect of for example ss.55A and 57. Quite clearly the working of s.17 of Schedule 2 creates doubt and ambiguity. I would suggest that the relevant provisions of the Act touching upon the duties and power of a returning officer in respect of offences under the Act, be clarified.[520]

5.49 While the example provided to the Committee emanated from a matter arising from a local government election, the Committee notes that the role of the Returning Officer could equally be applied to the Election Manager at a state election or by-election.

Regulatory period

Inquiry participants' views

5.50 Several inquiry participants proposed various time frames in which misleading or deceptive political advertising should be regulated. Associate Professor Ken Coghill proposed that the regulatory period should be confined to the election period:

> I would confine it to the period of the election — in other words, between the dissolution of the houses and the actual casting of the ballot — but within that period I would be including in it any material published by candidates or on behalf of candidates.[521]

5.51 Emeritus Professor Colin Hughes provided a number of options for the Committee's consideration but favoured the regulatory period to include some preceding months leading up to the election and the election period:

> A choice has to be made among having any solution available during the usual statutory period after the issue of writs, or for a longer period of that plus some preceding months, or continuously. I would favour the second option, and a fixed term for the Parliament is helpful in this regard.[522]

5.52 Julian Burnside AO QC proposed that the regulatory period should be continuous.[523]

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519 Electoral Matters Committee, *Report into the 2006 Victorian state election and matters related thereto*, Parliament of Victoria, Melbourne, June 2008, p.127.

520 Magistrate Michael Smith, Transcript of proceedings, *Derek Balogh v Victorian Electoral Commission*, 30 August 2006, p.21.

521 Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.

522 Emeritus Professor Colin Hughes, *Submission*, no.13, p.2.

523 Julian Burnside AO QC, *Submission*, no.12, p.2.

Discussion

5.53 The *Electoral Act 2002* (Vic) defines the period in which misleading or deceptive political advertising is regulated as starting on the day on which the writ is issued for the election and ending at 6 pm on election day.[524]

5.54 The Committee supports the current regulatory period.

Defences

Inquiry participants' views

5.55 In a prosecution of a person for an alleged breach of Section 84(1) or 84(2) of the *Electoral Act 2002* (Vic), it is a defence if the person proves that the person:

> (a) [D]id not know; and
>
> (b) [C]ould not reasonably be expected to have known—
>
> that the matter or thing was likely to mislead an elector when casting the elector's vote.[525]

5.56 In its submission Liberty Victoria requested the Committee consider:

> [T]hat the prohibition should apply irrespective of intent, i.e even where the person who engaged in the misleading or deceptive conduct was not aware that it was misleading or deceptive. However, where the deception was deliberate this should be an aggravating factor to be considered in setting the penalty.[526]

Discussion

5.57 The defences for an alleged breach of the misleading or deceptive electoral provisions in the *Electoral Act 2002* (Vic) are similar to that found in the Australian Capital Territory's, Western Australia's and Northern Territory's electoral legislation. Liberty Victoria's suggested defence is not found in any electoral legislation in Australia.

5.58 The Queensland Parliament's Legal, Constitutional and Administrative Review Committee (LCARC), in its report into truth in political advertising in 1996, received evidence on defences from three inquiry participants. The defences included:

- That the person was unaware of the falsity;
- That the person did not publish recklessly; and
- That the publication was reasonable in the circumstances.[527]

524 "Relevant period" cited in *Electoral Act 2002* (Vic) s.3.
525 *Electoral Act 2002* (Vic) s.84(3).
526 Liberty Victoria, Victorian Council for Civil Liberties, *Submission*, no.7, p.2.
527 Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, p.35.

5.59 The Queensland Parliament's LCARC concluded that "in terms of the remedies recommended above, defences would only be applicable if a conviction and fine was sought to be imposed".[528]

5.60 The Committee does not believe that the defences specified in the *Electoral Act 2002* (Vic) should be amended.

Legal representation

Inquiry participants' views

5.61 William (Jennifer) Jacomb proposed that legal representation should be publicly funded:

> Make provision for legal representation before the Court of Disputed Returns publicly funded and no possibility for costs to be awarded against the applicant (petitioner) – Section 128 ... Section 130.[529]

Discussion

5.62 The Committee noted the work of previous parliamentary committees. In particular the Queensland Parliament's LCARC in its report *Truth in political advertising* tabled in December 1996 acknowledged that "application to the Courts may involve considerable expense to individuals, but notes that in most cases, actions would be taken by political parties."[530]

5.63 In 2009, the Australian Government's Electoral Reform Green Paper – *Strengthening Australia's Democracy* – noted similar points. First, that it has been contended that the costs of a petition in the Court of Disputed Returns may be "too heavy to be borne by an individual", given the costs of legal representation and the possibility of an adverse costs order.[531] Second, "decisions about the prospects of a challenge are left to the hard-nosed men of the major parties rather than the defeated candidates".[532]

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528 Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, p.35.

529 William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.11.

530 Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, p.39.

531 Australian Government, *Electoral reform green paper: Strengthening Australia's democracy*, Department of Prime Minister and Cabinet, Canberra, September 2009, p.200. See Colin Hughes, 'The Illusive Phenomenon of Fraudulent Voting Practices: A Review Article', *Australian Journal of Politics and History,* vol.44, no.3, 1998, p. 477, citing C Copeman and A McGrath (eds.), *Corrupt Elections: Recent Australian Studies and Experiences of Ballot Rigging*, Tower House Publications, Kensington, 1997.

532 Australian Government, *Electoral reform green paper: Strengthening Australia's democracy*, Department of Prime Minister and Cabinet, Canberra, September 2009, p.200. See Colin Hughes, 'The Illusive Phenomenon of Fraudulent Voting Practices: A Review Article', *Australian Journal of Politics and History,* vol.44, no.3, 1998, p. 477, citing C Copeman and A McGrath (eds.), *Corrupt Elections: Recent Australian Studies and Experiences of Ballot Rigging*, Tower House Publications, Kensington, 1997.

5.64 The Australian Government is currently reviewing the appropriateness of the legal costs associated with lodging a petition. Possible options for change included in *Strengthening Australia's Democracy* are:

- [I]ncreasing the court costs of lodging a petition in order to deter unmeritorious or nuisance claims;
- [R]emoving the exemption or waiver of filing fees for lodgement of electoral petitions;
- [R]equiring the Commonwealth to bear all costs in electoral proceedings, except where the proceedings are summarily dismissed as being vexatious or frivolous, or for not complying with procedural requirements; or
- [I]ntroducing an additional cost penalty for petitions found to be frivolous or lacking in substance or merit.[533]

5.65 However, the Victorian Parliament's Law Reform Committee in its report on vexatious litigants noted the importance of legal costs as a financial disincentive to discourage frivolous or vexatious petitions devoid of merit.[534]

5.66 The Committee, given its interest in the harmonisation of electoral law, awaits the outcome of the Commonwealth Government's electoral reform process on this matter.

Penalties

5.67 The *Electoral Act 2002* (Vic) provides sanctions for the breaching of section 84(1) or section 84(2) of the misleading or deceptive provisions of the Act, as follows:

> Penalty: In the case of a natural person, 60 penalty units or 6 months imprisonment;
> In the case of a body corporate, 300 penalty units.[535]

5.68 The value of a penalty unit for the financial year commencing 1 July 2009 is $116.82.[536] A natural person who breached the misleading or deceptive content provisions of the *Electoral Act 2002* (Vic) could be fined $7,009.20 (60 penalty units) or be sentenced to 6 months imprisonment. A body corporate could be fined $35,046 (300 penalty units).

5.69 Associate Professor Ken Coghill noted that the effectiveness of the penalties is dependent on "whether alleged offences are prosecuted, the courts apply

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533 Australian Government, *Electoral reform green paper: Strengthening Australia's democracy*, Department of Prime Minister and Cabinet, Canberra, September 2009, p.201.

534 Law Reform Committee, *Inquiry into vexatious litigants*, Parliament of Victoria, Melbourne, December 2008, p.111. The Law Reform Committee noted that "[t]he cost of bringing legal proceedings in Victoria's courts and tribunals has the potential to serve as a disincentive for vexatious litigants."

535 *Electoral Act 2002* (Vic) s.84(1) and s.84(2).

536 John Lenders MP, Treasurer of Victoria was cited in the *Victorian Government Gazette*, No.S132, Victorian Government Printer, Melbourne, Friday 15 May 2009, p.1.

the provisions rigorously and the penalties (s.84(3)) are an effective deterrent."[537]

5.70 The Committee explored breaches of the *Electoral Act 2002* (Vic). The Victorian Electoral Commission advised the Committee of a relevant case – *T Muscat v Victorian Electoral Commission* in the Municipal Electoral Tribunal – November 2000:

> The application raised a matter related to the registration of HTVC [how-to-vote card] by the Returning Officer for candidate Puig. The applicant alleged that the card that showed a photograph of candidate Puig and the Premier, the Honourable Steve Bracks, was misleading in that it suggested that candidate Puig was the endorsed Labor candidate for the election when in fact the Labor Party had not endorsed any of the 3 Labor candidates at the election. The tribunal dismissed the application and relied on *Evans v Crichton-Browne* in reaching its conclusion.
>
> An appeal was subsequently lodged with VCAT [Victorian Civil and Administrative Tribunal] – *T Muscat v Electoral Tribunal* – September 2001. VCAT overturned the Municipal Electoral Tribunal's original decision.[538]

5.71 The Committee compared these penalties with those states with similar legislative provisions as Victoria in relation to misleading or deceptive provisions. Table 5.1 summarises the findings of the Committee.

5.72 Inquiry participants proposed amendments to the penalties including fines, damages, injunctions, barring candidate from contesting or holding public office and imprisonment. These are also discussed in this section.

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537 Associate Professor Ken Coghill, *Submission*, no.2, p.2.

538 Liz Williams, Deputy Victorian Electoral Commissioner, Victorian Electoral Commission, *Correspondence*, 16 December 2009, p.2.

Table 5.1: Penalties for breach of misleading or deceptive political advertising provisions

Jurisdiction	VIC	C'WEALTH	NSW	QLD	SA	TAS	WA	ACT	NT
Act	*Electoral Act 2002* s.84	*Commonwealth Electoral Act 1918* (Cth) s.329	*Parliamentary Electorates and Elections Act 1912* (NSW) s.151A	*Electoral Act 1992* (Qld) s.163	*Electoral Act 1985* (SA) s.113	*Electoral Act 2004* (Tas) s.197	*Electoral Act 1907* (WA) s.191A	*Electoral Act 1992* (ACT) s.297	*Electoral Act* (NT) s.287
Natural person	60 penalty units ($7,009.20) or 6 months imprisonment	A fine not exceeding $1,000 or imprisonment for a period not exceeding 6 months, or both	A penalty not exceeding 10 penalty units ($1,100) or imprisonment for a period not exceeding 6 months, or both	Maximum penalty—40 penalty units ($4,000)	Maximum penalty: $1,250 In addition, the advertiser can be requested to do one or more of the following: (a) withdraw the advertisement from further publication; (b) publish a retraction in specified terms and a specified manner and form	Fine not exceeding 200 penalty units ($24,000) or imprisonment for a term not exceeding 6 months, or both	$1,000	50 penalty units ($5,500), or imprisonment for 6 months, or both	100 penalty units ($13,000) or imprisonment for 6 months

Note: The monetary value of penalty units varies in each state.

Jurisdiction	VIC	C'WEALTH	NSW	QLD	SA	TAS	WA	ACT	NT
Body corporate	300 penalty units ($35,046)	A fine not exceeding $5,000	A penalty not exceeding 50 penalty units ($5,500)		Maximum penalty: $10,000	Fine not exceeding 200 penalty units ($24,000) or imprisonment for a term not exceeding 6 months, or both			500 penalty units ($65,000)
Note		A defendant bears a legal burden in relation to the defence in subsection (5) (see s.13.4 of the Criminal Code)							

Fines

Inquiry participants' views

5.73 The *Electoral Act 2002* (Vic) provides fines for breaches of the misleading or deceptive provisions.

5.74 A natural person who breached the misleading or deceptive provisions of the *Electoral Act 2002* (Vic) could be fined $7,009.20 (60 penalty units) whereas a body corporate could be fined $35,046 (300 penalty units).[539]

5.75 Fines are intended to serve as a deterrent.[540] However, one inquiry participant, William (Jennifer) Jacomb believed that the value of the penalty was not a sufficient enough deterrent:

> [A]t the moment with the current fines, 300 penalty units [$35,046] — they get $93 000 [sic] a year as an MP — that is the best return on an investment I've ever seen.[541]

5.76 New penalty units were proposed. Firstly, William (Jennifer) Jacomb proposed that section 83 of the *Electoral Act 2002* (Vic), which refers to the printing and publication of electoral advertisements, handbills, pamphlets or notices, be amended to include "anything that will mislead a substantive number of electors in the formation of their intent to vote is an offence". In this case, William (Jennifer) Jacomb stated the fine should be 300 penalty units ($35,046) for a natural person and 3,000 penalty units ($350,460) for a body corporate.[542]

5.77 Secondly, William (Jennifer) Jacomb proposed that section 84(1) of the *Electoral Act 2002* (Vic) should be amended so that misleading an elector in the formation of their intent to vote is an offence. He indicated that the fine for such an offence should be 300 penalty units ($35,046) for a natural person and 3,000 penalty units ($350,460) for a body corporate.[543]

5.78 The penalty units suggested by William (Jennifer) Jacomb are within the range currently operational in the *Electoral Act 2002* (Vic): 1 penalty unit ($116.82) to 3,000 penalty units ($350,460). The fine of 3,000 penalty units is currently restricted to offences such as misuse of enrolment and electoral information.[544]

5.79 Julian Burnside AO QC supported fines, among other penalties.[545]

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539 *Electoral Act 2002* (Vic) s.84.

540 This was noted by the Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, p.34.

541 William Robert Jacomb (Jennifer Belinda Jacomb), *Transcript of evidence*, Melbourne, 18 August 2009, p.6.

542 William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.14.

543 William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.14.

544 A registered political party and body corporate may be fined 3,000 penalty units under sections 36, 37 and 123 of the *Electoral Act 2002* (Vic).

545 Julian Burnside AO QC, *Submission*, no.12, p.3.

5.80 The only penalty supported by Liberty Victoria was fines. Liberty Victoria indicated that "where the deception was deliberate this should be an aggravating factor to be considered in setting the penalty".[546]

Discussion

5.81 The Committee does not believe that the remedy provisions specified in the *Electoral Act 2002* (Vic) should be amended.

Damages

Inquiry participants' views

5.82 The Committee did not receive any evidence on damages from inquiry participants.

Discussion

5.83 Under the *Defamation Act 2005* (Vic), damages are a prescribed remedy. The amount of damages awarded is determined by the courts ensuring "that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded."[547]

5.84 The maximum amount of damages for non-economic loss is $250,000.[548] However, a court may order damages that exceed the maximum amount if "the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages".[549]

5.85 The following factors may mitigate the damages awarded:

> (a) the defendant has made an apology to the plaintiff about the publication of the defamatory matter; or
>
> (b) the defendant has published a correction of the defamatory matter; or
>
> (c) the plaintiff has already recovered damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter; or
>
> (d) the plaintiff has brought proceedings for damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter; or
>
> (e) the plaintiff has received or agreed to receive compensation for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter.[550]

5.86 The Committee does not believe that the remedy provisions specified in the *Defamation Act 2005* (Vic) should be amended.

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546 Liberty Victoria, Victorian Council for Civil Liberties, *Submission*, no.7, p.2.
547 *Defamation Act 2005* (Vic) s.34.
548 *Defamation Act 2005* (Vic) s.35(1).
549 *Defamation Act 2005* (Vic) s.35(2).
550 *Defamation Act 2005* (Vic) s.38(1).

Injunction

Inquiry participants' views

5.87 An injunction is "a court order of an equitable nature requiring a person to do, or refrain from doing, a particular action. Injunctions may be classified as final or interlocutory; mandatory or prohibitory; ex parte or inter partes; and equitable or legal."[551]

5.88 Some inquiry participants noted their concerns regarding injunctions. William (Jennifer) Jacomb indicated:

> [I]t is possible to go to the Supreme Court and obtain either a civil injunction or an injunction under Section 469AA of the *Crimes Act.* However, this does not undo the damage done or the tainting of the election. Furthermore, where the act complained of occurs on Polling day, based upon informal research with the Supreme Court I have identified that:-
>
> - Whilst it is possible to get the injunction ex parte (albeit with some difficulty)
> - Said injunction would be unlikely to be issued until after midday
>
> Which means that the offending material would most likely not be removed until after 2 [pm].
>
> By this time most of the electors have cast their vote and the damage is done and irreversible. What is needed is a more cost and time effective solution to prevent tainting of the election.[552]

Discussion

5.89 The injunction remedy has been discussed earlier in this chapter (see section discussing independent agencies responsible for enforcing misleading or deceptive political advertising provisions in Victoria).

5.90 The appropriateness of injunctions has been investigated by the Commonwealth Parliament. In its *Second report*, the Commonwealth Parliament's JSCER reported that witnesses were concerned about the potential for candidates to seek injunctions in order to prevent the publication of a rival candidate's advertisements. Concerns included:

> An application for an interim injunction could prove to be an effective tactic for a candidate to obtain publicity for him or herself and to disrupt the advertising campaign of another party.
>
> An injunction, particularly an interim injunction, while an appropriate remedy in the *Trade Practices Act*, gives rise to severe difficulties in the area of political advertising. In an election period strict time constraints apply.[553]

5.91 Furthermore, in the Commonwealth Parliament's JSCER's report, Mr McHugh QC's evidence noted the likelihood of a judge granting an injunction and the implications of this remedy:

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551 Peter E Ngyh and Peter Butt (eds), *Butterworths Concise Australian legal dictionary*, Second edition, Butterworths, Sydney, 1998, p.229.

552 William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.16.

553 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.25.

> Mr McHugh told the Committee that an injunction could be obtained quickly. If an offending advertisement appeared, a party's lawyers could approach a judge at any time. The judge would probably require some notice to the other side, either a few hours or until the next morning. As it would be unlikely that the judge could conduct a full enquiry so as to come to a final decision, he [the judge] would be obliged to grant an interim injunction if he thought there was a serious issue to be tried, unless he held on the balance of convenience that he would not do anything. ... Thus the grant of an interim injunction to prevent publication of an election advertisement in the final week of a campaign is, in effect, a final remedy. ... This procedure may be appropriate in trade advertising – a campaign may have been delayed, and some form of monetary payment will compensate for it. Clearly, no amount of money can compensate a political party if it is prevented from publishing advertising material in the final week of a campaign.[554]

5.92 Consequently, the Commonwealth Parliament's JSCER did not recommend an injunction remedy and rejected a role for the Electoral Commissioner:

> [T]he injunction remedy could cause grave injustice to political parties or candidates and could disrupt the normal political process, if available at the suit of any candidate. A possible modification would be to restrict the right to seek an injunction to the Australian Electoral Commission. The committee however rejects this proposal, as it would require the Commission to enter the political fray in deciding whether to seek such an injunction.[555]

5.93 Given the injunction remedy may cause injustice to political parties or candidates and may disrupt the election campaign process, the Committee does not view injunctions as an effective remedy for resolving complaints regarding misleading or deceptive political advertising.

Candidate barred from contesting or holding public office

Inquiry participants' views

5.94 Inquiry participants, Julian Burnside AO QC and Associate Professor Ken Coghill proposed that an appropriate penalty for publishing and distributing misleading or deceptive political advertising is the disqualification of a natural person from contesting or holding public office. This would effectively void the election of the convicted candidate.[556] In the case of an offence by a body corporate or political party, Associate Professor Ken Coghill noted that this could void the election of one or more candidates of the convicted body corporate or political party:

> [W]here the offence was by a body corporate or political party, that body or party would be debarred from supporting the election of a member of the party in the Legislative Assembly electoral district or districts and/or Legislative Council Region or Regions in which the offence occurred for a similar period. The provision should void the election of the candidate(s) supported by the convicted body corporate or party. These provisions should be available as penalties additional to those currently

554 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.25.

555 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, p.26.

556 Julian Burnside AO QC, *Submission*, no.12, p.3; Associate Professor Ken Coghill, *Submission*, no.2, pp.2-3.

> provided. Having regard to the seriousness of these offences and the consequences of the proposed available penalties, these offences should be prosecuted in the Court of Disputed Returns.[557]

5.95 Associate Professor Ken Coghill noted that these penalties should be available to the court, so that:

> [I]n extreme circumstances where a political party or a candidate has manipulated the result to the extent of undermining the will of the electors, then it should be possible to void the election of the candidate who has benefited from that, or the candidate of the political party which has benefited from that.[558]

5.96 William (Jennifer) Jacomb proposed to "make misleading an elector in the formation of their intent to vote grounds to set aside the election result." This would require amending sections 83, 84, 139 and 140 of the *Electoral Act 2002* (Vic). [559]

Discussion

5.97 The penalty of candidates being barred from contesting or holding public office is being examined as part of the Australian Government's Electoral Reform process. The Green Paper, *Strengthening Australia's Democracy*, proposed that:

> [O]ne option that could be considered to increase the deterrent effect of truth in advertising laws might be to disqualify any person who had breached such laws from being chosen or sitting as a member of either House of Parliament for a specified period (such as two years). This could align with a similar provision currently in the Electoral Act which disqualifies persons convicted of bribery or undue influence offences from being chosen or sitting as a member for two years from the date of their conviction. However, it might be argued against this option that this approach would be too heavyhanded, or that it would encourage parties to implement arrangements in which candidates or members did not play a role in authorising advertisements.[560]

5.98 The Committee noted that South Australian case law has determined that a breach of section 113 would not in itself lead to the voiding of an election. For example, in *Featherston v Tully*, Barry James Featherston sought declaration that one House of Assembly seat at the 2002 South Australian state election – Hammond District – was void because Peter Lewis,[561] the elected Independent candidate, engaged in misleading advertising contrary to section 113 of the *Electoral Act 1985* (SA). The Supreme Court of South Australia found that a breach of section 113 would not in itself lead to the voiding of an election:

> [T]here is nothing in the Act which requires that the Court must declare an election void where a candidate has committed an offence against that section. The mere fact

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557 Associate Professor Ken Coghill, *Submission*, no.2, p.3.

558 Associate Professor Ken Coghill, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.

559 William Robert Jacomb (Jennifer Belinda Jacomb), *Submission*, no.9, p.11.

560 Australian Government, *Electoral reform green paper: Strengthening Australia's democracy*, Department of Prime Minister and Cabinet, Canberra, September 2009, pp.156-157.

561 In October 2000 Peter Lewis resigned from the Liberal Party. He had been an endorsed Liberal candidate and parliamentarian since 1979.

> that an offence of that nature has been committed would not be sufficient, in accordance with the common law principles, to [a]void the election. [562]

5.99 In *King v Electoral Commissioner*, which was heard by the Supreme Court of South Australia, the judgment was that a Liberal Party advertisement issued at the 1997 South Australian state election with "(words to the effect) 'a vote for an Independent was a vote for the Labor Party'" had breached section 113 of the *Electoral Act 1985* (SA). The Court ruled:

> On the material presented to the court, it is established that those advertisements in breach of s113 were neither likely to, nor did they affect the result of the election in the District of Davenport in the sense of causing Mr Evans and not someone else to be elected.[563]

5.100 It is the Committee's view that in most circumstances the electors are the ultimate deciders of who is elected to public office.

Imprisonment

Inquiry participants' views

5.101 Some inquiry participants, including Julian Burnside AO QC, supported imprisonment as a penalty for publishing misleading or deceptive political advertising in "extreme cases".[564]

5.102 Other inquiry participants, however, were concerned that a prison penalty was too severe. Mark Polden did not believe that imprisonment is warranted for any person who, "knowingly or unknowingly, publishes matter which is merely misleading or inaccurate."[565]

Discussion

5.103 The *Electoral Act 2002* (Vic) currently provides that the penalty for a natural person who breaches the misleading or deceptive provisions be imprisoned for 6 months.[566] Imprisonment for up to 6 months for a natural person is also found in misleading or deceptive advertising provisions in the Commonwealth, New South Wales, Tasmania, Australian Capital Territory and Northern Territory. There is no imprisonment penalty in Western Australia, South Australia and Queensland for misleading or deceptive conduct.

5.104 The *Wrongs Act 1958* (Vic) currently provides for a penalty of imprisonment for anyone who maliciously publishes false defamatory libel. Section 10 of the Act states:

> (1) Every person who maliciously publishes any defamatory libel knowing the same to be false shall be liable to imprisonment for a term of not more than two years and to pay such fine as the court awards.

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562 *Featherston v Tully* SCCIV-02-481 [2002]; SASC 243 (1 August 2002) at 163.

563 *King v Electoral Commissioner* SCGRG 97/1670 Judgment No. 6557 (1998) 72;SASR 172 [1998]; SASC 7071 (5 March 1998).

564 Julian Burnside AO QC, *Submission*, no.12, p.3.

565 Mark Polden, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.

566 *Electoral Act 2002* (Vic) s.84.

> (2) Every person who maliciously publishes any defamatory libel shall be liable to fine or imprisonment or both as the court may award such imprisonment not to exceed the term of one year.[567]

5.105 The Organization for Security and Co-operation in Europe (OSCE), the world's largest regional security organisation, does not support imprisonment as a penalty for defamation. Miklos Haraszti, the OSCE Representative on Freedom of the Media, in its *Yearbook 2008* noted:

> The case law of the European Court of Human Rights rejects imprisonment for defamation as damaging to free debate in society.[568]

5.106 The OSCE Representative on Freedom of the Media and other international organisations advocate that libel and insult provisions should be excluded from criminal law.[569] The OSCE noted that Ireland is the first Western European country to initiate the complete abolition of criminal libel.[570]

Other options

Inquiry participants' views

5.107 In its submission to this inquiry, the AEC informed the Committee of the difficulties associated with administering the existing criminal offences relating to political advertising. The AEC recommended that amendments be made to the *Commonwealth Electoral Act 1918* (Cth) to provide the AEC with a range of options for dealing with electoral offences, including:

- [W]arning letters for technical breaches;
- [P]ublic shaming and reports to Parliament for more serious breaches;
- [C]ompliance agreements that are signed and published on the internet that acknowledge the breach and agreed steps to prevent future breaches;
- [C]ivil penalties; and
- [W]ithholding election funding for continuing breaches. [571]

Discussion

5.108 The Committee notes the views of the AEC.

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567 *The Wrongs Act 1958* (Vic) s.10.

568 The Representative on Freedom of the Media, *Yearbook 10 2008*, Organization for Security and Co-operation in Europe, Vienna, 2009, p.368. Retrieved from http://www.osce.org/item/38821.html on 8 December 2009.

569 The Representative on Freedom of the Media, *Yearbook 10 2008*, Organization for Security and Co-operation in Europe, Vienna, 2009, p.251.

570 The Representative on Freedom of the Media, *Yearbook 10 2008*, Organization for Security and Co-operation in Europe, Vienna, 2009, p.99.

571 Australian Electoral Commission, *Submission*, no.11, pp.2-3.

Chapter
6

Chapter 6: Other considerations

6.1 This chapter outlines other issues the Committee has considered as part of the inquiry including the *Charter of Human Rights and Responsibilities Act 2006* (Vic), harmonisation of electoral law, the media, issues at the Victorian local government elections and the applicability of the recommendations contained in this report to other electoral laws.

Charter of Human Rights and Responsibilities Act 2006

The relevance of human rights legislation

6.2 It is essential to consider human rights as part of the inquiry into whether the provisions of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising should be amended. Human rights promote and protect a person's well-being and discourage actions that may hinder a person's dignity and participation in public life.

6.3 As discussed in Chapter 1, Australia and Victoria are committed to protecting and promoting human rights. Australia ratified the International Covenant on Civil and Political Rights (ICCPR) in 1980. The ICCPR stipulates that every citizen has the right to participate in political and civil life, and:

> To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.[572]

6.4 The ICCPR also sets out that while "everyone shall have the right to freedom of expression", the exercise of the rights should "respect the rights or reputations of others".[573]

Human rights law in Victoria

6.5 Victoria has enacted its own human rights legislation – "the Charter" – "to protect and promote human rights" in Victoria.[574] All provisions of the Charter came into operation on 1 January 2007, except Division 3

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572 Office of the United Nations Commissioner for Human Rights, "International Covenant on Civil and Political Rights". Article 25(2). Retrieved from http://www.hrweb.org/legal/cpr.html on 27 August 2009.

573 Office of the United Nations Commissioner for Human Rights, "International Covenant on Civil and Political Rights". Article 19(2), 19(3). Retrieved from http://www.hrweb.org/legal/cpr.html on 27 August 2009.

574 *Charter of Human Rights and Responsibilities Act 2006 (*Vic) s.1(2).

(Interpretation of laws) and Division 4 (Obligations on public authorities) which came into operation on 1 January 2008.[575]

6.6 The Charter is relevant to this inquiry because all new Victorian legislation is required to be compatible with human rights. A "statement of compatibility" must accompany every Bill introduced into a House of Parliament. The statement must outline:

> (a) [W]hether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and
>
> (b) [I]f, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.[576]

6.7 Given the Committee is considering whether the provisions of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising should be amended, it is appropriate to consider the requirements and principles of the Charter alongside any amendments.

6.8 Any amendment to legislation, notwithstanding the *Electoral Act 2002* (Vic), is also subject to the Charter's reasonable limitations test, as expressed in section 7(2) of the Charter.[577]

6.9 Freedom of expression is a right established under section 15 of the Charter. This right is very similar to that set out in the ICCPR. That is:

> (1) Every person has the right to hold an opinion without interference.
>
> (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—
>
> (a) orally; or
>
> (b) in writing; or
>
> (c) in print; or
>
> (d) by way of art; or
>
> (e) in another medium chosen by him or her.
>
> (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—
>
> (a) to respect the rights and reputation of other persons; or
>
> (b) for the protection of national security, public order, public health or public morality.[578]

6.10 Freedom to participate in public life is another right established under section 18 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). It stipulates that:

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575 *Charter of Human Rights and Responsibilities Act 2006 (*Vic) Endnotes.
576 *Charter of Human Rights and Responsibilities Act 2006 (*Vic) s.28(3)(a)(b).
577 *Charter of Human Rights and Responsibilities Act 2006 (*Vic) s.7(2).
578 *Charter of Human Rights and Responsibilities Act 2006 (*Vic) s.15.

> (1) Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.
>
> (2) Every eligible person has the right, and is to have the opportunity, without discrimination—
>
> (a) to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors; and
>
> (b) to have access, on general terms of equality, to the Victorian public service and public office.[579]

6.11 Some inquiry participants noted the importance of, and the challenges associated with, balancing human rights, particularly the right to participate in the conduct of public affairs and the right to freedom of expression with the regulation of misleading or deceptive political advertising.[580]

6.12 The Committee is of the view that any amendment to the *Electoral Act 2002* (Vic) should not compromise freedom of speech.

Harmonisation of electoral law

6.13 Regulation of electoral law in Australia rests with the Commonwealth and each state and territory. The Commonwealth, states and territories are able to create individual laws on misleading or deceptive electoral matter, which has created rules for each jurisdiction, as outlined in Chapter 3.

6.14 Moreover, the Commonwealth and other states and territories are unable to interfere in the electoral processes of other jurisdictions, given that:

> The High Court has drawn an implication from the Constitution that the Commonwealth may not legislate to destroy or curtail the continued existence of the States, or restrict or burden them in the exercise of their constitutional powers. The Commonwealth ... is limited in its power to interfere in the constitutional and electoral processes of the States. ... Equally, any State law that interfered with Commonwealth elections ... would be vulnerable to constitutional challenge. [581]

6.15 The House of Representatives Standing Committee on Legal and Constitutional Affairs tabled its report on the inquiry into harmonisation of legal systems entitled *Harmonisation of legal systems within Australia and between Australia and New Zealand* in December 2006. Although the report paid considerable attention to the harmonisation of laws which have an

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579 *Charter of Human Rights and Responsibilities Act 2006 (*Vic) s.18.

580 Mark Polden, *Transcript of evidence*, Melbourne, 18 August 2009, p.5; Port Phillip Greens, *Submission*, no.5, p.2; William Robert Jacomb (Jennifer Belinda Jacomb), *Transcript of evidence*, Melbourne, 18 August 2009, p.2; Professor Jock Given, *Transcript of evidence*, Melbourne, 18 August 2009, pp.4-5.

581 Anne Twomey, *The reform of political donations, expenditure and funding*. Paper prepared for the Department of Premier and Cabinet of New South Wales, Sydney, November 2008, pp.4-5.

impact on trade and commerce, electoral law was not included in the inquiry's term of reference.[582]

6.16 Harmonisation was defined in the Commonwealth Government's *Electoral reform green paper: Strengthening Australia's democracy* as "the adoption of uniform or consistent rules and laws across multiple jurisdictions. Harmonisation results in a unified regulatory environment in which participants benefit from clarity and simplicity."[583]

6.17 The Commonwealth electoral reform green papers have identified the harmonisation of electoral law as an issue for discussion. The Commonwealth has indicated its commitment to working with state and territory governments in a range of forums, including the Council of Australian Governments and other ministerial councils to achieve harmonisation in election funding and disclosure systems, electoral administration activities, enrolment requirements and processes, party registration arrangements, campaign regulations and polling arrangements.[584]

6.18 The Commonwealth Government in its second electoral reform green paper noted the benefits of harmonisation as being, to:

- [C]reate efficiencies, by reducing duplication across different levels of government;
- [E]nsure greater certainty, if consistent rules apply across all jurisdictions;
- [R]educe compliance costs for those who must comply with multiple regulatory regimes across jurisdictions; and
- [I]mprove the effectiveness and integrity of laws by removing regulatory inconsistencies.[585]

6.19 The Commonwealth Government also cited some challenges associated with harmonisation:

> Agreement must be secured between all nine jurisdictions before a consistent approach can be implemented, and where legislation is required to give effect to a harmonised approach, there is a risk that it may be varied by one or more of the nine parliaments. The political environment is constantly changing, which can present challenges to maintaining a harmonised approach in a particular area.[586]

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582 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of legal systems within Australian and between Australia and New Zealand*, Parliament of Australia, Canberra, December 2006. Retrieved from http://www.aph.gov.au/house/committee/LACA/harmonisation/report.htm on 3 September 2009.

583 Australian Government, *Electoral reform green paper: Strengthening Australia's democracy*, Department of Prime Minister and Cabinet, Canberra, September 2009, p.221.

584 Australian Government, *Electoral reform green paper: Donations, funding and expenditure*, Department of Prime Minister and Cabinet, Canberra, December 2008, p.24; Australian Government, *Electoral reform green paper: Strengthening Australia's democracy*, Department of Prime Minister and Cabinet, Canberra, September 2009, p.27.

585 Australian Government, *Electoral reform green paper: Strengthening Australia's democracy*, Department of Prime Minister and Cabinet, Canberra, September 2009, pp.26-27.

586 Australian Government, *Electoral reform green paper: Strengthening Australia's democracy*, Department of Prime Minister and Cabinet, Canberra, September 2009, p.27.

6.20 The Committee did not receive any evidence advocating for the harmonisation of electoral law, in particular the misleading or deceptive political advertising provisions between state and Commonwealth jurisdictions during the inquiry.

6.21 The Committee has documented its position, in particular its support for the harmonisation of electoral law in its recent reports to Parliament.[587] The Victorian Government, in its response to the Committee's report into political donations and disclosure and its 2010 Annual Statement of Government Intentions supported working with the Commonwealth Government for the harmonisation of electoral laws.[588]

Media

Inquiry participants' views

6.22 The Australian Press Council lodged a submission to the Committee about the publishing of a fair report of a third party during an election period and the correcting of misleading or deceptive political advertising during an election. The Australian Press Council is a "voluntary association of organisations and persons … [that aims to] promote freedom of speech through responsible and independent print media, and adherence to high journalistic and editorial standards."[589]

6.23 The Australian Press Council was concerned that a media organisation's right to freedom of speech may be threatened under a reading of the current Act:

> The Council is concerned that ... the news media or journalists employed by them could be subject to a prosecution under the Act for publishing a fair report of a third party during an election period. Given the importance of electors understanding the policies of candidates and the political issues at stake, it is imperative that the media be able freely to report matters of public concern. This right has been recognised by the High Court in several cases, unanimously in *Lange*.[590]

6.24 In *Lange v Australian Broadcasting Corporation*, one of the principal questions arising was whether "there is implied in the Constitution a defence to the publication of defamatory matter relating to government and political matters."[591] In its judgment, the High Court recognised that the right to

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587 Electoral Matters Committee, *Inquiry into voter participation and informal voting*, Parliament of Victoria, Melbourne, July 2009, pp.24-25; Electoral Matters Committee, *Inquiry into political donations and disclosure*, Parliament of Victoria, Melbourne, April 2009, pp.17-20, 128-129.

588 Victorian Government, *Government response to the Electoral Matters Committee inquiry into political donations and disclosure*, Melbourne, 10 November 2009, p.1; Victorian Government, *Annual statement of Government intentions*, Melbourne, February 2010, p.74.

589 Australian Press Council, *Submission*, no.10, p.4.

590 Australian Press Council, *Submission*, no.10, p.2.

591 *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520; (1997) 145 ALR 96; (1997) 71 ALJR 818 (8 July 1997). Retrieved from http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1997/25.html?query=lange on 16 November 2009.

freedom of communication in political or government matters is implied in the Australian Constitution:

> While the system of representative government for which the Constitution provides does not expressly mention freedom of communication, it can hardly be doubted, given the history of representative government and the holding of elections under that system in Australia prior to federation, that the elections for which the Constitution provides were intended to be free elections in the sense explained by Birch.[592] … [A]s Dawson J pointed out in *Australian Capital Television Pty Ltd v The Commonwealth*, legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election.[593]

6.25 Accordingly, the Australian Press Council recommended that:

> The provisions of the *Electoral Act* need to be amended to ensure that a fair and accurate third party report, made in good faith, of matters raised by candidates at an election, and commentary upon those reports, should be excluded from the ambit of the Act.[594]

6.26 The second issue raised by the Australian Press Council was about redress or corrections policies regarding misleading or deceptive political advertising. The Australian Press Council noted that:

> If there is a decision to include a redress or corrections policy within the Act, the provisions of that policy should ensure that the person or entity responsible for the original statement is responsible for the publication of any correction.[595]

6.27 In its submission, the Australian Press Council elaborated on the reasons for its view:

> When discussing provisions of the federal Electoral Amendment (Political Honesty) Bill 2000, the Council expressed concern with an amendment that sought to give to the Electoral Commission and/or the Federal Court the power to request or order the 'advertiser' to publish a retraction in specific terms and specified manner and form, when what the commission believed to be false or misleading matter was published during an election. Such a provision, in the Victorian Act, might have the unfortunate consequence of making the publisher of a newspaper or magazine, or the licence holder of a broadcaster, responsible for the publication or broadcast of a correction or clarification ordered by the commission or the court.[596]

6.28 Mark Polden, an inquiry participant and former John Fairfax Holdings Limited in-house counsel, in response to the Australian Press Council's submission noted that if the provision in the *Electoral Act 2002* (Vic) was widened, the "publication of editorial matter, including comment by independent third parties would risk being caught." Mark Polden stipulated

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592 Anthony Harold Birch stated that "the chamber must occupy a powerful position in the political system and that the elections to it must be free, with all that this implies in the way of freedom of speech and political organization." See Anthony Harold Birch, *Representative and responsible government: An essay on the British Constitution*, Allen & Unwin, London, 1964, p.17.

593 *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520; (1997) 145 ALR 96; (1997) 71 ALJR 818 (8 July 1997).

594 Australian Press Council, *Submission*, no.10, p.3.

595 Australian Press Council, *Submission*, no.10, p.2.

596 Australian Press Council, *Submission*, no.10, p.3.

that "any attempt to broaden or rewrite the section [84 of the *Electoral Act 2002* (Vic)] should include media safe harbour".[597]

6.29 Professor Jock Given, an inquiry participant and expert in media and communications, stated that "the space we give for political speech should be as expansive as possible."[598]

6.30 When questioned about his view on the regulation of bloggers and citizen journalists who publish online, Professor Given noted that "there are large questions about the extent to which some of those [broadcasting and political advertising] rules may be equally applicable to other kinds of enterprises [i.e. new media]."[599] Professor Jock Given noted that the blackout period is the "starkest example" of the differences in regulation between online and broadcast political advertising.[600]

6.31 Professor Jock Given also referred the Committee to a case – *Dow Jones & Company Inc v Gutnick* – which considered the issue of jurisdiction for the purposes of publication of defamatory material on the internet.[601] The High Court of Australia ruled that:

> The appellant's submission that publication occurs, or should henceforth be held to occur relevantly at one place, the place where the matter is provided, or first published, cannot withstand any reasonable test of certainty and fairness. If it were accepted, publishers would be free to manipulate the uploading and location of data so as to insulate themselves from liability in Australia, or elsewhere: for example, by using a web server in a "defamation free jurisdiction" or, one in which the defamation laws are tilted decidedly towards defendants. Why would publishers, owing duties to their shareholders, to maximise profits, do otherwise? The place of "uploading" to a web server may have little or no relationship with the place where the matter is investigated, compiled or edited. Here, the State where the matter was uploaded was different from the State in which the article was edited. Matter may be stored on more than one web server, and with different web servers at different times. Different parts of a single web page may be stored on different web servers in different jurisdictions. Many publications in this country, whether by television, radio, newspaper or magazine originate in New South Wales. The result of the adoption of a rule of a single point of publication as submitted by the appellant, is that many publications in Victoria, South Australia, Tasmania, Western Australia and Queensland would be governed by the *Defamation Act 1974* (NSW) which provides, in its present form, for a regime by no means commanding general acceptance throughout this country. Choice of law in defamation proceedings in this country raises a relatively simple question of identifying the place of publication as the place of comprehension: a readily ascertainable fact.[602]

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597 Mark Polden, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.
598 Professor Jock Given, *Transcript of evidence*, Melbourne, 18 August 2009, p.4.
599 Professor Jock Given, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.
600 Professor Jock Given, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.
601 Professor Jock Given, *Transcript of evidence*, Melbourne, 18 August 2009, p.3.
602 *Dow Jones and Company Inc v Gutnick* [2002] HCA 56; 210 CLR 575; 194 ALR 433; 77 ALJR 255 (10 December 2002) at 199. Retrieved from http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2002/56.html?query=gutnick on 16 November 2009.

Discussion

6.32 The Commonwealth Parliament's JSCER in 1984 considered whether the publisher should be responsible for untrue statements. The JSCER heard evidence from Patrick Auld, then Executive Director of the Media Council of Australia that if the publisher was responsible, along with the advertiser, for the publication of misleading or deceptive political advertising, the media industry was concerned with criminal liability for media proprietors and the negative impact on the media and electoral process:

> [T]he imposition of this criminal liability on a media proprietor will make that media proprietor handle political advertising with very great caution. ... An advertisement lodged with a publisher would now be referred immediately to the advertising manager or a senior management figure in the proprietor's business. He will look at the advertisement and, if he has any doubts about its compliance with s.161 he would refer it to the editor or to legal advisers. At that stage, the lawyers may require substantiation of statements or changes to the text of the advertisement. This would mean that the lead time for any political advertisement could be from 48 hours to seven days.[603]

6.33 The Committee noted the work of other parliamentary committees who have considered the regulation of misleading and defamatory internet publications. In particular, the Commonwealth Parliament's JSCEM which held the view that the feasibility of regulating misleading or defamatory comment on the internet posed "immense obstacles".[604]

6.34 The Committee discussed the pervasiveness of new media, including internet communication, at the public hearing. The Committee's consideration of this issue took place at a time when Les Twentyman, an independent candidate at the Kororoit District by-election, obtained an intervention order against Andrew Landeryou, a political blogger, to prevent him from publishing photos of Mr Twentyman's house on his website, "The other cheek".[605]

6.35 The Committee considered the recommendations from the Australian Press Council. The Committee is of the view that preservation of the implied constitutional convention of free speech is essential. The third party reporting of matters raised by candidates at an election and commentary upon those reports should not be impeded.

6.36 In addition, the Committee discussed the recommendation from the Australian Press Council that if the Committee was to amend the *Electoral Act 2002* (Vic), the provisions should ensure that the person or entity responsible for the original statement also be responsible for the publication of any correction.[606] The Committee noted that this suggested enforceable

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603 Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, pp.15-16.

604 Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2004 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, October 2005, p.282.

605 Nick Higginbottom, "Twentyman wins ban on blogger", *Herald Sun*, First edition, 11 July 2008, p.29.

606 Australian Press Council, *Submission*, no.10, p.2.

undertaking is similar to what is required of an organisation or person who has breached the *Trade Practices Act 1974* (Cth). The Australian Competition and Consumer Commission (ACCC), an independent statutory authority which deals generally with competition matters and has the responsibility for enforcing the *Trade Practices Act 1974* (Cth), may require an organisation which has, or person who has, allegedly breached the *Trade Practices Act* to be responsible for the running of a corrective advertisement.[607]

6.37 The Committee notes that with the exception of South Australia, no other electoral law in Australia places responsibility on the person responsible for the original statement to publish a correction.[608] The Committee believes that legislation of this kind would need to be considered as part of a national approach.

2008 Victorian Local Government elections

Alleged misleading or deceptive how-to-vote card

Inquiry participants' views

6.38 The Committee received one submission which discussed an alleged misleading how-to-vote (HTV) card distributed at the 2008 Victorian local government elections in the Catani Ward in the City of Port Phillip. The Port Phillip Greens described the alleged misleading or deceptive HTV card in its submission:

> [A] rival candidate produced a HTV card, using the distinctive colour and triangle shape used by the Australian Greens and known by the community as such. It seemed to us that the HTV card was misleading and was likely to confuse voters.[609]

6.39 At the public hearing, Ann Birrell, Co-convenor of the Port Phillip Greens, provided a number of examples of electors who were confused by the HTV card. She also noted the impact on some electors:

> When we [Port Phillip Greens] saw the card we thought it was misleading. I did not see it until election night. We thought voters would be misled, and that was really confirmed by our experience on voting day. I would just like to read a few sentences — things that people said to me about voting day.
>
> One is from a Greens member — 'I walked into the polling booth, and I said, "I am looking for the Greens sign". Sean [O'Donohue, Reclaim St Kilda candidate] — that is the rival candidate — said, "Here you go" and handed me his how-to-vote card. I looked at it, and I was a bit confused. I wondered why [Mathew] Dinesh's [The Green's candidate] picture was not on it. I said, "Is this the Greens one?", and he did say no. I said, "What if I had just picked it up?". There were people ahead of me who had been given the card, and he seemed more than happy to let me think it was the

607 Australian Competition and Consumer Commission, "How is the Trade Practices Act enforced?", Commonwealth of Australia, 2009. Retrieved from http://www.accc.gov.au/content/index.phtml/itemId/277794 on 18 November 2009.

608 *Electoral Act 1985* (SA) ss.113(4) and (5).

609 Port Phillip Greens, *Submission*, no.5, p.2.

> Greens card until I actually asked him'. That is a Greens member who knew the candidate and was nearly confused and could have been left to be confused.
>
> Another Greens campaign worker said, 'People would go past, a significant number, maybe a third, and not go to grab one of the Greens cards. I would go up to them and catch them and say, "Here is the Greens card", and their body language and what they said indicated they thought they already had the cards'.
>
> Serge Thomann, who is one of the rival candidates for unChain St Kilda, another community group, said, 'A lot of people were coming up to me and complaining that it was misleading too'.
>
> [Mathew] Dinesh, our candidate, said, 'A lot of people were coming through, and I would say "I am the Greens candidate and this is the Greens card", and they would stop and they would look at the bundle and at me, and they were confused; it was quite noticeable. I vividly remember there was one woman who was quite disgusted. She came up and she said to Sean's volunteer, "Why are we handing this out? You are obviously not the Greens, but you said this was their triangle". I think she threw it on the ground to their feet and left. There were people who said to me, "I've already got it", and when she followed them and explained they replied, "Oh really? Oh God. It is so typical. Lucky you explained it to me". There were also a couple of people handing out for Serge [Thomann], who were annoyed and helped us to explain to people who is in which group'.[610]

6.40 At the public hearing the Committee members discussed with Ann Birrell, Co-convenor of the Port Phillip Greens, the issue of political parties and candidates who may appropriate the words, colours or symbols of rival political parties and candidates for political advantage and the possibility of regulation.[611]

6.41 Given that the Returning Officer has the power to register or refuse to register a HTV card, the Port Phillip Greens suggested that VEC guidelines on this issue should be made public and transparent.[612]

Discussion

6.42 The Committee noted the concerns of the Port Phillip Greens and the potential for appropriation of words, colours or symbols of rival political parties and candidates. However, it also noted that Local Government Victoria, part of the Victorian Government's Department of Planning and Community Development, advised that the alleged HTV card met the requirements for registration[613] and was not misleading:

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610 Ann Birrell, Co-convenor, Port Phillip Greens, *Transcript of evidence*, Melbourne, 18 August 2009, pp.2-3.

611 Discussion was cited in Ann Birrell, Co-convenor, Port Phillip Greens, *Transcript of evidence*, Melbourne, 18 August 2009, p.5.

612 Port Phillip Greens, *Submission*, no.5, p.3.

613 The *Local Government (Electoral) Regulations 2005* (Vic) regulates the registration and review of how-to-vote cards for local government elections. Section 29(3) deals with the Returning Officers powers in relation to a misleading or deceptive HTV card: "29(3) The returning officer must refuse to register a how-to-vote card if the returning officer is satisfied that the card-(a) is likely to mislead or deceive a voter in casting his or her vote; or (b) is likely to induce a voter to mark his or her vote otherwise than in accordance with the directions on the ballot-paper.

> With regard to the shape of the card and the colour used in it, although you believe that the card's appearance could be construed as having a link with the Greens, as the card contains clear endorsement from another body, this is insufficient in itself to establish that the card would likely mislead or deceive a voter in the casting of their vote.[614]

6.43 The Committee notes that the Candidate Handbook for attendance voting, which is part of the VEC's Local Government Election Information Series, contains information about the registration or refusal of registration of HTV cards and includes a HTV card checklist. The handbook is available on the VEC's website at http://www.vec.vic.gov.au/publications.html.

6.44 Similar information is found in the Candidate Handbook for state parliamentary elections.

Review of Returning Officer's decision

Inquiry participants' views

6.45 The *Local Government (Electoral) Regulations 2005* (Vic) govern the review of a returning officer's decision regarding the registration or refusal of registration of a HTV card. Section 30 stipulates the time frame in which the review must take place:

> (1) Any person may apply to VCAT [Victorian Civil and Administrative Tribunal] for review of a returning officer's decision under regulation 29.
>
> (2) An application under subregulation (1) must be made no later than whichever of the following occurs first-
>
> (a) noon on the second working day after the day on which the returning officer gives notice under regulation 29(1); or
>
> (b) noon on the fourth working day before the election day.[615]

6.46 The Port Phillip Greens indicated that this time frame does not provide a reasonable opportunity to object, especially when candidates must visit the Election Office to view the registered HTV cards. The Port Phillip Greens in their submission outlined a scenario for the Committee's consideration:

> If a candidate lodges a HTV card at the latest date, at noon on the Friday, 6 working days before a Saturday election and the Returning Officer registers by noon on the Monday before the election, an aggrieved person is required to lodge an objection by noon on the Tuesday, 4 working days before the election. This gives the aggrieved person only 24 hours (or 8 working hours) to go down to the Election Office and view the HTV cards, take copies (is this allowed?), then consider and consult and then apply to VCAT for review of the decision.[616]

6.47 The Port Phillip Greens suggested the Committee consider the following recommendations:

- Copies of registered HTV cards be displayed on the VEC website; and

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614 Local Government Victoria, *Letter to Ms Ann Birrell*, 21 April 2008, p.1, cited in Port Phillip Greens, *Submission*, no.5, p.12.

615 *Local Government (Electoral) Regulations 2005* (Vic), s.30.

616 Port Phillip Greens, *Submission*, no.5, p.3.

- The VEC Candidates Guidelines be amended to advise candidates that to view registered HTV cards they are required to visit the Election Office within a specified time frame.[617]

Discussion

6.48 The Committee believes that the accessibility of HTV cards for electors, candidates and political parties should be improved. The Committee recommends that the VEC publish on its website registered HTV cards during the election period. The Committee believes that such a recommendation would assist electors (especially absentee, overseas and postal voters), candidates and political parties to view HTV cards.

6.49 The Committee agrees that the Victorian Government considers the applicability of this recommendation to other Victorian electoral laws.

Recommendation 1: The Victorian Electoral Commission publish on its website registered how-to-vote cards during the election period.

Extension to other electoral laws

Inquiry participants' views

6.50 William (Jennifer) Jacomb, an inquiry participant, noted that his remarks regarding amending the *Electoral Act 2002* (Vic) also apply to the *Local Government Act 1989* (Vic).[618]

Discussion

6.51 The *Local Government Act 1989* (Vic) has similar provisions to the *Electoral Act 2002* (Vic) in relation to misleading or deceptive electoral matter. Section 55A of the *Local Government Act 1989* (Vic) stipulates that:

> (1) A person must not-
>
> (a) print, publish or distribute; or
>
> (b) cause, permit or authorise to be printed, published or distributed-
>
> any matter or thing that is likely to mislead or deceive a voter in relation to the casting of the vote of the voter.
>
> Penalty: In the case of a natural person, 10 penalty units; In the case of a body corporate, 20 penalty units.
>
> (2) A person must not-
>
> (a) print, publish or distribute; or
>
> (b) cause, permit or authorise to be printed, published or distributed-
>
> an electoral advertisement, handbill, pamphlet or notice that contains a representation or purported representation of a ballot-paper for use in an

617 Port Phillip Greens, *Submission*, no.5, p.3.

618 William Robert Jacomb (Jennifer Belinda Jacomb), *Transcript of evidence*, Melbourne, 18 August 2009, p.6.

election that is likely to induce a voter to mark the voter's vote otherwise than in accordance with the directions on the ballot-paper.

Penalty: In the case of a natural person, 10 penalty units; In the case of a body corporate, 20 penalty units.

(3) In a prosecution of a person for an alleged offence against subsection (1) or (2), it is a defence if the person proves that the person-

(a) did not know; and

(b) could not reasonably be expected to have known-

that the matter or thing was likely to mislead a voter when casting the voter's vote.[619]

6.52 As noted previously in this report, in 1996 the Queensland Parliament's Legal, Constitutional and Administrative Review Committee (LCARC) recommended that legislation in respect of truth in political advertising should be introduced in Queensland for parliamentary elections.[620] LCARC also recommended that if such legislation was introduced, the inclusion of a truth in political advertising provision should be inserted into the *Local Government Act 1993* (Qld) and the *Referendums Act 1989* (Qld) – or the Referendums Bill 1996 which was before the Legislative Assembly at the time – to harmonise this electoral law in Queensland. While the Referendums Bill passed the Legislative Assembly on 2 May 1997,[621] the Electoral Amendment Bill 1999 (Qld) was defeated on 12 April 2000 and a truth in political advertising provision was never included in any electoral law in Queensland.[622]

619 *Local Government Act 1989* (Vic), s.55A.

620 Legal, Constitutional and Administrative Review Committee, Legislative Assembly, *Truth in political advertising*, Parliament of Queensland, Brisbane, December 1996, p.29.

621 Legislative Assembly, *Bills Update 1997*, Parliament of Queensland, Brisbane, no date, p.1, Retrieved from http://www.parliament.qld.gov.au/view/historical/tabledPapers.asp?SubArea=bills on 6 November 2009.

622 Legislative Assembly, *Bills Update 2000*, Parliament of Queensland, Brisbane, 24 November 2000, p.1. Retrieved from http://www.parliament.qld.gov.au/view/historical/tabledPapers.asp?SubArea=bills on 30 October 2009.

Chapter

7

Chapter 7: Conclusion

7.1 This inquiry emanated from a complaint about a pamphlet authorised by the then State Secretary of the Australian Labor Party (Victorian Branch), Stephen Newnham, for the Kororoit District by-election held on 28 June 2008. The pamphlet, which bore the statement "A vote for Les Twentyman is a vote for the Liberals" was in the complainant's opinion, misleading.[623]

7.2 As a consequence, the Victorian Electoral Commissioner in his report to Parliament on the Kororoit District by-election, tabled in Parliament on 3 February 2009, suggested the Parliament may wish to consider whether the provisions of the Act relating to misleading or deceptive political advertising require amendment.[624] The Committee subsequently received terms of reference from the Legislative Council on 1 April 2009 to inquire into this matter.

7.3 The Committee recognises that members of parliament have a duty and responsibility as elected representatives to uphold the values of honesty and integrity. The Committee believes that candidates, who aspire to be elected representatives, as well as party officials, who develop and conduct election campaigns, should also uphold these values. The Committee believes that the community rightly has an expectation that political parties will conform to community standards which hold truth and honesty in high regard.

7.4 Over the course of the inquiry the Committee heard different opinions from inquiry participants about the political strategy used by the Australian Labor Party (Victorian Branch) at the Kororoit District by-election. Phil Cleary and Dennis Galimberti, a lawyer acting for Les Twentyman, denied there was an arrangement between Les Twentyman and the Liberal Party of Australia (Victorian Division) and alleged that the pamphlet influenced voters on election day not to vote for Les Twentyman.[625] On the other hand, Stephen Newnham informed the Committee that he would "run this strategy again" because the statement was an "absolute statement of fact".[626]

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623 Victorian Electoral Commission, *Report on the Kororoit District By-election held on 28 June 2008*, Victorian Electoral Commission, Melbourne, January 2009, p.13.

624 Victorian Electoral Commission, *Report on the Kororoit District By-election held on 28 June 2008*, Victorian Electoral Commission, Melbourne, January 2009, p.13.

625 Phil Cleary, *Transcript of evidence*, Melbourne, 18 August 2009, pp.3-4; Hall & Thompson on behalf of Les Twentyman, *Submission*, no.4, p.2.

626 Stephen Newnham, State Secretary, Australian Labor Party (Victorian Branch), *Transcript of evidence*, Melbourne, 18 August 2009, pp.2-3, 4.

7.5 The Committee considered the varying evidence in support of and in opposition to amending the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising. The Committee discussed a range of proposed measures to regulate misleading or deceptive political advertising and enforcement issues including:

- Educating candidates and political parties about ethical standards and legal provisions affecting the nature and content of political advertising;
- Educating electors about voting systems;
- Introducing a voluntary code of conduct for political parties and candidates;
- Mounting a test case;
- Making it an offence to mislead an elector in the formation of their vote;
- Making it an offence to use a candidate's name, photo or likeness without written consent;
- Requiring a statement to accompany political advertisements relating to preferences;
- Introducing a Trade Practices Act style provision;
- Requiring political parties to register their logos;
- Nominating an agency to monitor, review and investigate compliance of the misleading or deceptive political advertising provisions of the *Electoral Act 2002* (Vic); and
- Reviewing the penalties associated with breaches of the *Electoral Act 2002* (Vic).

7.6 These measures were identified by inquiry participants including political parties, candidates, electoral administrators, associations, academics and interested individuals, together with supplementary documentation such as reports by parliamentary committees and electoral commissions.

6.53 After much deliberation, the Committee has determined to not support the majority of these proposals. While the Committee acknowledges the limitations of the current provisions in the *Electoral Act 2002* (Vic), the Committee is not convinced that many of the proposed measures put to the Committee, as noted in paragraph 7.5, would improve the regulation of misleading or deceptive political advertising. The Committee regards the adherence by political parties to norms of ethical conduct, particularly during election campaigns, as a vital part of electoral democracy. The Committee also supports the Victorian Electoral Commission (VEC) educating electors about the system of preferential voting and that the voter has the power to control where his or her preferences are directed.

7.7 The Committee was concerned that expanded measures to regulate misleading or deceptive political advertising would have implementation difficulties and increase the risk of a more litigious approach to elections and electoral law.

7.8 The Committee is reluctant for the Victorian Electoral Commissioner to have an expanded role monitoring, reviewing and investigating breaches of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising. In addition, the Committee does not support the establishment of a separate agency for compliance purposes. The Committee was also concerned that the subjective nature of political discourse would make it difficult for any compliance agency to define and determine what is a fact, opinion or comment.

7.9 The Committee's concerns have been also been noted in reports by five Commonwealth parliamentary committees, as well as international and domestic electoral commissions.[627]

7.10 These reasons contributed to the Committee's concern that amending the provisions of the *Electoral Act 2002* (Vic) relating to misleading or deceptive political advertising would be potentially unworkable and could have unintended consequences, including the potential for a chilling effect on robust political discourse.

7.11 The Committee also considered the issue of accessibility. The Committee recommends that the VEC publish on its website registered how-to-vote cards during the election period which would improve access to how-to-vote cards for electors (especially absentee, postal and overseas voters), candidates and political parties.

7.12 The Committee believes that there are already some measures in place to regulate misleading or deceptive political advertising. Parliamentary inquiries and the media have the ability to scrutinise and bring the policies and conduct of candidates, as well as the political issues at stake, to electors' attention. The Committee believes that the highest authority to test truth in political advertising is the electors. Electors who are dissatisfied with a government, political party, or a candidate's election campaign or question a government, political party or a candidate's honesty and integrity can "discipline" the candidate or party at an election by not voting for them.

7.13 The Committee believes that the voting public ultimately determines the regulation of misleading or deceptive political advertising and is capable of

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627 See Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1998 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 2000; Senate Finance and Public Administration Legislation Committee, *Charter of Political Honesty Bill 2000 [2002], Electoral Amendment (Political Honesty) Bill 2000 [2002], Provisions of the Government Advertising (Objectivity, Fairness and Accountability) Bill 2000, Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2], Parliament of the Commonwealth of Australia*, Canberra, August 2002; Joint Standing Committee on Electoral Matters, *Report of the conduct of the 2001 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, June 2003; Joint Standing Committee on Electoral Matters, *Report of the conduct of the 2004 federal election and matters related thereto*, Parliament of the Commonwealth of Australia, Canberra, October 2005; Electoral Commission (UK), *Political advertising: Report and recommendations*, Electoral Commission, London, June 2004; Joint Select Committee on Electoral Reform, *Second report*, Parliament of the Commonwealth of Australia, Canberra, August 1984, pp.16-26; Electoral Commission SA, *Election report: Frome by-election 17 January 2009*, Electoral Commission SA, Adelaide, 2009, p.22.

making informed choices about who to vote for. This is also a view shared by the Commonwealth Government.[628] The Committee believes that whilst these measures are not perfect, most of the options put before the Committee did not provide a satisfactory alternative.

7.14 This inquiry has taken place during a time of significant development at the Commonwealth level with respect to electoral reform. The Commonwealth Government is currently undertaking an electoral reform process and released its second green paper – *Strengthening Australia's Democracy* – on 23 September 2009. The Australian Government has identified truth in political advertising as an issue for consideration.[629] The electoral reform process is yet to be completed. Given the Committee's commitment to harmonisation and the findings from this inquiry, the Committee is well placed to contribute to the consultative process.

Committee Room

Parliament House

25 February 2010

628 See Senator John Faulkner, Cabinet Minister and Special Minister of State, "Transparency and accountability: Our agenda", 30 October 2008. Retrieved from http://www.smos.gov.au/speeches/2008/sp_20081030.html on 12 October 2009; Commonwealth of Australia, "The future of Australian governance", *Responding to the Australia 2020 Summit*, Canberra, April 2009, p.235. Retrieved from http://www.australia2020.gov.au/response/index.cfm on 28 September 2009.

629 Australian Government, *Electoral reform green paper: Strengthening Australia's democracy*, Department of Prime Minister and Cabinet, Canberra, September 2009, p.160.

Appendix 1: List of submissions

No.	Name/Organisation	Date Received
1	Nance Budge	4 July 2009
2	Associate Professor Ken Coghill	7 July 2009 27 August 2009
3	Western Australian Electoral Commission	17 July 2009
4	Hall & Thompson on behalf of Les Twentyman	22 July 2009
5	Port Phillip Greens	3 August 2009
6	Democratic Audit of Australia	3 August 2009
7	Liberty Victoria, Victorian Council for Civil Liberties	3 August 2009
8	Victorian Electoral Commission	3 August 2009
9	William Robert Jacomb (Jennifer Belinda Jacomb)	3 August 2009
10	Australian Press Council	5 August 2009
11	Australian Electoral Commission	5 August 2009
12	Julian Burnside AO QC	14 August 2009
13	Emeritus Professor Colin Hughes	23 September 2009

Appendix 2: List of witnesses

No.	Date of Hearing	Witness	Position	Organisation
1	18 August 2009	Steve Tully	Victorian Electoral Commissioner	Victorian Electoral Commission
2	18 August 2009	Liz Williams	Deputy Victorian Electoral Commissioner	Victorian Electoral Commission
3	18 August 2009	Paul Thornton-Smith	Senior Information and Research Officer	Victorian Electoral Commission
4	18 August 2009	Professor Brian Costar	Co-ordinator	Democratic Audit of Australia
5	18 August 2009	Stephen Newnham	State Secretary and Campaign Director	Australian Labor Party (Victorian Branch)
6	18 August 2009	Mark Polden		
7	18 August 2009	Professor Jock Given		
8	18 August 2009	Michael Pearce SC	President	Liberty Victoria, Victorian Council for Civil Liberties
9	18 August 2009	Phil Cleary		
10	18 August 2009	William Robert Jacomb (Jennifer Belinda Jacomb)		
11	18 August 2009	Associate Professor Ken Coghill		
12	18 August 2009	Ann Birrell	Co-convenor	Port Phillip Greens
13	18 August 2009	Dr Howard Whitton	Visiting Fellow	ANZSOG Institute for Governance

Appendix 3: Australian legislation on misleading or deceptive political advertising

Jurisdiction and Act	Provision
Victoria *Electoral Act 2002* s.84	84 Misleading or deceptive matter (1) A person must not during the relevant period— (a) print, publish or distribute; or (b) cause, permit or authorise 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 the vote of the elector. Penalty: In the case of a natural person, 60 penalty units or 6 months imprisonment; In the case of a body corporate, 300 penalty units. (2) A person must not during the relevant period— (a) print, publish or distribute; or (b) cause, permit or authorise to be printed, published or distributed— an electoral advertisement, handbill, pamphlet or notice that contains a representation or purported representation of a ballot-paper for use in that election that is likely to induce an elector to mark the elector's vote otherwise than in accordance with the directions on the ballot-paper. Penalty: In the case of a natural person, 60 penalty units or 6 months imprisonment; In the case of a body corporate, 300 penalty units. (3) In a prosecution of a person for an alleged offence against subsection (1) or (2), it is a defence if the person proves that the person— (a) did not know; and (b) could not reasonably be expected to have known— that the matter or thing was likely to mislead an elector when casting the elector's vote.
Commonwealth *Commonwealth Electoral Act 1918* (Cth) s.329	329 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) is guilty of an offence punishable on conviction: (a) if the offender is a natural person—by a fine not exceeding $1,000 or imprisonment for a period not exceeding 6 months, or both; or

Jurisdiction and Act	Provision
	(b) if the offender is a body corporate—by a fine not exceeding $5,000. (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. Note: A defendant bears a legal burden in relation to the defence in subsection (5) (see section 13.4 of the Criminal Code). (6) In this section, publish includes publish by radio or television.
New South Wales *Parliamentary Electorates and Elections Act 1912 (*NSW) s.151A	151A Printing etc false information (1) Any person who: (a) prints, publishes or distributes any "how to vote" card, electoral advertisement, notice, handbill, pamphlet or card containing any representation of a ballot paper or any representation apparently intended to represent a ballot paper, and having thereon any directions intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his or her vote, (b) prints, publishes or distributes any "how to vote" card, electoral advertisement, notice, handbill, pamphlet or card containing any untrue or incorrect statement intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his or her vote, or (c) prints, publishes or distributes any "how to vote" card, electoral advertisement, notice, handbill, pamphlet or card using: (i) the name, an abbreviation or acronym of the name or a derivative of the name of a party respectively included in the Register of Parties kept under Part 4A (or a name or abbreviation resembling such a name, abbreviation, acronym or derivative) in a way that is intended or likely to mislead any elector, or (ii) the word "Independent" and the name or an abbreviation or acronym of the name or a derivative of the name or a party respectively included in that Register in a way that suggests or indicates an affiliation with that party, shall be liable: (d) if the person is a corporation--to a penalty not exceeding 50 penalty units, or (e) in any other case--to a penalty not exceeding 10 penalty units or to imprisonment for a period not exceeding 6 months, or both. (2) Subsection (1) shall not prevent the printing, publishing or distributing of any "how to vote" card, not otherwise illegal, which contains instructions how to vote for any particular candidate or candidates, so long as those instructions are not intended or likely to mislead any elector in or in relation to the casting

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	of his or her vote. (3) Subsection (1) (c) (ii) does not apply in a case where the word "Independent" is included in the name of the party as registered in the Register of Parties.
Queensland *Electoral Act 1992* (Qld) s.163	163 Misleading voters (1) A person must not, during the election period for an election, print, publish, distribute or broadcast anything that is intended or likely to mislead an elector in relation to the way of voting at the election. Maximum penalty--40 penalty units. (2) A person must not for the purpose of affecting the election of a candidate, knowingly publish a false statement of fact regarding the personal character or conduct of the candidate. Maximum penalty--40 penalty units. (3) A person must not, during the election period for an election, print, publish, distribute or broadcast by television any representation or purported representation of a ballot paper for use in the election if it is likely to induce an elector to vote other than in accordance with this Act. Maximum penalty--40 penalty units. (4) In this section-- publish includes publish on the internet, even if the internet site on which the publication is made is located outside Queensland.
South Australia *Electoral Act 1985* (SA) s.113	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: If the offender is a natural person--$1 250; If the offender is a body corporate--$10 000. (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. (4) If the Electoral Commissioner is satisfied that an electoral advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent, the Electoral Commissioner may

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	request the advertiser to do one or more of the following: (a) withdraw the advertisement from further publication; (b) publish a retraction in specified terms and a specified manner and form, (and in proceedings for an offence against subsection (2) arising from the advertisement, the advertiser's response to a request under this subsection will be taken into account in assessing any penalty to which the advertiser may be liable). (5) If the Supreme Court is satisfied beyond reasonable doubt on application by the Electoral Commissioner that an electoral advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent, the Court may order the advertiser to do one or more of the following: (a) withdraw the advertisement from further publication; (b) publish a retraction in specified terms and a specified manner and form.
Tasmania *Electoral Act 2004* (Tas) s.197	197 Misleading and deceptive electoral matter A person must not - (a) print, publish or distribute, or permit or authorise the printing, publishing or distribution of, any printed electoral matter that is intended to, is likely to or has the capacity to mislead or deceive an elector in or in relation to the recording of his or her vote; or (b) publish on the internet, or permit or authorise the publishing on the internet of, any electoral matter that is intended to, is likely to or has the capacity to mislead or deceive an elector in or in relation to the recording of his or her vote; or (c) broadcast on radio or television, or permit or authorise the broadcasting on radio or television of, any electoral matter that is intended to, is likely to or has the capacity to mislead or deceive an elector in or in relation to the recording of his or her vote. Penalty: Fine not exceeding 200 penalty units or imprisonment for a term not exceeding 6 months, or both.
Western Australia *Electoral Act 1907* (WA) s.191A	191A Misleading or deceptive publications etc. (1) A person shall not, during the relevant period in relation to an election, print, publish or distribute, or cause, permit or authorise 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 the elector's vote. Penalty: $1 000. (2) A person shall not, during the relevant period in relation to an election, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, an advertisement, handbill, pamphlet or notice that contains a representation or purported representation of a ballot paper for use in that

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	election that is likely to induce an elector to mark his ballot paper otherwise than in accordance with the directions on the ballot paper. Penalty: $1 000. (3) In a prosecution of a person for an offence against subsection (1), it is a defence if the person proves that he 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 the elector's vote. (4) In this section — publish includes publish by radio or television or by electronic communication; relevant period, in relation to an election, means the period commencing on the day that notice of issue of the writ for the election is published in the Government Gazette pursuant to section 65 and ending at the latest time on polling day at which an elector in the State could enter a polling booth for the purpose of casting a vote in the election. [Section 191A inserted by No. 79 of 1987 s. 73; amended by No. 36 of 2000 s. 21 and 80; No. 50 of 2003 s. 56(5).]
Australian Capital Territory *Electoral Act 1992* (ACT) s.297	297 Misleading or deceptive electoral matter (1) A person shall not disseminate, or authorise to be disseminated, electoral matter that is likely to mislead or deceive an elector about the casting of a vote. Maximum penalty: 50 penalty units, imprisonment for 6 months or both. (2) It is a defence to a prosecution for an offence against subsection (1) if it is established that the defendant did not know, and could not reasonably be expected to have known, that the electoral matter was likely to mislead or deceive an elector about the casting of a vote.
Northern Territory *Electoral Act* (NT) s.287	287 False or misleading statements (1) A person must not, in an electoral paper, make a statement that is false or misleading in a material particular. Penalty: If the offender is a natural person – 100 penalty units or imprisonment for 6 months. If the offender is a body corporate – 500 penalty units. (2) It is a defence to a prosecution for an offence against subsection (1) if it is established the defendant did not know, and could not reasonably be expected to have known, that the relevant statement was false or misleading in a material particular. (3) It is enough for a complaint against a person for an offence against subsection (1) to state the statement was, without specifying which, "false or misleading" to the person's knowledge.

Appendix 4: Queensland's code of conduct for election candidates

Code of conduct for election candidates[630]

The purpose of the Code is:

(a) To maintain public confidence in the electoral process by promoting conditions conducive to the conduct of free and fair elections; and

(b) To provide general guidance to candidates on what is fair and reasonable conduct in elections, thereby ensuring candidates know what is required of them.

The code applies to all candidates for state elections (independents and candidates endorsed by parties).

A "candidate" is any person who is publicly identified as a candidate in a state election, either by the candidate's party, or through the actions of the person in the case of independent candidates. The Code applies to candidates who are so publicly identified before they are formally nominated as a candidate under the *Electoral Act 1992*.

The Code binds candidates personally, and not their agents. Candidates are expected to make all reasonable efforts to ensure their campaign workers are aware of and observe the standards of conduct set by the Code, and of the public interest in free and fair elections.

How election candidates shall conduct themselves.

Candidates shall conduct themselves and their campaigns so as to maintain and strengthen the public's trust and confidence in the democratic election process, and promote integrity in our electoral system.

Candidates conduct should be fair and reasonable. This requires that a candidate will:

(a) Act honestly in making representations about the candidate's own claims for election, and their intention to represent the electorate.

(b) Refrain from knowingly acting dishonestly in making representations about the claims of other candidates for election.

(c) Avoid making public statements which the candidate knows, or ought to know, are untrue, about an opponent's personal affairs.

630 Extract from the Legislative Assembly (Queensland), Votes and Proceedings no. 128, 9 September 2003, p.1187 cited in Legislative Assembly of Queensland, Code of ethical standards, Parliament of Queensland, Brisbane, September 2004, pp.65-66. Retrieved from http://www.parliament.qld.gov.au/view/committees/documents/MEPPC/other/ethicalStandards/Code04.pdf on 20 October 2009.

(d) Avoid making vexatious complaints to the Crime and Misconduct Commission against an opponent during a campaign.

(e) Avoid conduct which is contrary to state or Commonwealth law including but not limited to:

- Racial and religious vilification offences under the *Anti-Discrimination Act 1991*;
- Official misconduct under the *Crime and Misconduct Act 2001*;
- Criminal Code offences; and
- Electoral Act 1992 offences.

(f) Avoid conduct which would tend to compromise a free and fair election process.

(g) Avoid conflicts of interest arising from advocating election policies or proposals which would specifically deliver a private pecuniary benefit to the candidate and, if the candidate is not a Member of Parliament who has already lodged a pecuniary interests declaration on the Parliamentary Members' Register of Interests, furnish to the Electoral Commissioner a declaration of the candidate's pecuniary interests.

The Code is voluntary, with the exception of (e) above, but candidates who do not follow it will risk disfavour in the electorate because they have not followed the Code.

Minority report

The Electoral Matters Committee was required, among other matters, to inquire, consider and report on:

> The deliberate misleading of the electors in the 28 June 2008 Kororoit by-election, whereby a pamphlet authorised by the Secretary of the Australian Labor Party was distributed that claimed 'A vote for Les Twentyman is a vote for the Liberals' contributing, in the opinion of the Victorian Electoral Commissioner, to 'an undesirable trend for candidates to take advantage or build on community misunderstandings of preferential voting with confusing statements'.

In evidence, in response to a question put by Philip Davis MLC regarding the legitimacy – or lack thereof – of the political strategy, Mr Cleary stated:

> If that is a legitimate political strategy, then nothing matters anymore. There is nothing virtuous about the body politic. It is all about deceit. … If Mr Newnham says it is a legitimate practice, I will just repeat: that debases the political process, not on the basis of the cut and thrust of politics, or robust opinions of critiquing someone's ideas or actions, but on the basis of the fact that what was stated in Kororoit was a lie.

Earlier, it is further noted in a submission by Dennis Galimberti that:

> The conduct of the Secretary of the Australian Labor Party ('ALP') in authorizing and distributing the pamphlet "A Vote For Les Twentyman is a Vote for the Liberals", was clearly designed by the ALP to mislead voters so that when they were forming their judgement as to whom they would vote for, they would be influenced against voting for Twentyman, believing that in effect it would be a vote for the Liberals. This pamphlet was handed to electors by representatives of the ALP outside the polling booths on election day. Electors who clearly demonstrated an intention to vote for Twentyman reformed their judgement when they were handed a pamphlet and told that "A Vote for Twentyman was effectively a vote for the Liberals."

The Victorian Electoral Commission had expressed concern that:

> Such statements, that a vote for one candidate or party is a vote for someone else, are effectively exploiting community misunderstanding of how preferential voting works. Despite the VEC's and AEC's efforts, strong anecdotal evidence suggests that a high proportion of voters are not confident about how the preferences they mark on ballot papers translate into election results. Misunderstandings are likely to be especially prevalent in electorates with concentrations of voters who are not proficient in English. In these circumstances, it is tempting for a party to promote the message that a vote for one party will somehow turn into a vote for another.

It is a matter of serious concern on the part of members signing this minority report that at the public hearing, Stephen Newnham, the then State Secretary of the ALP (Victorian Branch) noted:

> I would run this strategy again if the by-election was being held tomorrow. … I think it is a legitimate political strategy, and I stand by it 110 per cent.

We regard the view of Stephen Newnham as being unacceptable. We hold the view that the conduct of individuals and political parties should not compromise the conduct of free and fair elections. The strength of the democratic process is undergirded by honest representations in political

literature. We hold the view that under our terms of reference, the position adopted by the ALP could be categorised as at best tending to confuse, and at worst, in the words of a campaign worker for Les Twentyman ‘a debasement of the political process’.

Philip Davis

Michael O’Brien

Murray Thompson