Victorian Electoral Commission

Submission to the Electoral Matters Committee Inquiry into the Kororoit District By-election

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Introduction – origins and purpose of the submission

A by-election for the electoral District of Kororoit was held on 28 June 2008. There were six candidates for the by-election, including Ms Marlene Kairouz (Labor), Ms Jenny Matic (Liberal) and Mr Les Twentyman (Independent).

On 27 June 2008, Mr Twentyman's campaign manager lodged a complaint with the Victorian Electoral Commission (VEC) about a pamphlet authorised by the State Secretary of the Australian Labor Party (ALP), that stated that Mr Twentyman had done a deal with the Liberal Party and that "a vote for **Les Twentyman** is a Vote for the **Liberals**". 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.

After taking submissions from those involved and receiving legal advice, it was concluded that the pamphlet in question was misleading in its suggestion of an affiliation between Mr Twentyman and the Liberal Party, but that it did not clearly mislead electors **in the casting of their vote** and that consequently a successful prosecution was unlikely. The VEC's report on the by-election stated:

> Regardless of the legal consideration, such messages do conflict with messages from the electoral administrators that electors allocate preferences, and contribute to an undesirable trend for parties to take advantage or build on community misunderstandings of preferential voting with confusing statements.
>
> In this context, the Parliament may wish to consider whether the misleading provisions of the Act require amendment.[1]

Subsequently, the Electoral Matters Committee of the Victorian Parliament has commenced an inquiry into whether the provisions of the *Electoral Act 2002* should be amended to make better provision for misleading or deceptive electoral content. The terms of reference cover the incident at the Kororoit by-election and whether the Electoral Act should be amended to improve the operation of the misleading provisions of the Act so that abuses are more likely to be successfully prosecuted.

The Victorian Electoral Commission's view is that the statement "a vote for **Les Twentyman** is a Vote for the **Liberals**" did not breach the misleading advertising provisions of the *Electoral Act 2002*. It is also the VEC's view that, without legislative amendment, the above statement 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).

[1] *Report on the Kororoit District By-election held on 28 June 2009*, p. 13.

Accordingly, the VEC's main submission is straightforward: it simply requests Parliament to decide whether such statements should continue to be allowed or whether legislative amendment is required.

The submission provides background of relevant legislation and cases that may assist the Committee to consider this matter, but the VEC remains respectful of administering the laws passed by Parliament.

Legislation on misleading advertising

The following table sets out Australian legislation on misleading advertising in parliamentary elections. Legislation for local government elections also covers misleading advertising, mostly in similar ways to the legislation for parliamentary elections.

Jurisdiction and Act	**Provision**
Victoria *Electoral Act 2002*, s. 84(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.
Commonwealth *Commonwealth Electoral Act 1918*, s. 329(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.
New South Wales *Parliamentary Electorates and Elections Act 1912*, s. 151A(1)	Any person who: ... (b) prints, publishes or distributes any "how to vote" card, 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, ... shall be liable: (d) if the person is a corporation – to a penalty not

Jurisdiction and Act	Provision
	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.
Queensland *Electoral Act 1992*, s. 163(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.
Western Australia *Electoral Act 1907*, s. 191A(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: $1000
South Australia *Electoral Act 1985*, s.113(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 - $1250; If the offender is a body corporate - $10000. (The legislation also involves the Electoral Commissioner making decisions on material during the election period.)
Tasmania *Electoral Act 2004*, s. 197	A person must not – (a) print, publish or distribute, or permit or authorise the printing, publishing or distribution of, any printed electoral material that is intended to, is likely to or has the capacity to mislead or deceive an elector 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

Jurisdiction and Act	Provision
	to mislead or deceive an elector 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 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.
Australian Capital Territory *Electoral Act 1992*, s. 297(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.
Northern Territory *Electoral Act 2004*, s. 271	(1) A person must not distribute any of the following that has on it directions that are intended or likely to mislead, or improperly interfere with, a voter casting a vote: (a) an electoral advertisement, notice, handbill or pamphlet; (b) a card or other document, containing a representation of a ballot paper, or apparently intended to represent a ballot paper. Penalty: If the offender is a natural person – 100 penalty units. If the offender is a body corporate – 500 penalty units. (2) A person must not distribute a thing mentioned in subsection (1) that contains an untrue or incorrect statement. Penalty: If the offender is a natural person – 100 penalty units. If the offender is a body corporate – 500 penalty

Jurisdiction and Act	Provision
	units.

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.

Legal cases on misleading advertising

The key case in this field is *Evans v Crichton-Browne*, which was heard by the High Court in 1981[2]. This case arose out of the 1980 Federal election. Mr Evans, an Australian Democrat candidate for the Senate in Western Australia, challenged the election of Mr Crichton-Browne, a Liberal candidate, arguing that Liberal advertisements had breached the then paragraph 161(e) of the *Commonwealth Electoral Act 1918*, 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". Mr Evans alleged that Liberal advertisements had made untrue or incorrect statements about the Australian Democrats' voting record and that a vote for the Australian Democrats could be a vote for Labor Party. The High Court had to consider the scope of paragraph 161(e). The critical words were "in or in relation to the casting of his vote". The Court determined that these words meant that this provision did not relate to the formation of an elector's judgement about whom to vote for, but only to the carrying into effect of that judgement by casting a vote once the judgement had already been formed. Thus, statements that might be untrue in the ordinary sense of the word, such as those that Evans complained of, were not covered by the provision if they related to persuading electors about which candidates or parties to support. The Court gave examples of hypothetical statements to which the provision could apply: a statement misleading voters about how to cast a formal vote, an incorrect statement about the time and place of voting, or 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.

Courts in a range of jurisdictions have followed the principle set in *Evans v Crichton-Browne*. For example, in *Webster v Deahm*[3], the Commonwealth Court of Disputed Returns found that advertisements alleged to misrepresent the policies of the Liberal Party were not

[2] (1981) 147 CLR 169.
[3] (1993) 67 ALJR 781 at 784.

likely to mislead or deceive an elector in relation to the casting of a vote as distinct from forming a judgement as to the person for whom to vote. In *MacDonald v Electoral Commissioner*[4], the New South Wales Supreme Court found that advertisements criticising an Independent candidate did not misguide the casting of a vote according to the *Crichton-Browne* principle.

South Australian cases

In South Australia, cases in this field have followed a different trajectory. In *Cameron v Becker* (1995)[5], the Supreme Court dismissed an appeal against a stipendiary magistrate's conviction of the State Secretary of the ALP for a breach of s. 113 of the *Electoral Act 1985*. The magistrate had found that an ALP advertisement including the words "The fact is the Brown Liberals have stated that any school with less than three hundred students will be subject to closure" contained a statement of fact that was inaccurate and misleading to a material extent, and thus constituted an offence against s. 113. The Supreme Court also upheld a constitutional challenge to s. 113, rejecting the argument that the section breached an implied constitutional right of freedom of communication. In *State Electoral Office v Pigott*[6], the State Director and Campaign Manager of the Liberal Party at the 1997 State election pleaded guilty to breaches of s. 113 in a Liberal Party advertisement on preferences. In *King v Electoral Commissioner* (1998)[7], the Court of Disputed Returns found that a Liberal Party advertisement that implied that a vote for an Independent or Democrat would, "thanks to preferences", give you a Labor government, breached s. 113. However, the Court found that this breach did not affect the result of the election. Similarly, in *Featherston v Tully* (2002)[8], the Supreme Court found that a breach of s. 113 would not in itself lead to the voiding of an election. In *Featherston v Tully (No 2)*[9], the Liberal candidate for the electoral district of Hammond in the 2002 State election sought to overturn the election result, partly on the ground that in advertisements Mr Peter Lewis MHA had made inaccurate and misleading statements about support for a Labor government contrary to s. 113. The Court of Disputed Returns carefully considered Mr Lewis's statements and credibility, and concluded that there was no breach of s. 113. There were several successful prosecutions for breaches of s. 113 at the 1997 State election, but no matters have been taken to court since.

Effects of the legislation on election campaigns

The legislation and related legal cases have had profound effects on the nature of election campaigns in Australia. Electoral administrators have followed the Crichton-Browne

[4] SCt NSW (unreported), 30 March 1995, Barr AJ.
[5] 64 SASR 238.
[6] Magistrates Court 15 December 1998, 98/8658.
[7] SASC 6557.
[8] SASC 243.
[9] SASC 338 (10 October 2002).

principle in responding to complaints about misleading electoral material. The Australian Electoral Commission's *Electoral Backgrounder No. 15: Electoral Advertising*[10] states:

> 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.

Similarly, the New South Wales Electoral Commission's pamphlet, *Electoral Advertising for the 2008 Local Government Elections in NSW*, states (paragraph 4):

> The laws regulating electoral advertising are **not** designed to regulate the content of political messages. They are designed to ensure amongst other things:
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> - 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
>
> - 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.

However, the narrow interpretation of what constitutes misleading advertising within the meaning of electoral law does not prevent a multitude of complaints about misleading electoral matter by participants in elections. At the 2008 Victorian local government elections, 61 of 223 written complaints were about false or misleading material. At the 2006 Victorian State election, the VEC received 103 written complaints about political parties or candidates, 34 of which related to allegedly false or misleading material. In most cases, the VEC's response was along the following lines:

> Section 84 of the *Electoral Act 2002* relating to misleading or deceptive matter has been narrowly interpreted by the courts in Victoria to concern the casting of the vote. Thus, like the material about which you complain, most election comment does not come within the scope of the 'misleading' provision as it does not refer to the manner in which a person will mark their ballot paper.

The fact that the content of election advertising has been effectively unregulated except in relation to the casting of a vote may have contributed to a feeling that anything goes. Probably more important in this regard is the nature of election campaigns. Campaigns are conducted for high stakes, in an atmosphere of high emotion. Participants are convinced of

[10] As updated August 2007, paragraphs 6 and 7.

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.

Particularly problematic from the VEC's point of view have been statements which relate to the electoral system. In the Kororoit by-election, the statement at issue was "A vote for Les Twentyman is a vote for the Liberals". 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. In *King v Electoral Commissioner*[11], the Liberal Party's State Director stated that "his experience was that generally voters do not understand how the preferential voting system works and that he had to take that into account when devising a strategy and the slogan 'Put Labor Last' was the simplest way to highlight to voters the importance of preferences". In a preferential voting system, voters' preferences can flow to other candidates (this after all is the essence of the system), but parties' statements about this can be misleading.

The lack of broad regulation of the content of electoral matter has led from time to time to a push for "truth in advertising". Observers, concerned at the far-fetched claims in campaign advertising, maintain that misleading or false statements "may distort election outcomes, divert voter attention from substantive issues and may even discourage qualified individuals from seeking election"[12]. Parliamentary Committees have repeatedly considered this matter, with varying results. In the recent report by the Commonwealth Joint Standing Committee on Electoral Matters, the Committee as a whole did not consider this issue, but Senator Bob Brown issued a dissenting report which advocated truth in advertising legislation[13]. Two main models have been put forward for such legislation: an adaptation of the *Trade Practices Act*, or the South Australian model.

South Australian experience

In South Australia, s. 113 has been in operation for a generation. There have been prosecutions for breaches of s. 113, affecting both sides of politics. Elections are still hard-fought, but it seems that the legislation has tended to discourage participants from making claims as statements of fact.

[11] SASC 6557.
[12] George Williams: :"Truth in Political Advertising Legislation in Australia", Australian Parliamentary Library Research Paper 13 1996-97.
[13] Joint Standing Committee on Electoral Matters: *Report on the conduct of the 2007 federal election and matters related thereto*, Canberra, 2009, pp. 335-336.

On the other hand, the legislation may encourage more participants to lodge complaints about false or misleading advertising. In the 1997 State election, the State Electoral Office received 40 such complaints, consuming at least 80% of the time spent dealing with complaints. Complaints became major media issues. In six cases, the Electoral Commissioner requested advertisers to publish retractions as provided in the Act[14]. At the 2002 State election, there was another flood of complaints, distracting from the conduct of the election. And at the January 2009 Frome by-election, there were nine such complaints. The Electoral Commissioner 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.
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> 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.
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> 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.[15]

Conclusion

This submission sets out legislative regimes and their consequences in Australia generally and in South Australia. In most of Australia, the restriction of the scope of the misleading advertising provisions allows robust debate, but can lead to the dissemination of statements that are misleading in the ordinary sense of the word. In South Australia, different legislation means that the content of advertising is examined. This can lead to redress for misleading material, but the risk is that the 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.

There will be those who see no need to change Victoria's misleading advertising laws, and to place the onus on the elector to consider all material before casting their vote. However, if the Committee believes that legislative change is required, then the challenge will be to devise a workable system that deals with misleading advertising while protecting freedom of expression. The issue that sparked the inquiry was a misleading statement related to the effect of preferences. A possible amendment would be to require election advertisements

[14] State Electoral Office South Australia: *Election Report General Elections 11 October 1997*, pp. 31-32.
[15] Electoral Commission of South Australia: *Election Report Frome By-election 17 January 2009*, p. 22.

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. A code of conduct for political parties and candidates is another possibility.

Whatever the outcome of the inquiry, it will be the VEC's role to implement the laws as passed by Parliament and to raise any issues for further consideration in its reports.

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