

Peter Holland

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The Executive Officer  
Electoral Matters Committee  
Parliament House  
Spring Street  
EAST MELBOURNE VIC 3002  
[emc@parliament.vic.gov.au](mailto:emc@parliament.vic.gov.au)

## **Introduction**

The Parliament of Victoria's Electoral Matters Commission has invited submissions on the impact of social media on Victorian elections and Victoria's electoral administration.

This submission is made by Peter Holland, who was the campaign manager for Cr Serge Thomann, a candidate for the seat of Albert Park in the 2010 Victorian elections.

It is submitted that:

- Online advertising will be of increasing importance in political campaigns.
- It is important for democracy to have effective regulation of social media in Victorian elections.
- One problem with regulation of social media in political campaigns is whether overseas entities such as Google will comply with Victorian regulations and co-operate with Victorian regulatory authorities.
- If overseas entities such as Google are unwilling to comply with Victorian authorities, then the State should impose significant restrictions. Otherwise there will be no effective controls on abuses of online political advertising.
- The Electoral Matters Committee should use the Google advertising in the 2010 elections in the seat of Albert Park as a test-case concerning the co-operation of overseas entities.

**The candidacy of Cr Serge Thomann in the 2010 Victorian elections.**

Cr Thomann ran as an Independent in the 2010 state elections. Unlike most independent candidates, it was likely that he would attract a significant number of votes because of his prominence as President of unChain St Kilda in the controversial St Kilda Triangle campaign and his election as a Councillor in Port Phillip in 2008.

The St Kilda Triangle had been the major issue in the 2008 council elections for the City of Port Phillip. The St Kilda Foreshore Urban Development Framework had promised that the Triangle would be developed as an entertainment and cultural precinct. However the Council and the State Government had approved a Development Agreement/Development Plan with Babcock Brown Citta in 2008 that failed to comply with this promise. In the following Council elections in November 2008, only one of the six councillors who supported this Triangle plan was re-elected. The ALP had made a significant, but unsuccessful, effort to get candidates it supported elected. Subsequently, unChain made a detailed submission to the ALP on the 'politics' of the St Kilda Triangle. We submitted that if the Babcock Brown Citta Agreement was still 'live' in the 2010 state elections, there could be a significant electoral backlash in Albert Park against the Labor government. Subsequently the Council and the State Government reached a commercial settlement with Babcock Brown Citta to terminate the Agreement and therefore it was not a specific issue in the 2010 elections. Nevertheless the issue of the future of the St Kilda Triangle generally and other 'local' issues meant that Cr Thomann loomed as a significant vote-winner in the November election.

Cr Thomann's how-to vote card recommended giving second preferences to the Greens' candidate (Ann Birrell), and then a 'split ticket' between the Labor candidate (Martin Foley) and the Liberal candidate (Mark Lopez).

The result in Albert Park in the 2010 state elections was that the Labor candidate (Martin Foley) narrowly defeated the Liberal candidate (Mark Lopez). The margin after distribution of preferences was just 2.07%. Mark Lopez got 38.29% of the first preference votes well ahead of Martin Foley who got 30.19%. The Greens (Ann Birrell) got 18.14% and Cr Serge Thomann got 9.10%. Ultimately, Labor's Martin Foley was narrowly elected on the Greens' preferences. Had Cr Thomann preferred Mark Lopez, it is likely that he would have been elected.

The election was marred by an illegal Google advertisement. This may have reflected the tight contest in the campaign for the seat of Albert Park.

### **The Google Advertisement**

On the weekend of 20-21 November 2010, in the heart of the election campaign, an unknown person published four unauthorised Google advertisements.

When a Google search was made under 'Serge Thomann' or 'Ann Birrell' various paid advertisements appeared which defamed Serge Thomann. They claimed (See attached example):

- 'Waterfront Planning myths ..Serge is lying to get elected'

- ‘Who is Serge Thomann. Celebrity obsessed paparazzo? Or something far more sinister?’
- ‘Albert Park voter? Do you really know Serge Thomann? Say NO to this Liberal deception’
- ‘Don’t trust sleazy Serge?’

The advertisements appeared to come from the Greens as they each included a link to the Greens website.

These claims were false and defamatory.

The Greens assured us that these ‘scurrilous publications have not been placed by myself (Ann Birrell) or anyone else in the Greens.’

The advertisements were removed by Google within a few hours after a complaint was lodged by the Greens. Nevertheless claims like these continued to dog the election campaign.

We do not know who was responsible for the Google ad. It could have been

- A Greens supporter, concerned that Cr Thomann may take ‘protest’ votes away from the Greens.
- A Labor supporter trying to blacken the image of Cr Thomann in the eyes of ‘progressive’ voters.
- A Liberal supporter trying to blacken the image of Labor in Cr Thomann’s eyes and therefore persuading him to preference the Liberals over Labor.
- An ‘outsider’ who simply did not approve of Cr Thomann.

It is not important for the Electoral Matters Committee to try to identify who was responsible. The important question for the Committee is how adequate are our institutional arrangements to deal with this sort of abuse of online advertising in Victorian elections.

### **Breach of the Electoral Laws**

The Google advertisements carried no authorisation. We believed that this was a breach of s83 of the Electoral Act, which prohibits publication of an electoral advertisement without details of an authorising person.

Section 83(1) of the Electoral Act stated that

*‘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.*

*Penalty: In the case of a natural person, 10 penalty units; In the case of a body corporate, 50 penalty units.*

On Monday 22 November, immediately after the publication of the Google ads, I wrote to the Victorian Electoral Commission to lodge a complaint. In the letter I said:

*I therefore believe that this is a breach of s83 of the Electoral Act, which prohibits publication of an electoral advertisement without details of an authorising person.*

*It think it is important for our democratic system to take a stand against such dirty tricks. This is not legitimate politics. It is essential that the Victorian Electoral Commission take vigorous action.*

*I suggest that the VEC should contact Google to establish*

- *Who placed the advertisements with Google*
- *Payment details – which credit card was used, or who were the signatories to any cheque used or authorised any money transfer.*

*The VEC should then take enforcement action against these persons involved in this horrible example of ‘dirty tricks’*

*I look forward to a response as soon as possible*

The Victorian Electoral Commission report on the 2010 elections concluded that that it lacked power to enforce the law. It said (at p. 92) :

*The VEC received a complaint during the election regarding unauthorised electoral advertising published as Google Adwords. The AdWords purported to be advertisements for the Greens and contained a link to the Greens’ website (vic. greens.org.au). The advertisements were short-lived, and had ceased to run before Google Australia Pty Ltd had received any complaint about them. Subsequently, the VEC sought the assistance of Google Australia to provide information regarding those responsible for the placement of the advertisements.*

*After investigation, Google Australia advised that although it held the information requested in accordance with ‘commercial confidentiality practices’, since Google Adwords was not conducted by Google Australia, the VEC should direct its request to Google Inc., of California, through an email to its Legal Investigations Support Team. This process appears largely automated. The Victorian Government Solicitor’s Office (VGSO), acting for the VEC, received a response advising that ‘valid legal process’ was required for Google Inc. to make such disclosure, and indicating that it may accept ‘an order signed by a judge or magistrate’ served by registered mail.*

*The VEC was not in a position, under the legislation as it currently stands, to obtain an order in this form.*

*The VEC will therefore refer the matter for consideration by the Parliament to consider legislative amendment empowering the VEC to require that certain information be provided in relation to the publication of electoral material. A*

*recommendation in relation to this matter is included in the concluding section of this report.*

*(The report then made this recommendation at p.101) ... Recommendation 7. The VEC recommends that consideration be given to providing the VEC with the power to require information to be provided to it concerning the name and address and any other identifying detail of any person publishing electoral advertisements or electoral matter online.*

## **Submission**

It is submitted that there should be effective regulation of on-line advertising. It is further submitted that it may not be sufficient simply to adopt the recommendation of the VEC report. The issue is whether a foreign entity such as Google would ignore any such order from the VEC to provide the identifying detail of advertisers.

It is submitted that the Google advertising in the 2010 elections be used as a test case to assess Google's compliance with Australian authorities. It is submitted that the Committee (or the Parliament) should request from Google the name and any other identifying detail of the person who published the electoral advertisements in question in the 2010 elections. If Google is unwilling to co-operate, it indicates that we have a state of anarchy regarding on-line advertising for politics in Victoria. This is not acceptable because online advertising is becoming such a powerful tool.

Some of the considerations for the importance of online advertising and thus the need to have effective controls against abuse are:

- Online advertising is of increasing importance because millions of voters have stopped watching television or listening to the radio as a way to gather information about candidates.
- In particular, online ads can reach a young audience that prefers to get information from the Internet or from pay TV and may be cynical about traditional politics.
- Online ads offer more precise demographic targeting generally than traditional media: allowing targeting by age, gender, location and interests.
- Online ads can often reach people at a time of day when they aren't inundated by ads from other media.
- Online ads can even target voters waiting in the queue at the polling booths. This means there is no opportunity for the opponents to counter any false or misleading message. Josh Koster, managing partner at the online strategy firm Chong + Koster said about the US experience: 'The number of people Googling candidates while they're standing in line at the polls is staggering.'
- Online ads are cheap and effective. For example the John Kerry presidential campaign spent \$37,000 on online ads and raised \$26.7 million over the Internet in the first three months of his campaign. Could online advertising be used to circumvent Victorian campaign funding laws?
- Social media campaigns can measure the results of banner ads or sponsored links nearly immediately after placing an ad. This allows changes in political strategies in mid-stream.

- Online ads can be interactive with surveys embedded in the as infrastructure that allows the collection of detailed data to refine the political messages.
- Online ads can be swifter than traditional advertising, allowing virtually a real time response to any issues that emerge in the election campaign. In contrast preparation of traditional advertising has a significantly slower response time.

It is therefore submitted that:

- Online advertising will be of increasing importance in political campaigns.
- It is important for democracy to have effective regulation of social media in Victorian elections, including search ads (Google) and display ads (banners and rich media).
- One problem with regulation of social media in political campaigns is whether overseas entities such as Google will comply with Victorian regulations and co-operate with Victorian regulatory authorities.
- The Electoral Matters Committee should use the Google advertising in the 2010 elections in the seat of Albert Park as a test-case on the co-operation of overseas entities.
- The Electoral Matters Committee (or the Parliament) should request from Google the name and any other identifying detail of the person who published the electoral advertisements in question in the 2010 elections.
- If overseas entities such as Google are unwilling to comply with this request, then the State should impose significant restrictions. Otherwise there will be no effective controls on abuses of online political advertising. At the extreme, if Google is unwilling to co-operate with Victorian laws, it is submitted that it should be made illegal for Google to accept political advertising in Victorian elections and for Victorians to pay Google for political advertising.

If it would be useful, I am prepared to be heard by the Electoral Matters Committee.

Yours truly,

Peter Holland



