

SUBMISSION

*Inquiry into the impact of social media on Victorian elections and Victoria's electoral administration**

Overview

The Electoral Matters Committee has been given the following terms of reference, which we refer to in this submission:

- a) *The impact of social media technologies on the Victorian electoral process, focusing on how social media platforms such as Twitter and Google are used for political communication and whether current regulations regarding the authorisation of political content on social media are appropriate;*
- b) *Whether online electoral advertising, such as Google Adwords, is appropriately regulated in Victoria; and*
- c) *How social media and new communications technologies are used by the Victorian Electoral Commission and the Parliament to engage Victorians and improve knowledge of electoral processes.*

Our comments are of a general nature, in anticipation of answering more specific questions the Committee might have, with respect to the views of younger members of the legal profession, at the public hearing.

Impact of Social Media (including Twitter and Google)

While the Internet has always been a content sharing platform, before the birth of social media, accessibility was poor. The conversations flowed far slower, and largely in a single direction, limited by the facilities available on individual websites (such as message boards, feedback forms, or chat rooms).

Social media has made the Internet more accessible, permitting users to express themselves more easily, and to share content more rapidly. It has led to more interactions, opening up lines of communication that did not exist before. That said, social media is only a mode of communication; the content of those exchanges are not particularly novel, but rather, the form in which they are delivered (for instance,

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arguments could be made before the phenomenon of the “meme” arose, that is, without imposing words against a picture with reference to popular culture).

We note the Discussion Paper titled “Inquiry into the future of Victoria’s electoral administration” – particularly Discussion Point 7 – circulated by the Electoral Matters Committee in November 2012. The concern seemed to be if social media fell within the requirements applicable to other published materials, such as the need to be authorised, rather than the general impact it might have on the campaign.

Social media communications of a political nature are manifold. A fair amount of the discussion, it should be noted, is private or limited to a specific social network (particularly on Facebook). A significant amount of communication occurs on an “opt in” basis, for which recipients must, for example, “like” a Facebook page or “follow” a Twitter user. Increasingly, paid advertising makes content appear to users without their opting in. Problematic too is that private users can “share” public content they see.

Our view is that, if further regulation is perceived as necessary, **it should be on a “legacy” basis**, that is, for communications analogous to those already regulated, rather than to encompass more varieties. That a view is expressed publicly (for example, because a person does not set their social media account to “private”) does not mean it is a political communication worthy of regulation. What are now public communications have previously been expressed in private forums, such as over the dinner table, or at the local pub. Such private editorialising should remain unregulated.

Regulation of Online Electoral Advertising

As a preliminary matter, we refer to the recent *Unions NSW v New South Wales* decision in the High Court of Australia,¹ and note that how it might curtail the authority of Parliament of Victoria (as well as the legislatures of the other states) to regulate political communications.

The High Court of Australia first held that a freedom of political communication was implicit in sections 7 and 24 of the *Commonwealth Constitution* (respectively

¹ (2013) 88 AJLR 227. The authorised Commonwealth Law Report (CLR) for this case has not been released as at the time of writing.

providing for the election of Senators and Members) in *Nationwide News Pty Ltd v Wills*.² With *Unions NSW*, it is clear the implied freedom does apply to state legislation, the Court striking down a NSW state law providing that political parties could only accept donations from electors. The Court noted, for the purpose of defining the scope of the implication, that there is an increased overlap between state and federal political communication. The Committee should note in particular the comments of French CJ, Hayne, Crennan, Kiefel and Bell J at 232-4.

The views of the Court aside, we note that is commonly said of Australian politics that the electorate are always right. It follows that the intelligence of the electorate is not to be underestimated. Most Australians know when a pitch is being made to them, even when subtle. Newer forms of pitch might allow those pitches to find their target audience more easily, as Google Adwords and paid Facebook content do, but it does not mean their potency is greater than the full page advertisements that continue to appear in daily newspapers.

It would not seem that there is any great need to introduce more regulation in this field, although without specific proposals for regulatory change, it is difficult to provide any constructive comment.

Social Media and the VEC/State Parliament

The Electoral Matters Committee is no doubt familiar with the saying “you can lead a horse to water, but you cannot make it drink.”

If the electorate is the horse, and knowledge about the electoral process is the water, then social media is simply another path on which the horse can be led. The Internet has itself made information about the Victorian electoral process – amongst many other matters – more readily accessible. Social media does not change that, though it could be used to make awareness of it greater.

There is probably some merit in the suggestion that, for first time voters who have little understanding of the electoral process, social media would be an effective lure to existing resources the Victorian Electoral Commission has available online. Such an initiative should not, however, distract from what the overriding concern of the

² (1992) 177 CLR 1

Commission ultimately be, namely, making information about the electoral process as easily digested as possible.