



AUSTRALIA

Submission by Free TV Australia

Inquiry into the impact of social media on elections and electoral administration

Parliament of Victoria – Electoral Matters Committee

September 2020

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1. Executive Summary

Free TV welcomes the opportunity to contribute to the Parliament of Victoria Electoral Matters Committee (EMC) Inquiry into the impact of social media on elections and electoral administration (Inquiry).

Outdated election blackout laws should be repealed

The EMC should recommend repealing the existing election advertising blackout rules that apply only to broadcasters. These rules are irrelevant in circumstances where voters can, and do, readily access election advertising online. The only purpose they serve is to transfer advertising revenues from broadcasters to digital platforms where these rules do not apply.

Political matter should be regulated consistently across platforms

The rules in relation to tagging of political matter should be consistent across platforms. The EMC should recommend that the existing political matter licence condition that applies only to broadcasters should be removed from the Broadcasting Services Act. Broadcasters should be regulated in the same way as other platforms, in relation to electoral matter.

Political advertising standards

Free TV strongly opposes the introduction of truth in political advertising laws that capture publishers. To the extent that such laws are under consideration, liability must rest solely with the authorising body. It is not practical nor appropriate for broadcasters to make assessments on the truthfulness of political claims.

2. Introduction

2.1 About Free TV Australia

Free TV represents all of Australia's commercial free-to-air television broadcasters in metropolitan, regional and remote licence areas.



At no cost to the public, our members provide a wide array of channels across a range of genres, as well as rich online and mobile offerings.

The value of commercial free-to-air television to the Australian public remains high. Free-to-air television delivers high-quality Australian programmes including news, current affairs, sports and culture to all Australians for free. 98% of Australian households receive digital terrestrial television.

2.2 The importance of a harmonised electoral advertising regulatory framework

The letter from the EMC calling for submissions to this inquiry asks a number of questions in relation to the impact of social media on elections and electoral processes, including advertising around elections.

The issue of how digital platforms (in particular Google and Facebook) have changed the media landscape and the impacts that this has had for competition, consumers and our society more broadly, were explored in detail in the ACCC's recent Digital Platforms Inquiry Final Report.

One of the issues the report considered was the significant disparity in the regulatory frameworks that apply to digital platforms compared to traditional media companies and how this contributes to some of the more negative impacts of the changed landscape, including not only distorting competition and threatening the sustainability of credible news sources, but also social media manipulation and disinformation campaigns that can threaten democratic processes.

To address this problem, the ACCC recommended that the regulatory framework should be reformed so that comparable functions are regulated consistently across platforms. The ACCC highlighted election advertising as an example of a pressing disparity requiring reform.

In the first two sections of this submission we address two key areas of regulatory disparity in relation to electoral matter that need to be addressed:

1. The Election blackout that applies only to broadcasters. These rules are effectively redundant in today's media landscape and should be removed altogether.
2. The Political matter licence condition that applies only to broadcasters. The political matter rules are confusing and should be removed so that broadcasters are regulated in the same way as other platforms in relation to electoral matter.

In the third section of this submission we address our concerns in relation to suggestions that truth in political advertising should be introduced. In particular, we set out why we strongly oppose any such rules applying to publishers including broadcasters.

3. Election blackout provisions

3.1 Current Regulation is outdated

Under section 3A of Schedule 2 to the BSA, broadcasters are prohibited from broadcasting an election advertisement during the period commencing at midnight on the Wednesday before polling day in a licence area where an election to a Parliament will be held and ending on the close of polling on election day.

These rules were passed by the Parliament in 1992, prior to widespread internet access in Australia. They apply only to free-to-air and pay television and radio; however, they do not apply to any other form of electronic media. In other words, all online and mobile advertising is excluded from the ban.

In today’s media landscape, these rules are no longer effective or relevant, and unfairly disadvantage commercial broadcasters. With a shift to a 24-hour news cycle and the popularity of online content services, voters can and do readily access election advertising (including audio and video advertising) via Facebook, YouTube, online news sites, through google ad placements and via apps.

On commencement of the blackout period, political parties simply transfer their advertising from television to other digital media platforms that are not regulated, including via Facebook videos, targeted text messages, and through digital news media sites and other social media. By way of illustration, below are just a couple of examples of advertising during the election blackout period leading up to the last federal election:





These examples demonstrate that the political advertising blackout that applies only to commercial broadcasters is a nonsense in the current media environment.

3.2 Previous examinations of election blackout period by Commonwealth Joint Select Committee on Electoral Reform

A report by the Joint Select Committee on Electoral Reform, appointed by the Commonwealth Parliament in 2013 (2013 JSCER) considered these matters and as part of its report published in April 2015 (2015 Report) recommended that the Australian Government examine the future viability of the broadcast media blackout.

The 2015 Report noted the rise of social media and reliance on the internet and mobile communication.¹ It highlighted that continued political advertising and campaigning on these forms

¹ Paragraph 4.134 of the 2015 Report.

of non-traditional media during the blackout period undermined the intention of the blackout provisions by allowing candidates to campaign right up to, and including on, election day.²

The 2015 Report cited complaints made to the Australian Electoral Commission in relation to campaigning via text messages, advertisements on social media and other websites, banner advertisements on non-media websites and mobile phone applications, during the blackout period³.

The 2015 Report also found that businesses were promoting candidates and featuring these candidates in their advertisements during the blackout periods, distorting the intent of the blackout period.⁴

In its final report on the conduct of the 2016 federal election, the Committee noted that ‘a matter for future consideration by this Committee is the issue of political advertising blackouts during election periods. The current rules lack consistency, and favour by default, rather than design, online media platforms over more traditional media formats’.⁵

3.3 Provisions should be repealed

In practice, due to the current multi-platform media landscape, election advertising is available until and including election day. There is no public interest in these rules being maintained – they only serve to put commercial broadcasters and other traditional media companies at a disadvantage to digital media.

Recommendation

The EMC should recommend repeal of the outdated election blackout rules that apply only to broadcasters.

² Paragraph 4.135 and 4.143 of the 2015 Report.

³ Paragraph 4.137 of the 2015 Report.

⁴ Paragraph 4.138 of the 2015 Report.

⁵ JSCEM, Report on the conduct of the 2016 federal election and matters related thereto, Chair’s Foreword at x.

4. Tagging of political matter

In addition to the electoral advertising rules which apply to broadcasters under the *Broadcasting Services Act 1992*, and to other platforms under Commonwealth and State Electoral Acts, broadcasters are subject to an additional requirement to ‘tag’ political matter under Schedule 2 to the BSA.

This requirement is a licence condition and can attract serious penalties for breach, including suspension or cancellation of a broadcaster’s broadcasting licence. As with the election blackout rules, the continuation of this onerous requirement is shifting advertising revenue away from broadcasters to online platforms where the same rules do not apply.

The requirement under Schedule 2 is that all advertisements which contain “political matter” at any time (not just during election periods), must end with a spoken announcement containing specific required particulars in the form of words or images that sets out the name and city of the authorising person.

“Political matter” is defined very broadly in the BSA to mean ‘any political matter, including the policy launch of a political party’.⁶ The ACMA has provided only limited guidance on the sort of material that may constitute political matter. The ACMA’s Political Matter Guidelines do not provide a more detailed definition but instead provide that in determining whether matter is political or not, it will have regard to:

- the content of the broadcast
- the overall presentation of the material, including the tone, style and emphasis
- the nature and style of accompanying audio or visual material
- the context surrounding the broadcast.

This disparate obligation is having a negative financial impact on commercial free-to-air broadcasters. Advertisers are being deterred from advertising on platforms where they are required to give up advertising time or space to “required particulars” which detract from or change the message they are trying to deliver to audiences. A recent example was highlighted in the ACCC’s Final Digital Platforms Inquiry Report. Facebook had approached Free TV in relation to running an advertising campaign. Broadcasters notified Facebook that, in accordance with the requirements under the BSA and the broad scope of the definition of ‘political matter’, the advertisements were required to either be tagged or amended for the TV execution. This ultimately led to Facebook limiting its advertising on television and focussing on online advertising instead.

In another example, a major bank approached Free TV in relation to an ad setting out how it was going to improve its services to customers. Due to the timing, particularly the fact that it coincided with the banking Royal Commission, it was considered that the ad may be political and therefore require a tag. Free TV sought legal advice and took a decision to assume some risk in relation to whether the advertisement would be considered to be political. However, the bank, while appreciative of our efforts to accommodate their campaign, did not proceed with the campaign on television because they were concerned about the reputational risk if the ad did become the subject of an ACMA investigation.

⁶ Schedule 2, Clause 1.

As demonstrated by these examples, the political matter licence condition is an outdated regulation that is adversely impacting commercial broadcasters to our competitive disadvantage.

Schedule 2 to the BSA already requires tagging of:

- matter commenting on, or soliciting votes for, a candidate at the election;
- matter commenting on, or advocating support of, a political party to which a candidate at the election belongs;
- matter commenting on, stating or indicating any of the matters being submitted to the electors at the election or any part of the policy of a candidate at the election or of the political party to which a candidate at the election belongs;
- matter referring to a meeting held or to be held in connection with the election.

The regime in relation to electoral matter should apply consistently across all platforms. There is no reason for broadcasters to be governed by an additional complex set of political matter rules that do not apply to other platforms.

Recommendation

The EMC should recommend removal of the political matter licence condition from the Broadcasting Services Act so that broadcasters are regulated in the same way as other platforms in relation to electoral matter.

5. Truth in political advertising rules

The letter calling for submissions to this Inquiry asks whether more regulation is required to be introduced in relation to election advertising. Some commentators have raised questions about truth in political advertising laws and whether bodies such as Free TV and AdStandards could regulate truth in advertising.⁷

Free TV strongly opposes the introduction of truth in political advertising rules that do not clearly carve out publishers, who do not have control over the content of political ads, from their application. Advertising rules must not place liability with the publisher or broadcaster of the advertisement in relation to whether the ad is truthful or not; liability must rest with the authorising body. This is important for a number of reasons:

1. Firstly, publishers, such as broadcasters, take no part in determining the contents of the advertisement and cannot reasonably be expected to know what amounts to political truth and whether statements made are 'inaccurate and misleading'. Broadcasters are simply not equipped to make such assessments, particularly where they must be made in short time frames.
2. Secondly, it is not appropriate for a commercial or industry organisation to take on such a sensitive role in the political process.
3. Thirdly, it has long been recognised by Governments and legislators that regulating the truth in political advertising is not only a risk to freedom of speech and freedom of political communication, but also extremely difficult if not impossible to administer and enforce.

In relation to the first two points, in addition to the difficulty of determining the truth of political advertising, and the fact that it is likely to be highly contested by various political participants, this would ultimately likely require Free TV to rely on external legal advice, increasing the regulatory burden on Free TV as well as the cost to the advertiser of getting the ad to air. It would also result in significant delays in getting political ads to air.

In relation to the third point, the problematic nature of controlling political advertising through legislation was recognised previously by the Joint Select Committee on Electoral Reform, appointed by the Commonwealth Parliament in 1983 (1983 JSCER). In their second report, published in August 1984 (Second Report), the JSCER found that while truth in political advertising rules are desirable, it is not possible to administer through legislation. The 1983 Report concluded to repeal⁸ the short-lived truth in political advertising provisions that came into place under the Commonwealth Electoral Legislation Amendment Act 1983 (Cth).

The view was supported by the 1983 JSCER, who stated that:

- it is unreasonable for the media and advertising industry to decide what amounts to political truth;⁹

⁷ For example see: <https://www.theguardian.com/media/2019/aug/18/vast-majority-of-australians-support-ban-on-misleading-political-advertising>

⁸ Paragraph 2.81 of the Second Report recommended s329(2) (161(2)) of the *Commonwealth Electoral Legislation Amendment Act 1983 (Cth)* be repealed

⁹ Section 2.34 of the Second Report.

- it is unreasonable to expect the media to decide whether to accept or reject “misleading” political advertisement;¹⁰ and
- that the electorate is itself the best body to decide truth in political advertising.¹¹

Recommendation

To the extent that truth in political advertising rules are under consideration, the EMC should recommend that publishers and broadcasters be specifically excluded from their scope. So far as the EMC considers such rules appropriate, liability must rest solely with the authorising body.

¹⁰ Section 2.32 of the Second Report.

¹¹ Para 2.24 of the Second Report