Truth in Political Advertising Legislation in Australia

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The potential impact of misleading or false statements made in the course of electioneering is undoubted. Such campaigning obviously has an adverse affect upon the public interest. It may distort election outcomes, divert voter attention from substantive issues and may even discourage qualified individuals from seeking election.

The question of whether Australian Parliaments should enact truth in political advertising laws has been a recurrent theme in electoral law in recent years. In the 1980s the Commonwealth Parliament dallied with the idea—first introducing such laws, then quickly repealing them. There have recently been suggestions that the Commonwealth Parliament's Joint Standing Committee on Electoral Matters might again argue for the introduction of such laws at the federal level. At the State level, South Australia has introduced truth in political advertising laws, while Queensland is on the track to doing so.

Momentum for change has been provided by the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament, which released its Report on Truth in Political Advertising in December 1996. After a review process involving the production of an issues paper, the receipt of public submissions and the holding of a public hearing, a majority of the Committee found that it is both possible and desirable to legislate to prevent candidates from lying or misrepresenting facts during an election campaign. Many of the Committee's conclusions were based upon reasoning by analogy with the successful operation of section 52 of the Trade Practices Act 1974 (Cth), which provides 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. The Committee recommended that legislation be introduced into Queensland to regulate the use of inaccurate and misleading statements.
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in election advertising. A minority of the Committee, while supporting the principle of truth in political advertising, argued that such legislation was inappropriate as it would be unworkable.

A review of the laws in place in the United States shows that various State legislatures have attempted to enact truth in political advertising laws or similar provisions. However, this has been made difficult and may be frustrated by the guarantee of free speech in the First Amendment to the United States Constitution. This guarantee and its interpretation by the United States Supreme Court casts doubt on the constitutional validity of truth in political advertising provisions in that country.

Australia also faces constitutional problems with seeking to regulate truth in political advertising given the High Court's recognition that the Australian Constitution contains an implied freedom of political discussion. However, it would seem likely that the South Australian provision, which survived constitutional scrutiny in the South Australian Supreme Court in Cameron v Becker, as well as the provision suggested by the Queensland Committee, are effective and valid models by which truth in political advertising might be regulated.
Introduction

The notion that the law should provide for truth in political advertising is misleading. Any such law would be unworkable. Who is to say what is the 'truth'? How could such a law be enforced? Instead, when the argument is put for truth in political advertising legislation, it is really being suggested that the law should penalise electoral statements that can be shown to be false or misleading. No law could require that such statements actually be 'true'.

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Committee, while supporting the principle of truth in political advertising, argued that such legislation was inappropriate as it would be unworkable.

The History of Truth in Political Advertising Legislation in Australia

It was not until the passing of the Commonwealth Electoral Legislation Amendment Act 1983 (Cth) that the first provision prohibiting untrue advertising was enacted. The new section 116(2) [subsequently section 329(2)] of the Commonwealth Electoral Act 1918 (Cth) stated:

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.

Section 116(6) provided that it was a defence if the person was able to prove that he or she 'did not know, and could not reasonably be expected to have known' that the electoral advertisement contained an offending statement. A person convicted of an offence under the provision was liable to a fine not exceeding $1 000 or imprisonment of up to 6 months or both, while a corporation would be liable to a fine of up to $5 000.

Section 329(2) was repealed in 1984 upon the recommendation of the Commonwealth Parliament's Joint Select Committee on Electoral Reform. A majority of the Committee expressed the following criticisms of the section:

1. While fair political advertising is a legitimate objective, it is not one properly to be sought through legislation. Political advertising involves 'intangibles, ideas, policies and images' which cannot be subjected to a test of truth, truth itself being inherently difficult to define.
2. As evidence was given that even predictions and opinions may imply statements as to present fact, and thus be subject to the section, the section was considered to be so broad as to be unworkable.⁸

3. The section would have a disproportionate impact on publishers, who would need to seek legal advice before publishing. This would inhibit political advertising and thus limit the information received by the public.⁹

4. The Committee expressed concern that injunctions might be misused to disrupt the campaigns of other parties and candidates. In the context of an election campaign the grant of an interim injunction could have the same effect as a final order.¹⁰

Consequently, the final recommendation of the Committee was as follows:

the Committee concludes that even 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.

A similar view was repeated in 1994 by the Joint Standing Committee on Electoral Matters in its Report of Inquiry into the Conduct of the 1993 Federal Election and Matters Related Thereto.¹¹

There have been several unsuccessful attempts to reinsert section 329(2) or a like provision into the Commonwealth Electoral Act since its repeal in 1984.¹² In 1995, attempts were made to introduce provisions similar to the old section 329(2) into Commonwealth¹³ and Queensland¹⁴ law. In Queensland the move had the support of the Electoral and Administrative Review Commission's recommendations in 1991¹⁵ and 1992¹⁶ that controls over political advertising be imposed. However political events in 1996 saw both the Commonwealth and Queensland Bills lapse.
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Today, only South Australia has truth in political advertising legislation in force. Section 113(1) of the Electoral Act 1985 (SA) is in quite different terms to the old section 329(2) in its focus upon misstatements of fact. Section 113(1) reads:

Where—

(a) an electoral advertisement contains a statement purporting to be a statement of fact;

and

(b) the statement is inaccurate and misleading to a material extent, a person who authorised, caused or permitted the publication of the advertisement shall be guilty of an offence.17

It is a defence for the person to prove that he or she 'took no part in determining the contents of the advertisement' and that he or she 'could not reasonably be expected to have known that the statement to which the charge relates was inaccurate and misleading'. Section 113(1) has supported a successful prosecution and survived a challenge to its constitutional validity in Cameron v Becker.18

While section 113(1) of the South Australian Electoral Act is the only provision currently in force that might be called a truth in political advertising provision, there are laws in each other Australian jurisdiction that make it an offence to mislead an elector in relation to the casting of his or her vote. Such laws are phrased slightly differently in the various jurisdictions, but all refer to statements in electoral matter. For example:

- Section 151A(1)(b) of the Parliamentary Electorates and Elections Act 1912 (NSW) makes it an offence for a person to 'print, publish or distribute any "how-to-vote" card, electoral ad, 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'.

- Section 209(1) of the Electoral Act 1985 (Tas) prohibits statements 'intended or likely to mislead or improperly interfere with an elector in or in relation to the recording of his vote'. Section 163(1) of the Electoral Act 1992 (Qld) is in similar terms except that it is expressed as 'intended or likely to mislead an elector in relation to the way of voting at the election'.
• Section 267B(1) of the Constitution Act Amendment Act 1958 (Vic) reads: '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 matter or thing that is likely to mislead or deceive an elector in relation to the casting of the vote of the elector'. Sections 191A(1) of the Electoral Act 1907 (WA) and 329(1) of the Commonwealth Electoral Act 1918 (Cth) are in like terms.

• Section 106(c) and (d) of the Electoral Act 1993 (NT) prohibits statements 'intended to or likely to mislead or improperly interfere with an elector in or in relation to the casting of his vote'.

• Section 297(1) of the Electoral Act 1992 (ACT) reads: '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'.

In Evans v Crichton-Browne\textsuperscript{19} 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 judgment which the elector has made rather than to the formation of that judgment'.\textsuperscript{20} This may mean that each of the above provisions can only have a minimal impact on preventing false and misleading statements of fact during election campaigns. 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 judgment by the elector.

The Queensland Committee's Findings

Is Truth in Political Advertising Legislation Desirable and Possible?

In its December 1996 Report\textsuperscript{21} the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament sought to address many of the concerns posed by the 1984 Report of the Joint Select Committee on Electoral Reform by reasoning from the operation of section 52 of the Trade Practices Act 1974 (Cth).\textsuperscript{22} Thus, for example, the argument that the electorate is the most appropriate body to determine the truth or
otherwise of political claims was undermined by the reminder that it was once also alleged that the market would operate to allow consumers to ascertain the truth about products. The recognition that the information required to make appropriate decisions is usually privileged applies equally to political and commercial advertising. Similarly, the assertion that political statements 'promote intangibles, ideas, policies and images' which cannot be regulated was countered with evidence that section 52 has been successfully interpreted to regulate vague and complex subject matter. For example, under section 52 tests based on the state of mind of the person making the statement exist to assess whether opinions and predictions are misleading or deceptive, while statements which are clearly exaggerations have been labelled 'puffs' and are not subject to the law.

The Committee could not, however, completely equate commercial and political advertising. It recognised a primary difference between commercial and political advertising: freedom of political communication is protected by the Constitution, while commercial advertising is not. Following the analysis of the South Australian provision by the Full Court of the Supreme Court of South Australia in Cameron v Becker, the Committee 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. On the other hand, the Committee stressed that a political candidate must be free to express his or her opinion irrespective of 'how misguided or reprehensible the majority believe it to be'. Thus, provided an opinion or prediction is not specifically justified by inaccurate or misleading facts, its expression should not be regulated. The Committee concluded that regulating opinions or predictions would go beyond a proportional intrusion on the freedom of political discussion and may be unconstitutional. Consequently, only regulation as to false and misleading statements of fact was considered both possible and desirable.
The Form and Limits of the Proposed Legislation

Of all of the models examined by the Queensland Committee—the former section 329(2), its slight variations in the 1995 Queensland and Commonwealth Bills, the South Australian provision and section 52 of the *Trade Practices Act*—it was the South Australian provision which most closely conformed to the Committee's desired objectives. That provision is limited to statements of fact and is thus more objectively determinable, and has already survived a constitutional challenge. In addition, the Committee found that it is the most easily administered, an attribute which could not be overestimated given the difficulties with truth in political advertising legislation. The Committee thus recommended that a provision in terms of section 113(1) of the *Electoral Act 1985 (SA)* be inserted into the *Electoral Act 1992 (Qld)*.

Rather than formulate its own general defence, the Committee decided that the defences provided in Part I Chapter V of Queensland's *Criminal Code*, including the defence of honest and reasonable mistake of fact, were sufficient. One exception was in relation to the liability of third party publishers and distributors. The Committee drafted a provision excluding them from liability if they could establish that they 'took no part in determining the contents of the advertisement or how-to-vote material' and 'could not reasonably be expected to have known' that the statement was 'inaccurate and misleading'.

The debate in South Australia on the appropriate remedies for the breach of truth in political advertising legislation was also reflected in the Queensland Committee's deliberations. The 1984 Report of the Joint Select Committee on Electoral Reform recommended against the use of injunctions due to the possibility that they would be used by candidates to unjustly disrupt the advertising campaigns of opposing candidates, while obtaining additional publicity for themselves; an argument which was considered persuasive in South Australia. Although the Queensland Committee recognised this, it concluded that injunctions were still a valuable remedy for limiting the effects of false and misleading advertising. On the other hand, the Committee stated that corrective
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advertising had the potential to disproportionately affect the outcome of an election. Consequently, this type of remedy was limited to a judicial declaration of falsity. Overall, the Committee considered that fines of up to 40 penalty units for individuals and of up to 200 penalty units for corporations, declarations of falsity, injunctions, damages and, if the offending advertisement could be shown to have influenced an election outcome, a fresh election, provided sufficient protection to disadvantaged candidates.

The Committee also found that truth in political advertising legislation in Queensland should not be limited to State elections but should be extended to cover local elections. In reaching this conclusion, it noted that the South Australian provision is substantially repeated in its Local Government Act 1934 (SA) and that the Local Government Act 1993 (Qld) currently mirrors most of the offence provisions under the Queensland Electoral Act. The Committee further decided that it was appropriate to extend truth in political advertising legislation to the conduct of referendums by amending the Referendums Bill 1996 (Qld).

The Application of Truth in Political Advertising Legislation to How-to-Vote Cards

The Queensland Electoral Act imposes few limits on the handing out of election material, including how-to-vote cards, on polling day. The Committee concluded that how-to-vote cards do play an important role in the election process and should be retained. Indeed, it was suggested that any attempt to ban them or seriously restrict their availability may infringe the implied constitutional freedom of political discussion. The Committee favoured combating problems associated with the use of how-to-vote cards by extending truth in political advertising provisions to them. They proposed that a provision in similar terms to the following be included in any truth in political advertising legislation enacted in Queensland:
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Where—

(a) any how-to-vote material contains a statement purporting to be a statement of fact and the statement is inaccurate and misleading to a material extent; or

(b) any how-to-vote material purports or represents to be the how-to-vote material of another entity and such representation is misleading or is likely to mislead a person who authorised, caused or permitted the publication, or distributed, the how-to-vote material shall be guilty of an offence.

Comparative Experience with Truth in Political Advertising Laws

New Zealand

There are no provisions in the Electoral Act 1993 (NZ) that deal with false and misleading advertising, or making false statements which may mislead voters in the casting of their votes. However, under that Act all electoral advertisements must be authorised.

Canada

In Canada, the relevant statute is the Canada Elections Act 1990 (Canada). It has various sections relevant to the issue, but no equivalent provision to section 113(1) of the South Australian Electoral Act. For example, section 48 establishes an advertising blackout period on polling day and the previous day; section 261 requires that all advertisements must be authorised; while section 264 provides that 'every person who, before or during an election, knowingly makes or publishes any false statement of fact in relation to the personal character or conduct of a candidate is guilty of an illegal practice and of an offence'.
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United States

The First Amendment to the United States Constitution provides that: 'Congress shall make no law ... abridging the freedom of speech'. The United States Supreme Court has given a robust interpretation to this right. This obviously restricts the scope for legislatures in the United States to pass truth in advertising laws, particularly given that the First Amendment has its 'fullest and most urgent application precisely to the conduct of campaigning for political office'. For example, the decision of the Supreme Court in *New York Times v Sullivan* prevents a person from recovering for defamatory statements made in campaigning unless such statements can be shown to have been made with 'actual malice'. By 'actual malice' the Court meant a statement published with knowledge of its falsity or with reckless disregard as to its truth. To take a further example, in *Mills v Alabama* the United States Supreme Court found unconstitutional a ban on election speech on the day of polling.

Despite the width of the guarantee of free speech in the United States Constitution, several States prohibit the making of certain types of false statements, such as those that impact upon the reputation of a candidate, in political campaigns. However, such statutes are potentially subject to constitutional difficulties. One such provision that has been suggested might not survive constitutional scrutiny is a Massachusetts law that provides:

No person shall make or publish, or cause to be made or published, any false statement in relation to any candidate for nomination or election to public office, which is designed to aid or to injure or defeat such candidate.

A significant first amendment issue in the United States is the constitutionality of disclosure statutes, that is, legislative provisions prohibiting anonymous political advertising and campaigning. Recently, in *McIntyre v Ohio Elections Commission* the Supreme Court struck down an Ohio disclosure statute as being unconstitutional. Reactions to the *McIntyre Case* by United States commentators reflect a growing concern about the increasing use of deceptive negative advertising during campaigns and the ineffectiveness of the law in preventing it. This is grounded in a fear that the current law
fails to protect candidates, and in turn the public, yet any more severe sanctions would face constitutional difficulties.

**Conclusion**

In advocating the regulation of truth in political advertising, the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament focused on the aspirational impact of such legislation and rejected 'the logic that says that since we cannot stop all dishonest intent therefore we will not try to stop any'. In doing so, and in drafting recommended provisions, the Committee decided to err on the side of caution. The majority’s main concern was a pragmatic and sensible one: to develop a standard likely to withstand both political and legal scrutiny. They did this by developing a model that penalises false and misleading statements of fact but is ameliorated by a defence of honest and reasonable mistake of fact. The model put forward by the Committee is designed to deter blatant examples of such conduct rather than to place a blanket ban on any speech likely to mislead or deceive voters in their electoral choices. Free speech in the electoral process is restricted only so far as is necessary to achieve this aim.

An important part of the Committee’s reasoning relied upon doctrines and experience underpinning section 52 of the *Trade Practices Act* (TPA). The Committee’s reliance upon section 52 to support, by analogy, the case for truth in political advertising legislation in Queensland was perhaps the most important reason why it reached the opposite conclusion to the 1984 Report of the Joint Select Committee on Electoral Reform. Another significant reason for the different approach taken by the Queensland Committee is the recent rise of allegations of 'dirty tricks' in election campaigning. One prominent example is 'push polling', which was allegedly used in the 1995 Queensland State election. The rise of such practices has perhaps been a factor in what some have seen as the deepening cynicism of the electorate towards the political process and highlights the need, tapped into by the Committee, for ethical standards in electioneering.
Reliance upon section 52 of the TPA by the Queensland Committee is reflected in the remedies proposed for breaches of a truth in political advertising provision. Like those available where section 52 is breached, the remedies offer considerable leeway for a court and include the possibility of both injunctions and damages. However, the Queensland Committee went beyond the remedies offered under section 52 in one important respect. While a breach of section 52 does not give rise to an offence, breaches of the truth in political advertising legislation could incur significant fines. This can be justified by the need for an effective deterrent for the breach of such a provision as well as by the potentially irreversible consequences of such a breach.

The Queensland Report may be commended for the approach it has taken. It can be argued that their reasoning and explicit caution based upon the need to respect the constitutional freedom of political discussion makes their approach a compelling one. The Report should contribute to the setting of higher standards of debate and electoral practice in Queensland. Though any provision mandating truth in political advertising will be difficult to enforce, its wider impact upon the political culture should not be discounted. Such legislation has the potential to have a powerful impact in shaping political ethics and campaigning practices in Australia.

Endnotes

2. Legal, Constitutional and Administrative Review Committee, *Report on Truth in Political Advertising* (December 1996, Report No. 4). The author of this paper made a submission to the Committee and appeared before it in Brisbane on 30 August 1996.
5. Ibid at para 2.78.
6. Ibid at para 2.79.
7. Ibid at paras 2.50–2.54.
8. Ibid at paras 2.55–2.67.
9. Ibid at para 2.80.
10. Ibid at paras 2.68–2.77.
14. The *Electoral Amendment Bill 1995* (Qld) sought to introduce a provision similar to the old section 329(2) except that the requirement was to be that the statement had to be untrue OR misleading or deceptive.
17. See *Electoral (Miscellaneous) Amendment Bill 1996* (SA).
20. Ibid at 207–208.
22. Section 52 provides that 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. Although section 52 has a limited operation within each State according to the ambit of Commonwealth power, a like provision has been enacted by each State and by the Australian Capital Territory and the Northern Territory. See, for example, *Fair Trading Act 1987* (NSW), section 42; *Fair Trading Act 1989* (Qld), section 38.


27. Ibid at 28.

28. For the full text of the provision, see ibid at 54.

29. Note that the Electoral (Miscellaneous) Amendment Bill 1996 (SA) attempts to provide for the withdrawal of an offending advertisement and the publication of a retraction.

30. The Queensland Committee reported that the clause permitting injunctions in the South Australian legislation was removed before the legislation was passed [Legal, Constitutional and Administrative Review Committee, Report on Truth in Political Advertising (December 1996, Report No. 4): 12].

31. Under the Penalties and Sentences Act 1992 (Qld), section 5, each penalty unit would be equivalent to $75.

32. Cf Electoral Act 1992 (Qld), section 166.

33. For an example of a provision restricting the handing out of how-to-vote cards that might infringe the constitutional freedom, see Electoral Act 1992 (ACT), section 303. On this point, see G. Williams, op.cit.


36. Ibid at 279–280.

37. Ibid at 280. Cf the weaker test established in Australian by the majority in Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104.


41. See, for example, ibid at 515.


43. 115 S Ct 1511 (1995).


46. There have also been allegations of 'push polling' in the 1994 Northern Territory election, the 1995 New South Wales State election and, at the federal level, in the 1995 Canberra by-election. See Joint Standing Committee on Electoral Matters, Inquiry into Push Polling—Submissions; G. Williams, Push Polling in Australia: Options for Regulation (Research Note No. 36 1996–97) Commonwealth Parliament Information and Research Services, 4 march 1997.

47. Trade Practices Act, Pt VI.