Submission No 8

ADMINISTRATION OF THE 2023 NSW STATE ELECTION AND OTHER MATTERS

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The Hon Peter Primrose
Chair
Joint Standing Committee on Electoral Matters,
NSW Parliament

Dear Chair,

Please accept this submission on your inquiry into the 'Administration of the 2023 NSW State Election and Other Matters'. It addresses term of reference (3)(iii) concerning: 'Whether truth in political advertising laws for New South Wales state elections would enhance the integrity and transparency of the electoral system, taking into account any implications of the Commonwealth's *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023*.'

Truth in political advertising

Truth in political advertising is a worthy aim, but an elusive one. Political campaigns based upon lies and deception can not only affect election results but also undermine public trust in the system of government. This weakens social cohesion and makes Australia more vulnerable to external threats.

Four major problems arise in relation to legislative proposals to address campaign lies and attempts to mislead, confuse or deceive the public. The first is the practical problems about what kind of claims can be addressed and the avoidance of legal constraints. The second concerns who is the arbiter of truth, and how truth can be fairly ascertained. The third concerns what penalties can be both effective and fair. The fourth concerns the constitutional constraints arising from the application of the constitutionally implied freedom of political communication.

1. Practical problems

When people complain about deceitful political campaigns, they commonly mention the 'mediscare' claims at the 2016 election that the Coalition would privatise Medicare if elected and the claims at the 2019 election that Labor would introduce a 'death tax' if elected. Others point to promises made in election campaigns that are later not kept (eg Tony Abbott's 'no cuts to education, no cuts to health' and Julia Gillard's 'no carbon tax under the government I lead'). It is argued that if we had a 'truth in political advertising' law, this could not happen. But this is not so.

One needs to distinguish between verifiable statements of fact, assertions which cannot be proved one way or the other, promises, opinions and predictions. It is only the first category – verifiable statements of fact – which can be addressed by a truth in political advertising law. Most election campaigns, however, tend to focus on unprovable assertions, promises, opinions and predictions.

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Campaigns are primarily about promises to act in a particular way in the future. When the campaign promise is made, the candidate and their party most likely intend to implement the promise. Contrary to public opinion, governments want to implement their promises to maintain faith with the electors. Public servants are burdened with lists of electoral promises that they are instructed to implement as government priorities. But sometimes it is not possible to give effect to them (eg there are legal or constitutional constraints that prohibit the conduct) or circumstances have changed so that it would be irresponsible to give effect to the promise (eg there is a war, a pandemic, a natural disaster, a financial crisis or any number of other changed circumstances). Breaching a promise in those circumstances does not mean that the original promise was a 'lie'.

For example, in *Featherston v Tully (No 2)* [2002] SASC 338, the Supreme Court of South Australia dealt with a challenge to the election of an Independent candidate who had stated in electoral advertisements that he would not support the formation of a Labor Government, but later did so. The Court found at [201] that the petitioner had failed to establish that at any time before the election the candidate had intended to support the Labor Party to form a government. He only decided after the election to support the Labor Party in forming a government. His pre-election statements were therefore not inaccurate or misleading at the time they were made.

In any case, it would not be wise to enact a law that requires politicians to implement promises in changed future conditions or penalises them for failure to do so, especially when implementing the promise would be irresponsible and contrary to the public interest.

During campaigns, many politicians and parties will offer opinions about their opponents. They may offer the opinion that party Y is the better economic manager or that politician Z is untrustworthy. Opinions are simply the views of those who offer them and are not matters that can be verified as true or false. In *Hanna v Sibbons* [2010] SASC 291, the Supreme Court of South Australia found that advertisements stating that a candidate was 'soft on' crime, hoons and drugs, was an assertion of opinion, even though it was supported by some statements of fact (described as 'flimsy support'), and that it therefore did not amount to misleading advertising for the purposes of the South Australian law.

The other key component of election campaigns is predictions. Claims may be made that Party X will or will not 'stop the boats' or that interest rates will be higher under Party Y. As they are predictions, no one can know whether they will come true, particularly as circumstances affecting the future outcome may change. Many would regard these claims as 'mere puff', being the type of exaggerated party political claim made in an election which is not intended to be taken literally.

The type of 'truth in political advertising' law that is commonly proposed is similar to the South Australian one – s 113(2) of the *Electoral Act 1985* (SA).[1] It provides:

> (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.

It only deals with purported statements of fact, and that statement must be one that can be determined to be 'inaccurate and misleading to a material extent' to trigger the application of the offence. The penalties are low – a fine of $5000 for a natural person and $25,000 for a body corporate.

Section 113(4) also allows the Electoral Commissioner, if satisfied that an electoral advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent, to request the advertiser to withdraw the advertisement or publish a retraction. The advertiser's response is then taken into account in an assessment of a penalty to which the advertiser may be liable.

So how would such a law address claims by a political opponent that if elected, Party X will privatise Medicare or introduce death duties? First, it is unlikely that such claims would be made in formal 'advertisements'. They would more likely be made in social media posts, phone texts, robocalls or oral statements, so they would not be caught. Second, it is a prediction or opinion, rather than a statement of verifiable fact, so it would not be caught.

Third, if it were regarded as purporting to be a statement of fact, how would one go about investigating its veracity and determining whether it is inaccurate or misleading? Would relevant politicians have to produce all their emails, texts and communications on WhatsApp and Telegram to show that they had no secret plans to privatise Medicare or introduce death duties? I doubt that any politician would want to have to provide such evidence to support a prosecution. The mere denial of a secret plan does not prove that there is no secret plan, which by definition, would be secret.

The provision is very easily avoided. If a political party wants to make inaccurate or misleading claims about its policies or likely future conduct, it just frames them so they are not statements of fact. It could form them as predictions, opinions or even questions. For example, one advertisement during the Voice Referendum campaign just asked the following:

> Will the Voice
> 1. Have a veto over Australian law?
> 2. Have special rights based on race?
> 3. Be a front for politicians?
> 4. Take Australia from its citizens?

[1] See also s 297A of the *Electoral Act 1992* (ACT) for an equivalent provision.

Asking questions can be sufficient to raise concerns without any need to make statements of purported fact.

Alternatively, a political party can very effectively spread inaccurate and misleading claims outside of political 'advertising', through media reporting of statements in speeches or press conferences, or through social media.

In short, professionally organised political parties would be unlikely to be caught by such a law – unless they deliberately want to be caught to benefit from the free publicity. One person prosecuted in South Australia claimed that the small fine imposed for their inaccurate advertisement was great value for money given the free publicity for the claim that it generated in the media.[2]

2. Arbiter of truth

The next problem is who determines the truth of an assertion or whether it is inaccurate or misleading. Neither electoral commissions nor the courts would wish to be involved in such sensitive political assessments. Any finding could lead to significant political consequences. For example, if a complaint were made to the Electoral Commission about a claim by Party Y that Party X was going to introduce death duties if elected, and the Electoral Commission took no action or dismissed the complaint (because it could not establish the truth or falsity of such an assertion), then Party Y would no doubt publicly parade this finding as vindication of its assertion that Party X was going to introduce death duties.

Electoral Commissions, which rely on bipartisan support for their effective operation, do not want to be perceived as biased by reference to decisions they make about the veracity of contentious political claims, particularly during a fraught electoral campaign. Further, an Electoral Commission may not be equipped to make such assessments or to do so in a procedurally fair manner, as this does not form part of its ordinary business.

While the Courts are better placed to make such assessments and are obliged from time to time to make judgments on politically contentious matters, they do seek to avoid determining internal political matters where possible, relying on the principle of the separation of powers, the discretion involved in justiciability[3] and the reading down of offences. For example, in *Evans v Crichton-Browne* (1981) 147 CLR 169, the election of three Senators was separately challenged based on misleading electoral advertisements. They included statements that Democrat senators had in the last Parliament voted with Labor eight times out of ten and a 'vote for Democrats could be a vote for Labor' as well as ads claiming Labor 'plans to snoop on your money' and

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[2] Commonwealth, Senate Finance and Public Administration Legislation Committee, *Public Hearing of Inquiry into Charter of Political Honesty Bill 2000* (April 2001) p 44.

[3] In *Garbett v Liu* (2019) 273 FCR 1, the Court of Disputed Returns noted at [37] that questions of 'what is misleading or deceptive, in particular among political partisans or between opponents, may move into questions that are scarcely justiciable'.

introduce a wealth tax. The High Court was so reluctant to rule on such matters that it read down a statutory provision which made it an electoral offence to publish any electoral advertisement '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', so that it only applied to misleading a voter about the process of voting, rather than which candidate to choose.

Moreover, there are practical problems concerning the timeliness of action. Court proceedings take far too long to resolve to be an effective response to misleading advertisements during an election campaign. At most, an interim injunction could be sought, with the matter to be resolved in full proceedings after the election. But this would open up a front of 'lawfare' where each side tries to take down its opponents' advertisements and tie up its finances and attention on dealing with legal proceedings in the midst of an election campaign.

An alternative would be to create a bespoke body to make such determinations. But because the complaints would most likely primarily arise during campaigns for a short period every four years, it would not be efficient to establish a permanent body to deal with them.

3. Effective and fair penalties

Another difficult issue is what penalties should apply and to whom. A fine, as in South Australia, might simply be treated as a cost of doing business and value for money.

The risk of imprisonment may be a greater deterrent, but this raises the question of who is in the firing line. If it is the person who authorises advertisements, then that person is more commonly a party official, rather than a politician, and certainly not the political leader. It may make it very difficult to find persons prepared to undertake the role, given the potential risk. If it is the volunteers who distribute advertisements (eg by letterboxing them), they may have no knowledge about the contents of the advertisements or their veracity – see *Roberts v Bass* (2002) 212 CLR 1, 40-41.

If an election is voided as a result of false or misleading political advertisements, then the stakes would be very high and election results would end up being determined by the courts, which is not a good outcome. The High Court said in *Evans v Crichton-Browne* (1981) 147 CLR 169, 207:

> The result of many elections might be rendered uncertain if any untrue or incorrect statement of fact, opinion, belief or intention might have the effect of invalidating the election if the statement was intended or likely to mislead or improperly interfere with any elector in the formation of his political judgment.

One problem is that the more severe the penalty, the more likely a court will be to read a provision down or find it does not meet the proportionality requirement (discussed below) and therefore breaches the implied freedom of political communication.

4. Constitutional constraints

Political advertising goes to the core of the implied freedom of political communication. It is a significant means of communicating with electors and influencing their decision on how to exercise their vote in elections. Any limit on political advertising is therefore vulnerable to challenge as a possible breach of the constitutionally implied freedom of political advertising.

The first limb of the test for a breach of the implied freedom asks: Does the law effectively burden the freedom in its terms, operation or effect? To the extent that it would prohibit or limit political communications in election advertisements, clearly it does. However, there is a question about whether the implied freedom protects false or misleading political communications, or is confined to communications which are true. For example, Gaudron J said in the *Australian Capital Television* case in 1992 that 'as the freedom of political discourse is concerned with the free flow of information and ideas, it neither involves the right to disseminate false or misleading material nor limits any power that authorizes laws with respect to material answering that description'. But other judges have regarded the implied freedom as protecting communications that may ultimately be shown to be 'mistaken', false or unreasoned. The issue remains unresolved, so it would be wise to treat the implied freedom as applicable until there is a definitive finding otherwise.

The second limb of the test asks whether 'the purpose of the law is legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'. A purpose of preventing electors from being misled in making their choice at elections would appear to be a legitimate purpose that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, as it would be directed at ensuring that the people make a genuine and informed choice at elections.

The problem is likely to arise in relation to the third limb, which asks whether 'the law is reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'. Any law that imposes restrictions on political advertising will need to be very carefully targeted to achieve its legitimate purpose, while imposing the least possible burden on the implied freedom. In this regard, defences will be important. For example, the Commonwealth offence of making or publishing 'any false and defamatory statement in relation to the personal character or conduct of a candidate' in an election (see former s 350 of the *Commonwealth Electoral Act 1918* (Cth), which was repealed in 2007) was limited by a defence that the person making the statement had a reasonable ground for believing, and did believe, the statement to be true. While this helped bolster the constitutional validity of the provision, it made it very difficult to achieve a successful prosecution.

When the South Australia provision, mentioned above, was challenged in *Cameron v Becker* (1995) 64 SASR 238, the South Australian Supreme Court noted that s 113 was restricted to statements of fact, not opinion or comment, only applied to electoral

advertisements, not speeches or other statements, and that it did not penalise those who published inaccurate and misleading statements of fact under an honest and reasonable mistake of fact, relying on a common law defence. All these limitations on the offence, which were necessary to support its validity, also limit its effectiveness, as discussed above.

Relationship with proposed misinformation legislation

The Commonwealth Government's exposure draft *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (Cth) addresses indirectly the issue of truth in political advertising.[4]

The Bill is directed at digital platforms and places pressure on them, through codes and the threat of stronger regulation through the imposition of standards, to deal with misinformation and disinformation. Misinformation is defined as content that contains information that is false, misleading or deceptive and is reasonably likely to cause or contribute to serious harm. Disinformation is misinformation that the person disseminating intends to deceive another person. In both cases, certain content is 'excluded content' and therefore not directly caught, although in practice it is likely to be caught up with other material treated as misinformation by a digital platform.

Some political content falls with the current definition of excluded content. Content authorised by the Commonwealth, a State or Territory is excluded. This would cover government advertisements, most of which are to inform the public of matters they need to know (eg public health advertisements), but some of which tend to err towards the party-political – eg advertisements 'informing' the public of Government successes or policies.

Clause 35 of the Bill provides that the ACMA must not register a code or determine a standard that contains requirements relating to 'electoral and referendum content' (including matter communicated for the dominant purpose of influencing the way electors vote in a State or local government election or referendum) unless they concern 'disinformation' (being misinformation that is intended to deceive) and they 'do not relate to authorised content'. 'Authorised content' is defined to include matter communicated for the dominant purpose of influencing the way electors vote in a State or local government election or referendum that contains the particulars required to be notified by a State law relating to the authorisation of such matter (i.e. the type of advertisements that require an authorisation statement).

Thus, political parties and candidates may make advertisements that contain false, misleading or deceptive information, and neither the codes nor standards imposed by ACMA may address this unless it contains disinformation, and even then, not if it falls within advertising that requires an authorisation statement.

[4] Note that this 2023 Exposure Draft is under review and likely to be changed significantly – which will affect the accuracy of its discussion here.

The Bill also contains in cl 60 a provision stating that the law, any rules made under it and any code or standard 'have no effect to the extent (if any) that their operation would infringe any constitutional doctrine of implied freedom of political communication. This will result in uncertainty about the application of codes and standards to political communications.

In practice, however, digital platforms will use algorithms to sweep up certain categories of communications and either exclude them or demote them, even if they are not caught by a code or standard, because this is the most effective and efficient way of meeting the demands placed on them. Hence, political advertisements disseminated on digital platforms will likely be affected, even if they are not directly targeted under this proposed law through the creation of codes or standards.

Please let me know if you need further information.

Yours sincerely,

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* This submission is a personal view. It does not constitute legal advice and does not represent the views of the University or Gilbert + Tobin Lawyers).