

**Submission by
Free TV Australia**

Joint Standing Committee on Electoral
Matters

*Inquiry into and report on all aspects of the
conduct of the 2016 Federal Election and
matters related thereto.*

1 November 2016

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EXECUTIVE SUMMARY

- Free TV welcomes the opportunity to contribute to the Joint Standing Committee on Electoral Matters (**JSCEM**) *Inquiry into and report on all aspects of the conduct of the 2016 Federal Election and matters related thereto (Inquiry)*.
- Free TV does not support the introduction of any laws or regulations which unreasonably impinge on freedom of speech or freedom of political communication. These rights are fundamental to a democratic society that prides itself on openness, responsibility and accountability.
- Free TV does not support the introduction of any laws or regulations which place liability or an increased regulatory burden on commercial broadcasters who publish political advertising. Our members take no part in determining the contents of political advertisements, and it is neither appropriate nor practical for broadcasters to make assessments on the truthfulness of claims.
- The rules regarding prohibitions on election advertising during blackout periods should be removed. These rules have been overtaken by technological changes, where voters can, and do, readily access election advertising on-line. On commencement of the blackout period, advertisers simply transfer their advertising to online and social media platforms, where these rules do not apply. The rules do not keep pace with changes in technology and consumer behaviour, and only serve to put commercial broadcasters at a disadvantage compared to other forms of media.

Introduction

Free TV Australia (**Free TV**) is the peak industry body representing Australia's commercial free-to-air television broadcasting licensees. At no cost to the public, our members provide fifteen channels of content across a broad range of genres, as well as rich online and mobile offerings. On any given day, free-to-air television is watched by more than 13 million Australians.

Free TV welcomes the opportunity to provide comments on the Inquiry to the JSCEM in relation to the following matters, set out in the Terms of Reference:

- **Item 1(b)**, being the potential applicability of 'truth in advertising' provisions to communication to voters including third-party carriage services.; and
- **Item 5**, regarding the blackout provisions set out Section 3A of Schedule 2 of the *Broadcasting Services Act 1992 (BSA)* and the removal of these provisions.

Truth in political advertising

1. Commercials Advice/Free TV

Presently, the Commercials Advice area of Free TV (CAD) will review election advertisements prior to broadcast by commercial television stations for the purposes of:

- classifying the advertisement under the *Commercial Television Industry Code of Practice*;
- ensuring the advertisement includes the authorisation tag required by the *Broadcasting Services Act 1992* (Clause 4 of Part 2 of Schedule 2); and
- protecting broadcasters from liability for publishing defamatory material.

Commercials Advice may require an advertiser to provide substantiation for statements in an advertisement but this will only be for the purposes of assessing whether the advertisement may be defamatory or whether it contains a false statement of fact regarding the personal character or conduct of a person.

CAD does not otherwise require substantiation for the accuracy of statements and will not consider complaints where a statement could be considered misleading or deceptive.

The party or candidate authorising the advertisement is expected to ensure that the advertisement complies with all relevant laws including the applicable Electoral Act and the laws of defamation.

2. No liability or increased regulatory burden for broadcasters

It has 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 difficult to administer and enforce.

This 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 1983 JSCER found that while truth in political advertising rules are desirable, it is not possible to administer through legislation. The 1983 Report concluded to repeal¹ the short lived truth in political advertising provisions that came into place under the *Commonwealth Electoral Legislation Amendment Act 1983 (Cth.)* (**Commonwealth Amendment Act**).

Truth in political advertising rules must not place liability with the publisher or broadcaster of the advertisement; liability must rest with the authorising body.

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 not equipped to make such assessments, particularly where they must be made in short time frames. Further, it is not appropriate for a commercial or industry organisation to take on such a sensitive role in the political process.

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 truth²;
- it is unreasonable to expect the media to decide whether to accept or reject "misleading" political advertisement³; and
- that the electorate is itself the best body to decide truth in political advertising⁴.

If any liability were to rest with publishers, they would need to satisfy themselves of the truth of any proposed advertisement before publication, which may be inherently difficult and contested by various political participants. This will likely involve the acquisition of legal advice, increasing not only the regulatory burden but also the ultimate cost of getting the advertisement to air. It will also result in delay before any political advertisements are broadcast.

Further, if provisions are framed as a criminal offence, issues may also arise for commercial broadcasters as a result of the licence condition at clause 7(1)(h) of Schedule 2 to the BSA, whether or not specific liability rests with broadcasters.

Blackout Provisions

1. Current Regulation is outdated

¹ Paragraph 2.81 of the Second Report recommended s329(2) (161(2)) of the *Commonwealth Electoral Legislation Amendment Act 1983 (Cth.)* be repealed

² Section 2.34 of the Second Report.

³ Section 2.32 of the Second Report.

⁴ Para 2.24 of the Second Report

Under section 3A of Schedule 2 of the BSA, broadcasters are currently prohibited from broadcasting an election advertisement during the “*relevant period*”, being the period commencing on 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 apply to both free-to-air and pay television as well as radio, however they do not apply to other forms of electronic media such as internet or mobile advertising. They were passed by the Parliament in 1992, prior to the widespread internet access in Australia.

In today’s media landscape, these rules prohibiting advertisements during the blackout period 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 (such as news sites and apps), voters can, and do, readily access election advertising (including audio-video advertising) online.

On commencement of the blackout period, political parties simply transfer their advertising from television to other digital media platforms that are not regulated, such as digital news media sites and social media.

Examples of screenshots from the SMH and The Guardian websites during the blackout in 2013 and 2016, respectively, are set out below:





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

2. Previous examination by 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**).

The 2015 Report noted the rise of social media and reliance on the internet and mobile communication.⁵ It highlighted that continued political advertising and campaigning on these form 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 day⁶.

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 election period ⁷.

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 period⁸.

3. Provisions should be repealed

In practice, due to the current multi-platform media landscape, election advertising is available until and including polling day. There is no public interest in these rules being maintained.

⁵ Paragraph 4.134 of the 2015 Report.

⁶ Paragraph 4.135 and 4.143 of the 2015 Report.

⁷ Paragraph 4.137 of the 2015 Report.

⁸ Paragraph 4.138 of the 2015 Report.

These outdated provisions only serve to put Australian commercial broadcasters at a disadvantage to all other digital media, including platforms that are run by multinational corporations who do not pay their fair share of tax in this country.

The JSCEM should recommend the repeal of:

- **clause 3A of Schedule 2 of the BSA; and**
- **the definition of “relevant period” from clause 1 of Schedule 2 to the BSA.**

The removal of these prohibitions will provide voters with greater access to information about candidates and political parties right up until polling day, as well as addressing the current regulatory disparity that disadvantages Australian commercial broadcasters.