



AUSTRALIA

# Submission by Free TV Australia

**Inquiry into and report on  
all aspects of the conduct of  
the 2019 Federal Election**

September 2019

## Table of contents

<b>1. EXECUTIVE SUMMARY</b> .....	<b>3</b>
<b>2. INTRODUCTION</b> .....	<b>4</b>
<b>2.1 ABOUT FREE TV AUSTRALIA</b> .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
<b>3. CONSISTENT REGULATION OF ONLINE PLATFORMS</b> .....	<b>5</b>
<b>4. ELECTION BLACKOUT PROVISIONS</b> .....	<b>7</b>
<b>4.1 CURRENT REGULATION IS OUTDATED</b> .....	<b>7</b>
<b>4.2 PREVIOUS EXAMINATIONS BY JOINT SELECT COMMITTEE ON ELECTORAL REFORM</b> .....	<b>8</b>
<b>4.3 PROVISIONS SHOULD BE REPEALED</b> .....	<b>9</b>
<b>5. TAGGING OF POLITICAL MATTER</b> .....	<b>10</b>
<b>6. POLITICAL ADVERTISING STANDARDS</b> .....	<b>12</b>
<b>6.1 CALLS FOR STRONGER POLITICAL ADVERTISING STANDARDS</b> .....	<b>12</b>
<b>6.2 TRUTH IN POLITICAL ADVERTISING RULES DO NOT WORK</b> .....	<b>12</b>

## 1. 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 2019 Federal Election and matters related thereto (Inquiry).

### Addressing fake news, social media manipulation and disinformation

The ACCC's recently released Digital Platforms Inquiry Final Report has considered the issues of fake news, social media manipulation and disinformation (amongst others) and the threat to democracy they pose and has made a number of recommendations which will assist to address them. The JSCEM should recommend that the Government implement the ACCC's recommendations.

### Outdated election blackout laws should be repealed

The JSCEM 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 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, under the more recently passed provisions of the Commonwealth Electoral Act in relation to electoral matter.

### Political advertising standards

Free TV agrees that reform is needed to address the rise of social media manipulation and disinformation. This should be done by implementing the recommendations of the ACCC's Digital Platforms Inquiry Final Report. Free TV strongly opposes the introduction of truth in political advertising laws. 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

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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 Role of digital platforms in disinformation

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The media release launching this inquiry highlighted the importance of ensuring that our electoral processes take the serious dangers of digital platforms and disinformation into account:<sup>1</sup>

*“Senator McGrath said the rise of social media manipulation and disinformation campaigns were a threat to democracy.*

*‘Increasingly, Australians are consuming and accessing their news online, away from traditional offline sources. We need to ensure our electoral processes take the serious dangers of digital platforms and disinformation into account.’”*

Free TV notes that these issues have also been the subject of a major recent inquiry by the ACCC in Australia - the Digital Platforms Inquiry, which identified the disparity between the regulatory framework that applies to traditional media companies and the limited rules that apply to the digital platforms as a key underlying factor causing these issues. The ACCC made a number of recommendations (discussed further below) which, if implemented, would also assist in addressing the concerns identified by JSCEM.

Free TV Australia thanks the Joint Standing Committee on Electoral Matters for the opportunity to submit the views of our members on the conduct of the 2019 Federal Election and related matters.

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<sup>1</sup>[https://www.aph.gov.au/About\\_Parliament/House\\_of\\_Representatives/About\\_the\\_House\\_News/Media\\_Releases/Election\\_inspection](https://www.aph.gov.au/About_Parliament/House_of_Representatives/About_the_House_News/Media_Releases/Election_inspection)

### 3. Consistent regulation of online platforms

Free TV agrees that fake news and misinformation are increasingly a threat to political legitimacy and democracy. Governments around the world have started responding to this problem by introducing new measures to regulate the activities of digital platforms such as Facebook and Google.

As noted above, this issue has now also been the subject of a major recent inquiry by the ACCC in Australia - the Digital Platforms Inquiry. The ACCC in its Final Report released in late July recommended a range of measures, including:

- A code of conduct for digital platforms administered by an independent regulator such as the ACMA to govern the handling of complaints about disinformation (inaccurate information created and spread with the intent to cause harm) in relation to news and journalism, or content presented as news and journalism, on their services
- A digital platforms ombudsman, which will have the power to investigate complaints, including in relation to fake material or scams, and to require take down of this content
- A more consistent regulatory framework across platforms, including in relation to election advertising restrictions, and better aligned compliance and enforcement regimes
- The provision of digital media literacy resources and training via a program similar to the Online Safety Grants Program currently administered by the Office of the eSafety Commissioner; and
- Inclusion of digital media literacy in the Australian school curriculum review scheduled for 2020.

Free TV supports these recommendations. In relation to the ACCC's recommendation regarding a digital platforms code to counter disinformation, the ACCC recommended that there be a threshold requirement that the content is likely to cause "serious public detriment". In its view, this threshold would be likely to capture information such as:

- doctored and dubbed video footage misrepresenting a political figure's position on issues
- incorrect information about time and location for voting in elections
- information incorrectly alleging that a public individual is involved with illegal activity.<sup>2</sup>

Free TV considers that this threshold may be too high and further consideration should be given to the EU Code threshold that captures content that "may cause public harm".

In relation to the ACCC's recommendation that there should be harmonisation of the regulatory frameworks across platforms, Free TV notes that the ACCC recommended a staged process of implementation to enable regulatory disparities of immediate concern to be addressed quickly. Election advertising restrictions faced by broadcasters was specifically highlighted by the ACCC as one of those pressing disparities. This issue is detailed in section 4 below.

In addition to the recommendations of the ACCC, Free TV's view is that the Government should also implement the following measures which would assist to address fake news and misinformation:

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<sup>2</sup> ACCC, Digital Platforms Inquiry Final Report, 371.

- A takedown process to ensure effective and timely removal of copyright infringing or fake/misleading material supported by meaningful sanctions and penalties. The inadequacy of existing takedown practices by the platforms allows legitimate news content to be ‘drowned out’ and fake news and misinformation to persist; and
- Creation of a public information campaign by the ACMA to assist consumers identify credible news sources and to improve news literacy in the community more generally.

Unlike the digital platforms, the commercial free-to-air broadcasting industry operates under a comprehensive framework that regulates the content that can be broadcast, which is actively enforced by the ACMA. Digital Platforms should be subject to similar requirements. Where there are a specific set of rules in place for all platforms, such as with election advertising, broadcasters should not be subject to an additional layer of regulations that apply only to broadcasters (we detail specific examples relevant to this inquiry below).

### Recommendation

The JSCEM should recommend that the Government implement the ACCC’s recommendations in its Digital Platforms Inquiry Final Report to assist to counter fake news and misinformation.

## 4. Election blackout provisions

### 4.1 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 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 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.

Below are just a couple of examples of advertising during this period:



The image shows a Facebook post by Clive Palmer, dated May 18. The post contains four political advertisements for the United Australia Party. The ads are arranged in a 2x2 grid. The top-left ad says 'TAKE OUT INSURANCE IN THE SENATE. VOTE UNITED AUSTRALIA PARTY' and includes a photo of Clive Palmer and another man. The top-right ad says 'Increase the age pension by \$150 a week. Stop insulting our senior citizens.' and 'Give our elderly the respect they deserve'. The bottom-left ad says 'BILL SHORTEN WILL HIT US WITH AN EXTRA TRILLION DOLLARS OF TAXES & COSTS' and 'TELL SHIFTY HE'S DREAMING!'. The bottom-right ad says 'Liberal and Labor's dodgy tax cuts are not until 2024. By then Scomo and Bill will have gone walking +16. It's all on the never-never.' and 'Labor & Liberal THEY'LL NEVER, NEVER LEARN'. The post also shows engagement metrics: 204 reactions (likes, love, wow), 113 comments, and 22 shares. The Facebook interface includes a profile picture of Clive Palmer, a 'Like Page' button, and a list of pages liked by the user.

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

#### 4.2 Previous examinations 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) and 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.<sup>3</sup> It highlighted that continued political advertising and campaigning on these forms 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.<sup>4</sup>

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<sup>5</sup>.

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.<sup>6</sup>

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’.<sup>7</sup>

### 4.3 Provisions should be repealed

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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 – they only serve to put commercial broadcasters and other traditional media companies at a disadvantage to digital media.

#### Recommendations

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.

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<sup>3</sup> Paragraph 4.134 of the 2015 Report.

<sup>4</sup> Paragraph 4.135 and 4.143 of the 2015 Report.

<sup>5</sup> Paragraph 4.137 of the 2015 Report.

<sup>6</sup> Paragraph 4.138 of the 2015 Report.

<sup>7</sup> JSCEM, Report on the conduct of the 2016 federal election and matters related thereto, Chair’s Foreword at x.

## 5. Tagging of political matter

In addition to the electoral advertising rules under the Electoral Act, 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’.<sup>8</sup> 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, the bank 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.

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

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<sup>8</sup> Schedule 2, Clause 1.

The Electoral Act requirements already require tagging of communications that:

- are intended or likely to affect voting in a federal election or referendum, or
- contain an express or implicit comment on the election or referendum, a political party or candidates, or an issue that is before electors in connection with an election or referendum.<sup>9</sup>

This regime should apply consistently across all platforms, political parties and influencers seeking to use or communicate political messages to voters. There is no reason for broadcasters to be governed by an additional set of rules.

#### Recommendation

The political matter licence condition should be removed from the Broadcasting Services Act and broadcasters should be regulated in the same way as other platforms, under the more recently passed provisions of the *Commonwealth Electoral Act* in relation to electoral matter.

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<sup>9</sup> Commonwealth Electoral Act 1918.

## 6. Political advertising standards

### 6.1 Calls for stronger political advertising standards

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The 2019 election has again led to some commentators raising questions about the need for stronger advertising standards.

As noted in section 3 above, Free TV agrees that reform is needed to address fake news and misinformation. The Government has recently done significant work in its Digital Platforms Inquiry which provides a detailed assessment of the range of issues that arise from the platforms' market power in Australia, including fake news and misinformation and the negative consequences that this has for democracy.

The ACCC has made a number of substantial recommendations in relation to how to counter these issues in its final report which was released in late July. In Free TV's view, implementing the ACCC's recommendations would significantly assist in addressing the issues that the JSCEM has raised regarding fake news, social media manipulation and misinformation.

Free TV notes that traditional media organisations and commercial free-to-air broadcasters in particular, are already subject to very stringent advertising requirements which means that the proliferation of 'fake news' content is not an issue that has arisen on our platform.

In relation to election advertising, Free TV (ClearAds) reviews these advertisements prior to broadcast by commercial television stations for the purposes of:

- classifying the advertisement under the Commercial Television Industry Code of Practice;
- reviewing for defamatory material; and
- ensuring the advertisement includes the correct authorisation tag required by the Broadcasting Services Act 1992 so that viewers are aware that the ad is political and who is authorising the message.

As part of this process, ClearAds can require an advertiser to provide substantiation for the purposes of assessing whether the ad is defamatory or whether it contains a false statement of fact regarding the personal character or conduct of a person.

ClearAds does not require substantiation for the accuracy of statements and will not consider complaints where a statement could be considered misleading or deceptive. This is the responsibility of the party or candidate authorising the advertisement.

### 6.2 Truth in political advertising rules do not work

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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.<sup>10</sup>

Free TV strongly opposes the introduction of truth in political advertising rules. Advertising rules must not place liability with the publisher or broadcaster of the advertisement in relation to whether the

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<sup>10</sup> For example see: <https://www.theguardian.com/media/2019/aug/18/vast-majority-of-australians-support-ban-on-misleading-political-advertising>

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 repeal<sup>11</sup> 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;<sup>12</sup>
- it is unreasonable to expect the media to decide whether to accept or reject “misleading” political advertisement;<sup>13</sup> and
- that the electorate is itself the best body to decide truth in political advertising.<sup>14</sup>

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<sup>11</sup> Paragraph 2.81 of the Second Report recommended s329(2) (161(2)) of the *Commonwealth Electoral Legislation Amendment Act 1983 (Cth)* be repealed

<sup>12</sup> Section 2.34 of the Second Report.

<sup>13</sup> Section 2.32 of the Second Report.

<sup>14</sup> Para 2.24 of the Second Report