

# **ELECTORAL MATTERS COMMITTEE**

## **Inquiry into the Impact of Social Media on Elections and Electoral Administration**

Melbourne—Monday, 15 February 2021

*(via videoconference)*

### **MEMBERS**

Mr Lee Tarlamis—Chair

Mrs Bev McArthur—Deputy Chair

Ms Lizzie Blandthorn

Mr Matthew Guy

Ms Katie Hall

Ms Wendy Lovell

Mr Andy Meddick

Mr Cesar Melhem

Mr Tim Quilty

Dr Tim Read

**WITNESS**

Associate Professor Luke Beck, Law Resources, Monash University.

**The CHAIR:** I declare open the public hearing for the Electoral Matters Committee's Inquiry into the Impact of Social Media on Elections and Electoral Administration. I would like to begin this hearing by respectfully acknowledging the Aboriginal peoples, the traditional custodians of the various lands each of us is gathered on today, and pay my respects to their ancestors, elders and families. I particularly welcome any elders or community members who are here today to impart their knowledge of this issue to the committee or who are watching the broadcast of these proceedings.

I welcome Associate Professor Luke Beck, Associate Professor of Constitutional Law at Monash University. I am Lee Tarlamis, Chair of the committee and a Member for South Eastern Metropolitan Region. The other members of the committee here today are Katie Hall, Member for Footscray; the Honourable Wendy Lovell, a Member for Northern Victoria; Cesar Melhem, a Member for Western Metropolitan; and Dr Tim Read, Member for Brunswick.

All evidence taken by this committee is protected by parliamentary privilege; therefore you are protected against any action in Australia for what you say here today. However, if you repeat the same things outside of this hearing, including on social media, those comments may not be protected by this privilege. All evidence given today is being recorded by Hansard. You will be provided with a proof version of the transcript for you to check as soon as it is available. Verified transcripts, PowerPoint presentations and handouts will be placed on the committee's website as soon as possible. I now invite you to commence with an opening statement, introducing yourself and what you consider to be the key issues. To ensure enough time for discussion, please limit your opening statement to no more than 5 minutes.

**Assoc. Prof. BECK:** Thank you, Chair, and thank you, committee members, for inviting me to speak to you this morning. As you will see from my written submission, I am proposing that Victoria introduces deceptive and misleading political advertising laws based essentially on the South Australian model. In my opening statement I just want to be very, very brief to allow lots of time for questions.

I think it is important that we view this not from the perspective of slogans about truth in advertising, because that is not a legal concept. It is a nice slogan, but I think it distracts attention from the real issues and the real solutions. What I am proposing, and essentially what they have in South Australia, is not truth in advertising, it is simply an extension of our ordinary deceptive and misleading advertising rules to the political context. We have had in Australia for very many decades civil laws prohibiting deceptive and misleading advertising in the commercial context, but there is a carve out for politics. Those deceptive and misleading advertising laws do not apply to political advertising. My proposal is essentially what they have in South Australia: they have just extended that existing set of rules to the political advertising space. That is important, because notions of truth in advertising would be introducing a new legal concept that courts and participants in the system would need to learn and understand. Whereas if we extend the existing deceptive and misleading advertising standards to the political context, there are no new standards, there are no new things for courts and lawyers and advisers to come to understand. We have had this concept of deceptive and misleading advertising in Australian law for quite some decades. It is a very well developed, well understood concept. This is not new. All my proposal is doing in substance—and all they have really done in substance in South Australia—is take away the carve out for political advertising to just allow normal deceptive and misleading advertising rules to apply.

The second aspect of my proposal is based on the South Australian model. It would apply not just to those who authorise deceptive and misleading advertisements but to those who permit them to be advertised. In that manner, and this is what they have in South Australia, you could bring proceedings or make requests to take down advertisements to platforms such as Facebook and Twitter if you cannot contact or you cannot find the actual person behind it. So for example, if a major political party puts out a deceptive and misleading advertisement, you know who to go to, but if you have somebody who is hiding behind some Twitter handle, who is just some sort of mischief-maker not connected to any sort of mainstream party and who is therefore very difficult to track down, you can ask Facebook or Twitter to take it down subject to circumstances where they have reasonable notice that there is something obviously deceptive and misleading.

I think you just heard previously from the Commissioner from South Australia. I only caught the tail end of his evidence. I think the most important thing he said was that political parties and their apparatus in South Australia understand the rules and therefore for the most part usually comply with them. Introducing new rules in South Australia, introducing new deceptive and misleading advertising rules, is not about fining people. It is not about taking people to court. It is really about bringing about cultural change, and the Commissioner from South Australia suggested that that is what in fact has happened in South Australia. The key political players understand the rules and almost always abide by the rules. So it is not about the number of prosecutions brought. It is not about the number of contravention notices issued. It is about bringing about cultural change. I think that is the most important aspect of this.

Will this work completely? Will this completely get rid of fake news and mischief-making? Absolutely not. In the same way that the law against murder does not get rid of all murders but we have it anyway and we still have enforcement mechanisms, but you bring about broad cultural change and that is good enough. It does not have to be 100 per cent perfect, and we cannot let the search for the perfect solution be the enemy of a functional good solution, in short. I am happy to take as many questions as you might have for me.

**The CHAIR:** Thank you, Mr Beck. A number of submitters to the inquiry expressed concern that truth-in-political-advertising laws would limit freedom of expression and be detrimental to democracy. Now, that is not a view that I share, but it is an argument that a lot of people put forward when there are any regulations proposed in this space and the view of people who are opposed to these sorts of laws. How would you respond to that?

**Assoc. Prof. BECK:** Well, firstly, that is false. Secondly, you could make all those arguments in the context of commercial advertising. From time to time people do make all those arguments and say we should get rid of deceptive and misleading advertising rules in the commercial sphere, and governments, parliaments and the community do not accept that at all in the commercial space, so why should we accept that in the political advertising space? And thirdly, democracy is not about deception. Democracy is not about trickery. Democracy is about debate and empowering people to make their own decisions. There can be reasonable disagreement. There can be differences of opinion. You can argue the toss on points. That is fine, but you should not be deceptive and misleading. That is not a restriction on free speech, and certainly there would be no constitutional issue with that. As you might know, our constitution protects freedom of political communication. These laws—the South Australian laws, that is—have been expressly upheld by the courts as being compatible with our constitutional freedom of political communication, so arguments about, ‘Oh, no, we must allow deceit and trickery in politics’, those are arguments made by people who either, number one, do not really understand what they are talking about or, two, have ulterior motives and are perhaps practitioners of deception and trickery and want to continue to engage in trickery and deception.

My suggestion to you is that this committee should not buy that. It is not a risk to free speech and in fact it enhances it. Having rules that get rid of trickery and deception in politics is similar to having rules that get rid of corruption and undue influence in politics—it actually enhances the democratic system. Democracy is about debate and discussion, but it is about reasonable and honest debate and discussion. You cannot bribe politicians. You cannot bribe voters. Equally you cannot lie to voters and deceive and trick. You can debate and argue et cetera, but impropriety, undue influence, corruption, deception and trickery are no part of democracy, and laws that are proportionate to getting rid of those poor influences in politics are entirely compatible with democracy and free speech and in fact enhance democracy and political communication. And I think that is the way the High Court would view it. They would say that laws that promote honest, reasonable debate and discussion are not contrary to freedom of communication, they would actually enhance freedom of political communication, so the free speech argument I do not think has any merit at all.

**The CHAIR:** Another argument that may be run is that whilst the South Australian laws—and you touched on this—have been upheld by the courts, the model that you propose in your submission has not been tested in the way that you suggest, in the sense that you are looking at the South Australian model being applied more broadly to businesses. It has been applied to businesses, but not as such in the way that you propose. The argument would be that there is a risk because that model specifically in the way that you suggest it has not been tested—that that could be a risk—and that some may suggest, ‘If you are going to introduce it, just go with the South Australian model’, for instance. I am interested in your thoughts on that.

**Assoc. Prof. BECK:** No, I do not think there is any risk with the model I am proposing at all, for the very same reasons I have just suggested. And to the extent that my model varies from the South Australian model, it

is just a slightly more modern legislative drafting approach to the South Australian model, so the differences between the way I have suggested the provision and the existing South Australian provision are really just the developments in clarity in legislative drafting that have occurred from the mid-80s until now. So I do not think there is any risk that the model I am proposing would be struck down by the High Court at all. I think in fact the risk is zero.

**The CHAIR:** I have other questions, but I might pass over to my colleagues first to give them an opportunity as well. I will call on Ms Lovell.

**Ms LOVELL:** Thank you very much, Lee, and thank you, Luke, for your presentation. It is interesting to hear everybody's point of view on this. I was just wondering: you talked about getting some of the social media people to take down posts. How successful do you think that would be? And what are your thoughts on the social media companies actually recently becoming censors of some of the comments that were made, particularly during the American elections?

**Assoc. Prof. BECK:** Yes. Those are both very valid questions. So, how effective would it be if you were to issue the take-down or contravention notices to Facebook or Twitter et cetera rather than the political parties in cases where you cannot find the person authorising the deceptive advertisement? It may or may not be particularly effective. What it is is to bring about cultural change. So in the same way that Facebook and Twitter are already today, right now, subject to Australian laws against deceptive and misleading advertising, it is just getting rid of the exemption in respect of political advertising. But whatever concerns there might be about the effectiveness in the political advertising realm, those very same concerns exist right now in respect of the commercial trade advertising realm, so you know, I do not see any difference in that respect.

In the context of Facebook and Twitter becoming censors in their own right and applying their own standards, I think that is a slightly separate issue to this, because they can do that right now. They could just say, 'Well, heck, we don't like the Liberal Party. We're not going to let the Liberal Party advertise on our platform'. That is probably a very bad idea, that is not good for democracy, but they can do that right now, so I do not think a law like this would encourage them to do that. They have the ability to do that already: as a private enterprise, they can choose who to have on their platform or not, subject to antidiscrimination laws et cetera.

And the comparison with the United States—I am wary of comparisons with the United States, because as you all know, American politics is pretty nutty. A lot of the standards that they apply are standards that we think are completely ridiculous. This came across [inaudible] generally. They have a fundamental human right to have guns and shoot people. Everyone else in the world thinks that is completely nonsensical, but they sincerely hold to that and that is fine. They believe in secret donations and the value of big-money secret donors pulling the strings behind politicians. They think that is a really important part of democracy. We do not in Australia, so I am very wary of comparisons with America. Just because something crazy happens in America does not mean something crazy will happen in Australia. We are very different societies.

**Ms LOVELL:** Yes. I totally agree with you. American politics—in fact I think Americans in general are very different to Australians in what we think is acceptable to put out there in the public realm. But the fact is that the social media companies have already shown us in America that they are willing to do exactly what you said and say, 'Well, we just don't like you so we're not going to allow you to even post a tweet on our platform'. They have already done that to Trump, and regardless of what anyone may think of him, he was still the President. He was a member of parliament. He had a right to get his message across just as much as any other political figure did in the US. So it is an interesting scenario. But I was more aiming at—

**Assoc. Prof. BECK:** I think the solution to that—

**Ms LOVELL:** Sorry?

**Assoc. Prof. BECK:** I was just going to say the solution to that I think is slightly disconnected to this: you could have laws prohibiting deceptive and misleading advertising in Victoria in the political realm applicable to social media platforms—that does not touch censorship on Facebook of Trump and others in that realm—but you could equally have laws in Victoria that prohibit discrimination based on political opinion or affiliation that would cover if Facebook, for example, just decided on their own initiative to say, 'Hey, we don't like the Liberal Party. We're not letting them advertise on our platform anymore'. You could have laws that regulate that and prevent that but still allow Facebook to say, 'Well, hey, you're breaching our standards so you're out,

but the rest of the party can remain advertising'. So I do not think my proposal of the South Australian model is in any way inconsistent with making sure that large, powerful social media platforms—and they are very powerful, they do get to set the agenda in some respects—I do not think those things are inconsistent. You can have regulation of that at the same time as preventing deceptive and misleading advertising. It is not too different necessarily to newspapers taking a particular angle and taking stories from one party or another. These things are not inconsistent; you can do both.

**Ms LOVELL:** I think all publishers are very powerful. There used to be an old saying that said, 'Don't pick a fight with someone who buys their ink by the barrel' when newspapers were the main platform for getting an opinion out there. But now we know that everybody is a publisher and they do not necessarily publish under their own name, so this is the challenge that we have. It might be just someone called 'PR Guy' or 'Social Warrior Girl' or something like that, so it is very difficult to actually track that person down. Therefore those relationships with the social media platforms to actually take that down is going to be key to anything actually having effect, because otherwise it will not be done by the political parties, it will not be done by a candidate, it will not be done by someone affiliated with a political party, whether that be a business group or a union or whatever. It will be done under noms de plume, and that is going to be the biggest challenge to us. How do we deal with this?

**Assoc. Prof. BECK:** There will always be people who find ways around laws. That is the case always and forever. My profession is part of that—lawyers. You know, we help people find ways around laws, and then you have dishonest people, like the people you are describing, who are doing it in dishonest ways. That is true. Extending deceptive and misleading advertising laws to the political realm will not fix everything. It is not the 100 per cent perfect solution. There will never be a 100 per cent perfect solution, but taking a big step forward, even though it does not get you all the way to the perfect outcome, it is still important to take that big step forward. If you just stand still, there is no improvement. If you take some steps forward, you might not get 100 per cent improvement but at least you have got some improvement. We cannot let the fact that we cannot get the perfect outcome make us say, 'Well, hey, let's just not bother'.

I think, yes, there will be people who will still break the law in the same way there are people who still commit murder, rob banks and commit sexual assault, but we do not say, 'Well, hey, there was a murder last week, let's abolish the crime of murder'. There will be people who break the laws and there will be people who do that in a dishonest manner, but I think broadly if you were to have a law like this, as the Commissioner from South Australia explained, you would bring about cultural change. The key players—the major political parties and others of that nature—do understand the rules and then they do abide by them, and that culture makes a difference. If it becomes acceptable for political parties and ordinary players in the political process to engage in trickery and deception, that is a bad thing. If those people do not engage in it, even if one or two randoms on the internet might still do it in a dishonest manner, that means the politicians and parties and activist groups et cetera cannot piggyback off the top of that, which is sometimes what happens—you have got some random on the internet saying something completely wacky and then politicians, whether from the major parties or the minor parties, or activist groups or others, piggyback off the top of that and help spread that. In this scenario with deceptive and misleading advertising rules you would be able to jump on those political parties or activists for piggybacking even if you could not find the original person because they were operating under some handle that there was no way of tracking down without full and robust assistance from Twitter or Facebook or whichever it might be. So my suggestion to you is do not let the perfect be the enemy of the good and do not let the fact that there will be one or two breaches of the law nevertheless stand in the way of actually doing something to fix the situation.

**Ms LOVELL:** Thank you.

**The CHAIR:** Ms Hall.

**Ms HALL:** Thank you. Thanks for your time. I am interested in the role that you proposed for Consumer Affairs in, I suppose, investigating these matters and how you think that could present a challenging role for Consumer Affairs as bureaucrats, I suppose, in terms of what some people would perceive as making political judgements.

**Assoc. Prof. BECK:** Yes, so on the first question of what the law should be and then which agency should be tasked with enforcing the law, I have no strong view as to which agency should enforce the law. It is fine for the electoral commission to be tasked with this job, as it is in South Australia; I am just suggesting that there are

alternatives. Because this is just extending our longstanding existing deceptive and misleading advertising laws to the political realm and getting rid of the politicians' exemption, why not have the people who are familiar with deceptive and misleading advertising deal with deceptive and misleading advertising? They understand what is deceptive and misleading better than anybody, really, so they are a perfectly good agency to be tasked with it. But equally you could have people in the electoral commission do the job, as they do in South Australia, or you could have a special division in the electoral commission with some people seconded from Consumer Affairs assisting. There are various ways you could set up the enforcement agency when you allocate that function.

**Ms HALL:** Yes. I suppose it just means it has to be resourced properly wherever it is.

**Assoc. Prof. BECK:** Yes.

**Ms HALL:** Okay. Thank you. That is it from me.

**The CHAIR:** Dr Read?

**Dr READ:** No other questions from me, Chair, except to say thank you very much. I really like this submission and I think it is a really constructive contribution.

**Assoc. Prof. BECK:** Thank you.

**The CHAIR:** The Electoral Commissioner spoke about the pressures that they have in terms of the timing, around trying to make a decision as quickly as possible. Do you have any ideas or suggestions around how you could try and streamline that process—for instance, if you were to go in and model where Consumer Affairs were managing. I know resources is always one way in which you can try and streamline a process in terms of having more people being able to deal with the amount of inquiries that are coming in and also the Commissioner spoke about expanding and maybe delegating who else could make that decision, maybe the deputy commissioner as well. Are there any other ideas or suggestions that you might have in that space that could be helpful?

**Assoc. Prof. BECK:** Yes. There is a resourcing issue, and of course with these kinds of things it is not like commercial advertising, where if you sort it out next week or next month, that is probably okay. In the days leading up to an election time is of the essence. You do not want to be misleading voters. Certainly there is a weakness in the South Australian model where it is only the Commissioner personally who can make the decision; there is not really that ability to delegate to senior officers within his agency. That is something I would suggest that we would want to do slightly differently in Victoria: allow the Commissioner or whoever to delegate to senior officers within his or her agency.

There will always be cases where the matter is so complex it cannot be done quickly. Regardless of how many resources you have, some things take time to work out. That is fine because ultimately the goal here is not necessarily to have it taken it down immediately. That would be great. The real goal is to prevent it being up in the first place—to ensure that players in the political process do not engage in deceptive and misleading advertising. It is about bringing about that cultural change, which, as the South Australian Commissioner said, has in fact happened. So these cases where his resources are strained and sometimes you cannot get a quick decision, those are edge cases, because for the most part people obey the law in South Australia. So all of the cases and complaints that he gets are really edge cases, because for the most part people are obeying the laws. Just because some edge cases take a little bit of time, that is not necessarily a problem, because in the end if those people do cop a fine because they are being particularly bad, that reinforces the need to obey the law; that helps remind the major players, who are obeying the law most of the time, 'Hey, it's not worth trying to get away with anything sneaky'. So, yes, there will be times when things cannot be done quickly, but those will likely be edge cases, because for the most part most people most of the time will be obeying the law and they will not be being brought before the Commissioner or whoever it might be. There will be issues around that, but I do not think those are fatal issues at all.

**The CHAIR:** The other issue—and I am not sure whether you have given much thought to it—is a number of submitters have spoken about the advertising blackout period. Some have argued that it should be removed altogether. Some have argued that there should be consistency around it, that should apply to all ads—in terms of that it does not apply to social media—and that it should apply to everything. Is that maybe something that could be considered in terms of the timeliness of the election and some of these decisions where the Electoral

Commissioner spoke about the pressures around things that happen on election day in terms of advertising? Because if the cut-off was a couple of days beforehand for all paid advertising, is that something that could be considered or looked at for all paid advertising? I am not sure whether you have given any thought to that. It was just my thought at the moment.

**Assoc. Prof. BECK:** I have not given too much thought to that issue because I think that is quite tangential to my actual proposal. In terms of deceptive and misleading advertising, it is not just paid advertisements, because it costs nothing for each of you to put a Facebook post up. If you do that, you do not pay anything. Deceptive and misleading advertising rules should apply to that, even though you are not paying for it. It is not necessarily about paid or unpaid political advertising. Certainly there are debates both ways about the merits or otherwise of the blackout period, but I think that is a separate issue to whether or not you should have deceptive or misleading advertising laws applying to the political realm. Essentially, get rid of the politician's exemption for deceptive and misleading advertising.

**The CHAIR:** I was just thinking in terms of a tool, in terms of managing it in the latter part of the campaign, in terms of the timeliness of being able to take it down and so on and so forth. But, yes, no worries.

**Assoc. Prof. BECK:** You could certainly have mechanisms, for example, where if you did, for whatever reason, want to get rid of the blackout period and allow TV and radio and print advertising et cetera, you could have the penalty be double if the deceptive advertisement is put out in that last three days, to up the stakes: 'You're going to cop a really great fine, so don't try it'. There are ways to balance these things if that is something you wanted to do. But I think the question of media blackout and the question of deceptive and misleading advertising—I think those are separate issues but, as you say, there are connections.

**The CHAIR:** Mr Melhem?

**Mr MELHEM:** Thank you, Chair. And, Luke, thank you for your submission. I agree with you about bringing about the cultural change, but what I am struggling with is how you can bring that if you remove enforcement; well, not enforcement—for example, you were referring to removing the criminal offence, and I think that is in the federal Act, and just relying on a civil offence. I think in the case of South Australia it is \$25 000 for a corporation and \$5000 for an individual. I am actually not sure what the Victorian one is; I should know. So if we remove that, how are we going to be able to sort of drive that change, because a corporation or a major political party could say: 'Okay, we're going to actually run this campaign'—it is a bit like the 'death tax', which the coalition in the federal election said in relation to Bill Shorten—'and even if we're caught, we'll pay \$25 000 and so be it'. It is like a speeding ticket. I am just using that as an example. How can we balance that? I am having difficulty: without having strong reinforcements, without having strong legislation and penalties, how are you going to drive the cultural change? The Labor Party probably could do that as well. I am using it just as an example. I am trying to reconcile with that. It does not sort of sit right with me.

**Assoc. Prof. BECK:** I am absolutely not recommending that Victoria get rid of its existing criminal offence of misleading voters about how to fill in ballot papers. That should remain. Victoria currently has a deceptive and misleading political advertising criminal offence, but that only applies in respect of the mechanics of voting—how to fill out a ballot paper, where to go to vote et cetera. It does not apply to 'death tax' scare campaigns. In Victoria you can be as deceptive and misleading as you like in terms of policy and actual statements. You can say, 'The Premier said X' when the Premier never said X, and 'The opposition leader said Y' when the opposition leader never said 'Y'. But if you deceive people about how to fill in the ballot paper, that is a criminal offence. That should absolutely stay. So I am absolutely not suggesting any of the existing laws be taken away. I am suggesting a new rule about political advertising, deceptive and misleading, be introduced.

You are right that the fines need to be set at a level where it will actually influence people, where it is not just the cost of doing business. But \$5000 payable by an individual—the 'death tax' example, just to take that as an example—if you were happy just having a misleading advertising provision applying federally, the fine would not necessarily go to the Liberal Party, the fine would go to the individual, the human being, whose name is on the authorised bit. So if you are, you know, the director of the Liberal Party campaign, or whoever it was who authorised that, you having to pay \$5000 is very different to a party having to pay \$5000, or whatever the fine is. If \$5000 is not enough, set it at \$10 000 for a first contravention; set it at \$50 000 for a second or third contravention, for example. So just because the party engages in political deception, that does not mean the party is necessarily the one who is going to be paying the fine. It may well be the individual who signed off on

the ‘authorised by’ notice on the ad, and that is a very different thing, right? If I fined you, you know, \$5000, you would feel that a lot more than if I fined the party \$5000 because of something you did. That is a very different scenario, and you would think twice about that, whatever the fine level is. But you are absolutely right that you want to set the fine at a level that actually dissuades people from doing it and does not just make it a transactional cost.

**Mr MELHEM:** Should we then, by default, make it that the party is fined if the individual is fined, because you would have for the parties another sort of tool to actually enforce truthfulness in advertising and so forth? It is another reinforcement body. Is that something we should look at?

**Assoc. Prof. BECK:** Absolutely. You could have it so that both are fined, so if there is a deceptive and misleading advertisement—both the person who authorised it and other people who permitted it to be done. The way I have drafted it, based on the South Australian model, is anybody who authorises or permits it. So it is the person who signs off on the ‘authorised by’ notice but anybody else involved in permitting that to happen. So for the one event, for the one ad, you could have multiple people being fined—the person who signed off on it, their campaign boss who helped design it and so on—

**Mr MELHEM:** Or failed to basically stop it.

**Assoc. Prof. BECK:** Yes. Those who were actively involved and who are ultimately responsible for it, not, for example, the workers who actually put up the big billboard on the side of the road—they are just paid workmen—but the actual senior people who are behind it and responsible for it. Absolutely you could fine multiple people. It is about bringing about cultural change, but as the South Australian Commissioner said, the major parties in South Australia obey the law most of the time.

**The CHAIR:** Do any other committee members have any questions for Mr Beck? No. In that case, thank you, Mr Beck, for coming along today and presenting to the committee. It has been very insightful and helpful. If members have additional questions, would you be okay to provide additional information if that is required?

**Assoc. Prof. BECK:** Yes, of course—happy to help.

**The CHAIR:** No worries. Fantastic. Thank you again.

**Witness withdrew.**