

Democratic Audit of Australia

Submission to the Parliament of Victoria Electoral Matters Committee inquiry into the 2008 Kororoit District by-election

July 2009

Section One: Prologue

Claude Pepper (1900-1980) was a long-serving Florida politician, and admirer of FDR and the New Deal. In 1952 he was challenged in the Democratic primary by George Smathers (a close friend of Jack Kennedy's). At a political meeting in a rural and conservative part of Florida Smathers shocked his audience by describing his opponent as follows:

Are you aware that the candidate is known all over Washington as a shameless extrovert? Not only that, but this man is reliably reported to have practiced nepotism with his sister-in-law and he has a sister who was a wicked thespian in New York. He matriculated with co-eds at the University, and it is an established fact that before his marriage he habitually practiced celibacy.

Smathers won both the primary and the election.

Section Two: Reason for this Inquiry

During the campaign for the 28 February 2008 by-election for the Legislative Assembly District of Kororoit a pamphlet, authorized by the Secretary of the Labor Party, was circulated claiming that a 'vote for Les Twentyman [an

Independent candidate] is a vote for the Liberals'. Whereas, Mr Twentyman was directing his supporters to preference the ALP ahead of the Liberal Party.

During the campaign the Victorian Electoral Commission (VEC) received a complaint that the leaflet was likely to mislead electors in the casting of their vote. After reviewing the relevant law, the VEC recommended that '...the Parliament may wish to consider whether the misleading provisions of the Act require amendment' (Tully 2009, p 13). On 1 April 2009 the Electoral Matters Committee received a reference from the Legislative Council 'to inquire, consider and report' into, inter alia, 'whether the Electoral Act should be amended to improve the operation of the misleading provisions of the Act so that such abuses are more likely to be successfully prosecuted'.

Section Three: The Current Law

Section 84 of the *Electoral Act 2002* **Misleading or deceptive matter** states:

(1) A person must not during the relevant period---

(a) print, publish or distribute; or

(b) cause, permit or authorize to be printed 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.

[These words are almost identical to those found in Section 329 (1) of the Commonwealth Electoral Act 1918 (CEA)]

A preliminary reading of these sections might suggest them as remedies to the 'Twentyman matter', however the courts have consistently read them down. For example, Gibbs CJ (speaking for all seven High Court justices) explained in 1981 that:

'...the framers of a law designed to prevent misrepresentation or concealment which may affect the political judgment of electors must consider also the importance of ensuring that freedom of speech is not

unduly restricted, especially during an election campaign, and the practical difficulties that might result if an election were liable to invalidation on the ground that statements made in the interests of candidates were found in later litigation to be untrue or incorrect

and

'...it can be seen that 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.

(Evans v Crichton-Browne [1981] HCA 14; 1981, p 9 and Senator Harradine APD S, 16 October 1984)

The section thus has a narrow application: it would be an offence to advise electors just to vote one below the line in a Legislative Council election or to claim that because of inclement weather, the polls would not close until 8pm (the latter occurs all too commonly in the USA). In other words, the sections extend only to the mechanics of casting a valid vote and not, say, to claiming that Mr Twentyman was a 'thespian'.

Section Four: The very brief history of 'truth' in political advertising

Parliament is, of course, at liberty to amend legislation and in 1983, in the most sweeping renovation of the CEA since 1918, the federal parliament inserted Section 329 (2) (161(2) which 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 authorize 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.

Such a section probably would have been relevant in the case under consideration, but we cannot know because the section was repealed before the 1984 federal election and has not been reinstated.

In its second report in August 1984 the federal parliament's Joint Select Committee on Electoral Reform (JSCER) now the Joint Standing Committee on Electoral Matters (JSCEM) recommended the repeal of the section (*JSCER, 1984, p 27*). It did so for the following reasons:

- if Party A launched an 'attack' ad against Party B there could be a long delay ,because of legal prudence, before Party B could respond-- to the electoral disadvantage of B (p 16)
- the difficulty in establishing what a court might deem as 'true' and the potential problems arising with statements of 'opinion, belief or intention as well as of fact' (p 18)
- complications that would arise because the statement had to be both 'untrue **and** misleading or deceptive' to be impugned (p 19)
- the likelihood that a court might regard that a 'prediction' ' may involve an implication as to a present fact' and thereby catch a very large number of advertisements (p 20)
- that a court would find difficulty in developing objective standards of truth in relation to political statements which, by their nature, involve political judgments and premises (p 21)
- the real possibility of candidates seeking court injunctions to prevent the publication of advertisements by their opponents on purely political

grounds and the possibility that multiple, successful injunctions could disrupt the conduct of the election (pp22-3).

The injunction problem seemed to be the key reason behind the committee's decision to recommend repeal of the section; it said:

The committee concludes that the injunction remedy could cause grave injustice to political parties or candidates and could disrupt the normal political process, if available at the suit of any candidate (p 26)

The committee agreed that *while everyone agrees that fair advertising is a desirable objective...it is not possible to achieve such "fairness" by legislation (p 26)*

Australian Democrat member of the committee, Senator Michael Macklin in a dissenting report stated that it would be a *denial of essential elements of democracy if all restraints on political democracy were removed (p 46).*

Amendments moved by Senator Macklin in the committee stage of debate on 16 October 1984 were defeated 48 votes to 4 and the section and related sections dealing with referendums were repealed.

In 1995 the Australian Democrat senators moved an amendment to the *Electoral and Referendum Bill 1995* inserting a 'truth in advertising' provision, but the bill lapsed when the parliament was dissolved for the 1996 election (Mislin and Grant 2004, p 9)

Section Five: The South Australian 'Solution'

In a dissenting report in JSCEM's report on the 2007 federal election senator Bob Brown stated:

The Greens advocate amendment to the Commonwealth electoral Act to make it an offence to authorize or publish an advertisement purporting to be a statement of fact when the statement is inaccurate and misleading to a material extent, similar to legislation introduced in South Australia
(Brown 2009, p336)

Section 113 (1) of the South Australian *Electoral Act 1985* states:

*A person who authorizes, 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.*

In 1989 the South Australian Attorney General issued guidelines for the handling of complaints arising from the provisions of the Electoral Act (Sumner, 1989, pp14-15)

At the 2002 state election 53 (48%) complaints were received of ‘inaccurate or misleading material’. The Electoral Commission commented:

No complaint actions were pursued following the 2002 election though party attention was drawn to cases where it was considered that the boundaries of what was misleading or inaccurate were fully tested
(Electoral Commission 2003, p 42)

Despite requiring that an advertisement be both untrue **and** misleading, the SA Act seems an improvement on earlier attempts at regulation on two grounds:

- a. it limits restrictions to ‘statement(s) of fact’;

b. it partly addresses the injunction problem by empowering the Electoral Commissioner (acting on advice from the Solicitor-General or the Crown Solicitor) rather than the courts to handle complaints in the first instance—but but see section 113 (5) which gives the Supreme Court ultimate authority.

Unfortunately, when subjected to closer scrutiny, the South Australian ‘solution’ suffers from fatal flaws.

Section 113 (2) makes dubious assumptions as to the nature of ‘facts’. In general discourse facts are seen as bits of objective reality immune from ‘corruption’ by values, assumptions, premises or bias. This view is not supported by the weight of social science literature. As long ago as the early 1950s the political scientist David Easton showed that ‘A fact is a peculiar ordering of reality in terms of a theoretic interest’ (Easton 1953, p 53 and Goldberg 1969, pp 1247-50). Martin Rein (1976, p 252) warns that ‘often we find that the same facts are compatible with quite different interpretations of reality’. Facts, then, are not neutral pieces of information but abstractions based on contestable notions of significance or instrumentality.

If all this seems a little metaphysical, two examples may assist:

- It is often said that ‘It is a fact of human nature that.....’ Yet the essence of human nature has been a highly contested concept since at least Plato’s time (Scruton 1982, pp 207-08; Muschamp (Index) 1986, p 258). There are ‘theories’ of human nature but not ‘facts’ as they are commonly conceived.
- Once upon a time, it was widely known that Julius Caesar crossed the Rubicon River in north Italy in 49 BCE. Of the millions who have crossed that stream before and since we know and care little. Why? Because the Roman Senate had declared the Rubicon as the northern boundary below

which no army could enter without its permission. That Caesar did so declared war on the Senate and was to change fundamentally the Roman system of government from a republic to an imperium.

Anybody attempting to convince a court or tribunal that a political statement was or was not 'factual' would have to confront these conundrums.

Giving the Electoral Commissioner the power to 'request' advertisers to withdraw the advertisement or to publish a retraction runs the risk of compromising the impartiality of that office.

Section Six: Conclusion

While the advertisement circulated during the Kororoit election was egregiously mendacious and has recently attracted criticism from Premier Brumby (*Age*, 30 July 2009), the Democratic Audit of Australia recommends, for the reasons cited above, **that Section 84 of the Electoral Act 2002 not be amended to encompass the notion of 'truth in advertising'**.

References

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