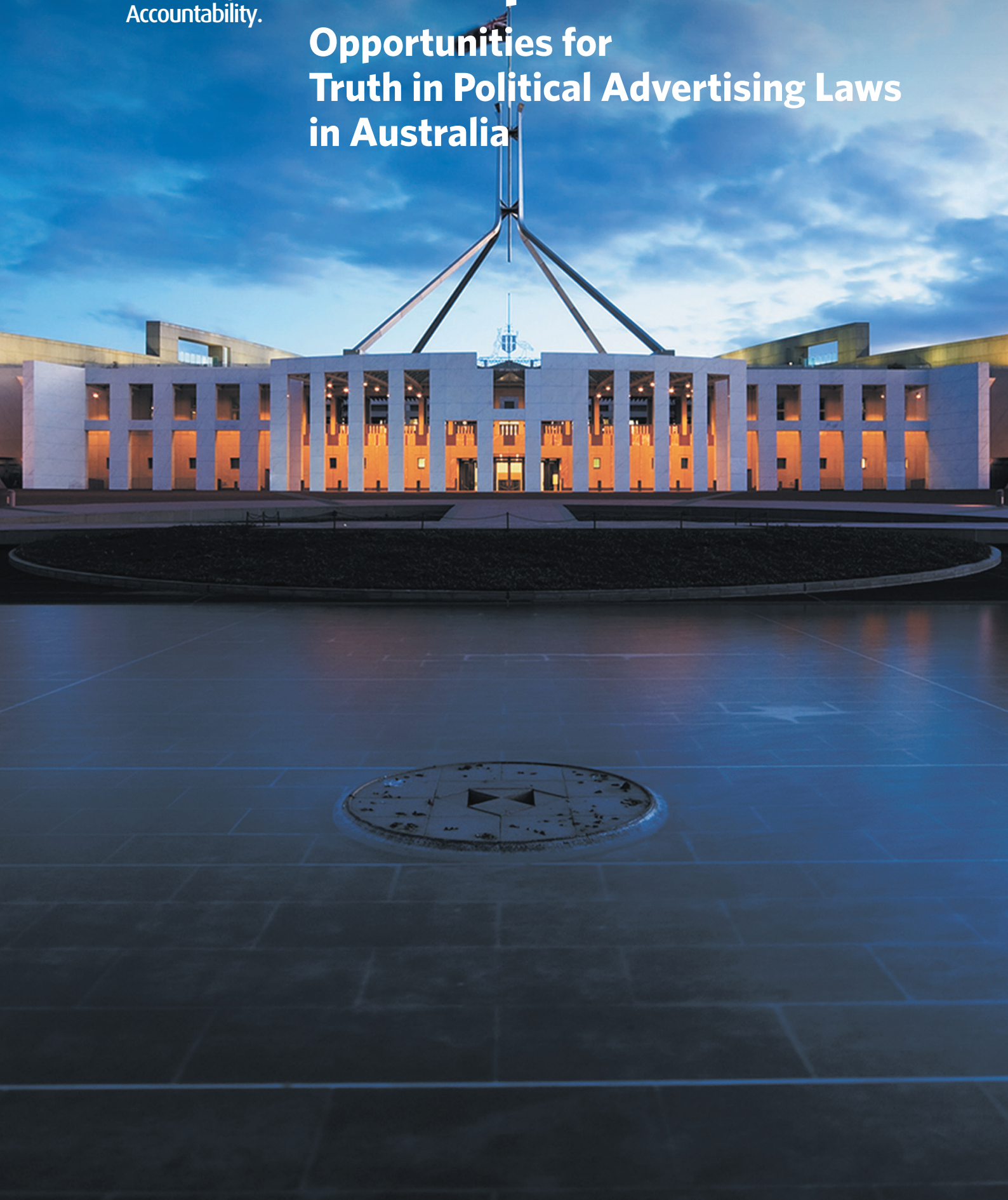


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Possible, Practical, and Popular

Opportunities for Truth in Political Advertising Laws in Australia



Lying in political advertising is perfectly lawful in Australia.

This is different to other aspects of advertising that are prohibited from making misleading or deceptive claims. Pharmaceutical companies cannot claim to have the cure for cancer, food companies cannot claim that sugary foods are good for kids, lawyers cannot guarantee that they will win every personal injury case.

Australians should be entitled to expect the same standard of honesty in politics as they receive in trade and commerce – if not a higher standard. But across most of Australia it is perfectly legal to lie in a political ad.

While election campaigning by its very nature will always be strong and robust, it should not be perfectly legal to lie in a political advertisement.

Political advertisements that are deceptive and misleading interfere with the public's ability to make informed decisions. Without action and regulation, we risk a democratic crisis and election campaigns risk sliding into a free-fall of fake news.

But there are clear examples being set across Australia that the federal parliament can follow. In South Australia, truth in political advertising laws have existed since the 1980s. In 2020 the ACT Legislative Assembly unanimously passed truth in political advertising laws that came into effect in July 2021.

Recent years have witnessed a growing number of complaints from both sides of politics that misinformation and misleading advertising are rampant in the lead up to elections.

Truth in political advertising laws are extremely popular. Not only do they enjoy support from all sides of politics, they are also supported by a staggering 87% of Australians.

The time is ripe for truth in political advertising laws that are constitutional, uphold free speech, but introduce a measure of fairness and accountability to the political process.

For a full briefing on truth in political advertising visit: australiainstitute.org.au/report/we-can-handle-the-truth-opportunities-for-truth-in-political-advertising

TRUTH IN POLITICAL ADVERTISING LAWS HAVE EXTREMELY WIDE AND STRONG SUPPORT

Currently Australian political parties and candidates do not need to tell the truth in their advertisements.

87%

of Australians

support truth in political advertising laws

87%

of Coalition voters

support truth in political advertising laws

88%

of Labor voters

support truth in political advertising laws

82%

of Greens voters

support truth in political advertising laws

87%

of One Nation voters

support truth in political advertising laws

There are successful models to emulate already:

South Australia has had such legislation since the 1980s.

ACT passed truth in political advertising legislation in 2020, modelled on the SA legislation.

Consumer protections laws and regulations in Australia already ensure a level of truth in advertisements and packaging.

Truth in political advertising laws currently enjoy support from MPs on all sides of the Australian Parliament.

CASE STUDY: SOUTH AUSTRALIA

South Australia has had truth in political advertising laws since the 1980s, and still has robust election campaigning and vigorous free speech.

How it works:

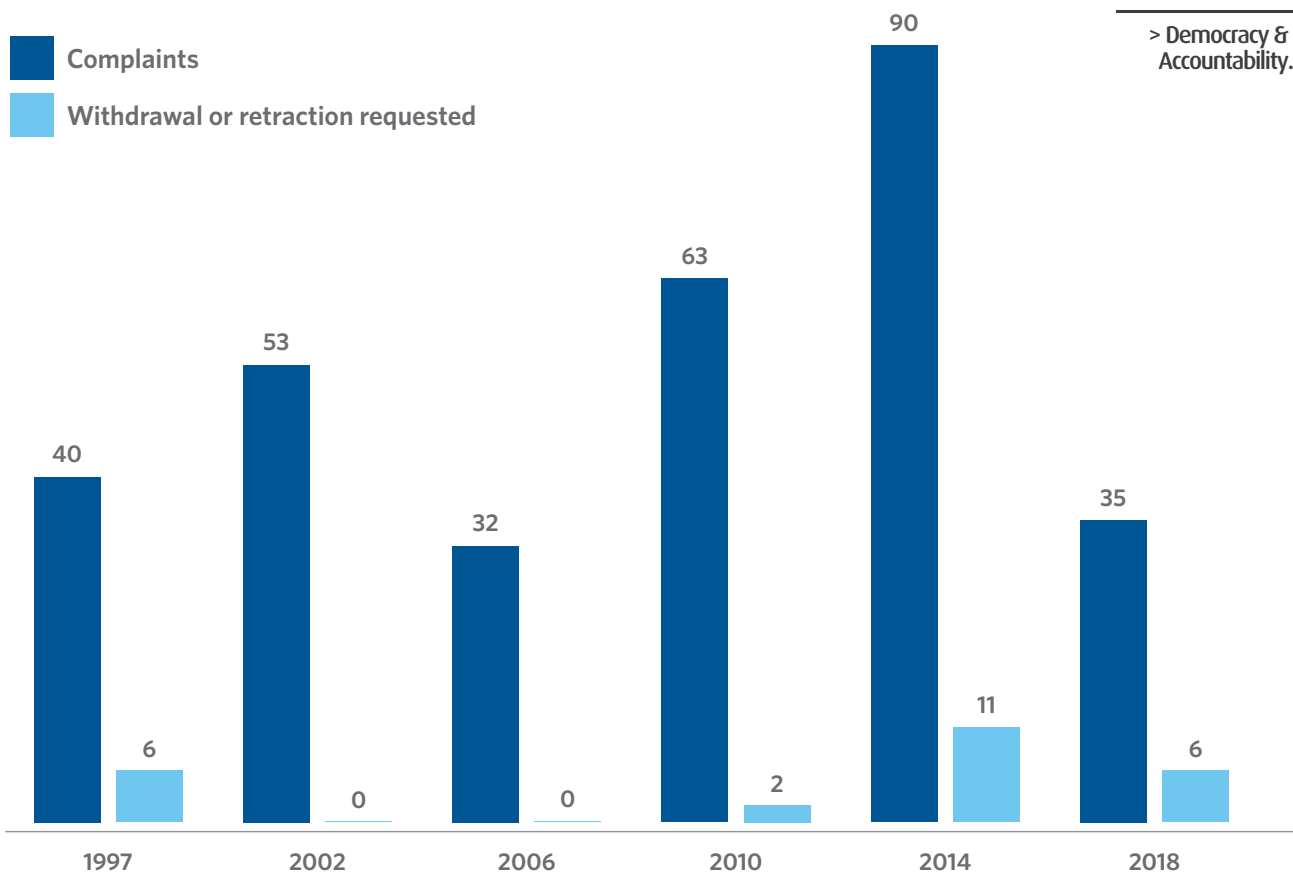
Section 113 of SA's Electoral Act 1985 makes it an offence to authorise or cause to be published electoral advertisements that are materially inaccurate and misleading. The SA Electoral Commissioner can request such advertisements be withdrawn from further publication and a retraction published; they can also apply to the Supreme Court to enforce withdrawal and/or retraction.

The maximum penalty for materially inaccurate and misleading advertising is \$5,000 for individuals or \$25,000 for a body corporate.

But it gets even more serious: the Court of Disputed Returns can invalidate the results of an election on the grounds of misleading advertising, if that advertising affected the election result.

Complaints and withdrawal/retraction requests in each election to South Australian electoral commission

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Source: Renwick & Palese (2019) *Doing Democracy Better*.

Conviction:

In 1993, the Labor Party ran a television ad that said: *"The fact is that the Brown Liberals have stated that any school with less than three hundred students will be subject to closure. We have 363 schools with less than 300 students ..."*.

The Liberal Party spokesperson had actually said that they were not going to close 200 schools or close schools with 300 students, but that "a small number of schools that have got a very small number of students" would potentially be closed. The Labor State Secretary was convicted, one of the few convictions under s 113.

Misleading Content:

In 1997, the Liberal Party printed a newspaper ad that said that voting for an independent or Democrat "gives you" Labor leader Mike Rann (as premier) "thanks to preferences". In fact, voters decide their own preferences, and in at least some cases independent how-to-vote cards recommended preferencing the Liberal candidate over the Labor one. Finally, if elected an independent or Democrat would not necessarily support Labor or Mike Rann. The Court of Disputed Returns found that the advertisement was inaccurate and misleading to a material extent, but it had not affected nor was likely to affect the election result.

Misleading Content:

In 2017, the Liberal Party published ads claiming that their energy plan would save households \$300 per year. The modelling showed that most of those savings would occur regardless of the Liberal energy plan, with households only saving \$60-\$70 as a result of the plan.

The Electoral Commissioner found that the Liberal claims breached s 113 and requested the party publish a retraction and correction.

Misleading Content:

In 2014, a Labor Party Facebook post said that, thanks to a new code of conduct, shoppers could "rest assured" while buying free-range eggs. However, the code had not yet been implemented.

The Electoral Commissioner found the statement breached s 113 and asked Labor to correct the post and post a retraction.

CASE STUDY: AUSTRALIAN CAPITAL TERRITORY

As the nation's capital and the heart of Australian democracy, the ACT has set a powerful example with tripartisan support for truth in political advertising laws.

In August 2020, the ACT Legislative Assembly passed truth in political advertising laws based on the existing South Australian laws, with the unanimous support of the Assembly's Labor, Liberal and Greens MLAs. The laws came into effect in July 2021.

The laws establish an offence for misleading political advertising and empower the ACT Electoral Commissioner to request that the person who placed the advertisement not disseminate it or retract it in stated terms and in a stated way. The laws are limited to electoral material that requires authorisation, and do not burden publishers any more than existing rules about defamation or offensive material do. Under the new laws an individual could be fined up to \$8,000 and a corporation up to \$40,500, if they have been found to have issued untrue political advertising.



"Unfortunately, in Australia there is no shortage of examples of false or misleading electoral advertising. While not perfect, the South Australian system has worked well there for decades and has been upheld as constitutionally sound by the full bench of the South Australian Supreme Court."

*- Caroline Le Couteur
then-Greens MLA
who proposed the amendment
in the ACT Legislative Assembly*



"I also note that, even though this provision will not be commencing prior to this election, I hope that the commitment of all three parties in support of this particular provision will at least morally and ethically bind each of the parties to support it."

*- Gordon Ramsay
then-ACT Attorney General*



"The Canberra Liberals will be supporting this amendment. We agree that there is a need for truth in electoral advertising ... There should be a level of accountability when something demonstrably false is disseminated. It severely undermines public confidence in the Assembly and its members."

*- Alastair Coe,
then-Opposition Leader*

REGULATING TRUTH? THE TRUTH IS THAT AUSTRALIA ALREADY DOES

One main criticism of proposals for truth in political advertising is that there is an implied constitutional freedom of speech, and that regulating the truth is problematic. While these are valid concerns, the reality is that many Australian regulations already act to prevent misleading content.

Misleading content by businesses

Australian consumer laws do not permit businesses to – in the course of trade and commerce – make incorrect statements, or those “likely to create a false impression”, even if the business’s intention is not to mislead.

Businesses cannot include fine print that contradicts the overall message of the ad, or make claims about environmental benefits that they cannot substantiate.

Ad Standards, the industry self-regulator, considers a limited set of misleading ads: advertising and marketing to children, food and beverage advertising, and environmental claims in advertising.

Laws against lying about voting mechanics

All Australian jurisdictions have laws against deceiving people specifically about the mechanics of voting but these do not necessarily prevent deception about who to vote for.

Case Study:

In the 2019 federal election, Liberal signs in Chinese that “mimick[ed] the purple theme of the Australian Electoral Commission” were reported to the AEC on the basis that the signs could mislead voters into thinking that the only valid vote is for the Liberals. The AEC mistakenly concluded that the signs were not in breach of the law, adding “While the AEC uses purple in our signs, the AEC can’t prohibit others doing so”.

The Federal Court found that the signs were “plainly misleading or deceptive”, although they did not overturn the election decision because the ads were not likely to have affected the result of the election.

In corporate law, the power of logos and colours to evoke a particular product or company is well-understood. Individual colour tones can be trademarked. Political material that evokes the AEC or a rival political party through colour, design and placement, however, has not been subjected to the same controls.

ABC and SBS “Free Time”

Australia already has proven and long-standing rules around political broadcasts: the standards that the public broadcasters place on the free airtime that they give political parties around an election.

These standards, especially for the ABC, are strict and detailed, and yet readily complied with by all eligible political parties. Before each election, the ABC and the SBS grant eligible political parties free airtime – time set aside for government, opposition and some minor parties to broadcast policy speeches and statements on election and policy issues. They could serve as a template for legislated standards for other political broadcasts.

ABC Political Broadcast Requirements

- *The broadcasts must be “in the form of a political comment or statement”, not an advertisement.*
- *No stylised images, misleading non-verbal impressions, unduly frequent or unduly prominent use of catchwords, slogans or jingles, and attempts to associate parties or candidates with anything universally approved or, conversely, universally condemned.*
- *Speakers must be sitting members or candidates.*
- *Graphics must be informative, and music must be background only.*

Private media discretion

Ad hoc rejection of advertisements does take place occasionally in Australia at the publisher level, ostensibly on factual grounds. While under no obligation to do so, media owners do have the discretion to implement editorial processes such as asking clients to verify claims made in political ads.

Example

In July 2019 the Mackay Mercury rejected an advertisement publicising the Galilee Blockade because the advertisement claimed that most Queenslanders “did not want the mine to proceed”.

SUPPORT FOR TRUTH IN POLITICAL ADVERTISING IS BROAD



“In order to help combat the confidence-deficit in democracy, taking a clear stand against misinformation is critical ... A Commonwealth law would need to be designed so as to ensure it does not breach the constitutionally implied freedom of political communication. ... In order for Australia to keep up with international best practice and build confidence in our democratic systems we strongly urge that the Joint Standing Committee on Electoral Matters investigates options to ensure truth in political advertising.”

— Joint submission to JSCEM by Independent MP Zali Steggall and Liberal Party MP Jason Falinski

There is support for truth in political advertising laws across all sides of politics, as evidenced by the passage of such legislation in the ACT with the support of all sides of ACT Legislative Assembly: Labor, Liberal and Greens.

Furthermore, independent MP for Warringah, Zali Steggall and Liberal Party MP Jason Falinski authored a joint submission to JSCEM following the 2019 Federal Election to recommend truth in political advertising laws. JSCEM’s report summarised the multiple submissions on truth in political advertising that it had received, including substantial extracts from the Australia Institute’s report into the matter, *We can handle the truth*. Labor members of JSCEM called for truth in political advertising laws; Greens members called for an inquiry. Furthermore, Jay Weatherill and Craig Emerson recommended truth in political advertising laws in the Labor Party’s review of the same election.

During the 2021 Tasmanian state election campaign, the Tasmanian Greens announced a truth in political advertising laws policy which, like the new ACT legislation, was based on the South Australian model. Shadow Attorney-General Ella Haddad also announced Labor’s support for truth in political advertising laws at a candidates’ forum hosted by the Australia Institute. At these forums, Greens candidates reiterated their support, and support was also voiced by independent, Shooters, Fishers and Farmers Party, and Animal Justice Party candidates.

In May 2021, Senator Kristina Keneally, Shadow Minister for Government Accountability, also reaffirmed Labor’s support for truth in political advertising laws at a federal level, in a webinar hosted by the Australia Institute. In March of the same year the Labor National Platform committed to introduce truth in political advertising laws, and in June the Queensland Labor Conference passed a resolution calling on the Palaszczuk State Government to investigate state-level truth in political advertising laws.

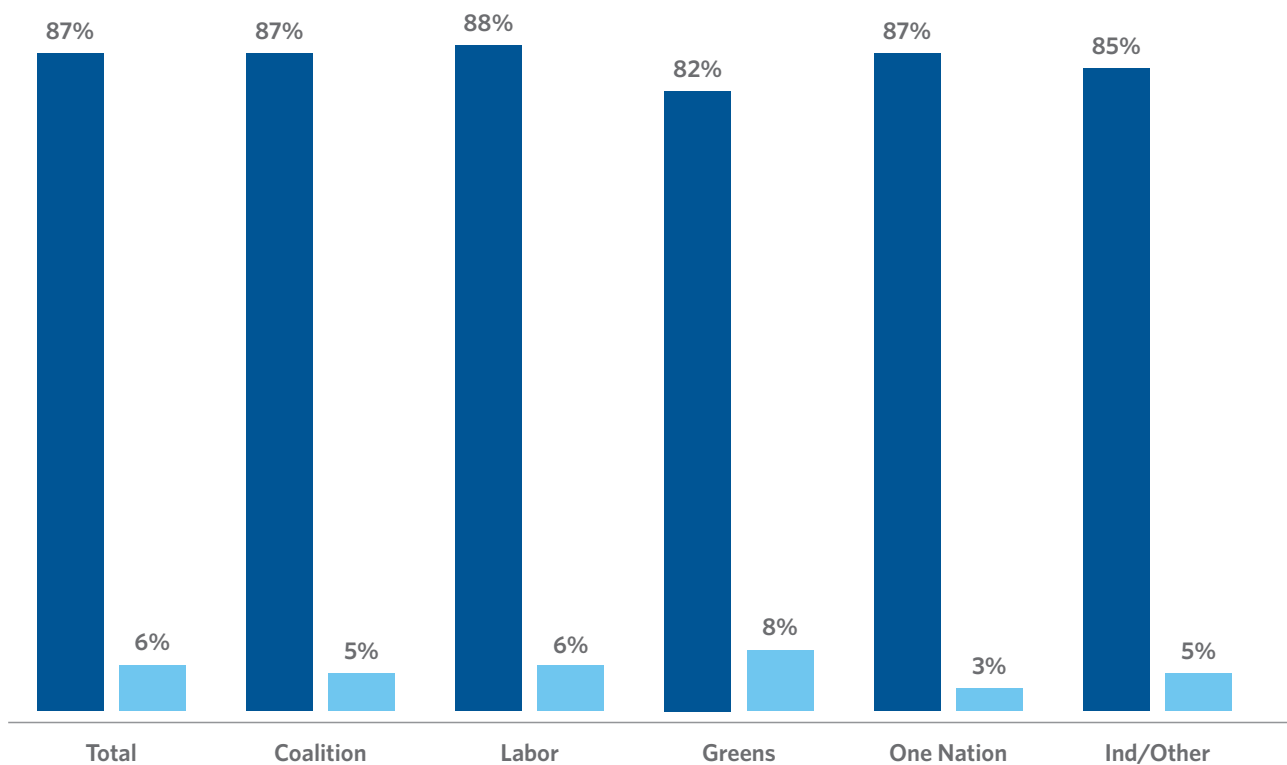
Then-Senator Nick Xenophon called for national truth in political advertising laws in 2016, and the Greens have long supported national laws as well as initiating the ACT legislation.

There is overwhelming support for truth in political advertising legislation from voters across all political persuasions.

Do You Support Truth in Political Advertising Laws?

Yes No

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SUPPORT FOR TRUTH IN POLITICAL ADVERTISING IS BROAD: SIGNATORIES TO THE AUSTRALIA INSTITUTE'S 2021 OPEN LETTER

The Hon David Harper AM QC

Former judge, Supreme Court of Victoria Court of Appeal

The Hon Anthony Whealy QC

Former judge, Supreme Court of NSW Court of Appeal

Nicholas Cowdery AO QC FAAL

Former Director of Public Prosecutions, NSW

Geoffrey Watson SC

Barrister and Director of the Centre for Public Integrity

Robert Richter QC

Barrister; former Chairman of the Criminal Bar Association; former President of Victorian Council of Civil Liberties

Professor Charles Sampford

Foundation Dean of Law and Research Professor in Ethics, Griffith University; Director, The Institute for Ethics, Governance and Law; Barrister

Dr David Morawetz

Founder and Director, Social Justice Fund

Professor Graeme Orr FASSA, FAAL

Professor, UQ Law School

Professor Meredith Edwards AM

Emeritus Professor, Institute for Governance and Policy Analysis, University of Canberra

Professor Spencer Zifcak

Allan Myers Chair of Law/Professor of Law, Australian Catholic University

Dr Klaas Woldring

Former Associate Professor, Southern Cross University

Professor Kate Auty

University of Melbourne

Professor John Langmore AM

Former Member for Fraser; Professorial Fellow, School of Social and Political Sciences, University of Melbourne

Dr Fergus Green

Lecturer in Political Theory & Public Policy, University College London

Emeritus Professor Julianne Schultz AM FAHA

Founding editor, Griffith Review; Professor, Griffith Centre for Social and Cultural Research

Professor Lisa Hill FASSA

Professor of Politics, Politics and International Relations, University of Adelaide

Dr JF Pixley

Honorary Sociology Professor, Macquarie University

Lisa Forrest

Olympian and Author

Professor Peter Doherty AC

Nobel Prize in Physiology/Medicine 1996; Australian of the Year 1997; Laureate Professor

The Hon Dr Carmen Lawrence

Former Premier of Western Australia; former Federal Cabinet Minister

Dr John Hewson AM

Crawford School, Australian National University; former Leader of the Opposition

The Hon Kevin Razzoli AM

Former Speaker, NSW Parliament

Cheryl Kernot

Former Leader, Australian Democrats; Fellow, Centre for Social Impact

Tony Windsor AM

Former Member for New England

Cathy McGowan AO

Former Member for Indi

Maxine McKew

Hon Enterprise Professor University of Melbourne

Caroline Le Couteur

Former Member of the ACT Legislative Assembly

Gordon Ramsay

CEO, Alliance for Gambling Reform

Sally McManus

Secretary, Australian Council of Trade Unions

Fiona McLeod AO SC

Chair, Accountability Round Table

Alice Drury

Senior Lawyer, Human Rights Law Centre

Bill Browne

Senior Researcher, Australia Institute Democracy & Accountability Program

Eva Cox AO

Adjunct Professor, Jumbunna Institute for Indigenous Education & Research

Dr Valarie Sands

Chair, Australian Citizens Against Corruption; Member, Accountability Round Table

Angela Smith

Member, Accountability Round Table

Ross Knowles

Chairman, Ethinvest

Dr Cameron Hazlehurst

Chairman, The Ethicos Group

Joshua Jones

Barrister

Kiera Peacock

Partner, Marque Lawyers

The growth in online disinformation campaigns globally should be of great concern. Elections that have come under concerted attack by both foreign and domestic disinformation campaigns include the 2016 United States election and the 2020 Taiwanese election. Closer to home, research by the Australia Institute and the Queensland University of Technology has shown that misinformation around the coronavirus vaccine was spread online using bots and other tactics.

Despite the size of the social media platforms and their domination of the online advertising markets, the regulatory framework surrounding political advertising on social media is almost non-existent – especially in contrast to strict election advertising rules for other forms of media.

The ACCC Digital Platforms Inquiry report finds that few of the laws, regulations and codes that apply to news media – like journalistic codes of ethics, broadcasting licensing conditions, telecommunications regulations and peak body self- and co-regulation – apply to the social media platforms. Social media is not subject to the broadcaster election blackout.

Social media platforms allow advertisers to engage in “micro-targeting”, which uses complicated combinations of personal data to personalise advertising messages. Micro-targeting can and has been used to amplify fringe views and discriminate against vulnerable groups.

Truth in political social media advertisements

- Truth in political advertising legislation would place the burden of compliance with the authorising party, rather than with social media or internet companies.
- These laws could potentially help to mitigate the risk of foreign election interference in what is currently an open market for disinformation.

Action: Creation of a publicly available ad library.

In order to enable public interest journalism and timely, accurate data on political advertising, a database of all political advertisements should be created, including details on how each ad was targeted. Examples such as Facebook’s Ad Library, Twitter’s Ad Transparency Centre and Google’s Transparency Report demonstrate that it is possible for political ads to be recorded in a publicly accessible database – although government regulation is appropriate to ensure the accuracy and completeness of a future public database.

STAY IN TOUCH



If you would like a briefing on the opportunities for Truth in Political Advertising Laws in Australia, please contact the Australia Institute.

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