



Submission by Free TV Australia

Parliamentary Inquiry into the 2022 Federal Election

October 2022

1. Summary

Election Blackout Provisions

- Election blackout laws applying only to linear broadcasting are not relevant or effective, and unfairly disadvantage commercial broadcasters.
- This regulatory imbalance has a commercial and competitive impact on commercial broadcasters, and creates confusion for audiences, who do not always distinguish between media platforms, and are not aware of the disparate rules.
- Free TV recommends the immediate 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 to remove the election blackout period from commercial television, and to provide regulatory consistency across platforms and media services.
- The alternative suggestion of introducing election blackout regulation to digital services would not significantly contribute to meeting the objectives of the election blackout period.
- In reality, there is currently no ‘cooling off’ period for voters in the lead-up to an election, with advertising being only one component of how political parties reach Australians, and an increasing proportion of Australians voting prior to Election Day. The introduction of media blackout laws on digital services would not create a ‘cooling off’ period.
- It would be most appropriate for any proposals for advertising regulation on digital services to be considered as part of a wholistic review of regulation of the media industry, through a review of the *Broadcasting Services Act 1992* (the **BSA**). This will ensure consistency and transparency for audiences, broadcasters, and digital services.

Truth in Political Advertising

- Free TV broadcasters are committed to providing a trusted and valuable service to audiences. A key part of this is meeting the already very stringent requirements for advertisements placed on commercial television.
- Should ‘truth in political advertising’ laws be introduced, broadcasters must be exempt from compliance under Schedule 2 7(1)(h) of the BSA in relation to these laws. Without such an exemption, the assessment of these advertisements would impose an unmanageable compliance burden on commercial broadcasters.
- Broadcasters are not equipped to make assessments of political truth about whether statements made are inaccurate or misleading, nor would it be appropriate for a commercial or industry organisation to take on such a sensitive role in the political process.

2. Introduction

Free TV Australia is the peak industry body for Australia's commercial television broadcasters. We advance the interests of our members in national policy debates, position the industry for the future in technology and innovation and highlight the important contribution commercial FTA television makes to Australia's culture and economy.



Australia's commercial broadcasters create jobs, provide trusted local news, tell Australian stories, give Australians a voice and nurture Australian talent.

A report released in September 2022 by Deloitte Access Economics, *Everybody Gets It: Revaluing the economic and social benefits of commercial television in Australia*, highlighted that in 2021, the commercial TV industry supported over 16,000 full-time equivalent jobs and contributed a total of \$2.5 billion into the local economy. Further, advertising on commercial TV contributed \$161 billion in brand value. Commercial television reaches 16 million in an average week, with viewers watching around 3 hours per day.

Free TV members are vital to telling Australian stories to Australians, across news, information and entertainment. Free to air television broadcasters understand and appreciate the cultural and social dividend that is delivered through the portrayal of the breadth and depth of Australian culture on television, and Australians prefer local stories. Commercial television networks spend more than \$1.5 billion on Australian content every year, dedicating over 85% of their content expenditure to local programming.

The commercial television industry creates these benefits by delivering content across a wide range of genres, including news and current affairs, sport, entertainment, lifestyle and Australian drama. 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 2022 Deloitte Access Economics report found that while the internet is widely used in Australia, it is not universal, the quality and access varies significantly, and it is not free. At least 5.6 million (22%) Australians cannot access live streaming and video on demand (VOD).

A strong commercial broadcasting industry delivers important public policy outcomes for all Australians and is key to a healthy local production ecosystem. This in turn sustains Australian storytelling and local voices and is critical to maintaining and developing our national identity.

3. Election Blackout Provisions

3.1 Election blackout periods are no longer relevant

As Free TV, and other stakeholders, have noted in recent years¹, election blackout laws applying only to linear broadcasting are not relevant or effective, and unfairly disadvantage commercial broadcasters. A recent survey found that commercial broadcasters were the most useful source of news and information during the election campaign², and are also the most trusted, with a CT Group 2021 survey showing that '65% of respondents agreed that commercial television is a 'trusted source of local news, current affairs and information which is essential to Australian society and our democracy'³.

Section 3A of Schedule 2 of the BSA provides that broadcasters must not broadcast 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: commercial television; commercial radio; community broadcasting; and subscription television.

These rules do not apply to newspapers, out-of-home advertising, or any form of digital media including streaming services, social media or other online advertising. Therefore, on commencement of the blackout period, political parties simply transfer their advertising from television to other digital media platforms that are not regulated. The Australia Institute found that, '[a] total of \$12.5 million was spent to run 26,945 political ads on Facebook and Instagram by parties and candidates over the two months leadup up to May 21 [2022]'⁴. This has a commercial and competitive impact on commercial broadcasters.

Additionally, this inconsistent regulation creates confusion for audiences, who do not always distinguish between media platforms, and are not aware of the disparate rules. For example, during the 2022 Federal Election, the Australian Communications and Media Authority received a complaint from an audience member that they had viewed a political ad during the election blackout period on commercial television. Further investigation found that the audience member had been viewing a livestream of the commercial television network through an online app. This one example demonstrates the need for regulatory consistency, in order to maintain transparency and trust with audiences.

3.2 Introducing blackout laws on digital services would not be an appropriate measure

The Australian Electoral Commission explains the reason for the blackout period:

¹ <https://www.freetv.com.au/wp-content/uploads/2019/09/2019-008-JSCem-Inquiry-into-the-2019-Federal-Election.pdf>

² JWS Research, *2022 Post Federal Election Survey Report*, page 22

³ CT Group, *Federal Election Campaign Research* (report commissioned by Free TV (October 2021)

⁴ <https://australiainstitute.org.au/post/12-5m-spent-on-social-media-election-ads-misinformation-widespread-research-exit-poll/>

This three-day blackout effectively provides a ‘cooling off’ period in the lead up to polling day, during which political parties, candidates and others are no longer able to purchase time on television and radio to broadcast political advertising.⁵

The introduction of election blackout regulation to digital services would not significantly contribute to meeting the objective of a ‘cooling off’ period. While not defined as ‘advertising’, voters continue to have free and unfettered access to election information and documentation available online, including social media posts of candidates and parties; news coverage of speeches and announcements; and text messages received directly from political parties.

The increase in pre-poll voting in recent years also makes the concept of a ‘cooling off’ period redundant. In the 2022 Federal Election, pre-polls represented 32.2 percent of enrolled voters, compared to 29.9 percent in the 2019 Federal Election⁶, and just 8.3 percent in the 2007 Federal Election⁷. For these voters, an election blackout period three days before Election Day is of no consequence.

In reality, there is currently no ‘cooling off’ period for voters in the lead-up to an election, with advertising being only one component of how political parties reach Australians, and the introduction of media blackout laws on digital services would not create a ‘cooling off’ period.

This was also noted by JSCCM in their 2019 report with paragraphs 5.41 – 5.42 stating that,

[t]he combination of the rise of smartphone technology, broadband internet and Wi-Fi means Australians are increasingly connected and online. The 24-hour news cycle means audiences expect information around the clock. No longer passive news consumers, audiences can also seek out information through search engines and engage with others in political ideas in online forums.

The blackout provisions in the BSA are clearly no longer fit for purpose.

In addition to recommending the repeal of the media blackout laws in the BSA, the JSCCM also recommended that,

[t]he current work of the Australian Competition and Consumer Commission and the Australian Communications and Media Authority to adapt regulation so it can keep pace with technological change, clearly addresses electoral and political advertising. It also recommends these agencies form a working group with the Australian Electoral Commission and other key stakeholders to ensure this important area is addressed as a priority.

The Minister for Communications, the Hon. Michelle Rowland MP, has committed to a full review of the BSA, including how it relates to digital services. This has also led to the recent extension of the *Broadcasting Services (“Broadcasting Service” Definition – Exclusion) Determination 2022* for a period of five years. It would be most appropriate for any proposals for advertising regulation on digital services to be considered as part of a holistic review of regulation of the media industry, through a BSA review. This will ensure consistency and transparency for audiences, broadcasters, and digital services.

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https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/2019Federalection/Report/section?id=committees%2Freportjnt%2F024439%2F73870

⁶ <https://antonygreen.com.au/5647-2/>

⁷ <https://antonygreen.com.au/should-we-count-pre-poll-votes-before-6pm-on-election-day/>

3.3 Provisions for election blackout periods should be removed from the BSA

Free TV recommends 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 to provide consistency across platforms and media services. This would recognise the irrelevance of blackout periods, given the variety of platforms through which audiences access political information, as well as the high incidence of pre-poll voting, and would align with the recommendations of the JSCEM *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto*, which considered in detail the issue of Media Blackouts. The Committee recommended that ‘...the media blackout, known as the relevant period in the *Broadcasting Services Act 1992* be reviewed with a view that the restrictions on commercial radio and television broadcasters be removed.’⁸

4. Political advertising standards

The inquiry lists as Term of Reference (c), the following:

the potential for 'truth in political advertising' laws to enhance the integrity and transparency of the electoral system

Successive Governments have been considering the introduction of truth in political advertising laws since the 1980s⁹. The JSCEM explored this issue in detail following the 2019 Federal Election. At that time, the Committee commented that,

The JSCEM understands the concerns of some about truth in political election campaigns but believes any proposed solutions, rather than introduce transparency, would make the system more opaque.

*The JSCEM believes the best arbiter of truth in election campaigns is an engaged electorate, rather than another well-funded quango.*¹⁰

Free TV broadcasters are committed to providing a trusted and valuable service to audiences. Schedule 2 7(1)(h) of the BSA in schedule 2 provides that, ‘the licensee [commercial broadcasters] will not use broadcasting services in the commission of an offence against another Act or a law of a State or Territory’. Should ‘truth in advertising’ laws be introduced, the compliance burden may fall to the broadcaster to then determine whether something is likely to breach a law.

This would not be a desirable approach – liability must not rest with the publisher or broadcaster of the advertisement – it should remain with the authorising body, which also determines the content of the advertisements. Broadcasters are not equipped to make assessments of political truth about whether statements made are inaccurate or misleading, nor would it be appropriate for a commercial

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https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024439/toc_pdf/Reportontheconductofthe2019federalectionandmattersrelatedthereto.pdf;fileType=application%2Fpdf

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https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp13#:~:text=Legal%2C%20Constitutional%20and%20Administrative%20Review%20Committee%2C%20Report%20on%20Truth%20in,likely%20to%20mislead%20or%20deceive.

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https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024439/toc_pdf/Reportontheconductofthe2019federalectionandmattersrelatedthereto.pdf;fileType=application%2Fpdf

or industry organisation to take on such a sensitive role in the political process. Political claims can be subjective, and both political and budgetary claims would be very complex to assess.

Should 'truth in political advertising' laws be introduced, broadcasters must be exempt from compliance under Schedule 2 7(1)(h) of the BSA in relation to these laws. Without such an exemption, the assessment of these advertisements would impose an unmanageable compliance burden on commercial broadcasters.