

SUBMISSION TO TASMANIAN *ELECTORAL ACT 2004* REVIEW

13 JUNE 2018

News Corp Australia and Fairfax Media appreciates the opportunity to make a submission to the Tasmanian *Electoral Act 2004* Review (the Review).

As you know News Corp Australia publishes the *Mercury* and Fairfax Media publishes *The Examiner*. Both corporately and editorially we are actively engaged in the important issue of freedom of the media and the role that public interest reporting plays in society.

Section 198 of the *Electoral Act 2004 (Tas)* – specifically section 198(1)(b)(ii) – restricts newspapers, and their online presence, reporting on election issues and candidates on polling day. Section 198 states:

198. Campaigning on polling day

- (1) A person must not, on the polling day fixed for an election, or on a day to which the polling for an election has been adjourned –
 - (a) distribute any advertisement, "how to vote" card, handbill, pamphlet, poster or notice containing any electoral matter; or
 - (b) publish or cause to be published in a newspaper –
 - (i) an advertisement for or on behalf of, or relating in any way to, a candidate or party; or
 - (ii) a matter or comment relating to a candidate or a question arising from, or an issue of, the election campaign.

Penalty: Fine not exceeding 100 penalty units or imprisonment for a term of 3 months, or both.

- (2) [Subsection \(1\)](#) does not apply to any matter printed, published or distributed by the Commission or the Commissioner in the course of promoting public awareness of elections and parliamentary matters.

The Terms of Reference for the Review incorrectly describes the legislative restriction as preventing campaigning and commentary pieces in newspapers on Election Day. Subsection (b)(ii) goes beyond that and prevents all editorial content and images – not just commentary – on Election Day.

RECOMMENDATION

Such a provision is self-evidently anachronistic and particularly so in the modern media environment where newspapers – both in print and online – are restricted from publishing material (as above) but other media is not. We hold that newspapers must not be gagged on Election Day.

We recommend that section 198(1)(b)(ii) of the Electoral Act be removed.

Given the more 'administrative' nature of this recommendation we request that this amendment occur expeditiously – particularly so that restrictions are not in force on the 2019 Legislative Council Election Day.

WE UNEQUIVOCALLY RECOMMEND THAT SECTION 198(1)(b)(ii) BE REMOVED EXPEDITIOUSLY BECAUSE:

- Journalists are criminalised for doing their jobs throughout the course of Election Day including reporting election results
- The Tasmanian public are deprived of their right to know
- The reporting prohibition is anachronistic
- The prohibition is blatantly unfair as it penalises newspapers and not any other form of media – which is bad public policy
- Tasmania is an outlier – no other state or territory has such a prohibition
- The effect of the ban impacts news reporting every year
- Election coverage is not restricted on Federal and Local Government Election Days

Journalists are criminalised for doing their jobs throughout the course of Election Day including reporting election results

The provision means that journalists and newspapers are criminalised for doing their jobs on election day – informing the Tasmanian public what they have a right to know throughout the course of the day including results and outcomes.

The provision applies to print newspapers, the digital version of such and also the websites and other online presences (for example, Facebook pages).

The Tasmanian public are deprived of their right to know

Of significant concern, the reporting prohibition impacts on democracy and the right of the Tasmanian voters and public to be fully informed before they cast their ballot.

On the day before polling day this year, it emerged that the Liberal Party had an unreleased policy to increase the availability of some high-powered guns for Tasmanian farmers. The restriction meant readers of the *Mercury* were simply not told of this late-breaking story with direct relevance to their vote.

It is here that I note the comments (reported in the *Mercury* on March 5, 2018) of Upper House member for Hobart Rob Valentine:

“It may have been an opportunity for the press to concentrate on that last minute (Liberal) policy that came through on gun control. The community deserved to be further illuminated on that.”

We also note comments made by Tasmania’s first electoral commissioner Bruce Taylor (in the *Mercury*, March 5, 2018):

“The media has changed dramatically since the Act first came into play. It’s certainly something that probably should be revisited. But it’s up to the politicians.”

The *Mercury* ran a front-page apology ad run on Election Day 2018 to draw national attention to this restriction placed only on newspapers in this state. That story said the reporting prohibition denies Tasmanians the right to know what we know. And that is undemocratic. On that basis alone the provision must be removed immediately.

The reporting prohibition is anachronistic

The prohibition is anachronistic and not fit-for-purpose for any media company operating in the digital publishing environment in 2018 and beyond. This is further exacerbated when it is a single platform – newspapers and their online presence including social media – to which the law applies.

There are no such limitations on television or radio — or indeed any anybody else, with everybody other than “newspapers” free to publish whatever they like today on any platform. That means that there is also no restriction on commentary on social media, on which – of course – far more outrageous claims can be made that can then be easily shared with voters before they cast a ballot.

It is impossible find any basis for the retention of this prohibition – nor any reason for its original inclusion.

The definition of “newspaper” and associated issues

Further, the *Electoral Act 2004* itself contains no definition of “newspaper”.

A definition of “newspaper” was previously found in Section 46 of the *Acts Interpretation Act 1931*. Its “Definitions of certain common phrases” provides as follows:

In any Act –

...

newspaper shall mean a newspaper as defined by the *Printers and Newspapers Act 1911*.

The *Printers and Newspapers Act 1911* defined “newspapers” as:

... every paper or pamphlet (other than those hereinafter excepted) containing any public news, intelligence, or occurrence, or any remarks of observations thereon or on any political matter, and published for sale periodically, or in parts or numbers at intervals not exceeding thirty-one days between the publication of any two such papers or pamphlets or parts or numbers, at a price of sixpence or any less amount; but does not include any document published in the course of his duty by the Government Printer or any document containing only matter wholly of a commercial nature. [our emphasis]

However, the *Printers and Newspapers Act 1911* was repealed by the *Legislation Repeal Act 1998*. To our knowledge there is no other legislation which substitutes a definition of “newspaper” for the purposes of the *Electoral Act 2004*.

Therefore, absent any definition of “newspaper” in any legislation currently, any Court dealing with a matter under section 198 of the *Electoral Act 2004* would have to resort to a dictionary meaning of that word. The *Macquarie Dictionary* (3rd edition) defines “newspaper” as:

1. A printed publication issued at regular intervals, usually daily or weekly, and commonly containing news, comment, features and advertisements.
2. The organisation publishing a newspaper.

Part two of that definition suggests the term “newspaper” could apply to the publisher rather than just the printed copy publication itself. That means that without any legislated definition of a “newspaper”, the restriction applies to our website and digital platforms as well – meaning newspaper publishers are the only people in Tasmania restricted from publishing anything relating to an issue or candidate on Election Day, on any digital platform.

We note here the comments made by Independent Legislative Councillor Rosemary Armitage (as published in the *Mercury* March 5, 2018) that a level playing field needed to be established:

“Whatever you have, it’s got to be consistent and there shouldn’t be one rule for one and another rule for others. If other media can do it then it’s only fair the print media can do it as well. Particularly with the onslaught of social media with very few restrictions, it’s only fair it should be a rule for all.”

The reporting prohibition is blatantly unfair as it penalises newspapers and not any other form of media – which is bad public policy

The application of the law to newspapers only, and not to other media and platforms is not competitively neutral – quite the opposite in fact – and is bad public policy. We refer again to the comments made by Independent Legislative Councillor Rosemary Armitage (as published in the Mercury March 5, 2018 that a level playing field needed to be established (as set out above).

Tasmania is an outlier – no other state or territory has such a prohibition

Tasmania is the only jurisdiction in Australia to prohibit newspaper reporting in this way – let alone as apply a prohibition in such an unfair manner.

We must be clear: it would be untenable for any consideration to be given to extending the prohibition to other media platforms. The only reasonable response is to remove the existing provision.

We also note that the provision is actively enforced. The *Mercury* was fined \$500 in 2012 for publishing a third party advertisement on polling day, and in 2006 the *The Advocate* was fined \$5000 for publishing a picture of a candidate.

The effect of the ban impacts news reporting every year

Tasmania holds Legislative Council elections on the first Saturday in May every year. Therefore the impact of the prohibition is felt each and every year on Election Day.

For these reason we urge the Government to immediately remove section 198(1)(b)(ii), and ensure this occurs before the 2019 Legislative Council Election Day.

Election coverage is not restricted on Federal and Local Government Election Days

Lastly we note that the restrictions on reporting on Election Day for Tasmanian State Government elections is out of step with Federal and Tasmanian Local Government election days where there are no restrictions on reporting.