

23 August 2024

The Hon. Meg Webb MLC

Committee Chair;
Joint Standing Committee on Electoral Matters;
Parliament House;
HOBART TAS

By email: electoralmatters@parliament.tas.gov.au

Dear Ms Webb,

RE: CONDUCT OF 23 MARCH 2024 TASMANIAN ELECTION

Thank you for the opportunity to provide information in relation to the Committee's inquiry. I note that I have been invited to provide the Committee with any information I deemed to be relevant to the Committee's inquiry.

The "conduct" of an election is a broad concept. At one level, it includes how the TEC manages the publicity, papers, counting and results. At another level, it includes voter turnout and the level of informal voting. At a broader level, the concept of the "conduct" of an election also includes the manner of the exchange of information about policies that particular candidates or parties bring to the attention of voters. This can also embrace what a candidate or political leader fails to tell the electorate. As a consequence, an examination of the conduct of an election involves an examination of the conduct of the candidates and parties contesting the election. This is not a novel proposition. The Electoral Matters Committee of the Victorian Parliament in its Inquiry into The Conduct of the 2022 Victorian State election¹ examined not only the public statements of candidates, but also their behaviour in some instances.

In a paper published by the University of Melbourne Law School entitled *The Challenge of Informed Voting in the 21st Century*², the authors note that joint standing committees in the different jurisdictions around Australia are now more common and that the committees are considering the role that informed voting does, or should, play in the Australian electoral process. The authors note "Generally, the submissions to the committees and the committees themselves take the intrinsic value of the informed voter as given". They cite a reference in the Commonwealth Joint Standing Committee on Electoral Matters Inquiry into Civics and Electoral Education which observes that a "healthy democracy needs citizens who are

¹ <https://www.parliament.vic.gov.au/get-involved/inquiries/2022-victorian-state-election/reports>

² A Research Report Commissioned by the Electoral Regulation Research Network April 2015 found at: <https://law.unimelb.edu.au/centres/errn/research/the-electoral-regulation-research-network-and-democratic-audit-of-australia-working-paper-series> University of Melbourne Law School.

informed, appreciate and participate in the various elements of our representative democracy”.

Clearly, the concept of “informing” a voter implies that the information conveyed to that voter is accurate and not misleading.

The approach of the High Court of Australia

The High Court has touched on this area, approaching it through the prism of the Commonwealth Constitution’s implied freedom of communication on government and political matters.

There are a series of decisions of the High Court that have validated the importance of an informed electorate when it comes to casting a vote at an election. Many of these considerations are identified in an article in the *Sydney Law Review* by Kieran Pender published in 2022³.

A single extract will suffice to make the point, taken from one of the earliest decisions on the implied freedom, *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45; (1992) 177 CLR 106 where Chief Justice Mason said:

*[38] Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives. By these means the elected representatives are equipped to discharge their role so that they may take account of and respond to the will of the people. Communication in the exercise of the freedom is by no means a one-way traffic, **for the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgments on relevant matters.** Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative. [emphasis added].*

It is not for the High Court to impose a requirement for either the provision of information or for the quality of that information. The role of the High Court in this area is confined to invalidating laws that conflict with the implied freedom because they impose a burden on the communication, where that burden is not justified.

³ “Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations” [2022] SydLawRw 1

But the Court’s acknowledgement of the importance of the free-flow of information on government and political matters is critical. It sets a standard, the attainment of which can only promote trust and integrity in our system of representative government.

South Australia and the ACT have legislated to prohibit false and misleading advertising. Such legislation is being considered in other jurisdictions, including federally. It has numerous identified benefits, but those prohibitions are not the subject matter of this submission.

The issue raised in this submission is the “conduct” of candidates at the March 2024 election, and the information they conveyed – or did not convey – in the course of the 2024 election.

For some 50 years, corporations have been prohibited from misleading and deceptive advertising, including deception by omission⁴. It is often asked why politicians don’t face such a prohibition when it is a baseline for standards of conduct in business. That question has never been satisfactorily answered.

This submission is not concerned, however, with misleading and deceptive advertising. This submission is concerned with circumstances where a candidate for election deceives or misleads by omission. That is what happened in the March 2024 election. This submission focuses on that conduct.

(1) The government’s deception by omission – the GST component of the stadium funding

The history and context to this deception has been comprehensively assembled by Richard Flanagan in his submission to the Public Accounts Committee, given on 21 June 2024⁵. The picture gleaned from that paper, supplemented as necessary, is as follows:

- On 29 April 2023 the Prime Minister joined with the Tasmanian Premier to announce \$240m of federal funds for the Macquarie Point Urban Renewal Project⁶.
- Through April and May 2023 the calculations for the funding for the proposed Macquarie Point stadium were based on this contribution of \$240 million from the Federal Government⁷. Only a week later, however, it became clear the federal funds were not extra funds at all; they were part of the GST funding for Tasmania. Apparently, nobody in the Tasmanian government appreciated the monumental blunder they were now making. About 30% of the total stadium funding was, in fact, an illusion. In the Premier’s rush to sign the AFL agreement⁸, he overlooked that the \$240m was not a

⁴ Originally, constrained by the *Trade Practices Act 1974*, and more recently by the *Competition and Consumer Act 2010*

⁵ https://www.parliament.tas.gov.au/__data/assets/pdf_file/0024/83175/Evidence-to-Public-Accounts-Committee-Richard-Flanagan-21-June-2024.pdf

⁶ <https://www.theage.com.au/sport/afl/albanese-formally-unveils-240-million-in-federal-funds-for-hobart-stadium-20230429-p5d47q.html>

⁷ See for example, the Club Funding and Development Agreement dated 3 May 2023, page 30.

⁸ Club Funding and Development Agreement dated 3 May 2023.

separate grant to Tasmania at all, but rather an advance on its GST allocation as is long established federal government practice. Although the Department of State Growth (DSG) had obtained legal advice from an external legal advisor, which advice had been reviewed by the Crown Solicitor⁹, each of the DSG, the external legal advisor and the Crown Solicitor presumably overlooked the GST as well, which is surprising since their brief was to examine “the high-level risks associated with the transaction”¹⁰. It is now clear the Premier sought no advice himself or through DPAC prior to entering into the agreement¹¹ about the effects and legal consequences of entering into the agreement.

- In the rush to sign the agreement, the Premier must have been duped by the AFL’s publicity machine: in its media statement on 3rd May 2023¹², released at the time the AFL agreement was signed, the AFL CEO said: “..... This morning the AFL signed binding commitments with the Tasmanian Government including partnering with the Federal Government for the construction of a 23,000-seat roofed stadium at Macquarie Point.” Of course, this was completely wrong; there was no “partnering with the Federal Government” at all. Nothing was signed with the Commonwealth, and nothing was due to be signed for at least 12 months¹³. There was no partnership. And there was no \$240m from the Federal government; there was just \$240m of GST revenue already destined for Tasmanian general revenue that now became earmarked for the purpose of Macquarie Point Redevelopment (rather than for the stadium as asserted by the Rockliff Government¹⁴).
- Soon after the Agreement was signed, questions were asked by the ALP in parliament on 9 May 2023 about whether the Federal Government was contributing \$240 million or simply agreeing that \$240 million of money already destined for Tasmania, from its GST allocation, could be directed towards the proposed stadium. The Premier obfuscated; he refused to answer the question¹⁵.
- In an apparent acknowledgement that the government had realised the massive blunder it had made, on 9 May 2023 the State Treasurer wrote belatedly to his federal counterpart asking for a GST exemption for the \$240m.
- In September 2023 the Prime Minister rejected any exemption of federal funds from the GST allocation.

⁹ Minute to Premier 3 May 2023 re Establishment of a Tasmanian AFL Club.

¹⁰ See page 2 of Minute.

¹¹ RTI response from DPAC delegate dated 7 June 2024

¹² <https://www.afl.com.au/news/917878/full-statement-tasmania-awarded-19th-afl-licence>

¹³ Part B Club Funding and Development Agreement; See also the Macquarie Point Urban Redevelopment Federation Funding Agreement – Infrastructure 17 May 2024.

¹⁴ By 20 May 2024 Infrastructure Minister Nick Duigan admitted the Commonwealth funding was for the entire precinct, and not for the stadium: <https://tasmaniantimes.com/2024/05/our-place-commonwealth-funding-agreement-is-disaster-for-stadium/>

¹⁵ Hansard House of Assembly 9 May 2023 pp 19 – 22.

- On 22 September 2023 Treasurer Ferguson said he still expected the Macquarie Point stadium project to be exempted from GST calculations, despite the Prime Minister rejecting any exemption. He never explained why he held out that expectation.
- On 5 October 2023 the Prime Minister reiterated on ABC radio there would be no exemption.
- On 13 December 2023 the Federal Treasury wrote to the Tasmanian Treasury reiterating the position that the \$240m was not exempt from the GST.
- Correspondence ensued between the State's Treasurer and the Federal Treasury. At all steps along the way, it was clear that Federal money was not additional to the State's existing revenue, but was already a part of revenue intended to be spent by the State as part of its GST allocation.
- On 13 February 2024 the State Treasurer again wrote to his federal counterpart, this time asking the decision be reviewed. This letter was disingenuous; the decision was not going to be reversed. The Treasurer was simply deferring the making of the public admission that the state had made a massive blunder, and was \$240m short in its funding for the stadium.
- On 14 February 2024, during Senate estimates, Ms. Sam Reinhardt — from the Commonwealth Treasury — again suggested that Macquarie Point funding would not be exempt. She noted that once one sporting infrastructure project was exempted, the states would all expect exemptions¹⁶.
- The Tasmanian election was announced that day, 14 February 2024, at which time it was crystal clear there was no exemption in place, and there would not be an exemption.

At all stages, the State Government either denied the position with the GST, or refused to answer it.

Tasmania held an election campaign for a month and then went to an election on 23 March 2024 with the Government failing to reveal the true position with respect to the GST allocation.

This was in the context where the early election was called because of the impact of the stadium of the Government's numbers in Parliament. It was an election called because of the stadium issue and its massive cost, and dominated by the proposed stadium. This is

¹⁶ <https://www.abc.net.au/news/2024-05-24/hobart-stadium-will-not-be-exempt-from-gst-payments-to-tasmania/103887734>

exemplified by the announcement by the Premier on day one of the election campaign that the State Government was going to cap its expenditure on the stadium. This was offered in an attempt to cauterise the issue within the electorate, as it was clearly having a significant impact.

It was not until 8 weeks after the election - on 23 May 2024 - that the State Treasurer finally made the admission that there was to be no GST exemption. He tabled correspondence in the parliament making clear what had been widely understood, but which remained unacknowledged through the State's election campaign: there was to be no exemption.

And because the Treasurer and the Premier had known the position since at least September 2023, and which position was undeniable by the day the election was called (14 February 2024) the failure to acknowledge the position (and the \$240m shortfall in stadium funding) in an election called over, amongst other things, the cost of the stadium, was a significant deception of the electorate.

(2) The deception about a cap on stadium funding

It cannot be a good start to an election campaign for the Premier of the State to make an announcement, on day one, that was a deception.

But that's what Premier Rockliff did. The Premier announced that the State was going to cap its expenditure on the Macquarie Point stadium at \$375 million¹⁷.

Why is that a deception?

It is a deception because, as the Premier knew, the Tasmanian Government's contract with the AFL¹⁸ contains these clauses:

- Clause 21.2(a), which locks the State in to pay \$460m towards the stadium construction¹⁹ as below, as explained by the cover page to the agreement.

Clause 21.2(a): Funding Commitments

The Tasmanian Government funding commitment to the Stadium Development is denoted as \$460 million. This amount includes the Tasmanian Government commitment of \$375 million and a further \$85 million to be procured through borrowings against land sale or lease for commercial uses.

¹⁷ <https://www.skynews.com.au/australia-news/politics/tasmanian-premier-jeremy-rockliff-pledges-to-cap-states-contribution-to-715-million-macquarie-point-stadium-at-375-million/news-story/1c2c1259b666306212c4400d8747dbd0>

¹⁸ Club Funding and Development Agreement 3 May 2023

¹⁹ This is comprised of \$375m from the state as direct funds, and \$85m from asset sales.

- Clause 21.4 which stipulates Tasmania is responsible for all cost overruns beyond the Estimated Stadium Build Cost (which was put at \$715m²⁰), as below:

21.1 Estimated build cost

The parties acknowledge that as at the date of this agreement that the total construction costs for the Stadium (including site costs e.g. remediation, demolition, piling, foundation, any minor road relocation, plaza civil works and infrastructure services costs) are currently estimated to be approximately \$715 million (**Estimated Stadium Build Cost**).

21.4 Overall funding responsibility

Subject to clause 19.2 (Construction Commitments), and provided that the conditions of all components of the funding commitments referred to in clause 21.2 (Funding commitments) are met, the Tasmanian Government agrees that it is solely responsible for the costs to develop and construct the Stadium, including any costs which exceed the Estimated Stadium Build Cost.

The State could never limit its contribution to \$375m when it promised the AFL it would pay \$460m, and promised to wear all the cost overruns.

The likely cost overruns were acknowledged in the State's Budget papers in August 2023, where it was said²¹ under the heading "Expenditure Risks":

As a large infrastructure project, and with the scope of the project yet to be fully defined, the project may be subject to the same ongoing supply constraints and cost escalations that other major projects across both the public and private sectors are experiencing as a result of high levels of activity in the Tasmanian construction sector.

This is utterly unsurprising, given that construction costs were increasing rapidly at that time. And by the time of the Premier's announcement on 14 February 2024 of the claimed cap on stadium expenditure, he was aware of the likely cost escalation predicted by the Treasury in the budget papers.

If the State Government was truly going to cap the costs of the stadium, it could only deliver that promise by abandoning the project. If the project is to continue, the costs will overrun significantly and will go beyond the so-called cap of \$375m, which is an illusion given the State signed up to pay \$460m (in cash and as funds from asset sales) and, further, is responsible for the inevitable cost overruns. And of course, a public private partnership is no answer here: no equity firm will take on the risks of the cost overruns without demanding a higher return. And this will make the State's position even more tenuous.

Conclusion

This Committee is looking at the "conduct" of the election. The conduct of the Premier and the Treasurer in the course of the 2024 election in misleading and deceiving the electorate

²⁰ Clause 21.1

²¹ Budget paper No 1, page 19

are reprehensible. The acts of deception by the Premier and concealing of the truth by the Treasurer (and Premier) amount to conduct that should be deprecated by this Committee.

What can be done?

Lies told by politicians are very different to changes in policy. This submission is not concerned with changes in policy. This submission is concerned with politicians who had information and either did not share it with the electorate in the course of an election campaign, or made statements that they knew were false. The remedies for misleading and deceptive advertising are not appropriate yardsticks for a solution for politicians who mislead and deceive either directly or by omission.

The only solution is for that conduct to be identified and for the politicians who engage in that conduct to be made to own those mistruths. That can only be done by a body such as this Committee, that looks into these instances of misconduct and makes findings.

The conduct of an election is a matter of enormous importance. It is exquisitely important that an election is conducted with the highest standards of integrity and as free a flow of information – accurate information – as possible. Those standards were not reached by the Premier and Treasurer in relation to the Macquarie Point stadium in the 2024 Tasmanian election campaign.

This Committee stands as the most appropriate opportunity – and perhaps the only opportunity - for accountability for this conduct and to enforce better standards of integrity by the state's political leaders in the conduct of election campaigns.

Yours faithfully,

A large black rectangular box redacting the signature of Roland Browne.

Roland Browne