

Inaccurate and Misleading electoral advertising

On 1 July 2021, the Electoral Act 1992 was amended by the Electoral Amendment Act 2020 to establish a new offence for inaccurate and misleading electoral advertising.

Under section 297A of the Electoral Act a person commits an offence if:

- the person disseminates, or authorises for dissemination of, an advertisement containing electoral matter; and
- the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.

The maximum penalty for a breach of this law is 50 penalty units.

Who can make a complaint?

A complaint may be made by any person or organisation to the ACT Electoral Commission. The complaint must be made in writing.

What should be included in a complaint?

To commence a formal assessment process, the Commission will require a complaint to identify the element of the advertisement that is being disputed as inaccurate and misleading and will require detailed evidence in support of this claim.

What does the Electoral Commission do when it receives a complaint?

When the Commission receives a complaint that an advertisement is inaccurate and misleading it will commence a formal assessment process against specific criteria.

To substantiate a complaint, the allegation must meet the following criteria:

- The advertisement must contain electoral matter (see definition of electoral matter below); and
- The advertisement must contain a statement purporting to be a fact. The Electoral Commission cannot apply the law regarding inaccurate and misleading electoral advertising against statements of opinion; and
- The relevant statement must be inaccurate and misleading to a material extent.

The Commissioner may then undertake investigations in order to corroborate the supporting evidence supplied. For instance, it may be necessary for the Electoral Commission to seek further information from either or both of the complainant and the alleged offender. This process may require multiple engagements to clarify that matters under review.

Additionally, it may be necessary, especially in more complex cases, for the Commissioner to seek external advice to enable the Commissioner to form a view on whether or not an advertisement is misleading and untrue to a material extent.

It must be appreciated that in order to ensure due process, the Commissioner's assessment may take some time, including during and through an election period.

What happens when the Commissioner does not find in favour of the complaint?

If, after completing the formal assessment, the Commissioner does not find that the electoral advertising contains a statement purporting to be fact that is inaccurate and misleading to a material extent, the Commissioner will write to both the complainant and the publisher of the electoral advertising advising of the outcome of the assessment. No further action will be taken in relation to the complaint.

What happens when the Commissioner finds evidence of inaccurate and misleading electoral advertising?

If the Electoral Commissioner finds that a piece of electoral advertising includes a statement purporting to be a fact which is inaccurate and misleading to a material extent, remedial action by the person responsible for the advertising, will be required.

The Commissioner may formally write to the person asking them to do one or more of the following:

- not disseminate the advertisement again; and/or
- publish a retraction in stated terms and in a stated way.

As part of a request for a retraction, the Commissioner may explicitly state the manner and form that the retraction should take. For example, if a person publishes a misleading advertisement in a newspaper, the Commissioner may request a retraction be published in the same newspaper.

It is also within the Commissioner's discretion to apply directly to the Supreme Court for an order obliging the person to cease disseminating the advertisement further and/or publish a retraction.

The Commissioner also has the discretion to refer the matter to the Director of Public Prosecutions for possible criminal prosecution.

The above enforcement activities may be utilised by the Commissioner in combination or in isolation.

What happens if a person refuses to comply with the Electoral Commissioner's request to cease disseminating the advertisement or to publish a retraction?

If having requested a withdrawal and/or retraction, a person refuses to comply, the Electoral Act provides the authority for the Electoral Commissioner to apply to the Supreme Court for an order obliging the person not to disseminate the advertisement again and/or to publish a retraction.

If a person is found guilty by the court of a misleading electoral advertising offence, the court must take the person's response to any request for remedial action made by the Electoral Commissioner into account when deciding upon the penalty to be applied.

Definition of electoral matter

Electoral matter is matter, in printed or electronic form, that is intended or likely to affect voting at an election. It is taken to be intended or likely to affect voting at an election if it contains an express or implicit reference to, or comment on:

- The election; or
- The performance of the Government, the Opposition, a previous Government or a previous Opposition of the ACT Legislative Assembly; or
- The performance of an MLA or former MLA; or
- The performance of a political party, candidate or a group of candidates in an election; or
- An issue submitted to, or otherwise before, the electors in relation to the election.