

LAWS, LIES AND ELECTIONS: DESIGNING A FRAMEWORK FOR TRUTH IN POLITICAL ADVERTISING LAWS

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In recent times, there has been significant concern about disinformation being peddled by political parties to influence electoral outcomes in their favour. The spread of disinformation in an electoral campaign undermines the public’s ability to make informed choices in casting their vote and is detrimental to electoral integrity and democratic processes. One mechanism for regulating disinformation is to introduce ‘truth in political advertising’ laws that prohibit false and misleading political ads. The main goal of truth in political advertising laws is to protect the integrity of the electoral process by curtailing the potential manipulation of voters. This article will articulate a recommended design framework for truth in political advertising laws towards ensuring their effective operation and enforcement within the constitutional boundaries of the implied freedom of political communication.

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I INTRODUCTION

In recent times, there has been significant concern about disinformation or untruths being peddled by political parties to influence electoral outcomes in their favour. A salutary example is the campaign of disinformation from President Trump, who falsely claimed that the 2020 United States (‘US’) presidential election had been ‘stolen’.¹ This led to Trump’s supporters storming the US Capitol

¹ Claire Seungeun Lee et al, ‘Storm the Capitol: Linking Offline Political Speech and Online Twitter Extra-Representational Participation on QAnon and the January 6 Insurrection’ (2022) 7 *Frontiers in Sociology* 876070:1–16, 2.

Building on 6 January 2021, resulting in multiple deaths.² In Australia, both major political parties have accused each other of disinformation, such as the ‘Mediscare’ campaign by the Australian Labor Party (‘ALP’) in the 2016 federal election and the ‘death tax’ campaign by the Liberal–National Coalition in the 2019 federal election.³ Although disinformation has increased in saliency in recent times, turbocharged by social media, it is worth noting that concerns about untruths in elections have reverberated over many decades, perhaps even as early as the early 1900s. This concern potentially formed the impetus for the introduction of reforms against anonymous electioneering in 1911.⁴

The spread of disinformation in an electoral campaign undermines the public’s ability to make informed choices in casting their vote and is detrimental to electoral integrity and democratic processes. In both 2024 and 2025, the World Economic Forum’s annual *The Global Risks Report* ranked misinformation and disinformation as the most severe risk facing the world over the next two years.⁵

² See *ibid* 1. The exact number of deaths is contested: see, eg, Kenya Evelyn, ‘Capitol Attack: The Five People Who Died’, *The Guardian* (online, 9 January 2021) <<https://www.theguardian.com/us-news/2021/jan/08/capitol-attack-police-officer-five-deaths>>, archived at <<https://perma.cc/93TQ-H92F>>; United States Senate Committee on Homeland Security and Governmental Affairs and Senate Committee on Rules and Administration, *A Review of the Security, Planning, and Response Failures on January 6* (Staff Report) 1 <https://www.hsgac.senate.gov/imo/media/doc/HSGAC&RulesFullReport_ExaminingU.S.CapitolAttack.pdf>, archived at <<https://perma.cc/MK5U-5BX>>.

³ See Kieran Pender, ‘Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations’ (2022) 44(1) *Sydney Law Review* 1, 3.

⁴ See *Commonwealth Electoral Act 1911* (Cth) s 37, inserting *Commonwealth Electoral Act 1902* (Cth) s 181AA. See also *Smith v Oldham* (1912) 15 CLR 355, 358–9 (Griffith CJ), 362–3 (Isaacs J); Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2nd ed, 2019) 156–9 (‘*Law of Politics*’).

⁵ World Economic Forum, *The Global Risks Report 2024: 19th Edition* (Insight Report, January 2024) 14 <https://www3.weforum.org/docs/WEF_The_Global_Risks_Report_2024.pdf>, archived at <<https://perma.cc/U6NT-JFRQ>>; Mark Elsner, Grace Atkinson and Saadia Zahidi, *The Global Risks Report 2025: 20th Edition* (Insight Report, January 2025) 8 <https://reports.weforum.org/docs/WEF_Global_Risks_Report_2025.pdf>, archived at <<https://perma.cc/28VL-LFYY>>.

One mechanism for regulating disinformation is to introduce ‘truth in political advertising’ (‘TiPA’) laws. By targeting or prohibiting disinformation in elections, the main goal of TiPA laws is ‘to protect the integrity of the electoral process: most importantly, to curtail the potential manipulation of voters at the individual level and to prevent the campaign debate being skewed in irrelevant directions’.⁶

TiPA laws are unique to Australia and tend to go further than other comparable liberal democracies in regulating disinformation by prohibiting misleading political advertising. Other liberal democracies have proposed broader mechanisms for upholding transparency⁷ or targeted a subset of political advertising (for example, through the prohibition of deepfakes).⁸ At present, TiPA laws only exist in South Australia (‘SA’)⁹ and the Australian Capital Territory (‘ACT’).¹⁰

⁶ Jacob Rowbottom, ‘Lies, Manipulation and Elections: Controlling False Campaign Statements’ (2012) 32(3) *Oxford Journal of Legal Studies* 507, 519.

⁷ See, eg, AI Transparency in Elections Act of 2024, S 3875, 118th Congress, § 2 (2024).

⁸ See, eg, Protect Elections from Deceptive AI Act, S 2770, 118th Congress, § 2 (2023).

⁹ *Electoral Act 1985* (SA) s 113 (‘SA Electoral Act’).

¹⁰ *Electoral Act 1992* (ACT) s 297A (‘ACT Electoral Act’), as inserted by *Electoral Amendment Act 2020* (ACT) s 13 (‘ACT Electoral Amendment Act’).

The Commonwealth introduced a bill on truth in political advertising in the House of Representatives in November 2024,¹¹ although this did not pass due to a lack of support from the Opposition.¹² There have been discussions in Victoria,¹³ New South Wales ('NSW')¹⁴ and Queensland¹⁵ about introducing TiPA laws. Representative polling by The Australia Institute shows that 84 per cent of Australians support TiPA laws.¹⁶ The level of activity and interest in TiPA

¹¹ Electoral Legislation Amendment (Electoral Communications) Bill 2024 (Cth) ('Electoral Communications Bill').

¹² The Liberal–National Coalition opposed the Electoral Communications Bill (n 11), which was not brought to a vote and lapsed on the dissolution of the Commonwealth Parliament in March 2025: see Commonwealth, *Parliamentary Debates*, Senate, 21 November 2024, 5030 (James McGrath); 'Electoral Legislation Amendment (Electoral Communications) Bill 2024', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7279>, archived at <<https://perma.cc/KX9L-F4H5>>.

¹³ In 2021, a Victorian parliamentary committee recommended that the Victorian government introduce a form of truth in political advertising legislation: Electoral Matters Committee, Parliament of Victoria, *Inquiry into the Impact of Social Media on Elections and Electoral Administration* (Report, September 2021) 124 <<https://www.parliament.vic.gov.au/4a46fc/contentassets/67f7b03a91d842c788d639b8a1679a19/inquiry-into-the-impact-of-social-media-on-victorias-elections-and-victorias-electoral-administration-final-report.pdf>>, archived at <<https://perma.cc/H5YN-7L3B>> ('*Social Media and Elections Inquiry*'). See also at 113–23. The 2024 Electoral Matters Committee Report into the 2022 Victorian State election reaffirmed the previous recommendation that the Victorian government should introduce TiPA laws: Electoral Matters Committee, Parliament of Victoria, *The Conduct of the 2022 Victorian State Election* (Report, July 2024) vol 1, 48 <https://www.parliament.vic.gov.au/4a472f/contentassets/635f48542714461cb587013aad2ab765/emc-60-01_conduct-of-the-2022-vic-state-election_vol-1.pdf>, archived at <<https://perma.cc/NTN4-NELP>>.

¹⁴ In 2024, the NSW Joint Electoral Matters Committee concluded that TiPA laws would be difficult to implement (for example, due to limited scope, limited effectiveness, difficulties in regulating) and would not be effective: Joint Standing Committee on Electoral Matters, Parliament of New South Wales, *Administration of the 2023 NSW State Election and Other Matters* (Report, October 2024) 38–45 <<https://files.parliament.nsw.gov.au/fileapi/ParlFiles/GetArtifact?serverRelativeUrl=%2Flado cs%2Fenquiries%2F3024%2FAAdministration%20of%20the%202023%20NSW%20state%20election%20and%20other%20matters.pdf>>, archived at <<https://perma.cc/6ZT4-YMZD>> ('*NSW Election Report*').

¹⁵ During the 2024 Queensland State election campaign, the then Opposition Leader and now Premier David Crisafulli indicated that he would consider introducing TiPA laws: Madura McCormack and Taylah Fellows, 'LNP To Consider a War on Scare Campaigns and Flyer Fibs If Crisafulli Is Elected', *The Courier-Mail* (Brisbane, 18 November 2024) 4.

¹⁶ Bill Browne, 'We Can Handle the Truth: Opportunities for Truth in Political Advertising' (Discussion Paper, The Australia Institute, August 2019) 31 <<https://australiainstitute.org.au/wp->

laws in recent times indicates a need to analyse more closely the purpose, scope, design and enforcement of these laws.

This article will articulate a recommended design framework for TiPA laws towards ensuring their effective operation and enforcement within the constitutional boundaries of the implied freedom of political communication. Towards this aim, the article will first examine the regulation of truth in political advertising in Australia (Part II). Building on Part II, Part III will analyse the design choices for TiPA laws. Finally, the article will make recommendations for a design framework for TiPA laws by reference to their rationale and considering any unintended consequences (Part IV). The recommendations in this article are underpinned by empirical data from the author's 34 interviews with various stakeholders involved in TiPA laws, such as current and former Premiers, Ministers, Members of Parliament, electoral commissioners, political party directors and secretaries and civil society groups.¹⁷

II THE REGULATION OF TRUTH IN POLITICAL ADVERTISING IN AUSTRALIA

At present, TiPA laws only exist in SA and the ACT.¹⁸ The Commonwealth previously had a TiPA law in 1984, but this was repealed soon after its enactment.¹⁹ In November 2024, the Commonwealth government introduced a TiPA bill in Parliament (the Electoral Legislation Amendment (Electoral Communications) Bill 2024 (Cth) ('Electoral Communications Bill')), but this failed to pass without the support of the Opposition.²⁰ The key features of these laws are outlined below.

content/uploads/2020/12/P751-We-can-handle-the-truth-Web_0.pdf>, archived at <<https://perma.cc/TXC2-4Q57>>.

¹⁷ See generally Yee-Fui Ng, *Truth in Political Advertising Laws: Design, Operation, Effectiveness and Recommendations for Reform* (Final Report, 2024) <https://aap.storyblok.com/f/3001038/x/03c58f3bb6/d_truth-in-political-advertising-laws-operation-and-effectiveness_final-report.pdf>, archived at <<https://perma.cc/CT2R-VPXW>>.

¹⁸ See *ACT Electoral Act* (n 10) s 297A; *SA Electoral Act* (n 9) s 113.

¹⁹ Sarah Miskin and Richard Grant, 'Political Advertising in Australia' (Research Brief No 5, Parliamentary Library, Parliament of Australia, 29 November 2004) 7–9 <https://www.elections.act.gov.au/__data/assets/pdf_file/0006/1830885/7.-ECSA-Political-advertising-in-Australia-Research-Brief-Parliamentary-Lib.pdf>, archived at <<https://perma.cc/JJB8-RZFK>>.

²⁰ See above nn 11–12 and accompanying text. In Tasmania, a Greens private member's bill was introduced in 2024 that incorporated TiPA provisions, but this did not pass as it lacked the

A South Australia

In SA, s 113(2) of the *Electoral Act 1985* (SA) ('SA *Electoral Act*') provides that the offence of misleading advertising applies to a person who 'authorises, causes, or permits the publication of an electoral advertisement' which contains 'a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent'. The penalty is a fine of \$5,000 for a natural person and \$25,000 for a body corporate.²¹

The SA *Electoral Act* provides that it is a defence to prove that the defendant took no part in determining the content of the advertisement and could not reasonably be expected to have known that the statement was inaccurate and misleading.²²

B Australian Capital Territory

Similar wording is used in s 297A(1) of the *Electoral Act 1992* (ACT) ('ACT *Electoral Act*'), which provides that it is an offence if a person 'disseminates, or authorises the 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'. Section 297A was introduced in 2021 following the passage of the *Electoral Amendment Act 2020* (ACT).²³

Like the SA *Electoral Act*, the ACT *Electoral Act* provides that it is a defence to prove that the defendant 'took no part in deciding the content of the advertisement', and 'could not reasonably be expected to have known that the statement was inaccurate and misleading'.²⁴

support of the major parties: see Electoral Disclosure and Funding Amendment Bill 2024 (Tas) cl 16. See generally House of Assembly Standing Committee on Government Administration B, Parliament of Tasmania, *Inquiry into the Electoral Disclosure and Funding Amendment Bill 2024 (No 9)* (Report, 17 September 2024) 46–53 <https://www.parliament.tas.gov.au/__data/assets/pdf_file/0023/85055/Final-Version-for-Website-Report-Inquiry-into-the-Electoral-Disclosure-and-Funding-Amendment-Bill-2024.pdf>, archived at <<https://perma.cc/ME7L-79V8>> ('Tas Disclosure Bill Inquiry').

²¹ SA *Electoral Act* (n 9) s 113(2).

²² Ibid s 113(3).

²³ ACT *Electoral Amendment Act* (n 10) ss 2, 13.

²⁴ ACT *Electoral Act* (n 10) s 297A(2).

C Commonwealth

In 1984, the Commonwealth Parliament inserted s 329(2) into the *Commonwealth Electoral Act 1918* (Cth), ‘under which it was an offence to print, publish, distribute or broadcast an electoral advertisement containing a statement that was untrue or was, or likely to be, misleading or deceptive’.²⁵ The Joint Committee on Electoral Reform called for the repeal of s 329(2) in August 1984,²⁶ based on concerns about legislative interference; the distinction between facts, predictions and opinions; the impact of the law on publishers; and the misuse of interim injunctions.²⁷ Following that call, s 329(2) was repealed in October 1984, eight months after its assent.²⁸

In 2021, independent MP Zali Steggall tabled a private member’s bill on TiPA in the Parliament: the Commonwealth Electoral Amendment (Stop the Lies) Bill 2021 (Cth).²⁹ This Bill was modelled on the South Australian legislation with the addition of ‘modernising’ clauses, but it did not pass Parliament.³⁰

The Commonwealth Parliament’s Joint Standing Committee on Electoral Matters’ *Conduct of the 2022 Federal Election and Other Matters* interim report recommended that the Commonwealth government develop legislation to implement truth in political advertising reforms, with consideration given to the South Australian laws.³¹

In November 2024, the Commonwealth government introduced the Electoral Communications Bill into Parliament that, if passed, would have set up a truth in political advertising regime at the federal level.

²⁵ Miskin and Grant (n 19) 7–8.

²⁶ Joint Select Committee on Electoral Reform, Parliament of Australia, *Second Report* (Report, August 1984) 27 [2.82] <https://aphref.aph.gov.au/house/committee/reports/1984/1984_pp198.pdf>, archived at <<https://perma.cc/6FJZ-4K5T>> (*Second Report*).

²⁷ Browne (n 16) 14.

²⁸ Miskin and Grant (n 19) 9.

²⁹ Lisa Hill, Max Douglass and Ravi Baltutis, *How and Why To Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022) 95. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 25 October 2021, 9898–900 (Zali Steggall).

³⁰ Hill, Douglass and Baltutis (n 29) 95.

³¹ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 106 [3.180] <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000012/toc_pdf/Conductofthe2022federalectionandothermatters.pdf>, archived at <<https://perma.cc/AM9G-LVPH>> (*2022 Federal Election Report*).

The Electoral Communications Bill would have established new civil penalty provisions to prohibit authorising certain electoral and referendum matter that is inaccurate and misleading to a material extent, including material that has been modified using technology such as deepfakes.³² Notably, it would have applied to referenda,³³ so it would have applied to the 2023 Indigenous Voice Referendum if it had been in place then.

The Electoral Communications Bill would have prohibited a person or entity from authorising certain electoral matter in written, visual and audio form which is inaccurate and misleading to a material extent.³⁴ It also would have required a person or entity who authorises electoral matter to disclose whether the content was ‘substantially or entirely created or modified using digital technology’ as part of the authorisation particulars, to be administered by the Australian Electoral Commission (‘AEC’).³⁵

In terms of enforcement of the TiPA provisions, the Electoral Communications Bill would have established an Electoral Communications Panel as an independent secondary statutory structure within the AEC.³⁶ The Electoral Communications Panel would have consisted of a Chair (a retired Federal Court judge) and at least three and not more than 14 other members.³⁷ The Chair and the other members would have been appointed by the Governor-General on the recommendation of the Minister.³⁸ A Decision Panel of at least three members would have been able to request that certain remedial action be

³² Electoral Communications Bill (n 11) sch 1 item 27, sch 2 item 23. These amendments inserted ss 321L–321MA into the *Commonwealth Electoral Act 1918* (Cth) (‘*Cth Electoral Act*’) and s 112D into the *Referendum (Machinery Provisions) Act 1984* (Cth) (‘*Referendum Machinery Act*’).

³³ Electoral Communications Bill (n 11) sch 1 item 27, inserting *Referendum Machinery Act* (n 32) s 112D.

³⁴ Electoral Communications Bill (n 11) sch 2 item 23, inserting *Cth Electoral Act* (n 32) ss 321L–321MA.

³⁵ See Electoral Communications Bill (n 11) sch 1 item 34.

³⁶ *Ibid* sch 1 item 27, inserting *Cth Electoral Act* (n 32) ss 321Q, 321QA(4).

³⁷ Electoral Communications Bill (n 11) sch 1 item 27, inserting *Cth Electoral Act* (n 32) ss 321QA(1), 321QB(2).

³⁸ Electoral Communications Bill (n 11) sch 1 item 27, inserting *Cth Electoral Act* (n 32) ss 321QB(1), 321QC(1).

taken or apply to the Federal Court for an injunction in relation to a possible contravention of the TiPA provisions.³⁹

As noted above, the Electoral Communications Bill was quietly shelved as it failed to gain Opposition support.⁴⁰

III DESIGN CHOICES FOR TRUTH IN POLITICAL ADVERTISING LAWS

There are two key design choices that can be made regarding TiPA laws.

- 1 **Scope:** The scope of the laws will dictate the types of disinformation regulated. While a narrow law may fail to combat the multifarious forms of disinformation, a broad scope may chill political debate or fall foul of the freedom of political communication implied by the *Australian Constitution*.⁴¹
- 2 **Enforcement:** The effectiveness of the laws depends on enforcement by the regulator (in SA and the ACT, this is the Electoral Commissioner).⁴² Due to the time sensitivity of an election, such enforcement needs to be timely and there needs to be compliance by political actors and media and social media outlets with the determinations of the regulator. It is also necessary to consider any further enforcement action by the regulator in the courts.⁴³ Further, as policing disinformation is time-consuming, the regulator needs adequate resourcing to be able to enforce these laws alongside running elections.

A Scope of Truth in Political Advertising Laws

The scope of a TiPA law is malleable. It can be altered by, for example, limiting the law to statements of fact (altering ‘the substance covered’) or limiting the law to advertising (altering ‘the form covered’).⁴⁴

³⁹ Electoral Communications Bill (n 11) sch 1 item 27, inserting *Cth Electoral Act* (n 32) ss 321QD(1)(c), 321RE–321RF.

⁴⁰ See above n 12 and accompanying text.

⁴¹ Pender (n 3) 1, 4, 23.

⁴² See *ACT Electoral Act* (n 10) ss 297A(3), (5), 325; *SA Electoral Act* (n 9) ss 8, 113(4)–(5).

⁴³ See, eg, *ACT Electoral Act* (n 10) s 297A(5); *SA Electoral Act* (n 9) s 113(5).

⁴⁴ Pender (n 3) 20.

The way that the scope is defined and drafted in TiPA laws has direct consequences for the effectiveness and constitutionality of the law. If its scope is drafted too broadly, the law ‘may punish statements that fall foul of the letter of the law, but which do not pose a threat of manipulation or distortion’.⁴⁵ While a broader law may be more effective, it will also result in a higher constitutional burden, making it more difficult for the law to pass constitutional scrutiny.⁴⁶

The tensions between effectiveness, protection of expression and constitutionality mean that a TiPA law might only have a limited scope but nevertheless be effective within the constraints of that scope. Alan Renwick and Michela Palese concluded that TiPA laws in SA and New Zealand (‘NZ’) involve ‘a trade-off: in order not to impinge upon free speech, such interventions can be applied only where the inaccuracy of information is unambiguous’.⁴⁷ The result of this trade-off is that TiPA laws may be able to ‘operate without undue difficulty’ but have ‘constrained’ benefits.⁴⁸

Based on case law, the scope of the *SA Electoral Act* and *ACT Electoral Act* can be confined by reference to:

- 1 substance (‘inaccurate and misleading’ statements of fact);
- 2 form (‘ads’);
- 3 temporality (whether the operation of the law is confined to election periods);
- 4 materiality (‘to a material extent’); and
- 5 the target of regulation (person who ‘authorises, causes or permits the publication of an electoral advertisement’).⁴⁹

⁴⁵ Rowbottom (n 6) 525. In the US, for example, Joshua Sellers suggests a relatively narrow set of circumstances where lies should be regulated (where foreign nationals seek to interfere in an election, where lies are intended to undermine election administration and where mandatory disclosure forms are intentionally falsified): Joshua S Sellers, ‘Legislating against Lying in Campaigns and Elections’ (2018) 71(1) *Oklahoma Law Review* 141, 154.

⁴⁶ Pender (n 3) 22.

⁴⁷ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (Report, March 2019) 20 <https://www.ucl.ac.uk/social-historical-sciences/sites/social_historical_sciences/files/184_-_doing_democracy_better.pdf>, archived at <<https://perma.cc/7CXQ-N73W>>.

⁴⁸ Ibid.

⁴⁹ See *ACT Electoral Act* (n 10) s 297A; *SA Electoral Act* (n 9) s 113.

1 Substance

Substance is concerned with the kind of untruth that is covered by a TiPA law, alongside how it is framed and defined.⁵⁰ Both false negative (lying to denigrate opponents) and false positive statements (positive lies favourable to candidates or parties) are covered by TiPA laws.⁵¹ Untruths are themselves divisible based on factors such as intentionality (eg lying compared to negligence) and objectivity (eg fact compared to opinion).

In terms of objectivity, there is a spectrum of types of communication that range from predictions, opinions, promises, unprovable assertions and verifiable facts. Only verifiable statements of fact are covered by TiPA laws in SA and the ACT, meaning that the scope of coverage is very narrow.⁵² Professor Anne Twomey has argued that

many political advertisements primarily contain promises (eg ‘no new taxes’), opinions (eg ‘X Party is incompetent and untrustworthy’) and predictions (eg ‘interest rates will be higher under Y Party’ or ‘Z Party will stop the boats’).⁵³

Accordingly, many of these ads would fall outside the ambit of the SA and ACT TiPA laws.⁵⁴ Nevertheless, it is possible for statements about the future to be covered if they can be explicitly disproved. For example, the South Australian Electoral Commissioner regulated a claim that ‘[the ALP] has a secret plan to increase GST’.⁵⁵ Although this is a statement about the future, the existence or

⁵⁰ Pender (n 3) 20.

⁵¹ An example of a false positive untruth is former Townsville mayor Troy Thompson embellishing his military history: Crime and Corruption Commission (Qld), *Investigation Murray: An Investigation into Allegations of Corrupt Conduct by the Mayor of Townsville* (Report, November 2025) 11–14 [50]–[65] <https://www.ccc.qld.gov.au/sites/default/files/Docs/Publications/CCC/CCC-Public-Report_Investigation-Murray_November-2025.pdf>, archived at <<https://perma.cc/P3BQ-KDSW>>. This approach is supported by the United Kingdom case of *Morrison v Carmichael* [No 1] 2016 SC 585, where the Election Court held that s 106(1) of the *Representation of the People Act 1983* (UK) (regarding false statements about a candidate’s personal character or conduct) applied to false statements that candidates made about themselves, be they laudatory or disparaging, provided they are made before or during an election for the purpose of affecting the return of any candidate: at 593–4 [20]–[24], 595 [29] (Lady Paton and Lord Matthews).

⁵² *ACT Electoral Act* (n 10) s 297A(1); *SA Electoral Act* (n 9) s 113(2).

⁵³ Anne Twomey, ‘Truth in Political Advertising’ (2010) 21(4) *Public Law Review* 232.

⁵⁴ *Ibid.*

⁵⁵ Interview with Former Party Official (Yee-Fui Ng, Zoom, 6 August 2024).

non-existence of a plan can be verified. As the Liberal Party of Australia ('Liberal Party') was not able to show the existence of a plan, they had to retract their statement.⁵⁶ Drawing an analogy to this, a claim that '[the ALP] will introduce a death tax' could potentially be regulated under the South Australian and ACT model if the ALP can show it has no policy pronouncements to that effect and the author of the statement cannot show they have.

However, many campaign pronouncements or promises would not be explicitly verifiable and would fall outside of the ambit of the South Australian and ACT provisions. Examples include qualitative claims, such as 'the Liberal Party is a good economic manager', or visions for the future, such as 'for a fairer Australia, vote for the ALP'. This means that TiPA laws can be avoided by carefully formulating false or misleading material in the form of opinions or predictions rather than facts. Nevertheless, it should be emphasised that TiPA laws are not intended to enforce electoral promises, debate their sincerity or regulate the broader aspects of political marketing in terms of the visions of political parties.

Mick Sherry, the South Australian Electoral Commissioner, considered that it is appropriate for TiPA laws to focus on facts, rather than opinions, otherwise they could not be administered.⁵⁷ Former South Australian Attorney-General John Rau argued that, in a democracy, it is a contest of ideas and it is important that all opinions, no matter how ridiculous (provided they are not unlawful), should be given an opportunity to be heard.⁵⁸

Both the *SA Electoral Act* and the *ACT Electoral Act* provide that it is a defence to prove that the defendant took no part in determining or deciding the content of an advertisement and could not reasonably be expected to have known that the statement was inaccurate and misleading.⁵⁹ Thus, the law does not penalise those who publish inaccurate and misleading statements of fact under an honest and reasonable mistake of fact.⁶⁰ This is supported by Jacob

⁵⁶ Ibid.

⁵⁷ Interview with Mick Sherry, Electoral Commissioner of South Australia (Yee-Fui Ng, Adelaide, 6 August 2024) ('Mick Sherry Interview').

⁵⁸ Interview with John Rau, Former Deputy Premier and Former Attorney-General of South Australia (Yee-Fui Ng, Adelaide, 7 August 2024) ('John Rau Interview').

⁵⁹ See *ACT Electoral Act* (n 10) s 297A(2); *SA Electoral Act* (n 9) s 113(3)(b).

⁶⁰ This approach is supported by the Canadian case of *Canadian Constitution Foundation v A-G (Canada)* (2021) 154 OR (3d) 338, where the Ontario Superior Court of Justice struck down s 91(1) of the *Canada Elections Act*, SC 2000, c 9 ('CEA'): at 356 [75] (Davies J). Section 91(1) prohibited a 'making or publishing certain false statements about candidates,

Rowbottom, who contended that TiPA laws should not cover honest mistakes or negligent statements as this would go 'beyond what is required to address harms to the electoral process' and may contribute to a chilling effect.⁶¹ There is thus an intentionality requirement under TiPA laws.

2 Form

Form is concerned with what constitutes 'political advertising'. The *SA Electoral Act* and the *ACT Electoral Act* define electoral advertisement as an advertisement containing electoral matter.⁶² The *SA Electoral Act* defines electoral matter as matter 'calculated to affect the result of an election',⁶³ while the *ACT Electoral Act* defines electoral matter as matter that is 'intended or likely to affect voting at an election'.⁶⁴ Both provisions therefore apply to a range of media including print, radio, television and online advertising, as well as social media and text messages.

Although not explicitly stated in the legislation, advertising has been interpreted broadly by the South Australian Electoral Commissioner to include more than paid ads or sponsored social media material: it includes concerted campaign efforts by political parties or third party campaigners, for example involving flyers or coordinated social media memes.⁶⁵ However, it does not cover individuals using outlets such as social media to express opinions or advocate in an uncoordinated way.⁶⁶

One issue in this space relates to developments in contemporary electoral campaigning. Advertising director Dee Madigan considered that there are significant issues regarding dubious practices by political parties that do not fall

prospective candidates, the leader of a political party or any public figure associated with a political party during federal elections with the intention of affecting the results of an election': at 341 [3] (Davies J). The Court held that the removal of the intentionality requirement in s 91(1) of the *CEA* (n 60) of 'knowingly' making a false statement breached the minimal impairment requirement under s 1 of the *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter*'): at 355–6 [71]–[72] (Davies J).

⁶¹ Rowbottom (n 6) 529.

⁶² See *ACT Electoral Act* (n 10) s 198 (definition of 'electoral advertisement'); *SA Electoral Act* (n 9) s 4(1) (definition of 'electoral advertisement').

⁶³ *SA Electoral Act* (n 9) s 4(1) (definition of 'electoral matter').

⁶⁴ *ACT Electoral Act* (n 10) s 4(1) (definition of 'electoral matter').

⁶⁵ See Ng (n 17) 26, 45; Renwick and Palese (n 47) 22.

⁶⁶ *NSW Election Report* (n 14) 39 [2.39]–[2.40], discussing Evidence to Joint Standing Committee on Electoral Matters, Parliament of New South Wales, Sydney, 17 May 2024, 19 (Anne Twomey).

within the ambit of political advertising.⁶⁷ This includes astroturfing, where political parties hide behind ‘pseudo grass-roots groups’,⁶⁸ and utilise social media or fabricated ‘fake news’ to project the appearance of genuine community support or opposition to an issue with the intent to mislead voters.⁶⁹ These activities are not regulated by TiPA laws as they do not fall within the category of political advertising.

Further, Bruce Hawker, former ALP campaign strategist, raised the issue of push polling, which does not fall into the scope of political advertising:⁷⁰

Political parties would commission people who claim to be pollsters to make statements like, ‘if you knew that a certain politician (naming them) was a war criminal, would that change your attitude towards them?’ And not saying that he’s a war criminal, but saying, ‘if you knew that he was’. The push pollers would ask that question of tens of thousands of people and thousands of people would go around and say to their friends, ‘I didn’t know that XYZ was a war criminal’.⁷¹

Mr Hawker noted that this was the sort of thing that has been done in election campaigns which did not fall into the category of advertising, but was still in the realm of trying to spread wrongful information in order to get a political advantage.⁷² A study has found that exposure to push polls can increase false memories for corresponding fake news stories, suggesting that push polling can effectively create disinformation and increase susceptibility to fake news stories.⁷³

⁶⁷ Interview with Dee Madigan, Founding Partner and Creative Director at Campaign Edge (Yee-Fui Ng, Zoom, 14 August 2024) (‘Dee Madigan Interview’).

⁶⁸ A Paul Pross and Robert P Shepherd, ‘Innovation Diffusion and Networking: Canada’s Evolving Approach to Lobbying Regulation’ (2017) 60(2) *Canadian Public Administration* 153, 169.

⁶⁹ New South Wales Independent Commission Against Corruption, *The Regulation of Lobbying, Access and Influence in NSW: A Chance To Have Your Say* (Consultation Paper, April 2019) 9 <[https://www.icac.nsw.gov.au/ArticleDocuments/884/The%20regulation%20of%20lobbying%20access%20and%20influence%20in%20NSW%20-%20a%20chance%20to%20have%20your%20say%20\(April%202019\).pdf.aspx](https://www.icac.nsw.gov.au/ArticleDocuments/884/The%20regulation%20of%20lobbying%20access%20and%20influence%20in%20NSW%20-%20a%20chance%20to%20have%20your%20say%20(April%202019).pdf.aspx)>, archived at <<https://perma.cc/KX5C-7ZDS>>.

⁷⁰ Interview with Bruce Hawker, Former Labor Party Campaign Strategist (Yee-Fui Ng, Zoom, 25 October 2024) (‘Bruce Hawker Interview’).

⁷¹ Ibid.

⁷² Ibid.

⁷³ Gillian Murphy et al, ‘Push Polls Increase False Memories for Fake News Stories’ (2021) 29(6) *Memory* 693, 705–6.

Another issue is the deceptive use of artificial intelligence ('AI') and deep-fakes which do not fall within the category of electoral advertising, as they are generally not authorised by political parties.⁷⁴

3 Temporality

A further consideration is whether politicians should only be subject to TiPA laws during election periods. For example, the equivalent law in NZ only applies in a strictly time-limited period to ads issued for the three days up to and including polling day.⁷⁵ However, the *Electoral Act 1993* (NZ) ('NZ Electoral Act') is seen to be ineffective due to its overly strict temporal coverage, which excludes the vast majority of ads.⁷⁶

The South Australian Electoral Commissioner notes that s 113 stipulates that in addition to an electoral advertisement containing a statement of fact that is inaccurate and misleading to a material extent, the advertisement must also be calculated to affect the result of an election.⁷⁷ Therefore, the intent and contents of the advertisement and the proximity of an election are taken into consideration when assessing complaints under s 113.

In effect, ads issued two years prior to an election that are intended to affect its outcome could potentially be covered by the TiPA law, but the South Australian Electoral Commissioner has also made determinations that ads that fall outside an election period have not been calculated to affect the result of an election.⁷⁸

Julian Burnside argued in a submission to the Victorian Electoral Matters Committee that it should be an offence for politicians to engage in conduct which is 'misleading or deceptive' and that such conduct should be prohibited

⁷⁴ See *ACT Electoral Act* (n 10) s 297A(1)(a); *SA Electoral Act* (n 9) s 113(2).

⁷⁵ See, eg, *Electoral Act 1993* (NZ) s 199A ('NZ Electoral Act'). This temporally narrow law is aimed at preventing late-breaking surprises where there is little or no time to correct the record: Hill, Douglass and Baltutis (n 29) 58–9, citing Justice and Electoral Committee, Parliament of New Zealand, *Inquiry into the 1999 General Election: Report of the Justice and Electoral Committee* (Report, 18 December 2001) 91–2 [8.4.1]. However, the rationale for the temporal limitation has become strained by an increase in early voting: see Skye Predavec, 'The Rise of Early Voting in Australian Elections', *The Australia Institute* (Web Page, 23 May 2025) <<https://australiainstitute.org.au/post/the-rise-of-early-voting-in-australian-elections/>>, archived at <<https://perma.cc/2H2V-3WLY>>.

⁷⁶ Hill, Douglass and Baltutis (n 29) 60.

⁷⁷ Mick Sherry Interview (n 57).

⁷⁸ *Ibid.*

for politicians at all times, even beyond the election period.⁷⁹ Likewise, South Australian Labor State Secretary Aemon Bourke supported the extension of TiPA laws to be without temporal limitation. Otherwise, he contended that inaccurate statements ‘could be made for three years and nine months out of four years’.⁸⁰

4 Materiality

Materiality is embedded in the *SA Electoral Act* and the *ACT Electoral Act* through the requirement that advertising must be inaccurate and misleading ‘to a material extent’.⁸¹ Materiality counterbalances breadth by building in consideration of the effect of the advertising. It ‘does not involve a counterfactual inquiry into whether the election would have been decided differently’, but rather examines ‘whether it is likely that a substantial number of electors have been led astray by deceit’.⁸²

However, the requirement of ‘material extent’ may temper the vagueness of the ‘inaccurate and misleading’ standard. This is supported by evidence that materiality is a basis to dismiss claims about statements that are only marginally misleading. In SA, for example, a complaint alleged that a claim of overspending by \$5.0 million was untruthful when the actual amount was \$3.8 million.⁸³ This complaint was not considered ‘material’.⁸⁴

⁷⁹ Julian Burnside, Submission No 12 to Electoral Matters Committee, Parliament of Victoria, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) Relating to Misleading or Deceptive Political Advertising* (14 August 2009) 2, quoted in Electoral Matters Committee, Parliament of Victoria, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) Relating to Misleading or Deceptive Political Advertising* (Report No 5, February 2010) 108 [4.110] <<https://www.parliament.vic.gov.au/4af701/contentassets/8c7922ab6e284c75ac65e702424f5a56/final-report.pdf>>, archived at <<https://perma.cc/FC8N-289P>> (*‘Vic Electoral Act Inquiry’*).

⁸⁰ Interview with Aemon Bourke, South Australian Labor State Secretary (Yee-Fui Ng, Zoom, 28 August 2024).

⁸¹ See *ACT Electoral Act* (n 10) s 297A(1)(b); *SA Electoral Act* (n 9) s 113(2), (4)–(5).

⁸² Ravi Baltutis, ‘South Australia’s Truth in Political Advertising Law: A Model for Australia?’ (2021) 42(2) *Adelaide Law Review* 597, 601, citing *Featherston v Tully* [No 2] (2002) 83 SASR 302, 395 [237]–[238] (Bleby J) (*‘Featherston’*).

⁸³ Evidence to Electoral Matters Committee, Parliament of Victoria, Melbourne, 18 August 2009, 8 (Steve Tully, Victorian Electoral Commissioner), quoted in *Vic Electoral Act Inquiry* (n 79) 53 [3.17].

⁸⁴ Evidence to Electoral Matters Committee, Parliament of Victoria, Melbourne, 18 August 2009, 8 (Steve Tully, Victorian Electoral Commissioner), quoted in *Vic Electoral Act Inquiry* (n 79) 53 [3.17].

However, materiality also raises administrative difficulties. In 2009, the Electoral Commission of South Australia expressed the view that s 113 of the *SA Electoral Act* should be amended to remove the 'misleading to a material extent' component.⁸⁵ In their view, materiality posed an 'onerous burden' that 'divert[s] attention away from managing the election'.⁸⁶ Repealing this aspect of s 113 'would also afford the Commissioner and her staff the opportunity to focus on administering the provisions of the Act in relation to the conduct of elections'.⁸⁷

Although there is an administrative burden in enforcement, the threshold of materiality ensures that minor misleading comments can be dismissed. It is also desirable to dismiss minor or vexatious complaints in order to prevent the laws being misused by opportunistic political parties.

5 Target of Regulation

The locus of liability in TiPA laws is also a site of contestation, given divergent views on whether publishers (eg social media platforms) should be held responsible for misleading advertising in addition to the authorisers and creators of ads. Another issue is whether TiPA laws should apply to third party campaigners in addition to political parties.

In SA, the offence of misleading advertising applies to a person who 'authorises, causes or permits the publication of an electoral advertisement'.⁸⁸ This wording captures the authors or creators of the ad, such as political parties, unions and third party campaigners seeking to affect electoral outcomes. There is some ambiguity about whether publishers or intermediary platforms (such as social media platforms) who 'cause' or 'permit' publication are covered by the legislation, but the Electoral Commissioner has found it generally sufficient to target authors of ads.⁸⁹

⁸⁵ Electoral Commission SA, *Election Report: Frome By-Election* (Report, 17 January 2009) 22 <<https://www.ecsa.sa.gov.au/component/edocman/2009-frome-by-election-report-and-statistics/download>>, archived at <<https://perma.cc/JW23-ZFCM>> ('*Frome By-Election Report*').

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ *SA Electoral Act* (n 9) s 113(2).

⁸⁹ Mick Sherry Interview (n 57).

The TiPA law of the ACT was drafted with the intention not to apply to publishers.⁹⁰ This approach is supported by the News and Media Research Centre, which considered that responsibility for truth in political advertising should lie with the authoriser, although publishers ‘might have ethical responsibilities as well’ in relation to enforcing compliance and countering malevolent uses of their platforms.⁹¹ In 1984, the Joint Select Committee on Electoral Reform also considered that the liability on publishers should be removed.⁹² It referred to views that an expansionary concept of liability would require extending the lead time for ads due to doubts about compliance.⁹³ Further, Ravi Baltutis posits that holding publishers liable might increase constitutional risk by discouraging publication of political advertising.⁹⁴

By contrast, in NZ, complaints of untruth in political advertising can be made against broadcasters for regulation by the Broadcasting Standards Authority.⁹⁵ This approach is supported by commentators who believe that holding publishers liable enables more effective enforcement. Luke Beck is of the view that publishers, such as social media platforms, should be liable for failing to remove ads.⁹⁶ The Victorian Electoral Matters Committee also considered

⁹⁰ *Social Media and Elections Inquiry* (n 13) 120, citing Supplementary Explanatory Statement, Electoral Amendment Bill 2018 (ACT) 3. This Supplementary Explanatory Statement related to the amendments moved by Caroline Le Couteur MLA: at 1.

⁹¹ News and Media Research Centre, University of Canberra, Submission No 75.1 to Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into and Report on All Aspects of the Conduct of the 2019 Federal Election and Matters Related Thereto*, 15–16 <<https://www.aph.gov.au/DocumentStore.ashx?id=b02ebbd-c3427-4565-8f51-a4180c7e79ba&subId=670234>>, archived at <<https://perma.cc/2AZG-G57P>>, quoted in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (Final Report, December 2020) 83 [4.122] <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024439/toc_pdf/Reportontheconductofthe2019federalelectionandmattersrelatedthereto.pdf;fileType=application%2Fpdf>, archived at <<https://perma.cc/VQY4-MJYH>> (‘2019 Federal Election Report’).

⁹² *Second Report* (n 26) 16–17 [2.44].

⁹³ *Ibid* 15–16 [2.40].

⁹⁴ Baltutis (n 82) 608–9.

⁹⁵ Renwick and Palese (n 47) 34–5.

⁹⁶ Luke Beck, Submission No 65 to Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into and Report on All Aspects of the Conduct of the 2019 Federal Election and Matters Related Thereto* (19 September 2019) 2 <<https://www.aph.gov.au/DocumentStore.ashx?id=a71226c0-e3ab-4870-89bc-0e0175710fab&subId=670194>>, archived at <<https://perma.cc/XT6K-8GXR>>, cited in 2019 *Federal Election Report* (n 91) 81 [4.114].

that legislation should prohibit publishers from continuing to publish an advertisement after it is determined to be inaccurate although they should not be required to assess accuracy prior to publication.⁹⁷ The benefit of holding publishers liable is that it provides an enforcement mechanism where the authoriser or creator of an advertisement is uncooperative.⁹⁸

However, there may be issues in achieving compliance and enforcement of laws for social media companies based overseas such as Meta or X, with interviewees reporting that social media platforms do not consistently comply with take-down requests.⁹⁹

Another question is whether third party campaigners should be subject to TiPA laws. In SA, TiPA provisions have been enforced against third party campaigners such as unions, associations, resident groups and business groups.¹⁰⁰

To ensure the efficacy of TiPA laws, it is necessary to cover third-party campaigners, as disinformation can otherwise be easily channelled by political parties through other entities.

B *Enforcement of Truth in Political Advertising Laws*

There are several elements to the enforcement of TiPA laws: identifying the appropriate arbiter, sanctions and remedies.

1 *The Appropriate Arbiter*

Another design choice of TiPA laws is choosing the appropriate arbiter. Both the South Australian and ACT TiPA laws employ three-part solutions to arbitrate disputes: first, they empower the electoral regulator to request a withdrawal and retraction; second, the regulator can apply to the Supreme Court for an order; and third, a prosecution can be brought.¹⁰¹ However, other suggestions for appropriate arbiters have been proposed.

⁹⁷ *Social Media and Elections Inquiry* (n 13) 121.

⁹⁸ *Ibid.*

⁹⁹ Ng (n 17) 6, 29.

¹⁰⁰ Interview with David Gully, Former South Australian Electoral Commissioner (Yee-Fui Ng, Zoom, 6 August 2024) ('David Gully Interview').

¹⁰¹ Pender (n 3) 24.

(a) The Electoral Commission

In both SA and the ACT, electoral commissioners are responsible for administering TiPA laws.¹⁰² This is ordinarily justified by reference to their expertise in elections and their impartiality. For example, The Australia Institute argues that electoral commissions are ‘trusted, non-partisan, familiar with electoral processes and used to ramping up during election periods’.¹⁰³

The former Attorney-General of SA, Mr Rau, also expressed the view that no other independent institution apart from the South Australian Electoral Commission has ‘particular expertise in elections’ or ‘any likelihood of understanding the practical time constraints involved in the adjudication of a matter and the delivery of a remedy’.¹⁰⁴ Mr Rau acknowledged that it is an invidious task for the Electoral Commissioner:

An Electoral Commissioner who’s not a judge, and who’s got other duties to do, has [to] stop doing their main business and behave like they’re a judge and jury in a matter of a few days, on inadequate evidence, with highly agitated people yelling at them. But realistically, in that time frame, there is no one else who can do it.¹⁰⁵

Although Mr Rau considered that the South Australian Electoral Commission is an ‘imperfect adjudicator’ in a ‘potentially conflicting position’, he concluded that ‘it appears to be the best of the set of choices’.¹⁰⁶

However, other electoral commissions have opposed assuming a role in regulating truth in political advertising. The AEC has stated that it should not assess truth in political advertising, ‘because it will involve ... making value

¹⁰² See *ACT Electoral Act* (n 10) ss 297A(3), (5), 325; *SA Electoral Act* (n 9) ss 8, 113(4)–(5).

¹⁰³ Bill Browne, Australia Institute, Submission No 122 to Electoral Matters Committee, Parliament of Victoria, *Inquiry into the Impact of Social Media on Elections and Electoral Administration* (November 2020) 5 <<https://cdn.australiainstitute.org.au/2021/06/17085857/P987-Submission-on-the-Impact-of-Social-Media-on-Elections-and-Electoral-Administration-Web.pdf>>, archived at <<https://perma.cc/F39G-STFA>>, quoted in *Social Media and Elections Inquiry* (n 13) 121.

¹⁰⁴ Renwick and Palese (n 47) 27.

¹⁰⁵ John Rau Interview (n 58).

¹⁰⁶ Renwick and Palese (n 47) 27.

judgements about candidates' and parties' material, and it could lead to accusations of bias by the AEC'.¹⁰⁷ The AEC also raised practical issues with assuming a regulatory role. Although the South Australian Electoral Commission administers the *SA Electoral Act*, the AEC considered that the scale of a state election is 'tiny' compared to the federal level and that dealing with issues federally 'would require quite a large support team' and be 'complex and difficult'.¹⁰⁸

This view is echoed by the Victorian Electoral Commission,¹⁰⁹ NSW Electoral Commission¹¹⁰ and other commentators.¹¹¹ For example, Brian Costar warned against drawing the electoral commissioner into political debate, given that 'a major and important positive feature of our electoral system ... is that the electoral commissions are totally impartial'.¹¹²

During the 2023 Indigenous Voice Referendum, there were unprecedented criticisms relating to the impartiality of the AEC from the Liberal–National Opposition,¹¹³ resulting in the AEC adding a disinformation register on the

¹⁰⁷ Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Canberra, 6 December 2019, 3 (Tom Rogers, Electoral Commissioner, Australian Electoral Commission), quoted in *2019 Federal Election Report* (n 91) 84 [4.124].

¹⁰⁸ Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Canberra, 3 November 2022, 12 (Tom Rogers, Electoral Commissioner, Australian Electoral Commission), quoted in *2022 Federal Election Report* (n 31) 85–6 [3.73].

¹⁰⁹ Interview with Sven Bluemmel, Victorian Electoral Commissioner (Yee-Fui Ng, Melbourne, 19 August 2024). See also Victorian Electoral Commission, Submission No 77 to Electoral Matters Committee, Parliament of Victoria, *Inquiry into the Impact of Social Media on Elections and Electoral Administration* (September 2020) 13–14 <<https://vec.vic.gov.au/-/media/51f3996af94f442cb86265b14bf9f2b5.pdf>>, archived at <<https://perma.cc/EY48-KYFW>>, discussed in *Social Media and Elections Inquiry* (n 13) 122–3.

¹¹⁰ Interview with Matt Phillips, Acting NSW Electoral Commissioner (Yee-Fui Ng, Zoom, 4 September 2024).

¹¹¹ See, eg, *Vic Electoral Act Inquiry* (n 79) 118–19 [5.5]–[5.11].

¹¹² Evidence to Electoral Matters Committee, Parliament of Victoria, Melbourne, 18 August 2009, 2–3 (Brian Costar, Coordinator of Democratic Audit Australia), quoted in *Vic Electoral Act Inquiry* (n 79) 119 [5.9]. See also Democratic Audit of Australia, Submission No 6 to Electoral Matters Committee, Parliament of Victoria, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) Relating to Misleading or Deceptive Political Advertising* (3 August 2009) 8, archived at <<https://perma.cc/ADA6-PAHQ>>, quoted in *Vic Electoral Act Inquiry* (n 79) 101 [4.84].

¹¹³ Sarah Basford Canales, 'AEC Hits Back after Peter Dutton Suggests Voice Referendum Rules Are "Rigged"', *The Guardian* (online, 25 August 2023) <<https://www.theguardian.com/australia-news/2023/aug/25/indigenous-voice-to-parliament-referendum-aec-poll-unfairness-claims-rejected>>, archived at <<https://perma.cc/9TWU-X295>>.

referendum process to correct inaccurate and misleading statements.¹¹⁴ This may point to a troubling new willingness by political parties to attack the independent electoral commission to try to achieve electoral success.

In practice, however, it may be that challenges to the impartiality and independence of electoral commissions are not as likely as suggested. In their study of the *SA Electoral Act*, Renwick and Palese identified an ‘isolated instance’ of a South Australian politician describing the Electoral Commissioner as ‘utterly corrupt’ in the House of Assembly.¹¹⁵ That remark was subsequently withdrawn.¹¹⁶ Apart from this, a wider survey of media reporting on s 113 identified ‘no direct accusations of Electoral Commission bias at all and no attempts to undermine the Commission’s legitimacy’.¹¹⁷ Indeed, the interviews conducted for this project affirmed the strong reputation that the South Australian Electoral Commission continues to enjoy in the community and among political participants, despite administering TiPA laws since 1985.¹¹⁸

The Electoral Communications Bill provided an example of a middle ground solution, as it would have established an Electoral Communications Panel as an independent secondary statutory structure within the AEC.¹¹⁹ The Electoral Communications Panel would have consisted of a Chair (a retired Federal Court judge) and at least three and not more than 14 other members.¹²⁰ This was intended as a mechanism to provide a buffer to the AEC, and therefore

¹¹⁴ See Australian Electoral Commission, *Referendum Report 2023* (Report, 9 February 2024) 17 <https://www.aec.gov.au/About_AEC/Publications/files/referendum-report-2023.pdf>, archived at <<https://perma.cc/M6TS-37EY>>. The AEC launched its disinformation register for the Indigenous Voice Referendum in April 2023: Australian Electoral Commission, ‘AEC Launches Referendum Disinformation Register’ (Media Release, 13 April 2023) <<https://www.aec.gov.au/media/2023/04-13.htm>>, archived at <<https://perma.cc/T8VB-3ZUE>>.

¹¹⁵ Renwick and Palese (n 47) 28.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ng (n 17) 5.

¹¹⁹ Electoral Communications Bill (n 11) sch 1 item 27, inserting *Cth Electoral Act* (n 32) ss 321Q, 321QA(4).

¹²⁰ Ibid sch 1 item 27, inserting *Cth Electoral Act* (n 32) ss 321QA(1), 321QB(2).

protect its independence and impartiality, while allowing the Electoral Communications Panel to draw on the AEC's resources and expertise.¹²¹ In addition, decisions would have been made by a panel of at least three members (out of a maximum of 14 members) of the Electoral Communications Panel, meaning that the workload is distributed during the election period.¹²²

(b) Tribunals

Another option is to make tribunals the arbiters of complaints under TiPA legislation, with electoral commissions performing a vetting function and then referring matters to the tribunal for their determination. David Gully, former South Australian Deputy Electoral Commissioner, noted that this proposal was considered by the South Australian government but did not progress to the bill stage.¹²³

This may be seen to be a more independent quasi-judicial mechanism compared to an electoral commission. However, it remains to be seen if tribunals can make determinations in the short timeframes required for the enforcement of TiPA laws.¹²⁴

(c) Courts

Courts are a proposed alternative to vesting oversight functions in an electoral commission. George Williams considered that 'it is better to have an independent, non-electoral body overseeing the scheme, because electoral commissions are always going to be wary about intervening'.¹²⁵ This might include a court.¹²⁶ However, Professor Twomey argued that 'court proceedings take too long to be

¹²¹ Explanatory Memorandum, Electoral Legislation Amendment (Electoral Communications) Bill 2024 (Cth) 15 [18].

¹²² Electoral Communications Bill (n 11) sch 1 item 27, inserting *Cth Electoral Act* (n 32) ss 321QG(1)(c). See also Electoral Communications Bill (n 11) sch 1 item 27, inserting *Cth Electoral Act* (n 32) s 321R(1)(a)–(b).

¹²³ David Gully Interview (n 100).

¹²⁴ Interview with Anne Twomey, Professor Emerita, University of Sydney (Yee-Fui Ng, Zoom, 31 October 2024) ('Anne Twomey Interview').

¹²⁵ Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Canberra, 7 September 2020, 23 (George Williams), quoted in *2019 Federal Election Report* (n 91) 78 [4.102].

¹²⁶ Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Canberra, 7 September 2020, 25–6 (George Williams), cited in *2019 Federal Election Report* (n 91) 78 [4.103].

an effective response to misleading ads during an election campaign' and a system of interim injunctions with full proceedings after the election could result in political parties trying to take down their opponents' ads, tying up finances and diverting attention to legal proceedings during an election campaign.¹²⁷

Others have raised concerns about the involvement of courts in political judgements. The Commonwealth Joint Select Committee on Electoral Reform has also historically expressed concern that the involvement of the courts would require their entry into the political arena.¹²⁸ The committee is of the view that, unlike the regulation of commercial advertising, the regulation of political advertising 'seems necessarily to involve a political judg[e]ment, based upon political premises'.¹²⁹ Michael Pearce considered that involving the courts might involve convergence with the American electoral system, creating the undesirable result of 'having elections decided by judges rather than voters'.¹³⁰

However, these concerns may be overstated given that Australia has an entrenched system of election results being overturned by courts of disputed returns,¹³¹ and this has not undermined perceptions of judicial independence.

(d) *Other Regulators*

Some calls have been made for other regulators to assume roles in regulating truth in political advertising. This would allow the laws to be administered by a body with relevant experience and expertise while limiting potential risks in relation to the integrity and independence of electoral commissions. For example, in the federal context, Beck considered that the Australian Competition and Consumer Commission ('ACCC') would be more suitable than the AEC if

¹²⁷ Evidence to Joint Standing Committee on Electoral Matters, Parliament of New South Wales, Sydney, 17 May 2024, 18 (Anne Twomey), discussed in *NSW Election Report* (n 14) 41–2 [2.50].

¹²⁸ *Second Report* (n 26) 21 [2.62].

¹²⁹ *Ibid.*

¹³⁰ Evidence to Electoral Matters Committee, Parliament of Victoria, Melbourne, 18 August 2009, 3 (Michael Pearce, President of Liberty Victoria), quoted in *Vic Electoral Act Inquiry* (n 79) 121 [5.20].

¹³¹ See, eg, *Re Culleton [No 2]* (2017) 263 CLR 176, 181–2 [4] (Kiefel, Bell, Gageler and Keane JJ, Nettle J agreeing at 192 [47]).

its role were ‘slightly expanded’ given its pre-existing experience dealing with misleading and deceptive advertising.¹³²

The ACCC administers the *Australian Consumer Law* at the federal level, including in relation to false or misleading representations in relation to trade or commerce.¹³³ However, the ACCC may not be the most appropriate body to administer TiPA laws. Although the ACCC may have expertise in determining allegations regarding false or misleading representations, this is in a business or commercial context. False or misleading claims in the context of political debate are likely to be of a fundamentally different nature. The ACCC has itself rejected this remit, stating that it is ‘in no position to deal with political advertising’ in an area ‘beyond trade and commerce’.¹³⁴

Another potential regulator could be the Australian Communications and Media Authority (‘ACMA’).¹³⁵ ACMA’s role and functions may more clearly align with the regulation of truth in political advertising as ACMA:

- is a statutory authority that currently regulates matters relating to broadcasting, radiocommunications, telecommunications, telemarketing and some aspects of online content;¹³⁶

¹³² Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Melbourne, 16 March 2020, 16 (Luke Beck), quoted in *2019 Federal Election Report* (n 91) 81 [4.115].

¹³³ *Competition and Consumer Act 2010* (Cth) sch 2 ss 2(1) (definition of ‘regulator’), 18(1) (‘*Australian Consumer Law*’). Relevant state and territory bodies administer the *Australian Consumer Law* (n 133) in their respective jurisdictions. For example, Consumer Affairs Victoria administers the *Australian Consumer Law* (n 133) in Victoria in relation to relevant consumer protections: *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 109.

¹³⁴ Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Canberra, 7 September 2020, 30 (Rod Sims, Chair, Australian Competition and Consumer Commission), quoted in *2019 Federal Election Report* (n 91) 82 [4.118].

¹³⁵ The Commonwealth’s Joint Standing Committee on Electoral Matters noted that the AEC, ACCC and ACMA are existing bodies that have a role in relation to political advertising or false/misleading representations, but recommended that the Commonwealth Government consider establishing a division within the AEC to administer TiPA legislation: *2022 Federal Election Report* (n 31) 86–106 [3.76]–[3.181].

¹³⁶ *Australian Communications and Media Authority Act 2005* (Cth) ss 8–10 (‘ACMA Act’). See also *2022 Federal Election Report* (n 31) 86 [3.76].

- can investigate complaints in relation to the broadcasting sector (including radio and television) including assessing whether content is factually accurate;¹³⁷ and
- has an existing role in relation to election, referendum and political ads (eg the regulation of ads broadcast over television during an election).¹³⁸

Responsible Technology Australia considered that regulators such as ACMA, the eSafety Commissioner and the ACCC do not currently have the remit to ‘neatly’ capture the regulation of political advertising.¹³⁹ It is therefore necessary ‘either to rethink the remit of some of those regulators or to think about new mechanisms for oversight’.¹⁴⁰

In NZ, a self-regulatory approach to truth in political advertising vests greater power in industry bodies. Centrally, NZ’s Advertising Standards Authority (an advertising industry body) is used to facilitate truth in advertising.¹⁴¹ The Advertising Standards Authority prevents misleading advertising through voluntary self-regulation, codes of practice and the policing of compliance with these codes.¹⁴² In parallel, the Broadcasting Standards Authority regulates broadcast advertising through its own codes of practice.¹⁴³ Renwick and Palese observed that the role of both bodies seems to be ‘marginal’, and that there have been no cases brought under s 199A of the NZ *Electoral Act* against advertisers and no significant adverse decisions by the Broadcasting Standards Authority for over 20 years.¹⁴⁴ Australia currently has a limited self-regulatory approach that only applies to television ads through ClearAds (operated by Free TV Australia, formerly the Federation of Australian Commercial

¹³⁷ *ACMA Act* (n 136) ss 10(1)(i)–(l), (m). See also *2022 Federal Election Report* (n 31) 87 [3.78]–[3.79].

¹³⁸ *2022 Federal Election Report* (n 31) 92 [3.98]–[3.102]. See also, eg, *ACMA Act* (n 136) s 10(1)(a); *Broadcasting Services Act 1992* (Cth) sch 2 pts 1–2.

¹³⁹ Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Canberra, 14 September 2020, 52 (Christopher Cooper, Executive Director, Responsible Technology Australia), quoted in *2019 Federal Election Report* (n 91) 79–80 [4.108].

¹⁴⁰ Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Canberra, 14 September 2020, 52 (Christopher Cooper, Executive Director, Responsible Technology Australia), quoted in *2019 Federal Election Report* (n 91) 79–80 [4.108].

¹⁴¹ Renwick and Palese (n 47) 30.

¹⁴² *Ibid.*

¹⁴³ *Ibid* 34.

¹⁴⁴ *Ibid* 37.

Television Stations), which only vets ads for defamation risk rather than truth.¹⁴⁵ This has not prevented false or misleading ads.

(e) *Specialised New Body*

Another option is to create a separate statutory body to regulate TiPA laws. For example, Williams suggested that an independent panel could be a suitable independent, non-electoral body to oversee TiPA laws.¹⁴⁶ Colin Hughes considered that this might include an independent statutory tribunal or an appointed Election Ombudsman.¹⁴⁷ The Greens NSW suggested that ‘an election tribunal made up of members of the public and legal professionals be created and given the power to determine the truth of public statements and impose penalties’.¹⁴⁸

The benefit of this approach is that it would remove the burden on electoral commissions in their busiest periods. If well-resourced with appropriate expertise, the body would be able to deal with TiPA matters in a timely manner. However, as Professor Twomey noted, the downside of a new body is that it would effectively only be operational every two to three years when there is an election, meaning that it could not develop systems of expertise if new people were appointed each time.¹⁴⁹ She suggested that another possibility is to tack a new body onto an existing administrative review body, with an electoral branch that is operational during the election periods with the same staff engaging in other work in non-election periods.¹⁵⁰

¹⁴⁵ Ng (n 17) 43; Graeme Orr, ‘Time To Tighten the Reins on Politicians and Their “Truths”’, *The Conversation* (online, 15 July 2016) <<https://theconversation.com/time-to-tighten-the-reins-on-politicians-and-their-truths-62457>>, archived at <<https://perma.cc/BP3N-TP9D>>.

¹⁴⁶ Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Canberra, 7 September 2020, 25–6 (George Williams), cited in *2019 Federal Election Report* (n 91) 78 [4.103].

¹⁴⁷ Colin Hughes, Submission No 13 to Electoral Matters Committee, Parliament of Victoria, *Inquiry into Whether the Provisions of the Electoral Act 2002 (Vic) Should Be Amended To Make Better Provisions for Misleading or Deceptive Electoral Content* (23 September 2009) 1, discussed in *Vic Electoral Act Inquiry* (n 79) 122 [5.24]–[5.25].

¹⁴⁸ Greens NSW, Submission No 27 to Joint Standing Committee on Electoral Matters, Parliament of New South Wales, *Administration of the 2023 NSW State Election and Other Matters* (23 February 2024) 10 <<https://files.parliament.nsw.gov.au/fileapi/ParlFiles/GetArtifact?serverRelativeUrl=%2F1adocs%2Fsubmissions%2F83626%2FSubmission%2027%20-%20The%20Greens%20NSW.pdf>>, archived at <<https://perma.cc/P8P8-6A3V>>, discussed in *NSW Election Report* (n 14) 37 [2.32].

¹⁴⁹ Anne Twomey Interview (n 124).

¹⁵⁰ *Ibid.*

2 Sanctions and Remedies

The appropriate enforcement mechanism for misleading advertising is also contested.

(a) *Withdrawal and Retraction*

Withdrawal and retraction are generally a two-part enforcement mechanism involving both an electoral commission and the court if initial requests fail.¹⁵¹ In practice, however, enforcement primarily occurs through the initial request stage rather than through court injunction.¹⁵²

The *SA Electoral Act* and *ACT Electoral Act* empower their respective electoral commissions to seek the withdrawal and retraction of misleading advertising.¹⁵³ Renwick and Palese note that '[i]n practice, the Commission "almost always" seeks the retraction as well as the withdrawal of an advertisement where, following assessment, it is deemed to breach the rules'.¹⁵⁴

The South Australian Electoral Commissioner's powers to seek withdrawal and retraction were introduced in 1997.¹⁵⁵ Previously, the courts decided cases under s 113 'well after the election was over'.¹⁵⁶ The Electoral Commission's powers are now the primary enforcement mechanism in the *SA Electoral Act*.¹⁵⁷ The Electoral Commissioner of South Australia 'has requested content be withdrawn at most elections since 1997'.¹⁵⁸ In analysing data provided by the Electoral Commission, Renwick and Palese found that the Electoral Commission has generally required withdrawal or retraction in more cases over time.¹⁵⁹

The South Australian Electoral Commissioner in most cases asks for the publisher to cease publication and issue a retraction, normally in the same way the material is published.¹⁶⁰ For example, if the post was made on an account

¹⁵¹ *ACT Electoral Act* (n 10) ss 297A(3), (5); *SA Electoral Act* (n 9) ss 113(4)–(5).

¹⁵² Renwick and Palese (n 47) 23.

¹⁵³ See *ACT Electoral Act* (n 10) s 297A(3); *SA Electoral Act* (n 9) s 113(4).

¹⁵⁴ Renwick and Palese (n 47) 23.

¹⁵⁵ *Ibid* 22–3. The Commission 'did not ask to be given the intervention powers that it received': at 25.

¹⁵⁶ *Ibid* 23.

¹⁵⁷ *Ibid* 22–3.

¹⁵⁸ *Social Media and Elections Inquiry* (n 13) 117.

¹⁵⁹ Renwick and Palese (n 47) 23.

¹⁶⁰ Mick Sherry Interview (n 57).

on a Meta-owned platform, then the retraction has to be on the same account.¹⁶¹ However, if flyers have been printed and hand delivered to 30,000 residents on the eve of polling day and the flyers contain material that is deemed misleading, it is not practicable to get the retraction issued in the same form as there is no time.¹⁶² In that situation the Commissioner determines an alternative method, for example, an ad in *The Advertiser* (daily paper), Meta post or a media release.¹⁶³ The Commissioner provides the wording of the retraction and writes to the authoriser.¹⁶⁴

The requirement to issue the retraction in the same medium and with independent wording improves the efficacy of the TiPA laws as it ensures that the same audience will view the retraction and be informed about the misleading nature of the statement. In addition, the Commissioner polices the wording of the retraction to ensure that the wording reflects a true retraction rather than a counterattack.¹⁶⁵

However, there remain loopholes reported by political participants. For example, Sam Hooper, lawyer and Liberal Party volunteer, noted that radio ads played at prime time can have retractions at 11:59pm at night or retractions can be buried under other subsequent posts.¹⁶⁶

The time pressures toward the end of an election create issues in terms of enforcement of TiPA laws. The Australia Institute observes that there is ‘little time’ to stop and address ads that come out late in an election campaign.¹⁶⁷ The Australia Institute has also noted that withdrawal and retraction may have limited effect given ‘[t]he short duration of election campaigns and the finality of an election result’.¹⁶⁸ To address these limitations, The Australia Institute proposed the withdrawal of public funding from parties and candidates who have authorised misleading or inaccurate ads.¹⁶⁹

¹⁶¹ See *ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ See *SA Electoral Act* (n 9) s 113(4)(b).

¹⁶⁶ Interview with Sam Hooper (Yee-Fui Ng, Adelaide, 7 August 2024) (‘Sam Hooper Interview’).

¹⁶⁷ Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Canberra, 26 October 2022, 4 (Bill Browne, Director, Democracy and Accountability Program, Australia Institute), quoted in *2022 Federal Election Report* (n 31) 84 [3.69].

¹⁶⁸ Browne (n 16) 3.

¹⁶⁹ *Ibid.*

An alternative is an injunction to require withdrawal or retraction if an initial request for withdrawal and retraction fails.¹⁷⁰ In SA, the South Australian Electoral Commissioner ‘has not taken legal action to achieve withdrawals/retractions’.¹⁷¹ The South Australian Electoral Commission also observed that a Supreme Court injunction is ‘not practical during the last week of the election campaign due to the blackout provisions’.¹⁷² This seems to support a more general criticism that vesting courts with decision-making powers will contribute to delays that are particularly problematic in an electoral context.¹⁷³ Kieran Pender noted, for example, that ‘[i]t may not always be possible, or politically desirable, to face judicial intervention — particularly in the frantic final days of an election’.¹⁷⁴

The injunction remedy has been strongly criticised in previous inquiries into truth in political advertising for its ancillary consequences on political discourse. The Victorian Electoral Matters Committee considered that an ‘injunction remedy may cause injustice to political parties or candidates and may disrupt the election campaign process’.¹⁷⁵ In 1984, the Joint Select Committee on Electoral Reform considered that an application for an injunction ‘could prove an effective tactic for a candidate to obtain publicity for [themselves] and to disrupt the advertising campaign of another party’.¹⁷⁶ This poses ‘severe difficulties’ for political advertising given the strict time constraints associated with the election period and the futility of an injunction once polls close.¹⁷⁷

¹⁷⁰ See *ACT Electoral Act* (n 10) s 297A(5); *SA Electoral Act* (n 9) s 113(5). It is noted that, at the Commonwealth level, the Parliament cannot vest injunctive enforcement powers directly in the Electoral Commission or another administrative tribunal: see *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 258 (Mason CJ, Brennan and Toohey JJ), 267–8 (Deane, Dawson, Gaudron and McHugh JJ).

¹⁷¹ Browne (n 16) 7.

¹⁷² Electoral Commission SA, *State Election 2014* (Election Report, 30 July 2015) 57 <<https://www.ecsa.sa.gov.au/component/edocman/2014-state-election-report-including-fisher-and-davenport-by-elections/download>>, archived at <<https://perma.cc/UE8F-BS2M>> (*‘SA Election Report’*).

¹⁷³ Renwick and Palese (n 47) 27.

¹⁷⁴ Pender (n 3) 24.

¹⁷⁵ *Vic Electoral Act Inquiry* (n 79) 138 [5.93].

¹⁷⁶ *Second Report* (n 26) 24 [2.70].

¹⁷⁷ *Ibid* 25 [2.74].

Consequently, an injunction in the final week of a campaign is effectively a final remedy.¹⁷⁸

(b) *Financial Penalties*

Both the *ACT Electoral Act* and *SA Electoral Act* are enforceable through financial penalties for criminal offences, which can be pursued through prosecution.¹⁷⁹ Although there have been successful prosecutions in the past, this mechanism is rarely used and different aspects of the penalty system have been subject to criticism.

(i) *Civil or Criminal*

One issue is the appropriateness of imposing a financial penalty as punishment for a criminal offence. In the *SA Electoral Act*, the maximum penalty for the criminal offence of materially inaccurate and misleading advertising is \$5,000 for individuals or \$25,000 for a body corporate.¹⁸⁰ In the *ACT Electoral Act*, the maximum penalty is 50 penalty units.¹⁸¹

Beck preferred that breaches of TiPA laws only attract civil penalties, resembling current misleading or deceptive commercial advertising prohibitions.¹⁸² Confining TiPA laws to civil penalties might also aid their case for constitutional validity, as a more severe penalty would increase the risk of invalidity.¹⁸³

However, there are also concerns that a lenient scheme would not be effective to prevent misleading advertising. Williams posited that penalties in federal TiPA laws could be stronger than penalties in the South Australian laws.¹⁸⁴ He considered that there is 'too high a risk with the South Australian law that falsehoods will be just seen as a cost of campaigning' and raised the possibility

¹⁷⁸ Ibid 25 [2.75].

¹⁷⁹ See *ACT Electoral Act* (n 10) s 297A(1); *SA Electoral Act* (n 9) s 113(2).

¹⁸⁰ *SA Electoral Act* (n 9) s 113(2).

¹⁸¹ *ACT Electoral Act* (n 10) s 297A(1).

¹⁸² Beck (n 96) 2, quoted in *2019 Federal Election Report* (n 91) 81 [4.114].

¹⁸³ Pender (n 3) 28.

¹⁸⁴ Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Canberra, 17 October 2022, 17 (George Williams), quoted in *2022 Federal Election Report* (n 31) 85 [3.72].

of ‘criminal sanctions ... or at least much, much higher fines’.¹⁸⁵ For instance, one person prosecuted in SA claimed that the small fine imposed for the false advertisement was great ‘value for money’ given all the free publicity for the advertisement during the campaign.¹⁸⁶

Lisa Hill, Max Douglass and Ravi Baltutis considered that private civil penalties are ‘inappropriate’ because ‘they send the wrong message that the problem is of a private nature whereas it is a matter of profound public importance’ in the context of the ‘significant social costs of false election campaigning’.¹⁸⁷

There may be concerns that penalties that are too onerous may disproportionately impact minor parties or independents who do not have the resources of major political parties to comply with TiPA laws.¹⁸⁸ As a solution to this, Pender suggested that a penalty could be expressed ‘as a percentage of turnover’, which may be more effective for deterring larger parties without unduly burdening smaller parties.¹⁸⁹

(ii) *Withdrawal of Public Funding*

Another potential remedy is to reduce the amount of public funding to political parties that breach TiPA laws as a more effective financial penalty. This was supported by former Victorian Deputy Electoral Commissioner Liz Williams on the basis that it is unacceptable for public money to be used for advertising that is false or misleading in a material way.¹⁹⁰ This may act as a stronger deterrent to political parties from making inaccurate and misleading statements.¹⁹¹ Ms Williams considered that any TiPA sanctions and remedies need to be strong because of the seriousness of voter choices and election outcomes being affected by disinformation.¹⁹²

¹⁸⁵ Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Canberra, 17 October 2022, 17 (George Williams), quoted in *2022 Federal Election Report* (n 31) 85 [3.72].

¹⁸⁶ Evidence to Senate Finance and Public Administration Legislation Committee, Parliament of Australia, Canberra, 6 April 2001, 44 (Andrew Becker, Electoral Commissioner, Australian Electoral Commission).

¹⁸⁷ Hill, Douglass and Baltutis (n 29) 125.

¹⁸⁸ See Pender (n 3) 28.

¹⁸⁹ *Ibid* 28–9.

¹⁹⁰ Interview with Liz Williams, Former Victorian Deputy Electoral Commissioner (Yee-Fui Ng, Melbourne, 13 August 2024).

¹⁹¹ *Ibid*.

¹⁹² *Ibid*.

(iii) Prosecution

In SA and the ACT, financial penalties can be pursued through prosecution.¹⁹³ If the Commissioner is pursuing a prosecution, the Commissioner must prove beyond reasonable doubt that an offence occurred.¹⁹⁴

Different South Australian Electoral Commissioners have had different appetites for prosecutions. While successful prosecutions of both major parties have occurred in the past, they have been rarely pursued in recent times.¹⁹⁵ Since the late 1990s there had been no prosecutions for a lengthy period until the prosecution of a local government candidate in 2018.¹⁹⁶ In evidence before the Victorian Electoral Matters Committee in 2009, the Victorian Electoral Commissioner (who was formerly the Electoral Commissioner of South Australia) provided examples of successful prosecutions under the *SA Electoral Act*.¹⁹⁷ He went on to state that ‘there have not been any’ prosecutions since the first election after the introduction of this Act.¹⁹⁸

Similarly, in an international context, there have been no prosecutions under s 199A of the *NZ Electoral Act*, which prohibits the publication of false statements to influence voters.¹⁹⁹ The only case ever to be brought under s 199A concerned the Electoral Commission failing to act.²⁰⁰

¹⁹³ See *ACT Electoral Act* (n 10) s 297A(1); *SA Electoral Act* (n 9) s 113(2).

¹⁹⁴ See *Criminal Code 2002* (ACT) ss 56–7; *ACT Electoral Act* (n 10) s 3A; *SA Election Report* (n 172) 57.

¹⁹⁵ See, eg, Browne (n 16) 9; Transcript of Proceedings (Sentencing Remarks), *State Electoral Office v Pigott* (Magistrates Court of South Australia, Moss CM, 15 December 1998) (*‘Pigott’*), discussed in *Vic Electoral Act Inquiry* (n 79) 102 [4.88].

¹⁹⁶ David Gully Interview (n 100).

¹⁹⁷ Evidence to Electoral Matters Committee, Parliament of Victoria, Melbourne, 18 August 2009, 5 (Steve Tully, Victorian Electoral Commissioner), cited in *Vic Electoral Act Inquiry* (n 79) 52–3 [3.16]. See also, eg, *Pigott* (n 195), discussed in *Vic Electoral Act Inquiry* (n 79) 102 [4.88]. Bill Browne outlines further case studies: Browne (n 16) 9–11.

¹⁹⁸ Evidence to Electoral Matters Committee, Parliament of Victoria, Melbourne, 18 August 2009, 9 (Steve Tully, Victorian Electoral Commissioner), quoted in *Vic Electoral Act Inquiry* (n 79) 53 [3.17].

¹⁹⁹ *Vic Electoral Act Inquiry* (n 79) 66 [3.59]. Renwick and Palese (n 47) offer a more recent restatement of that conclusion: at 37.

²⁰⁰ The NZ High Court decided that the Electoral Commission erroneously dismissed a complaint under s 199A based on an incorrect interpretation of the law: *Peters v Electoral Commission* [2016] 2 NZLR 690, 711 [90] (Mallon J) (*‘Peters’*), discussed in Renwick and Palese (n 47) 36. The Court issued a declaration to this effect: *Peters* (n 200) 711 [90].

The former South Australian Electoral Commissioner has expressed ‘serious concerns over prosecuting alleged offences’ due to the ‘significant public interest considerations in mounting a prosecution’.²⁰¹ Further, ‘[c]ases may drag out in the courts for some time with legal expenses far outweighing the maximum fine’.²⁰² There would also be ‘no effect on the election results’ and ‘little benefit for the public in prosecuting’.²⁰³

On the other hand, several interview participants, including former South Australian Deputy Electoral Commissioner Mr Gully, have stated that prosecutions are desirable in order to have a deterrent effect on political parties who may seek to test the boundaries by putting forward misleading ads.²⁰⁴

(c) *Voiding the Election*

Under the *SA Electoral Act*, the Supreme Court (sitting as the Court of Disputed Returns) may declare the results of an election void on the grounds of misleading advertising if the result of the election was affected by that advertising on the balance of probabilities.²⁰⁵ In SA, statutory electoral defamation is also a ground for voiding an election.²⁰⁶

Former South Australian Attorney-General Mr Rau considered that the most serious remedy has to be an *ex post facto* remedy. He opined:

[I]f advertising is demonstrably untrue, and that’s different to just an opinion that you disagree with, and it is of such a quality and nature that it might have adversely affected enough of the voting population to possibly have produced a different result (for example a false accusation that the person is a murderer), then maybe the remedy is [in the] [C]ourt of [D]isputed [R]eturns, which may lead to a by-election. This would be a sliding scale with two considerations. The first is the margin. So, if the margin is one vote, you don’t have to prove very much. If the margin is 10,000 votes, you’d have to prove a lot. And then the other one is how serious was the lie. How damaging was that to you as a candidate? So, it’s a combination of those two things. And if the point of this is to protect the

²⁰¹ *SA Election Report* (n 172) 57.

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ David Gully Interview (n 100). See also Sam Hooper Interview (n 166).

²⁰⁵ *SA Electoral Act* (n 9) ss 107(1)(c), (5).

²⁰⁶ *Crafter v Webster [No 2]* (1980) 23 SASR 321, 331–8, 357 (Mitchell J) (‘*Crafter*'). See also *Law of Politics* (n 4) 151–2.

political system, the ultimate solution to that is to let the people have a vote again.²⁰⁷

In practice, however, no election to date has been declared void since the introduction of the legislation in 1985,²⁰⁸ although petitions have been received and heard.²⁰⁹ Further, in *Featherston v Tully*, the Supreme Court of SA held that a breach of s 113 would not itself void an election because ‘there is nothing in the Act which requires that the [C]ourt must declare an election void where a candidate has committed an offence against that section’.²¹⁰

Professor Twomey suggested that the voiding of an election just because a party had been producing advertising that was false and misleading was problematic as it might render the result of many elections uncertain.²¹¹ As such, while the voiding of an election is possible under the *SA Electoral Act*, it does not appear to be a practical means of enforcing TiPA laws due to the high threshold that conditions its usage.²¹² Thus, it should be considered whether this penalty should be removed from the South Australian legislation.

The capacity to void an election on the basis of defamation (rather than TiPA laws) is exemplified in *Crafter v Webster [No 2]*,²¹³ in which a candidate petitioned the Court of Disputed Returns to declare that an election was void upon the ground that an Italian advertisement was defamatory of him by referring to another candidate as ‘your Member of Parliament’ despite the fact that he had not been elected at the time of the advertisement.²¹⁴ Justice Mitchell held that this language was defamatory and constituted undue influence — a ground to declare the election void.²¹⁵ Justice Mitchell made such a declaration of voidness because the result of the election was ‘likely to be affected’ by the defamatory statement, particularly given the narrow margin of the election and

²⁰⁷ John Rau Interview (n 58).

²⁰⁸ Browne (n 16) 7.

²⁰⁹ State Electoral Office (SA), *South Australian Election 18 March 2006* (Election Report, 29 March 2007) 47 <<https://www.ecsa.sa.gov.au/component/edocman/2006-state-election-report/download>>, archived at <<https://perma.cc/N3S3-4JG6>>.

²¹⁰ *Featherston* (n 82) 342–3 [163] (Bleby J, Mullighan J agreeing at 306 [1]).

²¹¹ Anne Twomey Interview (n 124).

²¹² *Ibid*.

²¹³ Note, however, that this case was decided prior to the passage of the *SA Electoral Act* (n 9).

²¹⁴ *Crafter* (n 206) 325, 331 (Mitchell J).

²¹⁵ *Ibid* 337–8.

additional procedural breaches of s 109(1) of the *Electoral Act 1929* (SA) which provided that voters should mark their vote in private.²¹⁶

(d) *Barring the Candidate*

Another option is to impose a penalty that bars a candidate from standing for one election cycle. This is a model based on s 106(1) of the *Representation of the People Act 1983* (UK), which makes it an offence to make false statements about a candidate's personal character or conduct to influence the outcome of an election. A breach of s 106(1) is punishable by an individual being barred from standing for Parliament or holding elected office for three years.²¹⁷ This kind of sanction already exists in the context of electoral bribery. A provision of the *Commonwealth Electoral Act 1918* (Cth) disqualifies anyone convicted of electoral bribery from holding a seat in Parliament and from being a candidate for a period of two years from the date of conviction.²¹⁸ Hill, Douglass and Baltutis recommend this option as it could have 'a potentially greater deterrent effect' compared to financial penalties.²¹⁹

IV RECOMMENDATIONS AND PROPOSED REGULATORY MODEL

Drawing upon the design choices, this article will now examine the purposes of regulating truth in elections, consider any unintended consequences and provide a recommended regulatory model.

A Purposes of Regulation

TiPA laws are desirable in order to prevent blatantly untrue statements being peddled by political parties. This has become particularly important in an era of 'fake news' and 'alternative facts' exacerbated by the rise of social media.²²⁰

²¹⁶ Ibid 356–7. The District Court of South Australia has expressed a preference for a narrower, subjective test of 'calculated to influence' rather than an objective one of 'likely to be affected by': *Cotton v Charles Sturt Council* [2000] SADC 4, [79]–[80] (Judge Smith) ('*Cotton*'), discussing *Crafter* (n 206) 357 (Mitchell J). See also *Law of Politics* (n 4) 151–2, discussing *Crafter* (n 206) 331–8, 357 (Mitchell J); *Cotton* (n 216) [79]–[80].

²¹⁷ *Representation of the People Act 1983* (UK) ss 160(4), (5)(b).

²¹⁸ *Cth Electoral Act* (n 32) s 386.

²¹⁹ Hill, Douglass and Baltutis (n 29) 143–4.

²²⁰ See generally, eg, Nicole A Cooke, *Fake News and Alternative Facts: Information Literacy in a Post-Truth Era* (American Library Association, 2018) 2–3, 8–13. See also Nic Newman

There are several harms in spreading lies in an election campaign. The first is damage to a candidate or political party in terms of reputation and electoral prospects if negative lies are spread about them.²²¹ The second harm is to the integrity of electoral processes if a lie causes people to change their vote based on false information which may, if aggregated, influence electoral outcomes.²²² In addition, false statements may distort the direction of political debate as candidates may feel compelled to rebut false attacks during an election, using scarce time and resources in an election campaign that could have been spent on more relevant or substantive issues.²²³

As the former South Australian Attorney-General Mr Rau noted, 'it is clearly desirable for electors to be able to access accurate information to assist them in their personal assessment of which of the varying political offerings that are before them best matches their point of view'.²²⁴ This was echoed by former South Australian Attorney-General Chris Sumner, who stated that 'if you can't rely on facts in a democracy for voters to be able to make a decision about particular parties or policy issues, then the democracy is demeaned'.²²⁵

Proponents of freedom of speech tend to oppose TiPA laws on the basis that freedom of expression provides a self-correcting process where false statements are soon corrected by public discussion; that is, you counter 'bad speech' with 'good speech'.²²⁶ However, there are several difficulties with the self-correcting argument. For one, it assumes that the person making the false statement and the respondent have equal communicative power and will reach the same audience, which will rarely be the case.²²⁷ Another issue with the self-correcting argument is that people can still be manipulated in the short term during an

et al, *Reuters Institute Digital News Report* (Report, 2025) 10–23
<https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2025-06/Digital_News-Report_2025.pdf>, archived at <<https://perma.cc/XK44-QXR3>>.

²²¹ Rowbottom (n 6) 510–11.

²²² Ibid 511–16.

²²³ Ibid 516–17.

²²⁴ John Rau Interview (n 58).

²²⁵ Interview with Chris Sumner, Former Attorney-General of South Australia (Yee-Fui Ng, Zoom, 30 October 2024).

²²⁶ Rowbottom (n 6) 522.

²²⁷ Ibid.

election campaign and false statements made close to an election date may not have the opportunity to be rebutted and corrected before the election.²²⁸

Another argument is that governments should not regulate free expression because such regulation fails to treat people as rational and autonomous agents and it is up to people to ascertain for themselves the truth and falsity of government policy.²²⁹ Restrictions on false speech arguably do not undermine the autonomy of the electorate as the falsity of a statement itself is an attack on voter autonomy. This is because the deceptiveness of a campaign lie means that voters lack vital information needed to make a proper evaluation.²³⁰ This contention is further undermined by the fact that other methods of false expression are regulated, including through defamation law and commercial laws prohibiting false advertising.²³¹

In this vein, former South Australian Premier Mike Rann questioned why political parties want and need a licence to lie in order to win an election. He made an analogy between pharmaceutical companies making false claims about medicines and drugs curing diseases when they cannot.²³² He noted:

Why should consumers and shareholders be protected from fraudulent and dishonest claims but not electors? Why don't you want electors to be able to make their judgements and cast their votes on the basis of facts and truthful arguments rather than deliberate falsehoods?²³³

Legislative intervention is also justified by reference to the inadequacy of other regulatory mechanisms, such as market regulation. Markets are ineffective regulators of information because 'consumer demand unconsciously tends towards the consumption of news that confirms existing prejudices' and 'consumers are not always equipped to sift the information'.²³⁴ Digital platforms

²²⁸ Ibid 523.

²²⁹ Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1(2) *Philosophy & Public Affairs* 204, 217–18; Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982) 39.

²³⁰ Rowbottom (n 6) 524.

²³¹ Ibid, citing TM Scanlon, 'Freedom of Expression and Categories of Expression' (1979) 40(4) *University of Pittsburgh Law Review* 519, 532.

²³² Interview with Mike Rann, Former Premier of South Australia (Yee-Fui Ng, Zoom, 30 August 2024).

²³³ Ibid.

²³⁴ Hill, Douglass and Baltutis (n 29) 27.

benefit financially from misinformation, disinformation and other harmful content spreading widely on their services, and thus have the incentive to amplify such behaviour for profits rather than to curb disinformation.²³⁵ This suggests that ‘leaving things to the market’ will be insufficient to combat misinformation in elections.

In the Australian context, TiPA laws may be justified specifically because of compulsory voting which arguably places ‘a special duty on the state to ensure that [voting] does not place an unreasonable burden on citizens’.²³⁶ This includes combatting false election information that elevates the ‘information costs’ of voting.²³⁷

B *Unintended Consequences*

While disinformation in elections is a problem, there are also risks that unintended consequences will emerge from legislative intervention. Discussion of unintended consequences tends to centre on two issues: the effect of the law on freedom of speech and the use of TiPA laws as a political tool.

While any designer of TiPA laws should be conscious of the risk of these consequences, it is generally recognised that the magnitude of such consequences can be mitigated through legislative design and is not necessarily an argument against the principle of introducing TiPA laws.²³⁸

1 *Freedom of Speech*

Critics of TiPA laws refer primarily to their effect on freedom of speech and the potential for regulatory overreach. In the first instance, there is a question of whether restrictions on free speech in elections are ever tolerable and whether TiPA laws can be justified at all. Renwick and Palese do not consider that this argument is feasible given the state’s regulation of advertising generally, as well as of other aspects of the electoral system.²³⁹ Further, rules ‘may enhance rather

²³⁵ David Mejia-Canales, *Rights-First: Principles for Digital Platform Regulation* (Report, 4 October 2024) 6–7 <<https://www.hrlc.org.au/app/uploads/2025/04/2410-Principles-for-Digital-Platforms-Regulation-Report.pdf>>, archived at <<https://perma.cc/AX2U-NEXY>>.

²³⁶ Hill, Douglass and Baltutis (n 29) 29.

²³⁷ Ibid 30.

²³⁸ Ng (n 17) 47–9.

²³⁹ Renwick and Palese (n 47) 40.

than detract from ordinary citizens' freedom to act autonomously', particularly if regulation of disinformation is 'genuinely independent of political control'.²⁴⁰

In addition, knowingly false statements may not attract human rights protection, for example, under art 10 of the *European Convention of Human Rights*.²⁴¹ As Lord Hobhouse noted:

There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society, being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed. These are general propositions going far beyond the mere protection of reputations.²⁴²

However, there are also more specific speech concerns surrounding whether TiPA laws may have the effect of silencing or chilling political discourse. A broad law might 'act as a deterrent to speech that is not, in fact, covered by its terms: individuals will self-censor'.²⁴³ That risk emerges particularly from drafting that is vaguely worded, where costs to defend a legal action are high, or where an advertiser believes that they may not have the proof to support their statement in court.²⁴⁴ Kevin Bonham contended that broader truth in electoral advertising laws 'create a danger that valid opinions may be suppressed (at least temporarily) because of errors in the interpretation of such laws'.²⁴⁵ Bonham argued that 'the damage done to democracy by a single possibly valid opinion being suppressed is far greater than the damage done by thousands of false claims being made in a domain where they can be rebutted

²⁴⁰ Ibid.

²⁴¹ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 200–1 (Lord Nicholls, Lord Cooke agreeing at 217, Lord Hope agreeing at 235, Lord Hobhouse agreeing at 237).

²⁴² Ibid 238.

²⁴³ Pender (n 3) 22.

²⁴⁴ Rowbottom (n 6) 525. See also Pender (n 3) 22–3.

²⁴⁵ Kevin Bonham, Submission No 13 to House of Assembly Standing Committee on Government Administration B, Parliament of Tasmania, *Inquiry into the Electoral Disclosure and Funding Amendment Bill 2024 (No 9)* (12 July 2024) 1, 4 <https://www.parliament.tas.gov.au/__data/assets/pdf_file/0020/83450/13-Dr-Kevin-Bonham.pdf>, archived at <<https://perma.cc/7PQE-V4S4>> ('Bonham Submission'), quoted in *Tas Disclosure Bill Inquiry* (n 20) 48 [2.178].

and where those making them can be judged negatively by those who care about honesty in politics'.²⁴⁶ However, this argument is geared towards broader TiPA laws that extend beyond statements of fact to opinion. These do not exist in Australia.²⁴⁷

Based on interviews with political participants, the risk of chilling speech has not eventuated in South Australia and electoral discourse has been unaffected by TiPA laws. Ms Madigan, who has written hundreds of political ads for 24 electoral campaigns in the Commonwealth, ACT, Northern Territory ('NT') and Queensland, and has done union ads in election campaigns in every other state, stated that her ads in SA did not differ from other jurisdictions.²⁴⁸ Likewise, Mr Hawker, former Labor Party campaign strategist for elections federally and in every state and territory jurisdiction except the ACT, stated that the TiPA laws in SA were no impediment to running political ads and he ran elections in the same way in all Australian jurisdictions.²⁴⁹ Mr Hawker worked on about four elections in SA from 1997 through to 2010 and does not recall them being different in any way.²⁵⁰ In addition, all political participants interviewed in SA and the ACT have agreed that they did not feel constrained in their electoral campaigning or in the exercise of their freedom of speech.²⁵¹

In Australia, the risk of constraining free speech has constitutional implications due to the implied freedom of political communication which provides a concrete mechanism to invalidate a law that unduly impinges political communication.²⁵² There is a constitutional risk that a TiPA law would be struck down for infringing the implied freedom if its scope is overly broad,²⁵³ although there is precedent for such laws to be upheld.

²⁴⁶ Bonham Submission (n 245) 4, quoted in *Tas Disclosure Bill Inquiry* (n 20) 48 [2.178].

²⁴⁷ See above n 52 and accompanying text.

²⁴⁸ Dee Madigan Interview (n 67).

²⁴⁹ Bruce Hawker Interview (n 70).

²⁵⁰ Ibid.

²⁵¹ Ng (n 17) 5–6.

²⁵² See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559–62 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

²⁵³ See, eg, Evidence to Electoral Matters Committee, Parliament of Victoria, Melbourne, 18 August 2009, 5 (Mark Polden), quoted in *Vic Electoral Act Inquiry* (n 79) 101 [4.84]. In the US, a similar concern is raised under the First Amendment of the *United States Constitution*: see, eg, Catherine J Ross, 'Ministry of Truth: Why Law Can't Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns' (2017) 16 (Fall) *First Amendment Law Review* 367, 388–401.

Specifically, in *Cameron v Becker* ('*Cameron*'), the Supreme Court of South Australia upheld the constitutionality of s 113 of the *SA Electoral Act*.²⁵⁴ There, Lander J stated that, although the legislation burdens political communication, it does so to protect the right 'that the elector is not led by deceit or misrepresentation into voting differently from that which the elector would have done if the elector had not been misinformed'.²⁵⁵ However, the salience of *Cameron* is limited as a result of developments in implied freedom jurisprudence which have taken place since *Cameron* was decided in 1995.²⁵⁶ Further, this precedent may be affected by the rise of social media content, which might attract stronger protections due to being 'ostensibly unofficial and personal' in nature.²⁵⁷

Since *Cameron* was decided, other commentators have considered whether TiPA laws would survive more recent formulations of the implied freedom. Pender considered that a court would likely accept that TiPA laws burden the implied freedom to a modest extent and serve a legitimate purpose of ensuring that the electorate is 'properly informed and not unduly influenced by falsehoods'.²⁵⁸ On balance, he concluded that the *SA Electoral Act* and *ACT Electoral Act* are 'reasonably appropriate and adapted' to advance their legitimate purpose.²⁵⁹ Particularly, it is unlikely that the benefits of counteracting the impact of misleading advertising on democratic norms will be 'manifestly outweighed' by their 'modest burden' on the implied freedom.²⁶⁰ Baltutis considered that there is a greater risk of invalidation under structured proportionality testing if publishers are liable for removing misleading advertising, including because this may 'generally discourage the publication of political advertising'.²⁶¹ However, he nonetheless concluded that the law could be refined to withstand constitutional risks.²⁶²

²⁵⁴ (1995) 64 SASR 238, 248 (Olsson J, Bollen J agreeing at 239), 257 (Lander J) ('*Cameron*').

²⁵⁵ Ibid 255.

²⁵⁶ Pender (n 3) 3.

²⁵⁷ Browne (n 16) 21.

²⁵⁸ Pender (n 3) 12.

²⁵⁹ Ibid 12–16.

²⁶⁰ Ibid 16. He also concluded that a court would likely hold TiPA laws constitutional using a 'calibrated scrutiny approach': at 16–19.

²⁶¹ Baltutis (n 82) 608–9.

²⁶² Ibid 611.

2 Politicisation

Another concern is that parties might ‘weaponise’ TiPA laws as a political tool ‘to serve their own interests’,²⁶³ including through the use of complaints ‘as a method of disrupting the[ir] opponents’ campaign — notwithstanding that there [is] no merit in the claim’.²⁶⁴ In 2009, the South Australian Electoral Commission suggested that complaints raised under s 113 ‘appeared to degenerate into a “tit for tat” distraction’.²⁶⁵

Based on the interviews conducted by this author, there is evidence of political parties using TiPA laws as a political tool in the 2018 and 2022 elections in SA, with parties lodging numerous complaints against their political opponents to try to stymie them and publicising the Electoral Commissioner’s findings against the other party by brandishing the Commissioner’s letter in the media and stating that the other party had lied.²⁶⁶ As Mr Gully explained: ‘[A]s soon as the Commissioner writes a letter to one side upholding a complaint, the other side will get on TV that night and hold the letter up saying, “Here’s a letter from the Commissioner saying the other side’s told fibs”’.²⁶⁷

Sam Hooper, lawyer and Liberal Party volunteer who assisted in drafting complaints, noted:

There’s a media story in it regardless. Because parties want to be able to go out and say, the Electoral Commissioner has said that the other side has misled the public, whereas the risk is the Electoral Commissioner says that they have not misled the public, and then this can be weaponised by the other side.²⁶⁸

However, meritless claims can backfire on the parties that raise them. Former State Secretary of the South Australian Labor Party, Reggie Martin, suggested that ‘a party’s case can be undermined if it makes a complaint that is not upheld’.²⁶⁹

²⁶³ Rowbottom (n 6) 525.

²⁶⁴ Renwick and Palese (n 47) 27.

²⁶⁵ *Frome By-Election Report* (n 85) 22.

²⁶⁶ Ng (n 17) 49.

²⁶⁷ David Gully Interview (n 100).

²⁶⁸ Sam Hooper Interview (n 166).

²⁶⁹ Interview with Reggie Martin, Former South Australian Labor State Secretary (Alan Renwick and Michela Palese, Adelaide, 3 August 2017), discussed in Renwick and Palese (n 47) 27.

C Recommendations for Reform

Although there have been concerns expressed about the implementation of TiPA laws, this article concludes that the advantages of TiPA laws outweigh the disadvantages and unintended consequences (including the practical effects and difficulties in implementation). Interview evidence has shown that TiPA laws have generally operated well in SA for the last 41 years and have the in-principle support of South Australian politicians, party officials and electoral commissioners.²⁷⁰

The South Australian and ACT TiPA laws provide a workable model that has the modest benefit of weeding out the most egregious lies in political ads, while not chilling free speech. A major concern about TiPA laws regarding the chilling of free speech and suppression of valid opinions has not eventuated in the operation of TiPA laws in SA and the ACT due to their narrow ambit that only covers statements of fact.²⁷¹ Although the laws are narrow in ambit, they do not contravene the implied freedom of political communication and are enforceable.²⁷² It is difficult for a regulator to arbitrate on a broader range of matters such as opinions or predictions. The South Australian Electoral Commission has done a remarkable job in administering the scheme within the extremely tight timelines and in the cut and thrust of election campaigns.

Although there have been indications that TiPA laws have been used as a political tool by political parties in South Australia, this has been the case for other laws (eg spurious referrals to anti-corruption commissions being used as a media story) and should not be a reason not to introduce such laws.²⁷³ Regulatory mechanisms can be introduced to ameliorate such effects, such as enforcing a threshold of materiality (eg enabling the Electoral Commissioner to

²⁷⁰ Ng (n 17) 22–6.

²⁷¹ See above Part IV(B)(1).

²⁷² See *Cameron* (n 254) 248 (Olsson J, Bollen J agreeing at 239), 257 (Lander J).

²⁷³ See above Part IV(B)(2). See, eg, Sean Tarek Goodwin and Holly Tregenza, ‘NSW Premier Chris Minns Denies “Disgraceful”, “Unsubstantiated Rumours” as Parliamentary Committee Moves To Refer Him to ICAC over Rosehill Development’, *ABC News* (online, 4 December 2024) <<https://www.abc.net.au/news/2024-12-04/nsw-premier-chris-minns-referred-icac-rosehill-racecourse/104686108>>, archived at <<https://perma.cc/Q8DG-3GGS>>. See also Yee-Fui Ng, *Truth in Political Advertising Laws: Interview Summaries* (Final Report, 2024) 39 <https://a-ap.storyblok.com/f/3001038/x/666d711a42/d_truth-in-political-advertising-laws-operations-and-effectiveness_interview-summary.pdf>, archived at <<https://perma.cc/L67B-ZUDT>>.

dismiss vexatious complaints) and having more defined timeframes for resolving complaints.

However, based on the interviews, TiPA laws may only have a limited impact as their scope is narrow and many forms of disinformation are not covered. Accordingly, other regulatory measures to support better quality information in electoral campaigns and political communication or to address misinformation and disinformation could be considered, such as transparency measures for generative AI and deepfakes. These would complement other electoral transparency requirements, such as the requirement for political parties and third party campaigners to publicly authorise their ads.²⁷⁴ TiPA laws also operate within a legislative context where it is impermissible for electoral ads to mislead voters in relation to the method of casting their vote.²⁷⁵ Further, push polling should be banned or restricted, as in the NT,²⁷⁶ because this is a means of spreading false information under the guise of polling.²⁷⁷

This article provides specific recommendations in terms of design principles relating to the scope of TiPA laws, as well as their operation and enforcement.

1 Scope

TiPA laws in South Australia and the ACT are limited to false and misleading statements of fact and do not cover opinions and predictions.²⁷⁸ The laws have been criticised as being easy to evade as political parties can simply frame their ads as an opinion, prediction or question, and escape the ambit of the law.²⁷⁹

However, as discussed above, the South Australian TiPA law has been held to be constitutionally valid due to the narrow ambit of the law.²⁸⁰ A broader law

²⁷⁴ See, eg, *Cth Electoral Act* (n 32) s 321D.

²⁷⁵ See, eg, *ibid* s 329. See also *Evans v Crichton-Browne* (1981) 147 CLR 169, 199–201, 207–8 (Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ).

²⁷⁶ *Electoral Act 2004* (NT) s 271.

²⁷⁷ Evan Gerstmann and Matthew J Streb, 'Putting an End to Push Polling: Why It Should Be Banned and Why the First Amendment Lets Congress Ban It' (2004) 3(1) *Election Law Journal* 37, 37.

²⁷⁸ See above nn 52–4 and accompanying text.

²⁷⁹ Anne Twomey Interview (n 124).

²⁸⁰ *Cameron* (n 254) 248 (Olsson J, Bollen J agreeing at 239), 257 (Lander J).

risks breaching the freedom of political communication implied by the *Australian Constitution*.²⁸¹ Further, a law that extends beyond statements of fact would be difficult to enforce by an adjudicator.²⁸²

The media for disseminating political information has radically changed over time, with the main avenues of political advertising being television, radio and newspapers in the 2000s. However, the rise of social media means that many people consume their news through various online avenues, apps and streaming services.²⁸³ Although social media can potentially enhance democratic participation, ‘social media can also be used to erode trust in political institutions, to spread harmful disinformation, and to incite hate, polarisation and anti-democratic sentiment’.²⁸⁴

Thus, TiPA laws designed 41 years ago need to be updated to encompass modern forms of political advertising, including social media (Meta-owned platforms, X and YouTube), streaming services, video on demand, bulk text messages and robocalls, in addition to traditional forms of media such as mail and broadcast radio and television. Under the South Australian and ACT TiPA laws, there may be a lack of clarity about paid ads compared to unpaid social media posts.²⁸⁵

Rapid developments in the use of AI have meant that there can be deceptive AI-generated content, such as deepfakes, which seek to influence electoral outcomes. For instance, in the recent US election, there was an AI voice clone of President Joe Biden targeting New Hampshire constituents telling them not to vote, and there were deepfakes of Donald Trump.²⁸⁶

²⁸¹ Pender (n 3) 22.

²⁸² Mick Sherry Interview (n 57).

²⁸³ Nic Newman et al (n 220) 10.

²⁸⁴ Department of Home Affairs (Cth), *Strengthening Australian Democracy: A Practical Agenda for Democratic Resilience* (Report, 2024) 28 <<https://www.homeaffairs.gov.au/about-us-subsite/files/strengthening-australian-democracy.pdf>>, archived at <<https://perma.cc/7QJU-5DF2>>.

²⁸⁵ *NSW Election Report* (n 14) 39 [2.39]–[2.40], discussing Evidence to Joint Standing Committee on Electoral Matters, Parliament of New South Wales, Sydney, 17 May 2024, 19 (Anne Twomey).

²⁸⁶ Miah Hammond-Errey, ‘Byte-Sized Diplomacy: AI-Enabled Elections or Deepfake Democracy?’, *The Interpreter* (Web Page, 3 July 2024) <<https://www.lowyinstitute.org/the-interpreter/byte-sized-diplomacy-ai-enabled-elections-or-deepfake-democracy>>, archived at <<https://perma.cc/PK6L-RLAM>>.

The proliferation of disinformation is now being supercharged by the rapid rise of AI technologies, ‘increasing the threat to groups often targeted in information spaces, including children’.²⁸⁷ United Nations Secretary-General António Guterres has made a call to curb harm from AI misinformation and disinformation.²⁸⁸ As such, TiPA laws should be extended to cover materially deceptive AI-generated audio or visual media created for the purposes of influencing an election. Exceptions may be required for satirical content, which will increase the likelihood of such laws being compliant with the implied freedom of political communication.

A TiPA law that has a tight temporal limitation, akin to the NZ law, which only applies in a strictly time-limited period to ads issued for the three days up to and including polling day, will be ineffective due to its overly strict temporal coverage, which excludes the vast majority of political ads.²⁸⁹ The South Australian TiPA law has been construed to be limited to false and misleading advertising that affects an election, meaning that some ads issued outside of the campaign period will not be adjudicated by the Electoral Commissioner.²⁹⁰

There is no justification for allowing false and misleading advertising outside of the electoral campaign period. Thus, it is recommended that all temporal limitations on TiPA laws be removed so that it is impermissible for political parties to make inaccurate and misleading statements at all times.

It is not just political parties that seek to influence the outcome of an election. There is a range of third party campaigners that seek to help promote or oppose candidates, elected members or registered political parties at elections such as unions, business groups and lobby groups such as Advance Australia.²⁹¹ Third party campaigners are regulated by electoral legislation.²⁹²

In SA and the ACT, TiPA laws capture the authors or creators of political advertising, including political parties, unions and third party campaigners

²⁸⁷ United Nations, ‘UN Launches Recommendations for Urgent Action To Curb Harm from Spread of Mis- and Disinformation and Hate Speech’ (Press Release, 24 June 2024) <<https://www.un.org/sustainabledevelopment/blog/2024/06/global-principles-information-integrity-launch/>>, archived at <<https://perma.cc/L334-QT8Z>>.

²⁸⁸ Ibid.

²⁸⁹ NZ *Electoral Act* (n 75) s 199A, discussed in Hill, Douglass and Baltutis (n 29) 60.

²⁹⁰ Mick Sherry Interview (n 57).

²⁹¹ See, eg, Browne (n 16) 5.

²⁹² See especially, eg, *ACT Electoral Act* (n 10) ss 198 (definitions of ‘financial representative’ para (f), ‘third-party campaigner’), 201(2)(c), 205G(1)(d)–(4), 218A, 220, 224(5); *Cth Electoral Act* (n 32) pt XX div 1A; *SA Electoral Act* (n 9) pt 13A div 8A.

seeking to affect electoral outcomes.²⁹³ These provisions have thus been enforced against third party campaigners such as unions, associations, resident groups and business groups.²⁹⁴

To ensure the efficacy of TiPA laws, it is necessary to cover associated entities of political parties and third party campaigners, as disinformation can otherwise be easily channelled by political parties through other entities.

The South Australian Electoral Commissioner has advised that the vast majority of complaints can be resolved by the author of the statement withdrawing the false and misleading statement and issuing a retraction.²⁹⁵ However, in a small minority of cases, the author of the inaccurate or misleading statement cannot be identified.²⁹⁶ In these circumstances, or if the author of the ad refuses to retract, the TiPA regulator should be empowered to order social media platforms to remove the false or misleading posts.

To facilitate this, there should be agreements between TiPA regulators and social media companies to remove inaccurate and misleading ads. There may be challenges in enforcement against social media platforms based overseas, as interviewees have reported variable compliance with such requests.²⁹⁷ Where take-down notices are refused or ignored by social media companies, the TiPA regulator should post a correction on the social media post and on a public disinformation register.

Electoral campaigning changes drastically over time due to technological advances and the different ways that people consume media over time. Accordingly, to remain fit for purpose, TiPA laws should be reviewed every four years. Some jurisdictions already have mechanisms for regular reviews of electoral regimes, such as the Joint Standing Committee on Electoral Matters in the Commonwealth, Victoria, NSW and Tasmania, but not all jurisdictions have this review mechanism.²⁹⁸

²⁹³ See *ACT Electoral Act* (n 10) ss 4(1) (definition of 'electoral matter'), 297A(1); *SA Electoral Act* (n 9) ss 4(1) (definition of 'electoral advertisement'), 113(2).

²⁹⁴ David Gully Interview (n 100).

²⁹⁵ Mick Sherry Interview (n 57).

²⁹⁶ *Ibid.*

²⁹⁷ Ng (n 17) 29.

²⁹⁸ See, eg, 'Role of the Committee', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/Role_of_the_Committee>, archived at <<https://perma.cc/YB9S-3BJL>>; 'Electoral Matters Committee', *Parliament of Victoria* (Web Page, 2026) <<https://www.parliament.vic.gov.au/emc>>.

2 Enforcement

Electoral commissions are appropriate bodies to arbitrate TiPA laws given their proven record of impartiality and high trust within the community and amongst political participants, as well as expertise in electoral management. The South Australian Electoral Commission has done an admirable job in administering TiPA laws in an impartial manner. As exhibited from the interviews conducted by this author, the reputation of the South Australian Electoral Commissioner has remained untarnished although it has administered these laws since 1985.²⁹⁹ Similarly, the ACT Electoral Commission's reputation for impartiality has not been negatively affected by administering these laws.³⁰⁰ However, Electoral Commissioners from other jurisdictions have not been enthusiastic about taking on this role.³⁰¹

Alternatively, the approach of the Electoral Communications Bill could be adopted, where an independent panel operates as a secondary structure to an electoral commission.³⁰² This structure provides additional protection for electoral commissions, while enabling the panel to draw on commission resources and expertise.

Another possibility is that a specialised new body could be created to adjudicate the withdrawal and retraction process. As this body would mainly be

archived at <<https://perma.cc/9DZ7-QKUY>>; 'Joint Standing Committee on Electoral Matters', *Parliament of New South Wales* (Web Page, 2026) <<https://www.parliament.nsw.gov.au/parliamentary-business/committees/committee-details?committeeId=181>>, archived at <<https://perma.cc/DVY6-HXEH>>; 'Joint Standing Committee on Electoral Matters', *Parliament of Tasmania* (Web Page, 2026) <<https://www.parliament.tas.gov.au/committees/joint-committees/standing-committees/joint-standing-committee-on-electoral-matters>>, archived at <<https://perma.cc/7HPV-W98H>>. The Western Australian Electoral Commission recently recommended that the Western Australian government consider forming a Joint Standing Committee on Electoral Matters: 'Oversight Committee', *Western Australian Electoral Commission* (Web Page, December 2025) <<https://www.elections.wa.gov.au/node/2513>>, archived at <<https://perma.cc/XUG3-RDFK>>. As of May 2026, the Western Australian government is 'working towards a committee to have independent oversight, with a number of independent officials, including the Electoral Commissioner [and] ... both houses [will need to] agree to new standing orders later this year' on its functions: Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 May 2026, 10 (David Michael).

²⁹⁹ Ng (n 17) 25.

³⁰⁰ Ibid 27.

³⁰¹ Ibid 28.

³⁰² Electoral Communications Bill (n 11) sch 1 item 27, inserting *Cth Electoral Act* (n 32) ss 321Q, 321QA(4).

operational during election periods, the body should preferably be linked to an existing administrative review body with an electoral branch that is operational during election periods, where staff engage in other work in non-election periods.

Sanctions and remedies are essential for the effective enforcement of TiPA schemes. The South Australian Electoral Commissioner has advised that the vast majority of cases are dealt with by ordering withdrawals and retractions by the author of the relevant political advertisement and that compliance by the political parties has been good.³⁰³ Retractions should be in the same medium as the original publication and in the same timeslot (eg prime time radio ads should be followed by a prime time radio retraction) or boosted at a similar level on social media.³⁰⁴ The South Australian Electoral Commissioner has noted that injunctions are rarely used due to good compliance with the regime, but they may be necessary in different political cultures or if practices change.³⁰⁵

Several interview participants have also noted the desirability of the Electoral Commissioner further prosecuting more egregious breaches in court to serve as a stronger deterrent. However, the fines imposed for breaches have been criticised as being too low in SA and the ACT, with some political participants considering that it was good ‘value for money’ for the publicity.³⁰⁶ Thus, fines should be increased to serve as a stronger deterrent. The size of the fine should be linked to the size of the political party so that minor parties and independents are not unduly disadvantaged.

To serve as an even stronger deterrent, political parties could be punished by a reduction of public funding if TiPA laws are breached. This is on the basis that it is unacceptable for public money for elections to be used for advertising that is false or misleading in a material way.³⁰⁷

³⁰³ Mick Sherry Interview (n 57).

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Evidence to Senate Finance and Public Administration Legislation Committee, Parliament of Australia, Canberra, 6 April 2001, 44 (Andrew Becker, Electoral Commissioner, Australian Electoral Commission).

³⁰⁷ Ng (n 17) 68. But see at 57.

While the South Australian and ACT TiPA laws provide for the ability to overturn an election result for breaches of TiPA laws,³⁰⁸ this is not desirable as rendering an election void because of a misleading ad is an extreme measure and may render election results uncertain. The high bar for voiding an election has meant that this penalty has never been applied³⁰⁹ and is not a practical means of enforcing TiPA laws.

V CONCLUSION

The Organisation for Economic Co-Operation and Development ('OECD') has noted the 'rapid and global spread of mis- and disinformation', which 'presents a fundamental risk to the free and fact-based exchange of information underpinning democratic debate'.³¹⁰

TiPA laws have successfully operated in SA for 41 years and have the support of politicians, party officials and electoral commissioners. These laws are narrow in ambit but are constitutional and enforceable. TiPA laws have also been introduced in the ACT and there is growing interest in introducing these provisions across the Federation.

Nevertheless, it is important to emphasise that TiPA laws are not a panacea for misinformation and disinformation due to the narrow ambit of the laws which only cover a fraction of electoral advertising. Indeed, there may be a risk that whilst formal election advertising might improve, bad actors will just focus on unregulated political channels, whether from offshore or through astroturfing or push polling, or even through official channels using controversial press statements. To comprehensively combat misinformation and disinformation in

³⁰⁸ See *ACT Electoral Act* (n 10) ss 265(a)–(b), 266(1)–(2), (5); *SA Electoral Act* (n 9) ss 107(1)(c), (5).

³⁰⁹ Browne (n 16) 7.

³¹⁰ Organisation for Economic Co-Operation and Development, *Facts Not Fakes: Tackling Disinformation, Strengthening Information Integrity* (Report, 2024) 14 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2024/03/facts-not-fakes-tackling-disinformation-strengthening-information-integrity_ff96d19f/d909ff7a-en.pdf>, archived at <<https://perma.cc/BDM2-YEV5>>, citing Organisation for Economic Co-Operation and Development, *Building Trust and Reinforcing Democracy: Preparing the Ground for Government Action* (OECD Public Governance Reviews, 2022) 14 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2022/11/building-trust-and-reinforcing-democracy_675763bc/76972a4a-en.pdf>, archived at <<https://perma.cc/CC9K-EYG8>>.

elections, TiPA laws need to be supplemented with other regulatory mechanisms such as those targeting social media platforms.

This article has made recommendations for the design, operation and enforcement of TiPA laws that can form a model for other jurisdictions or countries considering implementing TiPA laws. This article thus provides a framework for regulating truth in political advertising that is robust, principled, enforceable and well adapted to capturing the activities of modern digital campaigning.

False information can alter elections, affect voting participation, silence minorities and polarise the electorate.³¹¹ It is time to reform electoral laws in Australia and overseas to mitigate these significant dangers to our democratic systems.

³¹¹ Hill, Douglass and Baltutis (n 29) 54.