

# Truth in political advertising laws: design, operation, effectiveness and recommendations for reform.

FINAL REPORT

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# 1 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 online campaign of misinformation from then President Trump, who falsely claimed that the 2020 Presidential Election had been 'stolen'. This led to Trump's supporters storming the US Capitol Building on 6 January 2021, resulting in five deaths.<sup>1</sup>

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 2024, the World Economic Forum's annual Global Risks Report ranked mis- and disinformation as the most severe risk facing the world over the next two years.<sup>2</sup>

One mechanism for regulating disinformation is to introduce 'truth in political advertising' laws. By targeting or prohibiting disinformation in elections, the main goal of truth in political advertising 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'.<sup>3</sup>

Truth in political advertising (TiPA) laws already exist in South Australia<sup>4</sup> (since 1985) and the ACT<sup>5</sup> (since 2020), and the Commonwealth has introduced a bill on truth in political advertising in the House of Representatives in November 2024, although this has not yet been passed into law.<sup>6</sup> Truth in political advertising laws have thus been operational in South Australia for 39 years, and have been utilised for the first time in the October 2024 ACT election. Representative polling by the Australia Institute shows that 84% of Australians support truth in political advertising laws.<sup>7</sup>

This project has been commissioned by the Susan McKinnon Foundation to consider the effect and operation of truth in political advertising laws. This final report makes findings based on interviews with political participants, party officials, electoral commissioners and civil society organisations in South Australia, the ACT, and other Australian jurisdictions regarding truth in political advertising laws, as well as relevant Australian and overseas literature. It also provides recommendations on the design, operation and effectiveness of truth in political advertising laws.

The author would like to express her deep thanks and gratitude to all the interviewees who have participated in this project and enriched the report with their insights. She would also like to thank Catherine Zhou, who provided remarkable research assistance for this project. Thanks also to Daniel Smolich and Seamus Coleman from the Susan McKinnon Foundation, who provided assistance and facilitation at various stages of the project.

## 1.1 Aims

The aim of this project is to ascertain the operation, effectiveness and any unintended consequences of truth in political advertising laws in South Australia.

The project will examine and report on:

- a summary of the interviews<sup>that</sup> were undertaken for the project;

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<sup>1</sup> 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) *Frontiers in Sociology* 1.

<sup>2</sup> World Economic Forum, *Global Risks Report 2024* (2024)

<sup>3</sup> Jacob Rowbottom, 'Lies, Manipulation and Elections: Controlling False Campaign Statements' (2012) 32(3) *Oxford Journal of Legal Studies* 507, 519.

<sup>4</sup> *Electoral Act 1985* (SA) s 113.

<sup>5</sup> *Electoral Act 1992* (ACT) s 297A.

<sup>6</sup> Electoral Legislation Amendment (Electoral Communications) Bill 2024 (Cth).

<sup>7</sup> Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 4, 31.

- responses to the key research questions;
- an assessment of and conclusions about the impact of the laws;
- recommendations for reform of existing schemes or design of future schemes; and
- summarise academic literature and international examples, where relevant.

## 1.2 Structure

The report is structured as follows:

- Part 1 introduces the project and provides an executive summary of key findings and recommendations.
- Part 2 will summarise the current regulation of truth in political advertising laws in Australia.
- Part 3 will provide an overview of legislation regulating untruths and disinformation in comparable overseas jurisdictions.
- Part 4 will provide a summary of interviews that were undertaken for the project.
- Part 5 will provide an in-depth analysis outlining the design choices of truth in political advertising laws in Australia.
- Part 6 will provide recommendations in terms of the design, operation and enforcement of truth in political advertising laws.

## 1.3 Executive Summary

### 1.3.1 Key Findings from Interviews

The project has made the following findings in relation to the operation and effectiveness of truth in political advertising (TiPA) laws in South Australia:

- TiPA laws have undoubtedly changed the face of electoral campaigning in South Australia, with state party directors/secretaries working with the premier and lawyers to closely scrutinise the wording of all political ads to ensure that they are accurate and do not breach the laws.
- The level of compliance with the Electoral Commissioner's determinations is good, with political parties generally following the Commissioner's directions in issuing retractions.
- The rise of social media has led to an increased number of complaints to the Electoral Commissioner in the most recent 2022 election.
- There are indications that TiPA laws have been used as a political tool, particularly in the last two elections (2018 and 2022), by political parties seeking to gain electoral advantage. Prior to this (before the 2014 election), there was less indication of TiPA laws being weaponised.
  - Political parties have made multiple complaints against their opponents to distract them, delaying tactics have been employed, and parties have sought to embarrass their opponents by publicising electoral commissioner findings of false and misleading statements in the media.
- The South Australian participants were unanimous that the TiPA laws have had no 'chilling' effect on freedom of speech. This could be because the laws are narrowly formulated to statements of fact, rather than opinions or predictions.
- The South Australian participants were unanimous that the South Australian Electoral Commission's reputation for impartiality over time has been unaffected by administering TiPA laws, and that the Electoral Commission continues to enjoy strong public confidence for neutrality.

- Several participants have noted the desirability of more serious breaches of TiPA laws being prosecuted in the courts, in order to have a stronger deterrent effect.
- Several interviewees have noted that the current SA laws may not be fit-for-purpose in several respects, including in dealing with aspects of misinformation/disinformation that are not covered by political advertising, blackout periods being ineffective with early voting, AI and deepfakes.
- The TiPA laws are generally supported in principle in South Australia by most political participants, who believe that the laws have a positive effect. This is consistent with previous empirical research from 2019, where Renwick and Palese found that both parties ‘support the principle of s 113’.<sup>8</sup>

The project has made the following findings in relation to the operation and effectiveness of truth in political advertising (TiPA) laws in the ACT:

- There were very few complaints in the ACT 2024 general election, compared to the volume of complaints in SA.
- All ACT political participants unanimously supported the TiPA laws.
- Political parties did not change the practices within their party in terms of ensuring ads were not false and misleading. This could be because the ACT is a high information electorate, where sources are provided in the ads themselves.
- Several interviewees expressed frustration at the inability to challenge or appeal Electoral Commissioner determinations, the delays in determinations, and the lack of equivalence of the prominence of the media where an ad found to be misleading was run (prime time TV) compared to the retraction (social media).
- There was no evidence of weaponisation of TiPA laws or any unintended effects.
- The ACT interviewees were unanimous that there was no chilling effect of TiPA laws.
- The interviewees were unanimous that the ACT Electoral Commission’s reputation for impartiality has been unaffected by administering TiPA laws.

The project has made the following findings from other jurisdictions:

- There are disparate levels of fact checking of political ads by the major political parties in various jurisdictions without TiPA laws. Lawyers are generally only brought in for negative ads where there may be a risk of defamation.
- Political participants from non-TiPA jurisdictions have noted that they still aim to ensure the accuracy and truthfulness of their advertising and campaign material, as it is embarrassing to be found to have lied.
- Political parties in various jurisdictions have approached requests for retractions on social media platforms differently, with some approaching the social media platform directly, and others going through the electoral commission.
  - Participants report varying levels of cooperation from social media platforms, with some requests for removal of misleading content being ignored.
- Electoral Commissioners from other jurisdictions have expressed concerns about administering TiPA laws due to the fear of their impartiality being affected and being distracted from their main task of delivering an election.
- Electoral Commissions are taking active steps to combat electoral misinformation and disinformation, including posting corrective messages on social media and instituting disinformation registers.
- Political participants from non-TiPA jurisdictions were less enthusiastic about the introduction of TiPA laws, with some opposing the introduction of such laws on the basis of the laws being unnecessary or overly burdensome
- Civil society groups welcomed the introduction of TiPA laws in Australian jurisdictions on the basis that this will decrease disinformation in elections, there is public support for these laws, and a workable model already exists in South Australia.

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<sup>8</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 27.

### 1.3.2 Recommendations and Proposed Regulatory Model

This project has made 25 recommendations to enhance the transparency, operation and effectiveness of truth in political advertising laws. The recommendations encompass the scope, operation and enforcement of these laws, and can be used to design a regulatory model for jurisdictions considering adopting truth in political advertising laws.

Further explanation about these recommendations is provided in Part 6 of the Report.

#### **Scope of TiPA Laws**

##### Recommendation 1

The scope of TiPA laws should remain narrowly focussed on false and misleading statements of fact, and not encompass opinions or predictions.

- Although this limits the efficacy of the law, it will ensure an enforceable and constitutionally valid scheme.

##### Recommendation 2

TiPA laws should apply broadly to political advertising in all forms, including social media (Facebook/Meta, Twitter/X, Instagram and YouTube), streaming services, video on demand, bulk text messages, robocalls, broadcast radio and TV, and mail.

##### Recommendation 3

TiPA laws should be extended to materially deceptive AI-generated audio or visual media in carrying out an election for the purposes of influencing an election.

- This could be modelled on Zali Steggall's Bill in 2021.
- Exceptions may be required for satirical content.

##### Recommendation 4

TiPA laws should not be temporally limited to the election campaign period, and should apply at all times. It should not be permissible to distribute inaccurate and misleading material outside of the election period, although the laws will primarily be applicable in the election period.

##### Recommendation 5

TiPA laws should extend to anyone seeking to affect the outcome of an election, including political parties and third party campaigners (including unions, associations, resident groups and business groups).

##### Recommendation 6

Where the authors of inaccurate or misleading statements cannot be tracked or refuse to retract, the TiPA regulator should be empowered to order the social media platforms to remove the false or misleading posts.

- There should be agreements between the TiPA regulator with social media companies to remove inaccurate and misleading ads.
- There may be challenges in enforcement against social media platforms based overseas.
  - 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.

### Recommendation 7

To ensure that TiPA laws remain fit for purpose in the context of modern digital campaigning, the laws should be regularly reviewed every four years.

## **Operation**

### Recommendation 8

Education and training of political participants is desirable to improve knowledge and awareness of the laws.

- For instance, the SA Electoral Commission runs parliamentary, party and candidate briefings to the major political parties, and a separate briefing for minor parties and independents regarding the electoral process, including truth in political advertising laws.

### Recommendation 9

There should be more defined timelines for complaints to be resolved by the TiPA regulator, noting that some complaints raise more complex issues and that procedural fairness should be accorded.

### Recommendation 10

There should be a public website that allows the public (including political participants) to make complaints about breaches of TiPA laws.

- This could be modelled on the SA Electoral Commission complaints page.

## **Enforcement**

### Recommendation 11

The Electoral Commission is an appropriate arbiter of TiPA laws, but requires sufficient resourcing to carry out this task.

- The reputation of the South Australian Electoral Commissioner has remained untarnished although it has administered these laws since 1985.
- Electoral Commissioners from other jurisdictions have not been enthusiastic about taking on this role.

Alternatively, an independent panel linked to the Electoral Commission or specialised new body could be created to adjudicate the withdrawal and retractions process, preferably linked to an existing administrative review body, with an electoral branch that is operational during the election periods, with staff engaging in other work in non-election periods.

### Recommendation 12

The following sanctions and remedies should apply to breaches of truth in political advertising laws:

- power of the regulator to order withdrawal or retraction,
  - Retractions should be in the same forum as originally published, 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.
- power of the regulator to seek an injunction,
- fines of a greater magnitude than SA or ACT provisions, which are linked to the size of the political party (so that minor parties and independents are not unduly disadvantaged), and



- loss of public funding.

### Recommendation 13

To reduce the risk of the laws being misused, the TiPA regulator should be empowered to dismiss vexatious complaints, with a requirement of materiality.

### **Further Reform Options**

The interviews have indicated that the effects of TiPA laws may be limited, and other mechanisms to support better quality information in electoral campaigns and political communication, or to address misinformation and disinformation have been suggested. It is noted that given that the interviews focussed on TiPA laws, further research might be needed to consider the effects, implications and operation of some of these other potential reforms.

### Recommendation 14

There should be bans on the distribution of materially deceptive AI-generated audio or visual media in carrying out an election for the purposes of influencing an election.

- This could be modelled on the US Protect Elections from Deceptive AI Act of 2024.
- Exceptions may be required for satirical content.

### Recommendation 15

Transparency requirements should be introduced for deepfakes and AI-generated images, with a requirement for advertisements to explicitly state if generative AI was used.

- This could be modelled on the US AI Transparency in Elections Act of 2024.

### Recommendation 16

A disinformation register should be maintained by the Electoral Commissions to list disinformation where social media platforms refuse to take down misleading material.

### Recommendation 17

Blackout periods should be abolished if TiPA laws apply, as there is a need for correction of inaccurate or misleading statements.

### Recommendation 18

An independent and non-partisan parliamentary budget office (as exists in the Commonwealth and NSW) should be introduced to provide independent costings of policies proposed by political parties, which ensures accuracy of the cost of policy proposals by political parties.

### Recommendation 19

Push polling should be banned or severely restricted.

### Recommendation 20

Digital platforms should be subject to legal obligations to promptly delete illegal content, with significant financial penalties for non-compliance. Digital platforms should be obliged to enable users to flag illegal content, with those flagged having rights to challenge content moderation decisions through the platforms.

- This could be modelled on the EU Digital Services Act.

## **Recommendations for Reform of SA/ACT TiPA Laws**

The empirical interviews have found that the TiPA laws in SA have operated effectively in the last 39 years. The narrow scope of TiPA laws in only encompassing statements of fact, rather than opinions and speculation is appropriate, as it ensures the constitutionality and enforceability of these laws.

However, based on the broad regulatory model proposed above, the report provides the following refinements and recommendations for reform of existing SA/ACT TiPA laws:

### Recommendation 21

*Temporality:* Temporal limitations should be removed from TiPA laws, so that it is impermissible for political parties to make inaccurate and misleading statements at all times.

### Recommendation 22

- *Media Covered:* TiPA laws should be clearly expressed to apply to both traditional and online media, and be extended to generative AI.

### Recommendation 23

*Parties Covered:* TiPA laws should be clearly expressed to apply broadly to anyone seeking to affect the outcome of elections, including political parties and third party campaigners such as unions, associations, resident groups and business groups.

### Recommendation 24

*Preventing 'weaponising':* Regulatory mechanisms can be introduced to reduce the risk of TiPA laws being weaponised, such as enforcing a threshold of materiality (eg enabling the Electoral C complaints).

### Recommendation 25

- Other regulatory measures should be taken to more broadly combat disinformation in elections, such as bans on deceptive deepfakes and transparency measures for generative AI and deepfakes.

## 2 Current and Historical Regulation of Truth in Political Advertising Laws in Australia

At present, truth in political advertising laws only exist in South Australia and the Australian Capital Territory. The Commonwealth has previously had a truth in political advertising law in 1984, but this was repealed soon after its enactment. In November 2024, the Commonwealth government introduced a truth in political advertising bill in Parliament, but this has yet to be passed.<sup>9</sup> In Tasmania, a private member's bill has been introduced that incorporates truth in political advertising provisions, but is unlikely to pass without the support of the major parties.

The truth in political advertising laws in these jurisdictions will be summarised below, and relevant debates in other jurisdictions will be summarised. A comparison of South Australia's and the ACT current truth in political advertising laws, and the Commonwealth's 1984 laws and 2024 bill, is at [Appendix B](#).

### 2.1 South Australia

In South Australia, s 113(2) of the *Electoral Act 1985* (SA) ('SA 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.

The SA Act provides that it is a defence to prove that the defendant took no part in determining the content of the advertisement,<sup>10</sup> and could not reasonably be expected to have known that the statement was inaccurate and misleading.<sup>11</sup>

In 2019, Renwick and Palese described the SA Act as going 'further than any other [democratic polity] in seeking to ban misinformation in election campaigns'.<sup>12</sup>

A summary of case law on South Australia's truth in political advertising laws is at [Appendix C](#).

### 2.2 Australian Capital Territory

Similar wording is used in s 297A of the *Electoral Act 1992* (ACT) ('ACT 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'.<sup>13</sup> Section 297A was introduced in 2021 following the passage of the *Electoral Amendment Act 2020* (ACT).

Like the SA Act, the ACT Act provides that it is a defence to prove that the defendant took no part in deciding the content of the advertisement,<sup>14</sup> and could not reasonably be expected to have known that the statement was inaccurate and misleading.<sup>15</sup>

### 2.3 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

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<sup>9</sup> Electoral Legislation Amendment (Electoral Communications) Bill 2024 (Cth).

<sup>10</sup> *Electoral Act 1985* (SA) s 113(3)(a) ('determining').

<sup>11</sup> *Electoral Act 1985* (SA) s 113(3)(b).

<sup>12</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 22.

<sup>13</sup> *Electoral Act 1992* (ACT) s 297A.

<sup>14</sup> *Electoral Act 1992* (ACT) s 297A(2)(a) ('deciding').

<sup>15</sup> *Electoral Act 1992* (ACT) s 297A(2)(b).

containing a statement that was untrue or was, or likely to be, misleading or deceptive.<sup>16</sup> The Joint Committee on Electoral Reform called for the repeal of s 329(2) in August 1984,<sup>17</sup> 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.<sup>18</sup> Following that call, s 329(2) was repealed in October 1984, eight months after its assent.<sup>19</sup>

In 2021, independent MP Zali Steggall tabled a private member's bill on truth in political advertising in the Parliament: the Commonwealth Electoral Amendment (Stop the Lies) Bill. The bill was modelled on the South Australian legislation, with the addition of 'modernising' clauses, but did not pass Parliament.

The Steggall bill sought to expand the scope of the offence to encompass imitations and deepfakes which seek to affect the election result via negative, deceptive and digitally aided impersonations of rival candidates.

The offence in Steggall's proposed law had a lower threshold. It punished statements which are misleading or deceptive, rather than those which are misleading and deceptive. The Bill also encompassed statements of fact which are likely to be misleading or deceptive.

The proposed law allowed the courts to hear complaints brought by actors other than the Electoral Commissioner, although these can be promptly dismissed if they are found to be frivolous, unreasonable or an abuse of court process.

Similar to the South Australian provision, the Electoral Commissioner is empowered to request cessation of publication of the matter and to ask for a retraction or correction in specified terms, however the Electoral Commissioner is vested with the additional power to publish a correction.

More recently, 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.<sup>20</sup>

In 2022, the Labor government promised that truth in political advertising laws will be introduced ahead of the next federal election in 2025.<sup>21</sup> Federal Opposition Leader Peter Dutton has indicated in-principle support for truth in political advertising laws,<sup>22</sup> despite Opposition MPs on the Commonwealth Parliament's Joint Standing Committee on Electoral Matters opposing 'truth in political advertising

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<sup>16</sup> Department of Parliamentary Services (Cth), *Political Advertising in Australia* (Research Brief, 29 November 2004) 8–9.

<sup>17</sup> Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 27 [2.82].

<sup>18</sup> Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 14.

<sup>19</sup> Department of Parliamentary Services (Cth), *Political Advertising in Australia* (Research Brief, 29 November 2004) 8–9.

<sup>20</sup> Parliament of Australia Joint Standing Committee on Electoral Matters, *Conduct of the 2022 federal election and other matters (interim report)* (2023), available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Electoral\\_Matters/~link.aspx?id=D40F0DDBF8234F8C8683CB06C5104FD8&z=z](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/~link.aspx?id=D40F0DDBF8234F8C8683CB06C5104FD8&z=z), recommendations 11-12 and pages 70–106.

<sup>21</sup> See, eg, Paul Karp, 'Labor Aims to Legislate Spending Caps and Truth in Advertising, Says Don Farrell', *The Guardian* (online, 10 July 2022) <<https://www.theguardian.com/australia-news/2022/jul/10/labor-aims-to-legislate-spending-caps-and-truth-in-advertising-says-don-farrell>>.

<sup>22</sup> Paul Karp, 'Peter Dutton Says Truth in Political Advertising "Probably Welcome" But Criticises Labor as Scare Campaign "Experts"', *The Guardian*, 14 March 2024, available at <https://www.theguardian.com/australia-news/2024/mar/14/peter-dutton-truth-in-political-advertising-laws-labor-policy> (accessed 12 June 2024).

reforms'.<sup>23</sup> Crossbench MPs have indicated that they support 'truth in political advertising' laws,<sup>24</sup> and various Private Members Bills have been introduced into Parliament.<sup>25</sup>

In November 2024, the Commonwealth government introduced the Electoral Legislation Amendment (Electoral Communications) Bill 2024 (Cth) into Parliament that, if passed, will set up a truth in political advertising regime at the federal level.

The Commonwealth Bill establishes 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. Notably, the Bill applies to referenda, so it would have applied to the Voice referendum if it was in place then.

The Bill prohibits a person or entity from authorising certain electoral matter that:

- contains a written statement purporting to be factual but which is inaccurate and misleading to a material extent;
- a visual depiction purporting to be a factual visual depiction of a candidate for an election that is inaccurate and misleading to a material extent; or
- an audio depiction purporting to be a factual audio statement by a candidate for an election that is inaccurate and misleading to a material extent.

The Bill also requires 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).

In terms of enforcement of the TiPA provisions, the Bill establishes an Electoral Communications Panel as an independent secondary statutory structure within the AEC. The Electoral Communications Panel consists of a Chair (a retired Federal Court judge) and at least 3 and not more than 14 other members. The Chair and the other members are appointed by the Governor-General on the recommendation of the Minister.

If the Chair receives a report during the relevant election period, or is otherwise aware during that period, of a possible contravention of the TiPA provisions, the Chair must select at least 3 members of the Electoral Communications Panel to be a Decision Panel and refer the report or information about the possible contravention to the Decision Panel. The Chair may require a person, whom the Chair has reason to believe has information or a document that is relevant to the investigation by a Decision Panel of a possible contravention of the TiPA provisions, to give the information or produce the document to the Chair. A Decision Panel that receives a report or information of a possible contravention of the TiPA provisions from the Chair must conduct an investigation in relation to the possible contravention and make and publish its decision in relation to the possible contravention. A Decision Panel may request certain remedial action to be taken, or apply to the Federal Court for an injunction, in relation to a possible contravention of the TiPA provisions.

At the time of writing, the Commonwealth Bill has not passed into law.

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<sup>23</sup> See Parliament of Australia Joint Standing Committee on Electoral Matters, *Conduct of the 2022 federal election and other matters (final report)* (2023), available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Electoral\\_Matters/~/\\_link.aspx?id=B0EB44BCE6544D4488F8F90E44E0AA37&z=z](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/~/_link.aspx?id=B0EB44BCE6544D4488F8F90E44E0AA37&z=z) (accessed 12 June 2024).

<sup>24</sup> See e.g. Paul Karp, 'Peter Dutton Says Truth in Political Advertising "Probably Welcome" but Criticises Labor as Scare Campaign "Experts"', 14 March 2024, available at <https://www.theguardian.com/australia-news/2024/mar/14/peter-dutton-truth-in-political-advertising-laws-labor-policy> (accessed 12 June 2024).

<sup>25</sup> See Commonwealth Electoral Amendment (Stop The Lies) Bill 2022 (Cth), available at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?page=0:query=BillId:r6947%20Reconstruct:billhome> (accessed 12 June 2024); Electoral Legislation Amendment (Restoring Trust) Bill 2023 (Cth), available at [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r7067](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r7067) (accessed 12 June 2024); Electoral Legislation Amendment (Fair and Transparent Elections) Bill 2024 (Cth), available at [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r7168](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r7168) (accessed 12 June 2024).

## 2.4 Tasmania

A Greens Private Member's Bill relating to truth in political advertising has been recently introduced into the Tasmanian Parliament in 2024.<sup>26</sup> This law is based on the SA and ACT provision, and would make it an offence for an advertisement to contain a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.

The penalty is a fine not exceeding 200 penalty units or imprisonment for a term not exceeding 6 months, or both.

A parliamentary committee inquiry reported on the bill.<sup>27</sup> In relation to TiPA laws, the inquiry noted the range of opinions, and recommended that the Tasmanian Parliament refer TiPA laws to the newly-established Joint Standing Committee on Electoral Matters for inquiry and report.<sup>28</sup>

As at the time of writing, the Tasmanian Parliament has yet to make this reference, and the Bill has yet to progress. Without the support of the major parties, this Bill is not likely to pass.

The Tasmanian Joint Standing Committee on Electoral Matters is currently undertaking an inquiry on Tasmania's 2024 elections, and TiPA laws have been raised in this context.<sup>29</sup>

## 2.5 Discussions in Other Jurisdictions

### 2.5.1 Victoria

A 2010 parliamentary committee inquiry decided not to recommend 'truth in political advertising' reforms in Victoria.<sup>30</sup> A subsequent inquiry in 2021 by the same parliamentary committee noted that electoral advertising had evolved since 2010 and that transparency was not sufficient to guard against inaccurate information,<sup>31</sup> and recommended that the Victorian Government introduce a form of truth in political advertising legislation.<sup>32</sup>

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<sup>26</sup> See e.g. Electoral Disclosure and Funding Amendment Bill 2024, available at <https://www.parliament.tas.gov.au/bills/bills2024/electoral-disclosure-and-funding-amendment-bill-2024-9-of-2024> (accessed 14 June 2024), clause 16.

<sup>27</sup> Parliament of Tasmania, House of Assembly Standing Committee on Government Administration B, *Inquiry into the Electoral Disclosure and Funding Amendment Bill 2024 (No 9) (2024)* <https://www.parliament.tas.gov.au/committees/house-of-assembly/standing-committees/government-administration-committee-b/inquiries/inquiry-into-the-electoral-disclosure-and-funding-amendment-bill-2024-no.-9>.

<sup>28</sup> Parliament of Tasmania, House of Assembly Standing Committee on Government Administration B, *Inquiry into the Electoral Disclosure and Funding Amendment Bill 2024 (No 9) (2024)* <https://www.parliament.tas.gov.au/committees/house-of-assembly/standing-committees/government-administration-committee-b/inquiries/inquiry-into-the-electoral-disclosure-and-funding-amendment-bill-2024-no.-9>, 46-53.

<sup>29</sup> Parliament of Tasmania, Joint Standing Committee on Electoral Matters, *Inquiry into the Conduct of the 2024 House of Assembly General Election and 2024 Legislative Council Elections (2024)* <https://www.parliament.tas.gov.au/committees/joint-committees/standing-committees/joint-standing-committee-on-electoral-matters/inquiries/inquiry-into-the-2024-house-of-assembly-general-election-and-2024-legislative-council-elections>.

<sup>30</sup> Parliament of Victoria Electoral Matters Committee, *Inquiry into the provisions of the Electoral Act 2002 (Vic) relating to misleading or deceptive political advertising (2010)*, available at <https://www.parliament.vic.gov.au/4af9b0/contentassets/8c7922ab6e284c75ac65e702424f5a56/final-report.pdf> (accessed 12 June 2024).

<sup>31</sup> Parliament of Victoria Electoral Matters Committee, *Inquiry into the impact of social media on elections and electoral administration (2021)*, available at <https://www.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-the-impact-of-social-media-on-elections-and-electoral-administration/reports> (accessed 12 June 2024), pages 114-124.

<sup>32</sup> Parliament of Victoria Electoral Matters Committee, *Inquiry into the impact of social media on elections and electoral administration (2021)*, available at <https://www.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-the-impact-of-social-media-on-elections-and-electoral-administration/reports> (accessed 12 June 2024), pages 114-124.

The Victorian Government supported the recommendation from the 2021 inquiry,<sup>33</sup> but noted that it would undertake consultation with key stakeholders (such as the Victorian Electoral Commission), and consider the recommendation further (such as potential human rights and constitutional implications).

The 2024 Electoral Matters Committee report into the 2022 Victorian State Election reaffirmed the previous recommended that the Victorian Government should introduce TiPA laws, preferably in alignment with the Commonwealth laws.<sup>34</sup>

The Victorian Government is yet to respond to the report, with a response due by 30 January 2025.

### 2.5.2 New South Wales

An NSW parliamentary committee inquiry is currently considering matters relating to the administration of the 2023 NSW State Election, which includes consideration of the desirability of the introduction of truth in political advertising laws in its terms of reference.<sup>35</sup>

The NSW Joint Electoral Matters Committee issued its report on 31 October 2024, and found that TiPA laws would be difficult to implement (e.g. limited scope, limited effectiveness, difficulties in regulating) and would not be effective.<sup>36</sup>

The NSW Government is yet to respond to the report, with a response due by 1 May 2025.

### 2.5.3 Queensland

During the 2024 Queensland State Election campaign, the then Opposition Leader and newly elected Queensland Premier David Crisafulli indicated that he will consider introducing TiPA laws, and has made a commitment for a fully-funded Parliamentary Budget Office.<sup>37</sup>

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<sup>33</sup> Government Response to the Recommendations made by the Electoral Matters Committee in its 2021 Report on its Inquiry into the Impact of Social Media on Victoria's State Elections and Electoral Administration [https://www.parliament.vic.gov.au/49c44c/contentassets/31239935f05343109b7ce3c6e07b5691/attachment\\_-\\_government\\_response\\_to\\_the\\_electoral\\_matters\\_committee\\_recommendations\\_dqjthyt.pdf](https://www.parliament.vic.gov.au/49c44c/contentassets/31239935f05343109b7ce3c6e07b5691/attachment_-_government_response_to_the_electoral_matters_committee_recommendations_dqjthyt.pdf), pages 2-3.

<sup>34</sup> Parliament of Victoria Electoral Matters Committee, *Inquiry into the conduct of the 2022 Victorian state election* (2024) <https://www.parliament.vic.gov.au/get-involved/inquiries/2022-victorian-state-election/reports>, xxiv, 46-8 (Recommendation 16).

<sup>35</sup> See Parliament of New South Wales, *Administration of the 2023 NSW State Election and Other Matters* (2024) <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3024>.

<sup>36</sup> Parliament of New South Wales, *Administration of the 2023 NSW state election and other matters* (2024) <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3024#tab-reportsandgovernmentresponses> vi, 32-45 (Finding 4).

<sup>37</sup> Madura McCormack and Taylah Fellows, 'Qld Election Campaign 2024: Blatant Lies in Campaign Ads could be Scrapped by 2028 under LNP', *Courier Mail* (online, 17 October 2024) [https://www.couriermail.com.au/subscribe/news/1/?sourceCode=CMWEB\\_WRE170\\_a\\_GGL&dest=https%3A%2F%2Fwww.couriermail.com.au%2Fnews%2Fqueensland%2Fstate-election%2Ffact-check-the-truth-behind-both-parties-scare-campaigns%2Fnews-story%2Ff1e5b4db1872e3c65bd72388338b4a54&memtype=anonymous&mode=premium&BT=qldelection](https://www.couriermail.com.au/subscribe/news/1/?sourceCode=CMWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.couriermail.com.au%2Fnews%2Fqueensland%2Fstate-election%2Ffact-check-the-truth-behind-both-parties-scare-campaigns%2Fnews-story%2Ff1e5b4db1872e3c65bd72388338b4a54&memtype=anonymous&mode=premium&BT=qldelection)

### 3 Regulation of Untruths and Disinformation in Overseas Jurisdictions

While overseas jurisdictions have introduced some measures to combat disinformation and untruth in political advertising, they are either not as specific as the SA Act and ACT Act in prohibiting misleading political advertising (for example, by engaging broader mechanisms for upholding transparency) or target a subset of political advertising (for example, through the prohibition of deepfakes).

#### 3.1 Ireland

On 25 July 2022, Ireland passed the *Electoral Reform Act 2022*. Part 5 vests powers in their new Electoral Commission (An Coimisiún Toghcháin) to regulate online political advertising, including through monitoring, investigating and combatting disinformation and misinformation.<sup>38</sup> These functions are broader than analogous provisions in both the SA Act and ACT Act, and operate as part of the Electoral Commission's remit rather than setting out a particular prohibition.

The Commission is empowered to issue take-down notices<sup>39</sup> or correction notices<sup>40</sup> for online electoral information or process information that constitute disinformation. The Commission can also issue labelling orders (which require an online platform to state that its subject content is being investigated)<sup>41</sup> or access-blocking orders (which require an online platform to disable access to information that constitutes disinformation).<sup>42</sup> The Commission can apply to the High Court for an order directing compliance with these notices or orders.<sup>43</sup>

The *Electoral Reform Act 2022* also includes a more specific offence of disinformation and misinformation. Specifically, a person is guilty of an offence if they, during an election period and with the intention of influencing the results of the election, makes or publishes a false statement of withdrawal, a false statement of fact with the intention of causing voters to abstain from voting, or a statement that purports to be from another person.<sup>44</sup>

In proposed amendments to the *Electoral Reform Act 2022*, this offence applies to all of the above categories as well as a false statement with the intention of causing voters to inadvertently spoil their ballot papers, electoral process disinformation or manipulative or inauthentic behaviour.<sup>45</sup>

The penalty for this offence is a) on summary conviction, a class A fine or imprisonment for a term not exceeding 12 months or both, or b) on conviction on indictment, to a fine or imprisonment for a term not exceeding 5 years or both.<sup>46</sup>

Summary proceedings may be brought and prosecuted by the Electoral Commission, but all proceedings can only be instituted with the consent of the Director of Public Prosecutions.<sup>47</sup> The effect of this section is untested, as there is no intention to implement the enforcement powers in Part 5 prior to the next

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<sup>38</sup> *Electoral Reform Act 2022* (Ireland) ss 145, 150.

<sup>39</sup> *Electoral Reform Act 2022* (Ireland) s 153.

<sup>40</sup> *Electoral Reform Act 2022* (Ireland) s 154.

<sup>41</sup> *Electoral Reform Act 2022* (Ireland) s 155.

<sup>42</sup> *Electoral Reform Act 2022* (Ireland) s 156.

<sup>43</sup> *Electoral Reform Act 2022* (Ireland) s 158.

<sup>44</sup> *Electoral Reform Act 2022* (Ireland) s 166.

<sup>45</sup> General Scheme of the Electoral Reform (Amendment) Bill 2024 (Ireland) s 166(1).

<sup>46</sup> *Electoral Reform Act 2022* (Ireland) s 166(2).

<sup>47</sup> *Electoral Reform Act 2022* (Ireland) s 169(1)–(2).



general election on 29 November 2024.<sup>48</sup> Due to the ongoing dialogues between Irish authorities and the European Commission, Parts 4 and 5 have not commenced.<sup>49</sup>

Parts 4 and 5 of the *Electoral Reform Act 2022* were notified to the European Commission in accordance with requirements in Article 5 of *Directive (EU) 2015/1535* of the European Parliament and of the Council of 9 September 2015 to communicate any draft technical regulation.

On 5 July 2022, the European Commission issued a detailed opinion that Part 4 of the Act is incompatible with arts 14 and 15 of *Directive 2000/31/EC* ('e-Commerce Directive'). Article 14 provides for an exemption of liability for service providers storing information at the request of the recipient of the service who do not have knowledge of illegal activity or information (or who act expeditiously to remove or disable access to the information upon obtaining such knowledge).<sup>50</sup> Article 15 provides that member states shall not impose a general obligation on service providers to monitor information.<sup>51</sup>

The Commission considered that Part 4, which requires online platforms to verify the identity of buyers of online political advertising and to prevent access to buyers where there are reasonable grounds that the person is prohibited, effectively required online platforms 'to monitor all the advertisements available in their services ... to assess whether it fulfils the notion of "for political purposes"'.<sup>52</sup>

Subsequently, on 30 August 2022, the European Commission issued comments that Part 5 of the Act expressing similar concerns that the scheme of notices, orders and offences might not comply with arts 14 and 15, but that its concerns would be mitigated if the law accounted more fully for clarifications by Irish authorities that Part 5 is not intended to make service providers liable absent actual knowledge, and that there is no obligation on service providers to proactively seek out information to reach a state of actual knowledge.<sup>53</sup>

On 7 December 2023, the Minister for Housing, Local Government and Heritage noted that, given the European *Proposal for a Regulation of the European Parliament and of the Council on the Transparency and Targeting of Political Advertising*, both Parts 4 and 5 of the *Electoral Reform Act 2022* would be examined and adjusted to align the Act with the requirements of the European proposal.<sup>54</sup> On 3 July 2024, Ireland notified its General Scheme of the Electoral Reform (Amendment) Bill 2024, which proposes amendments to align Part 5 with the EU regulatory scheme.<sup>55</sup> No comments have yet been issued by the European Commission.

## 3.2 New Zealand

In New Zealand's 199A of the *Electoral Act 1993* (NZ) provides that a person is 'guilty of a corrupt practice' if they publish or arrange for the publication of a statement 'that the person knows is false in a material particular', 'with the intention of influencing the vote of an elector'.

As a corrupt practice, breach of s 199A is punishable by up to two years imprisonment and/or a fine of up to NZD40,000.<sup>56</sup>

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<sup>48</sup> Joint Committee on EU Affairs, *Report on EU Elections, Voting Rights and Disinformation* (May 2024) 20.

<sup>49</sup> See, eg, Houses of the Oireachtas, *Dáil Éireann Debate* (7 December 2023) <<https://www.oireachtas.ie/en/debates/question/2023-12-07/66/>>.

<sup>50</sup> *Directive 2000/31/EC of the European Parliament and of the Council* [2000] OJ L 178/1, art 14.

<sup>51</sup> *Directive 2000/31/EC of the European Parliament and of the Council* [2000] OJ L 178/1, art 15.

<sup>52</sup> *Detailed Opinion from the Commission regarding a Rule on Services (Article 6, Paragraph 2, Third Indent, of Directive (EU) 2015/1525* (5 July 2022) 3.

<sup>53</sup> *Observations from the Commission (Article 5, Paragraph 2 of Directive (EU) 2015/1535* (30 August 2022) 3–4.

<sup>54</sup> Houses of the Oireachtas, *Dáil Éireann Debate* (7 December 2023) <<https://www.oireachtas.ie/en/debates/question/2023-12-07/66/>>.

<sup>55</sup> *Notification 2024/0374/IE* (3 July 2024).

<sup>56</sup> Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 18–19.

However, this law only applies on election day and the two days before the election, meaning it is temporally very limited.

The operation of the New Zealand laws has been criticised as ineffective. Some were unaware that s 199A even existed.<sup>57</sup> Those that recalled the provision viewed it as 'impractical', unlikely to be proven, and as 'an inappropriate interference with free speech'.<sup>58</sup> Renwick and Palese conclude that '[i]t can be readily seen ... that section 199A has no impact'.<sup>59</sup>

In parallel, the Advertising Standards Code requires 'truthful presentation' of advertising.<sup>60</sup> Rule 2(b) expands upon what is meant by 'truthful presentation', noting that obvious untruths or hyperbole that are unlikely to mislead 'may be acceptable'.<sup>61</sup> This is overseen by the Advertising Standards Authority, and constitutes a mode of 'private regulation' which 'exposes political ads to significant analysis and the real threat of withdrawal'.<sup>62</sup>

### 3.3 United Kingdom

In the United Kingdom, s 106 of the *Representation of the People Act 1983* (UK) prohibits persons from making or publishing 'any false statement of fact in relation to the candidate's personal character or conduct' before or during an election, for the purpose of affecting the return of a candidate. This prohibition has applied since the 1895 amendment to the *Corrupt and Illegal Practices Act 1883* (UK).

A person can be restrained by interim injunction by the High Court or county court from repetition of the false statement. A knowing breach of s 106 constituting an illegal practice can void an election, and can also bar an individual from standing for parliament or holding elected office for three years. Section 106 is enforceable both through state prosecution for the criminal offence and by petitioners (typically, other candidates) seeking remedies such as the voiding of the election.

As Hill, Douglass and Baltutis observe, s 106 'applies only to false personal statements about political candidates, rather than those of a political nature'. It therefore functions as 'an electoral complement to existing defamation law than a guard against electoral corruption'.

That distinction is exemplified in *Watkins v Woolas*, which is the 'sole parliamentary breach' of s 106. There, the Administrative Court ruled that some statements of a personal nature did breach s 106, but also that s 106 did not apply to political statements, because 'parliament plainly did not intend the 1895 Act to apply to such statements; it trusted the good sense of the electorate to discount them'.

Hill, Douglass and Baltutis conclude that s 106 is 'little known, and ... rarely invoked', and 'arguably too cautious' in its narrowness. Similarly, Rowbottom considers that s 106 is 'limited' and 'under-enforced'.

### 3.4 Canada

In Canada, s 91 of the *Canada Elections Act* provides that no person shall, with the intention of affecting election results 'make or publish, during the election period, a false statement' that a candidate has committed an offence, or a false statement about the 'citizenship, place of birth, education, professional

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<sup>57</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 37.

<sup>58</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 37.

<sup>59</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 38.

<sup>60</sup> Advertising Standards Authority, *Advertising Standards Code* (as of 1 February 2019) principle 2, particularly r 2(b).

<sup>61</sup> Advertising Standards Authority, *Advertising Standards Code* (as of 1 February 2019) 10.

<sup>62</sup> Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 18–19.

qualifications or membership in a group or association' of a candidate.<sup>63</sup> The prohibition is specifically confined to false statements about a candidate rather than political issues (similar to the UK provision) and is limited to the election period.

A previous version of the law that did not require false statements to be 'knowingly' made was struck down in 2021 by the Ontario Superior Court. It was found to be incompatible with freedom of expression in s 2(b) of the *Canadian Charter of Rights and Freedoms*. Davies J found that the 'distribution of false information during elections can threaten our democracy', and that s 91(1) constituted part of 'Canada's overall response to the threat posed by misinformation and disinformation during elections'.<sup>64</sup> However, the removal of the requirement of knowledge of falsity of statements was not a justifiable limitation on freedom of expression. The law was then amended to only cover false statements that were knowingly made.

Hill, Douglass and Baltutis consider that s 91 'seems to have had little impact on the Canadian electoral landscape' and 'there is little evidence that it has been successful'.<sup>65</sup>

### 3.5 United States

Due to constitutional constraints stemming from the First Amendment protecting free speech, in the United States, it is almost impossible to regulate various electoral matters, including truth in political advertising laws.

The position of truth in political advertising in the United States is also affected by the Supreme Court decision of *United States v Alvarez* ('*Alvarez*').<sup>66</sup> In *Alvarez*, the Supreme Court considered the constitutionality of an Act which forbade false representations of military medals or honours. The Court held that 'Government has not demonstrated false statements generally should constitute a new category of unprotected speech'. Consequently, the statute conflicted with the First Amendment.<sup>67</sup>

Consequently, Professor Catherine Ross noted that the 'First Amendment poses a virtually insurmountable obstacle to government regulation of deceptive campaign speech', meaning that the 'state cannot become the arbiter of truth, even where misleading statements are nothing more than straight-out lies'.<sup>68</sup> Likewise Staci Liefkring suggested that US Courts would find 'any attempt to regulate false, non-defamatory statements of political speech unconstitutional'.<sup>69</sup>

As Hill et al note, '[t]he United States' political tradition of individualised free speech and expression rights protection, as codified into its political landscape through the First Amendment of the American Constitution has meant that any attempt to regulate political speech and, by extension, election advertising, has encountered fierce cultural, legal and constitutional resistance'.<sup>70</sup> As such, various State legislation attempting to regulate false electoral speech have been struck down as unconstitutional.<sup>71</sup>

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<sup>63</sup> *Canada Elections Act*, SC 2000, c 9, s 91.

<sup>64</sup> *Canadian Constitution Foundation v Canada (Attorney-General)* [2021] ONSC 1224, [2]–[3].

<sup>65</sup> Lisa Hill, Max Douglass and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022) 67.

<sup>66</sup> (2012) 567 US 709.

<sup>67</sup> *United States v Alvarez* (2012) 567 US 709, 722 (Kennedy J).

<sup>68</sup> C Ross, 'Ministry of truth? Why law can't stop prevarications, bullshit, and straight-out lies in political campaigns' (2017) 16(1) *First Amendment Law Review* 367.

<sup>69</sup> Staci Liefkring, 'First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After United States v Alvarez' (2013) 97 *Minnesota Law Review* 1047, 1061.

<sup>70</sup> Lisa Hill, Max Douglass, and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave MacMillan, 2022) 67.

<sup>71</sup> Eg *Commonwealth v Lucas* ((2015) 472 Mass 387); *Susan B Anthony List v Ohio Elections Commission* ((2014) 45 F Supp. 3d 765); *281 Care Committee v Arneson* ((2014) 766 F3d 774)., based on the approach in *United States v Alvarez* ((2012) 567 U.S. 709. See discussion in Lisa Hill, Max Douglass, and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave MacMillan, 2022) 67-71.

The situation is different in Australia, where various electoral legislation have been held to be consistent with the implied freedom of political communication, including truth in political advertising laws.<sup>72</sup>

Recently in 2024, three bills on election regulation were introduced to target disinformation in United States elections.<sup>73</sup>

First, the *Protect Elections from Deceptive AI Act* proposes to prohibit the distribution of materially deceptive AI-generated audio or visual media in carrying out a federal election for the purposes of influencing an election or soliciting funds. The prohibition is enforceable through a civil action by the person whose voice or likeness appears in, or who is the subject of, materially deceptive AI. Available relief includes injunctive or other equitable relief prohibiting the distribution of materially deceptive AI, or an action for general or special damages.<sup>74</sup>

Second, the *AI Transparency in Elections Act of 2024* proposes to require advertisements to state if generative AI was used.<sup>75</sup> The Federal Election Commission is responsible for enforcing any violations of this disclosure requirement by requiring a person to pay a civil money penalty.<sup>76</sup>

Third, the *Preparing Election Administrators for AI Act* proposes to require the Election Assistance Commission to develop voluntary guidelines for administering elections that addresses the use and risks of artificial intelligence.<sup>77</sup>

Broadly, each of these bills targets the intersection of technology and disinformation in the election context. Both deepfakes and AI have been recognised as posing risks to elections. Wilkerson considers that an absence of deepfake regulation 'leaves the nation vulnerable to election tampering and political dismantlement'.<sup>78</sup> AI may be more effective at microtargeting and influencing individuals.<sup>79</sup> AI can also constitute election interference: for example, if it is used to generate fake news to impact voter behaviour.<sup>80</sup>

Simultaneously, the regulation of these technologies also raises First Amendment considerations. For example, deepfakes may be protected if parodic, and some false statements which relate to political speech may be covered as well.<sup>81</sup>

### 3.6 European Parliament

On 13 March 2024, the European Parliament and Council adopted *Regulation 2024/900 on the Transparency and Targeting of Political Advertising* ('*Regulation 2024/900*'). *Regulation 2024/900* is essentially a transparency mechanism, rather than a prohibition on untruth in political advertising.

Chapter II of *Regulation 2024/900* imposes transparency and due diligence obligations for providers of political advertising services (including traditional media providers such as newspapers, television, and radio as well as online platforms), including by identifying whether advertising services are political advertising services,<sup>82</sup> and by keeping records on their provision of political advertising services.<sup>83</sup>

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<sup>72</sup> *Cameron v Becker* (1995) 64 SASR 238.

<sup>73</sup> Noting, however, that none of these bills have yet been enacted into law.

<sup>74</sup> *Protect Elections from Deceptive AI Act*, S 2770, 118<sup>th</sup> Congress, § 2.

<sup>75</sup> *AI Transparency in Elections Act of 2024*, S 3875, 118<sup>th</sup> Congress, § 2.

<sup>76</sup> *AI Transparency in Elections Act of 2024*, S 3875, 118<sup>th</sup> Congress, § 2.

<sup>77</sup> *Preparing Election Administrators for AI Act*, S 3897, 118<sup>th</sup> Congress.

<sup>78</sup> Lindsey Wilkerson, 'Still Waters Run Deep(fakes): The Rising Concerns of "Deepfake" Technology and Its Influence on Democracy and the First Amendment' (2021) 86(1) *Missouri Law Review* 407, 432.

<sup>79</sup> Sarah ML Bender, 'Algorithmic Elections' (2022) 121(3) *Algorithmic Elections* 489, 513.

<sup>80</sup> Sarah ML Bender, 'Algorithmic Elections' (2022) 121(3) *Algorithmic Elections* 489, 513–14.

<sup>81</sup> Lindsey Wilkerson, 'Still Waters Run Deep(fakes): The Rising Concerns of "Deepfake" Technology and Its Influence on Democracy and the First Amendment' (2021) 86(1) *Missouri Law Review* 407, 414–18.

<sup>82</sup> *Regulation 2024/900 on the Transparency and Targeting of Political Advertising* [2024] OJ L 1/44, art 8.

<sup>83</sup> *Regulation 2024/900 on the Transparency and Targeting of Political Advertising* [2024] OJ L 1/44, art 9.

Publishers are also obliged to ensure that political advertising provides information in a ‘clear, salient and unambiguous way’, including by stating that it is a political advertisement and the identity of its sponsor.<sup>84</sup>

Political advertising should also contain a transparency notice with details such as benefits received by providers of political advertising services and whether the political advertisement uses targeting or ad-delivery techniques on the basis of personal data.<sup>85</sup> *Regulation 2024/900* also restricts the instances in which targeting and ad-delivery techniques can be used, including through permitting these techniques only where the controller collected data from the data subject.<sup>86</sup>

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<sup>84</sup> *Regulation 2024/900 on the Transparency and Targeting of Political Advertising* [2024] OJ L 1/44, art 11.

<sup>85</sup> *Regulation 2024/900 on the Transparency and Targeting of Political Advertising* [2024] OJ L 1/44, arts 11–12.

<sup>86</sup> *Regulation 2024/900 on the Transparency and Targeting of Political Advertising* [2024] OJ L 1/44, art 18.

## 4 Summary of Interviews

This project has conducted 34 interviews with various stakeholders involved in truth in political advertising laws, such as current and former Premiers, Ministers, Members of Parliament, electoral commissioners, political party directors/secretaries, and civil society groups.

Interviews were concentrated in South Australia, where TiPA laws have been in operation since 1985 and which is currently the only jurisdiction that has run multiple election campaigns with TiPA laws in operation. The ACT laws were introduced in 2021 and have only been tested for the first time in the October 2024 elections. Interviews were conducted with relevant ACT political participants, although the ACT Electoral Commissioners have noted that they would only be able to provide commentary in 2025, so their views were unable to be incorporated into the final report published in December 2024. The views of stakeholders from other jurisdictions were also sought regarding TiPA laws. Some participants requested not to be attributed for comments.

The list of interviewees is at [Appendix A](#).

Interview summaries are compiled in a separate report, noting that some interviewees have chosen to be “off the record”, thus the summaries provided are only the ones expressly approved by interviewees.

### 4.1 Methodology

The author conducted qualitative interviews with current and former Premiers, Ministers, Members of Parliament, political party officials, electoral commissioners, and civil society organisations (listed in Appendix A). The qualitative methodology focuses on exploration and discovery rather than measurement and confirmation of predetermined hypotheses.<sup>87</sup> A semi-structured interview format was utilised and South Australian participants were asked about their experiences in terms of the scope, operation and unintended consequences of truth in political advertising laws, while participants from other jurisdictions were asked about their opinions about the scope, operation and unintended consequences of truth in political advertising laws. The data collected was transcribed for analysis. Analysis was conducted manually, with a thematic analysis utilised to code and annotate the data to identify, analyse, and report patterns or themes.<sup>88</sup> In addition to interview data, the research design incorporates parliamentary reports and other primary sources to triangulate between the different sources to enhance the reliability and validity of the study.<sup>89</sup>

The participants were recruited through purposeful sampling, where stakeholders who fell within the target group were identified and individually approached to be interviewed. This was supplemented by snowball sampling through requesting interviewees to identify other stakeholders who might be interested in participating in the research. The sample includes five former Premiers, two former Attorneys-General, three Members of Parliament, five Electoral Commissioners, eight political party directors/secretaries, two lawyers with experience with TiPA laws and advocacy, one advertiser, and three civil society group representatives.

### 4.2 Summary of Interviews

#### 4.2.1 Operation of Truth in Political Advertising Laws in South Australia

Truth in political advertising laws have the in-principle support of the majority of stakeholders in South Australia, including politicians, party officials and electoral commissioners. Most of the political

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<sup>87</sup> S B Merriman, *Case Study Research in Education* (Jossey Bass, 1988) 17.

<sup>88</sup> J Lofland and L H Lofland, *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis* (Wadsworth, 3<sup>rd</sup> ed 1995) 189-97.

<sup>89</sup> N K Denzin, *The Research Act: A Theoretical Introduction to Sociological Methods* (Prentice Hall, 3<sup>rd</sup> ed, 1989) 25.

participants are positive about the TiPA laws and consider that they work well. As the law has been in place for 39 years, the major stakeholders are familiar with the TiPA law,<sup>90</sup> and it has become 'part of the furniture'.<sup>91</sup>

Former Premier Mike Rann strongly supported TiPA laws, 'It's really important for there to be a free market of ideas in the political discourse. A free market of ideas, however, doesn't mean licensing a sewer of lies and fraud. And so, I think that in South Australia, we've been able through this legislation that we put in all those years ago, have been able to show that truth in advertising laws, that the public want it, the public support it, the public are protected by it, our democracy is enhanced by it'.<sup>92</sup>

Former Attorney-General Chris Sumner, who introduced the TiPA laws into the SA Parliament, stated that the TiPA laws were enacted in 1984 without any controversy, and most people accepted that this was a good idea.<sup>93</sup> In terms of the impetus of introducing the TiPA laws, Mr Sumner was cognisant of the fact that you couldn't make misrepresentations in the commercial world, and should not be able to do so in politics, and that "the whole basis of society operates around an ethical principle of honesty, honest dealings, and telling the truth". He recalled occasions where people pointed out to him, "why do you have a situation in politics where surely in many respects the outcome of what happens in a democratic process is more important than whether you're selling a used car".<sup>94</sup> Mr Sumner noted that the TiPA legislation was supported by the major political parties and generally by the community.<sup>95</sup>

Former SA Deputy Electoral Commissioner David Gully argued that TiPA laws are necessary because if these laws did not exist, then it opened up opportunities for people to tell lies in politics. He contended that if you can be sued for defamation for making untrue statements under the common law, then if you are telling untruths in a state election, or a federal election in a democracy, there should also be some penalty for doing so. Mr Gully stated: 'I don't think you should get a get out of jail free card, because it's just an election and I can say anything about you as an opposing candidate or party'.<sup>96</sup>

Former Premier Mike Rann argues that truth in political advertising laws have had a 'conditioning effect on the political discourse'.<sup>97</sup> A party official affirmed this point, stating that: 'Campaigns in other States or federally are run in a way that would not be possible in South Australia. The TiPA laws do restrict broad-based outrageous claims that are clearly false and misleading in South Australia. Parties need to justify what they are distributing. Overall, the laws have improved the tone of electoral campaigns'.<sup>98</sup>

All election campaigns contain a positive pitch for election, and a negative pitch on the threat that political opponents pose to public policy. Rann argued that TiPA laws mean that 'when advertising agents and political consultants and strategists are planning to do attack ads on the other side of politics, which is part of the process, they have to be mindful that they need to tell the truth in their attacks. And they also have to tell the truth in making claims about their achievements'.

Truth in political advertising laws have undoubtedly 'changed the face of electoral campaigning in South Australia'.<sup>99</sup> Political party state directors or secretaries work closely with the Premier and lawyers to ensure that the wording of political ads is accurate. For example, the practice inside the Labor Party is that election material has to be approved by the party secretariat before publication.<sup>100</sup> The party

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<sup>90</sup> Interview with Mick Sherry, 6 August 2024.

<sup>91</sup> Interview with Aemon Bourke, 29 August 2024.

<sup>92</sup> Interview with Mike Rann, 30 August 2024.

<sup>93</sup> Interview with Chris Sumner, 30 October 2024.

<sup>94</sup> Interview with Chris Sumner, 30 October 2024.

<sup>95</sup> Interview with Chris Sumner, 30 October 2024.

<sup>96</sup> Interview with David Gully, 6 August 2024.

<sup>97</sup> Interview with Mike Rann, 30 August 2024.

<sup>98</sup> Interview with former party official.

<sup>99</sup> Interview with former party official.

<sup>100</sup> Interview with Jay Weatherill, 13 August 2024.

secretariat would not approve the material until it also had a supporting brief of evidence that could justify the claim that was made within the material.<sup>101</sup>

There is a huge disincentive for political parties to be found to be inaccurate and misleading by the Electoral Commissioner, as the reputational damage for parties deemed to be misleading by the Commissioner is significant.<sup>102</sup> The media expose the outcomes of Electoral Commissioner decisions prominently. A political party claimed that they had wasted hundreds of thousands of dollars pulping material on the basis of one word or one sentence, because of the risk of reputational damage for the Electoral Commissioner saying they are misleading.<sup>103</sup>

As former South Australian Premier Jay Weatherill noted, the political impact was the real deterrent for publishing false and misleading information: 'Every day during election campaigns is important, and for you to lose one of those days through an adverse finding, within a four week election campaign, because an adverse finding of that sort is going to receive public notoriety, and if it doesn't lead the news that night, it will be a major story, and that will tend to have a negative impact on your momentum that you try and build an election campaign. So it's really something to avoid, and both political parties do take it seriously'.<sup>104</sup>

There is unanimous agreement from South Australian interviewees that there was no chilling effect on free speech. Elections in South Australia are fought with the same bitter and combative style of politics as other Australian jurisdictions, with numerous attack ads. Former Deputy Electoral Commissioner David Gully noted that 2022 state election was particularly combative: 'probably the most rigorous and spiteful election I've seen in a long time', where it became more presidential, with more personal attacks.<sup>105</sup>

The lack of impact on free speech could be because the TiPA laws cover a narrow ambit confined to just statement of facts, rather than opinions or predictions, meaning that the vast majority of communications are not covered by the laws.

There are, however, recent indications that TiPA laws have been used strategically by political parties as a tool against their political opponents. This has occurred in the last two elections (2018 and 2022), where each political party has put in multiple complaints to 'bog the other side down'.<sup>106</sup> A former party official noted that, 'The TiPA law is a tool in the toolkit to be exploited. All parties are using the same tactics, with the same bad behaviour. Both parties realised it was a tool to discredit other parties. Both parties are resourced with strong legal teams for claims and counterclaims'.<sup>107</sup> This has been a more recent phenomenon, as in the late 2000s, up to the 2010 election, there was no indication of such behaviour.<sup>108</sup>

The South Australian Electoral Commission has done an admirable job in administering the scheme, under the immense time pressure of an election, and in circumstances where one party would be disgruntled by their determinations.

Some participants stated that there have been issues with timely determinations by the Electoral Commissioner. The SA Electoral Commissioner, Mick Sherry, has noted that all parties are in a rush to get an outcome, but he has to make a considered determination and not all complainants provide sufficient information.<sup>109</sup> In addition, there have been delays occasioned by political parties using lawyers to challenge determinations and the wording of retractions.<sup>110</sup>

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<sup>101</sup> Interview with former Premier.

<sup>102</sup> Interview with former party official.

<sup>103</sup> Interview with former party official.

<sup>104</sup> Interview with former Premier.

<sup>105</sup> Interview with David Gully, 6 August 2024.

<sup>106</sup> Interview with Sam Hooper, 7 August 2024.

<sup>107</sup> Interview with former party official.

<sup>108</sup> Interview with David Gully, 6 August 2024.

<sup>109</sup> Interview with Mick Sherry, 6 August 2024.

<sup>110</sup> Interview with David Gully, 6 August 2024.



Mr Sherry has noted that there are challenges in administering the law, in terms of the Commissioner being brought into political debate, and the impact on the Commissioner running the election.

Mr Sherry said that the TiPA laws do put the Commissioner into an uncomfortable situation, where he is drawn into the political debate and commentary and required to adjudicate on electoral advertising during an election period.<sup>111</sup> On occasions, when the Commissioner has found a candidate or party has breached Section 113, the complainant has gone on media stating that the independent umpire has found their opponent has lied.<sup>112</sup>

Another major challenge in administering the legislation is that it consumes a lot of the Commissioner's time in the election period. Subject to the number or complexities of complaints received, the Commissioner has been required to spend considerable time administering these complaints, which prevents him from focussing on other aspects of the election.<sup>113</sup>

Nevertheless, Mr Sherry is of the opinion that the truth in political advertising laws work well and are effective.<sup>114</sup> Mr Sherry considers that the laws have changed the behaviour of political parties in a positive way.<sup>115</sup>

The level of compliance with TiPA laws by political parties has been good. There has been an increase in legal representation of candidates and parties who engage lawyers. For example, in a recent SA by-election in 2024, the Liberal Party indicated that their legal counsel was considering the Electoral Commissioner's decision.<sup>116</sup> Generally, once the Commissioner makes the decision, the parties will comply.<sup>117</sup> There was one incident where a political party refused to retract based on detailed legal advice from a King's Counsel, but this was seen to be unprecedented.<sup>118</sup>

The South Australian interviewees were unanimous that the South Australian Electoral Commission's reputation for impartiality is untarnished by administering TiPA laws. SA Electoral Commissioner Mick Sherry affirmed that the Electoral Commission has maintained its strong reputation for political neutrality,<sup>119</sup> while former Deputy Commissioner David Gully noted that the 'Commission has and continues to hold a very high regard in the community and in the political parties'.<sup>120</sup>

Different SA Electoral Commissioners have had different appetites for prosecution in courts. While successful prosecutions have occurred in the past of both the major parties, they have been rarely pursued in recent times. Since the late 1990s there were no prosecutions for a lengthy period until the prosecution of a local government candidate in 2018.<sup>121</sup>

Some interviewees considered that increased prosecutions would serve as a stronger deterrent. Mr Gully considered that if there is no action taken and people are not accountable for misleading ads and there are no prosecutions, the view of the combatants out in the political world may be that the Electoral Commission is a 'toothless tiger'.<sup>122</sup> Similarly, Sam Hooper, lawyer and Liberal Party volunteer, noted that the lack of prosecutions might make some consider there are no significant repercussions for breaching

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<sup>111</sup> Interview with Mick Sherry, 6 August 2024.

<sup>112</sup> Interview with Mick Sherry, 6 August 2024.

<sup>113</sup> Interview with Mick Sherry, 6 August 2024.

<sup>114</sup> Interview with Mick Sherry, 6 August 2024.

<sup>115</sup> Interview with Mick Sherry, 6 August 2024.

<sup>116</sup> 'Black By-election Campaign takes Acrimonious Turn as Thousands of Voters Head to the Polls in Adelaide's South', *ABC News* (online, 16 November 2024) <https://www.abc.net.au/news/2024-11-16/voters-to-cast-ballots-in-black-by-election/104606716>.

<sup>117</sup> Interview with Mick Sherry, 6 August 2024.

<sup>118</sup> Interview with political party official.

<sup>119</sup> Interview with Mick Sherry, 6 August 2024.

<sup>120</sup> Interview with David Gully, 6 August 2024.

<sup>121</sup> Interview with David Gully, 6 August 2024.

<sup>122</sup> Interview with David Gully, 6 August 2024.

the laws and keep pushing the boundaries, while prosecutions would make 'people might think twice about putting out misleading ads'.<sup>123</sup>

Interview participants acknowledge that the TiPA laws were drafted in a very different context of political communications, where the only mode of communication was traditional media, such as newspapers, television or the radio. However, modern digital campaigning has evolved to incorporate various platforms such as Facebook, Twitter, text messages and robocalls.

Nevertheless, TiPA laws were drafted broadly enough to cover both traditional media and new forms of communication including social media (Facebook/Meta, Twitter/X, Instagram and YouTube), streaming services, video on demand, bulk text messages, robocalls, broadcast radio and TV, and mail.<sup>124</sup>

Interviewees suggested, however, that there are gaps in regulation where there is the use of deceptive AI and deepfakes,<sup>125</sup> as well as where there is astroturfing (where political parties hide behind 'pseudo grass-roots groups'),<sup>126</sup> push polling (where political parties would commission people who claim to be pollsters to ask questions seeking to undermine their opponents),<sup>127</sup> or where there is factually inaccurate material where the original source cannot be traced.

#### 4.2.2 Operation of Truth in Political Advertising Laws in the ACT

The TiPA provisions in the ACT operated for the first time in their October 2024 general election. The Electoral Commissioners of the ACT have advised that, due to the proximity to the election, they were still analysing the data and would only be in a position to comment on the enforcement of the TiPA provisions in early 2025, thus it was not possible to incorporate their views into this final report published in December 2024.

However, interviews were conducted with several MPs and political party officials, who have commented on the operation of TiPA laws.

There were very few complaints reported by the interviewees, with Labor receiving three complaints but not making any themselves, the Liberal Party making one complaint but not receiving any, the Greens not making or receiving any complaints, and the Independents for Canberra making two complaints and not receiving any.

One complaint was upheld by the Electoral Commissioner, regarding an ACT Labor ad, which attributed the statement "women should definitely not be allowed abortions" to Liberal deputy leader Leanne Castley, when Ms Castley's actual position was that women should not readily be able to obtain an abortion if they request one.<sup>128</sup>

A couple of interviewees expressed frustration about the lack of the ability to appeal or challenge Electoral Commissioner determinations, particularly where the issue being decided is more nuanced and where they disagreed with the Electoral Commissioner's decision.

Mr Nick Tyrrell, President of the Canberra Liberals, noted that there were delays in adjudication by the Electoral Commissioner, meaning that the potentially misleading ad could be run for weeks before it was required to be retracted.<sup>129</sup> Likewise, Leigh Cox, Chief of Staff of Independent MP Thomas Emerson and

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<sup>123</sup> Interview with Sam Hooper, 7 August 2024.

<sup>124</sup> Interview with Mick Sherry, 6 August 2024.

<sup>125</sup> Interview with Mike Rann, 30 August 2024; Interview with Aemon Bourke, 28 August 2024.

<sup>126</sup> Interview with Dee Madigan, 14 August 2024. See 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.

<sup>127</sup> Interview with Bruce Hawker, 25 October 2024.

<sup>128</sup> Monte Bovill, 'ACT Labor instructed to remove 'inaccurate and misleading' election advertisement targeting Canberra Liberals' Leanne Castley', *ABC News* (online, 18 October 2024) <<https://www.abc.net.au/news/2024-10-18/act-labor-instructed-to-remove-election-ad-about-leanne-casley/104489952>>.

<sup>129</sup> Interview with Nick Tyrrell, 4 December 2024.

campaign director of Independents for Canberra, expressed concerns about the delays in decision-making by the Electoral Commission regarding a complaint about a Labor ad stating that the only time the Liberals had ever formed government was with the help of the Independents. The original complaint was lodged three and a half weeks before the election, but the determination was made one or two days prior to the election, and they did not have the opportunity to dispute the determination, which they disagreed with.<sup>130</sup>

Mr Tyrrell expressed concern that the forum of the retraction was not equivalent to the level of media where the ad was run, where the original ad was on a prime-time television slot during the AFL grand final, but the retraction was issued on social media.<sup>131</sup>

All interviewees have expressed support for the ACT TiPA laws. Mr Ash van Dijk, ACT Labor State Secretary, stated that 'ultimately it is good to have transparent elections where truth is just a fundamental fact... I'd hate to be in a position where anyone could say anything they wanted in an election and there'd be no recourse'.<sup>132</sup> Greens MP Mr Andrew Braddock stated that, upon reflection, 'the 2024 election was a little bit more tempered than previous elections were in terms of some of the wilder statements that parties made'.

All interviewees stated that they did not change the practices within their party in terms of ensuring ads were not false and misleading, as they already ensured their ads were accurate. Mr van Dijk stated that the ACT is a high information electorate, so in almost every ad they issued had quotes and sources in the ads themselves to say where they got this information from.<sup>133</sup> He noted that the ACT has a relatively civilised political culture where there was a generally respectful political debate in elections.<sup>134</sup> Mr Cox noted that the Independents for Canberra party provides direct evidence in the claims that they make. For instance, if they said 'the government is letting indigenous people down', they would have underneath that a set of statistics that would provide the incarceration levels for indigenous people and a range of outcomes, due to their belief in evidence-based decision-making.<sup>135</sup>

Mr Tyrrell noted the minimal penalty of merely issuing a retraction may mean that the reward of having been able to run the misleading material is greater than the potential risk of being found in breach.<sup>136</sup> Mr van Dijk noted that for a major political party, well-funded candidate or organisation, a fine of a few thousand dollars for spouting false or misleading information may be a small price to pay.<sup>137</sup>

There is no evidence of weaponisation of TiPA laws in the ACT, and there were no unintended consequences identified by interviewees. Interviewees also stated that the TiPA laws have not had a chilling effect on political discourse. The interviewees were unanimous that the impartiality of the ACT Electoral Commissioner was not affected by the enforcement of TiPA laws.

Mr van Dijk stated that there was anonymous unauthorised material going out in letterboxes which were low quality or handwritten making claims about the government that were untrue (eg distributing a letter to an entire suburb saying we're going to knock down all the houses and build apartments) but they were not authorised so there was nothing that could be done to right those wrongs.<sup>138</sup>

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<sup>130</sup> Interview with Leigh Cox, 29 November 2024.

<sup>131</sup> Interview with Nick Tyrrell, 4 December 2024.

<sup>132</sup> Interview with Ash van Dijk, 15 November 2024.

<sup>133</sup> Interview with Ash van Dijk, 15 November 2024.

<sup>134</sup> Interview with Ash van Dijk, 15 November 2024.

<sup>135</sup> Interview with Leigh Cox, 29 November 2024.

<sup>136</sup> Interview with Nick Tyrrell, 4 December 2024.

<sup>137</sup> Interview with Ash van Dijk, 15 November 2024.

<sup>138</sup> Interview with Ash van Dijk, 15 November 2024.

### 4.2.3 Views from Other Jurisdictions

#### 1 Electoral Commissioners

The Victorian Electoral Commissioners interviewed or contacted for this project (Sven Bluemmel (2023-present) and Warwick Gately (2013-2023), and former Victorian Deputy Electoral Commissioner Liz Williams (2005-2021)) were of the opinion that Electoral Commissions should not be the ones to administer TiPA laws in Victoria. The Acting NSW Electoral Commissioner Matt Phillips also stated that he did not wish to be the arbiter of TiPA laws in New South Wales because of the risk of pulling the focus of its limited resources from election events in critical periods and the risk of politicising the agency.

All electoral commissioners were concerned about the impact on the impartiality of the commission. Ms Williams was aware of an example at a recent State election where the Commission's impartiality was questioned in relation to its handling of a political finance matter during the election period.

Further, all electoral commissioners expressed concern about the high workload that this would entail in the election period, which might compromise the quality of election delivery.

Although there have been some attacks on impartiality of electoral commissions globally, which has included accusations against the Victorian Electoral Commission (VEC), Mr Bluemmel does not think that those attacks have captured the mainstream in Australia. But Mr Bluemmel noted: 'we always have to be vigilant. Above all, we have to keep delivering free and fair elections to the highest standards of integrity and transparency'.

The VEC does a lot of proactive work in relation to the right to vote, such as through ensuring that the VEC website and other channels can debunk misinformation about the electoral process and people's rights. During the last state election, there was some misinformation about how votes were counted and why pencils are used. These claims were disprovable and VEC put information out there to disprove it. VEC also engages extensively with marginalised certain cohorts that may be vulnerable or underrepresented to make sure they are aware of these rights.

The source of disinformation varies, and could include candidates or supporters. There are also importations of misinformation from other jurisdictions, such as misinformation about voting machines, which are not used in Victoria. The VEC's role is to put the facts out there and to run good elections with as much scrutiny as possible. It is done through various channels including publications and the roles of scrutineers.

The VEC responds to disinformation on social media platforms through tracking and through VEC staff who search for disinformation during the election campaign. Information can be rebutted through that channel and it has to be done fast. The VEC also has a misinformation and disinformation register, which only covers the electoral process and not broader policy. VEC also asks social media platforms to take things down.

According to the VEC's report to Parliament, the VEC was active in addressing 'harmful mis- and disinformation during the election period, including collaborating with the AEC to develop guidance for electoral management bodies, establishing a misinformation register, and establishing an arrangement with online platforms to work together to reduce the impact of mis- and dis-information'.<sup>139</sup>

For the 2024 Local Government elections the NSW Electoral Commission has a large budget to run a significant print media, radio, online video and social media campaign against disinformation called 'Stop and Consider', with a media spend of \$425,000. \$400,000 of this funding was made available by a special grant from the NSW Department of Premier and Cabinet as the Commission is not routinely funded for this type of campaign. The campaign encourages people to think about the source of their information and to check it with a reliable source such as the NSW Electoral Commission.

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<sup>139</sup> Victorian Electoral Commission, *Report to Parliament 2022 Victorian State election and 2023 Narracan District Supplementary Election* (October 2023) 5.

The NSW Electoral Commission has a disinformation register (like the VEC and AEC), and takes active steps to respond to and rebut disinformation in election periods by instituting a dedicated social media team. They use social media listening tools to monitor and respond to disinformation about the election. Persistent false information is debunked on the disinformation register, which is invaluable in rebutting false information and as a 'source of truth' for the public and the media.

The Acting NSW Electoral Commissioner has noted that most of the disinformation comes from individuals importing anti-democracy rhetoric from US elections, sovereign citizens and other groups/individuals, rather than established political parties.

Recently, the Australian members of the Electoral Council of Australia and New Zealand have jointly executed a protocol with the e-Safety Commissioner federally. That protocol covers the safety of election workers and ensures referrals can be made to the e-Safety Commissioner who can work with the platforms to address the issue, which may include taking the material down. The scheme relies on goodwill and compliance, which is not universal among the platforms. The e-Safety Commissioner has some powers and sanctions, but also good operational relationships with the platforms.

The Acting NSW Electoral Commissioner has raised issues regarding sovereign citizens and other fringe groups who have endangered electoral commission staff at the recent State general election in 2023 by harassing or intimidating them at polling places, posting photos and videos of them online with false accusations of stealing ballot papers, and creating physical disruptions during elections. Due to these issues, new offences have been introduced for the NSW local government elections which makes it an offence to film or photograph election officials and scrutineers while performing their duties in a way that would likely make the official or scrutineer feel intimidated or harassed.<sup>140</sup> It is a further offence for any person to publish or distribute (e.g. on social media) such a film or photograph.<sup>141</sup>

The Acting NSW Electoral Commissioner has also noted that his funding is largely limited to the election period, but misinformation often occurs outside of these periods. However, funding limitations mean the NSW Electoral Commission's ability to address disinformation and misinformation outside an election period is very limited, such as to undertake civics education within schools and new communities.

## **2 Politicians, Party Officials and Advertisers**

There are different levels of checking and vetting of ads for accuracy across jurisdictions without TiPA laws, with the federal level requiring the greatest degree of clearance of all paid media.<sup>142</sup> State jurisdictions have a more variable level of vetting before ads are approved by the State Director/General Secretary, depending on resourcing levels.<sup>143</sup> Generally, lawyers are only involved where ads are negative or there is a risk of defamation.

Some political parties deal with social media platforms directly if they wanted inaccurate material taken down, while others would go through the electoral commission. Social media platforms are not obliged to comply with take-down requests and the level of compliance is variable.

Political participants and party officials interviewed from New South Wales and Victoria were not enthusiastic about the prospect of introducing TiPA laws in their jurisdiction. Some felt that such laws were unnecessary and expressed scepticism about a regulator being an arbiter for truth.

A party official from a major party raised the issue that a major political party has the resources to be able to get legal advice, but independent candidates, who might be grassroots community advocates with a small group of people helping them in their campaign, would find it more difficult to comply with TiPA legislation.

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<sup>140</sup> Local Government (General) Regulation 2021 (NSW) s 365A.

<sup>141</sup> Local Government (General) Regulation 2021 (NSW) s 365A.

<sup>142</sup> Interview with Dee Madigan, 14 August 2024.

<sup>143</sup> Interview with Dee Madigan, 14 August 2024.

Several participants also raised the issue of the public being lulled into a sense of security that political ads are truthful when the laws are actually narrow in scope and/or ineffective.

The debate about truth in political advertising laws is in its infancy in NSW, with the first consideration of this issue in a NSW parliamentary committee in 2023.<sup>144</sup>

### 3 Civil Society Groups

The civil society groups interviewed, Australia Institute, Centre for Public Integrity, and Human Rights Law Centre expressed strong support for the introduction of TiPA laws.

Bill Browne, Director of the Democracy and Accountability Program at Australia Institute, considers that truth in political advertising laws could serve as a circuit-breaker for a recent trend where misinformation is used as a form of tit-for-tat or retaliation. The case for truth in political advertising laws is aided by South Australia's 40 years of experience, which demonstrates how a working model could be achieved and heads off concerns with truth in political advertising laws. Mr Browne noted that politicians have said that there is a higher quality to debate and that, even where a campaign may not fall foul of the laws, the existence of laws supports moderation and accuracy.

Dr Catherine Williams, Executive Director of the Centre for Public Integrity, stated that truth in political advertising laws can shift political culture, which is anecdotally what occurred in South Australia. The public polling also demonstrates that the laws are desired. In terms of South Australia, Dr Williams observes that people with experience say that the culture is such that misleading and deceptive advertising is not an issue in the same way it is in the federal jurisdiction and other jurisdictions.

David Mejia-Canales, Senior Lawyer at the Human Rights Law Centre, supported truth in political advertising laws, provided these are in line with human rights law and principles, as they make political conversations and electoral processes more fair, honest, and transparent, and reliable. He stated that, drafted correctly, this was in line with human rights law and principles to make sure that people can make electoral decisions in an informed, fair, and transparent way. Mr Mejia-Canales was of the opinion that TiPA laws had a beneficial effect in SA. As these laws were embedded before the time of social media, it has created and embedded a culture of making sure that truth exists in political advertisements and communications and a culture of telling the truth by default.

Dr Damien Freeman, Fellow of the Robert Menzies Institute and Honorary Fellow, Australian Catholic University, considered that truth in political advertising laws are necessary due to the effect of the digital age, the level of misinformation in US elections, and loss of trust in public institutions. He supported truth in political advertising laws being confined to statements of fact but not opinions.

Kiera Peacock from Marque Lawyers, who worked with independent candidates at the federal, New South Wales and Victorian state elections, and assisted Zali Steggall on her private member's bill, and worked as a lawyer advising the 'Yes' campaign for the Voice referendum, stated that 'it is an incredible gap in our system, the type of content that people are able to produce without consequence'.<sup>145</sup> For example, the Uluru Statement from the Heart was described by a Liberal Party Senator as being 26 pages rather than the one page that it is was a verifiably false statement of fact. Ms Peacock noted that in jurisdictions without TiPA laws, there was little that anyone could do about disinformation unless the conduct was defamatory or somehow violated discrimination laws.

Professor Anne Twomey from Sydney University supported the principle of TiPA laws, but identified practical issues with implementing these laws, due to the fact that the laws can be easily evaded, difficulties about the choice of adjudicator, and the risk of politicisation of these laws.<sup>146</sup>

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<sup>144</sup> See <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3024>.

<sup>145</sup> Interview with Kiera Peacock, 4 September 2024.

<sup>146</sup> Interview with Anne Twomey, 31 October 2024.

### 3.1.1 Recommendations for Reform by Interviewees

The following recommendations of reform of TiPA laws were suggested by interviewees who supported truth in political advertising laws:

- introduce a sanction of loss of public funding where participants are found to generate information that is untrue.
- introduce a clearer, more structured process with set time frames for resolving complaints. For example, complaints need to be resolved within a certain timeframe, such as two or three days.
- take the enforcement of TiPA laws out of the hands of the Electoral Commission and put it in an independent body such as a tribunal, or alternatively set up tribunal appeals of Electoral Commissioner decisions.
- institute a hotline for the election campaign where any breaches could be referred immediately to the Electoral Commission. Only top-level election officials would have access to the hotline, including state directors and senior campaign staff.
- consolidate times of release of Electoral Commissioner determinations. Currently Electoral Commissioner decisions are drip fed over the whole campaign. One option is to consolidate Electoral Commissioner decisions two or three times during the election campaign, for example, at the halfway mark and at the end, where all complaints are dealt with at once. Then there would be two critical points where all parties review claims and the Electoral Commissioner make findings. Consolidated decisions would minimise the distribution of media stories and political oxygen sucked up by such reporting. The majority of complaints are not upheld, so this will reduce and minimise it in the public eye.

The following broader regulatory proposals to combat disinformation were suggested by the interviewees:

- regulation of AI generated material to be certified to illustrate which material has been fact-checked.
- bans on the use of deceptive AI or deepfakes.
- voter education strategies should be developed to further assist voters to identify disinformation at the outset rather than solely relying on enforcement after breach.
- transparency measures that identify the authoriser may assist to identify people who have maliciously excluded identification.
- introduce a voluntary code of conduct between the party director and secretary of major parties in terms of political behaviour.
- Require social media platforms to include a feature similar to the 'community notes' function on Twitter/X that allows users to add context to potentially misleading posts.
- introduce an independent and non-partisan parliamentary budget office (as exists in the Commonwealth and NSW) in other Australian jurisdictions to provide independent costings of policies proposed by political parties, which means that political parties cannot make up how much their proposals are going to cost or introduce outrageous and expensive policies without consequence.

### 3.1.2 Key Findings from Interviews

#### Operation of TiPA Laws in South Australia

- TiPA laws have undoubtedly changed the face of electoral campaigning in South Australia, with state party directors/secretaries working with the premier and lawyers to closely scrutinise the wording of all political ads to ensure that they are accurate and do not breach the laws.
- The level of compliance with the Electoral Commissioner's determinations is good, with political parties generally following the Commissioner's directions in issuing retractions.
- The rise of social media has led to an increased number of complaints to the Electoral Commissioner in the most recent 2022 election.

- There are indications that TiPA laws have been used as a political tool, particularly in the last two elections (2018 and 2022), by political parties seeking to gain electoral advantage. Prior to this (before the 2014 election), there was less indication of TiPA laws being weaponised.
  - Political parties have made multiple complaints against their opponents to distract them, delaying tactics have been employed, and parties have sought to embarrass their opponents by publicising electoral commissioner findings of false and misleading statements in the media.
- The South Australian participants were unanimous that the TiPA laws have had no ‘chilling’ effect on freedom of speech. This could be because the laws are narrowly formulated to statements of fact, rather than opinions or predictions.
- The South Australian participants were unanimous that the South Australian Electoral Commission’s reputation for impartiality over time has been unaffected by administering TiPA laws, and that the Electoral Commission continues to enjoy strong public confidence for neutrality.
- Several participants have noted the desirability of more serious breaches of TiPA laws being prosecuted in the courts, in order to have a stronger deterrent effect.
- Several interviewees have noted that the current SA laws may not be fit-for-purpose in several respects, including in dealing with aspects of misinformation/disinformation that are not covered by political advertising, blackout periods being ineffective with early voting, AI and deepfakes.
- The TiPA laws are generally supported in principle in South Australia by most political participants, who believe that the laws have a positive effect. This is consistent with previous empirical research from 2019, where Renwick and Palese found that both parties ‘support the principle of s 113’.<sup>147</sup>

### Operation of TiPA Laws in the ACT

- There were very few complaints in the ACT 2024 general election, compared to the volume of complaints in SA.
- All ACT political participants unanimously supported the TiPA laws.
- Political parties did not change the practices within their party in terms of ensuring ads were not false and misleading. This could be because the ACT is a high information electorate, where sources are provided in the ads themselves.
- Several interviewees expressed frustration at the inability to challenge or appeal Electoral Commissioner determinations, the delays in determinations, and the lack of equivalence of the prominence of the media where an ad found to be misleading was run (prime time TV) compared to the retraction (social media).
- There was no evidence of weaponisation of TiPA laws or any unintended effects.
- The ACT interviewees were unanimous that there was no chilling effect of TiPA laws.
- The interviewees were unanimous that the ACT Electoral Commission’s reputation for impartiality has been unaffected by administering TiPA laws.

### Findings from Other Jurisdictions re TiPA Laws

- There are disparate levels of fact checking of political ads by the major political parties in various jurisdictions without TiPA laws. Lawyers are generally only brought in for negative ads where there may be a risk of defamation.
- Political participants from non-TiPA jurisdictions have noted that they still aim to ensure the accuracy and truthfulness of their advertising and campaign material, as it is embarrassing to be found to have lied.

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<sup>147</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 27.



- Political parties in various jurisdictions have approached requests for retractions on social media platforms differently, with some approaching the social media platform directly, and others going through the electoral commission.
  - Participants report varying levels of cooperation from social media platforms, with some requests for removal of misleading content being ignored.
- Electoral Commissioners from other jurisdictions have expressed concerns about administering TiPA laws due to the fear of their impartiality being affected and being distracted from their main task of delivering an election.
- Electoral Commissions are taking active steps to combat electoral misinformation and disinformation, including posting corrective messages on social media and instituting disinformation registers.
- Political participants from non-TiPA jurisdictions were less enthusiastic about the introduction of TiPA laws, with some opposing the introduction of such laws on the basis of the laws being unnecessary or overly burdensome.
- Interviewees have raised the issue that it is often not the established political parties, but rather sovereign citizens, fringe groups or minor political parties that spread disinformation.
- Civil society groups welcomed the introduction of TiPA laws in Australian jurisdictions on the basis that this will decrease disinformation in elections, there is public support for these laws, and a workable model already exists in South Australia.

## 5 Design Choices for Truth in Political Advertising Laws in Australia

There are several design choices that can be made regarding truth in political advertising laws.

**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 implied freedom of political communication protected by the Australian Constitution.<sup>148</sup>

**Operation:** Another major question is how these laws operate in practice, whether these laws have normative effect in terms of a change of behaviour by political actors in their electoral campaigning, and whether there have been any unintended consequences.

**Enforcement:** The effectiveness of the laws depends on the enforcement by the regulator, the Electoral Commissioner of SA and ACT. Due to the time sensitivity of the election, such enforcement needs to be timely, and there needs to be compliance by political actors and media/social media outlets to the determinations of the Commissioner. It is also necessary to consider any further enforcement action by the Commissioner in the courts. Further, as policing misinformation is time-consuming, the Electoral Commissioner needs adequate resourcing to be able to enforce these laws, alongside running the elections.

### 5.1 Scope of Truth in Political Advertising Laws

The scope of a truth in political advertising 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’).<sup>149</sup>

The way that a scope is defined and drafted in truth in political advertising laws has direct consequences for the effectiveness and constitutionality of the law. If 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’.<sup>150</sup> 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.<sup>151</sup>

The tensions between effectiveness, protection of expression and constitutionality mean that a truth in political advertising law might only have a limited scope but can nevertheless be effective within the constraints of that scope. The Victorian Electoral Matters Committee considers that it is ‘appropriate’ for truth in political advertising laws to operate in ‘limited and carefully selected circumstances’.<sup>152</sup> Similarly, Renwick and Palese conclude that truth in political advertising laws in South Australia and New Zealand 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’.<sup>153</sup> The result of this trade-off is that truth in political advertising laws may be able to ‘operate without undue difficulty’ but have ‘constrained’ benefits.<sup>154</sup>

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<sup>148</sup> Kieran Pender, ‘Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations’ (2022) 44(1) *Sydney Law Review* 1.

<sup>149</sup> Kieran Pender, ‘Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations’ (2022) 44(1) *Sydney Law Review* 1, 20.

<sup>150</sup> Jacob Rowbottom, ‘Lies, Manipulation and Elections: Controlling False Campaign Statements’ (2012) 32(3) *Oxford Journal of Legal Studies* 507, 525. In the United States, for example, Sellers suggests a relatively narrow set of circumstances for the regulation of lying, targeted at foreign interference, lies intended to undermine election administration, and lying on a mandatory disclosure form: Joshua S Sellers, ‘Legislating Against Lying in Campaigns and Elections’ (2018) 71(1) *Oklahoma Law Review* 141, 154–64.

<sup>151</sup> Kieran Pender, ‘Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations’ (2022) 44(1) *Sydney Law Review* 1, 22.

<sup>152</sup> Electoral Matters Committee, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria’s Electoral Administration* (September 2021) 117.

<sup>153</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 20.

<sup>154</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 20.

Based on case law, the scope of the SA Act and ACT Act can be confined by reference to 1) substance ('inaccurate and misleading' statements of fact), 2) form ('advertisements'), 3) temporality (whether the operation of the law is confined to the election period); 4) materiality ('to a material extent'); and 5) the target of regulation (person who 'authorises, causes or permits the publication of an electoral advertisement').<sup>155</sup>

### 5.1.1 Substance

Substance is concerned with the kind of untruth which is covered by a truth in political advertising law, and how it is framed and defined. Untruths are themselves divisible based on factors such as intentionality (e.g. lying compared to negligence) and objectivity (e.g. fact compared to opinion).

Submissions to the *Inquiry into the 2022 Federal Election* were 'generally supportive' of the South Australian model,<sup>156</sup> which centres on political advertising that is 'inaccurate and misleading'.<sup>157</sup> For example, Professor Luke Beck considers that wording similar to South Australian law, centring on standards of 'deceptive and misleading' or 'likely to deceive or mislead', are 'well established in Australian law', 'have applied in the commercial advertising context for decades' and 'are well understood'.<sup>158</sup>

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 truth in political advertising laws in South Australia and the ACT, meaning that the scope of coverage is very narrow.

#### **Types of statements that are covered by TiPA laws:**

- "The government has increased your power bills by 400%".
  - This will be covered by TiPA laws, as it is a statement of fact about past events that can be verified.
- "Labor has a secret plan to increase GST".
  - Although this is a statement about the future, the existence or non-existence of a plan can be verified.

However, as Professor Anne Twomey argues, '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")'.<sup>159</sup>

#### **Types of statements that will not be covered by TiPA laws:**

- "Labor will introduce a death tax" or "The Liberals will privatise Medicare".
  - This a prediction of future behaviour should the party get into power that will not be covered by TiPA laws.
- "The Liberal Party is a good economic manager".

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<sup>155</sup> See *Electoral Act 1985* (SA) s 113; *Electoral Act 1992* (ACT) s 297A.

<sup>156</sup> See, eg, Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 83–6 [3.64]–[3.73].

<sup>157</sup> *Electoral Act 1985* (SA) s 113.

<sup>158</sup> Luke Beck, *Transcript*, 16 March 2020, 16, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 78 [4.100].

<sup>159</sup> Anne Twomey, 'Truth in Political Advertising' (2010) 21(4) *Public Law Review* 232

- This is a statement of opinion that will not be covered by TiPA laws.

All of these would be outside of the ambit of the SA and ACT Act, making the legislation ineffective in enforcing 'honest' advertising about statements about future action, such as campaign promises.<sup>160</sup>

This means that the TiPA laws can be easily avoided by formulating false or misleading material in the form of opinions or predictions rather than facts.

Mick Sherry, the SA Electoral Commissioner, considered it is appropriate for the TiPA law to focus on facts, rather than opinions, otherwise it could not be administered.<sup>161</sup> Professor George Williams agrees that a truth in political advertising scheme 'can only be justified on very narrow terms' so as to be 'truly limited to clear statements of fact that are demonstrably false'.<sup>162</sup> Former SA 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.<sup>163</sup>

Both the SA Act and the ACT Act provide that it is a defence to prove that the defendant took no part in determining/deciding the content of the advertisement,<sup>164</sup> and could not reasonably be expected to have known that the statement was inaccurate and misleading.<sup>165</sup> Thus, the law does not penalise those who publish inaccurate and misleading statements of fact under an honest and reasonable mistake of fact. This is supported by Rowbottom, who contends that truth in advertising 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.<sup>166</sup> There is thus an intentionality requirement under TiPA laws.

### 5.1.2 Form

Form is concerned with what constitutes 'political advertising'. The South Australian and ACT Electoral Acts define electoral advertisement as an advertisement containing electoral matter. Electoral matter is defined as matter 'calculated to affect the result of the election', which means that these provisions apply to any form of advertisement, including print, radio, television and online advertising, as well as social media and text messages.

The South Australian Electoral Commissioner enforces the TiPA provisions on political parties who post on social media, such as Facebook posts. A couple of illustrative examples are provided below:

#### *2014 – Premier claim about free-range eggs*<sup>167</sup>

- Labor Then-Premier Jay Weatherill published a Facebook post claiming that a new code of conduct regarding producers of free-range eggs, '*shoppers can rest assured that when they buy South Australian accredited free range eggs, that's what they're getting*'.
- The code of conduct had not been implemented, so the Electoral Commission required the South Australian Labor Party to correct the initial post and post a retraction.

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<sup>160</sup> Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 22 [2.65].

<sup>161</sup> Interview with Mick Sherry, 6 August 2024.

<sup>162</sup> George Williams, *Transcript*, 7 September 2020, 23, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 78 [4.101].

<sup>163</sup> Interview with John Rau, 7 August 2024.

<sup>164</sup> *Electoral Act 1985* (SA) s 113(3)(a) ('determining'); *Electoral Act 1992* (ACT) s 297A(2)(a) ('deciding').

<sup>165</sup> *Electoral Act 1985* (SA) s 113(3)(b); *Electoral Act 1992* (ACT) s 297A(2)(b).

<sup>166</sup> Jacob Rowbottom, 'Lies, Manipulation and Elections: Controlling False Campaign Statements' (2012) 32(3) *Oxford Journal of Legal Studies* 507, 529.

<sup>167</sup> Cited in University College London The Constitution Unit, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK be Improved?* (2019), available at [https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/184\\_-\\_doing\\_democracy\\_better.pdf](https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/184_-_doing_democracy_better.pdf) (accessed 12 June 2024), page 24.

2021 – *Opposition Leader claim about number of doctors and nurses*<sup>168</sup>

- In 2021, then-Opposition Leader Peter Malinauskas claimed on social media that the South Australian Government was “secretly planning to cut even more doctors and nurses at our hospitals”.
- However, the Auditor-General’s most recent annual report indicated that there were fewer nurses in 2020 than in 2019, but not fewer than 2018. There were no fewer doctors in public hospitals in 2020 than in the previous two years.
- The South Australian Electoral Commissioner determined that the claim breached South Australia’s truth in political advertising laws, and Mr Malinauskas published a withdrawal of the statement.

Generally, the South Australian Electoral Commission does not interact with social media platforms or media companies, as they normally deal with those who issue the electoral advertisement.<sup>169</sup> However, if the Commissioner does not know who authorised the material or the author refused to remove the ad, then the Commissioner has to engage with the social media platform.<sup>170</sup> The Electoral Commissioner has not done this often, and the level of compliance is variable.<sup>171</sup>

One issue in this space relates to developments in contemporary electoral campaigning. The SA Electoral Commission has indicated in its report on the 2022 Election that Part 13, Division 2 (which includes section 113):

“has not been kept up to date over the years and is now showing its age and inability to deal with new situations that have arisen due to technological change, particularly the challenges surrounding digital campaigning. The current provisions of the Electoral Act predate the proliferation of social media, digital apps, and other digital channels never contemplated by legislators and are inadequate for regulating electoral advertising and commentary on these channels”.<sup>172</sup>

The SA Electoral Commission has stated it intends to undertake a review of this part of the Electoral Act in 2024, in consultation with stakeholders to consider how the legislation can be modernised to address these challenges, and will bring any recommendations for legislative change to Parliament.

Advertising director Dee Madigan considered that there are significant issues regarding dubious practices by political parties that do not fall within the ambit of political advertising. This includes astroturfing, i.e. where political parties hide behind ‘pseudo grass-roots groups’,<sup>173</sup> 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.<sup>174</sup> These activities are not regulated by TiPA laws as they do not fall within the category of political advertising.

Further, Bruce Hawker, former Labor Party campaign strategist raised the issue of push polling, which did not fall into the scope of political advertising.<sup>175</sup> Political parties would commission people who claim to be pollsters to make statements like, “if you knew that a certain politician, and they named them, was a war

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<sup>168</sup> See SA Opposition Leader Peter Malinauskas Forced to Apologise for Facebook Post about Health Staff Numbers’, *ABC News* (online, 7 July 2021) <https://www.abc.net.au/news/2021-07-07/sa-opposition-leader-forced-to-apologise-for-facebook-post/100273028>.

<sup>169</sup> Interview with Mick Sherry, 6 August 2024.

<sup>170</sup> Interview with Mick Sherry, 6 August 2024.

<sup>171</sup> Interview with Mick Sherry, 6 August 2024.

<sup>172</sup> South Australian Electoral Commission, *2022 SA State Election and Bragg By-election Report* (2022) 81 <<https://www.ecsa.sa.gov.au/state-and-by-election-reports>>.

<sup>173</sup> 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.

<sup>174</sup> New South Wales Independent Commission Against Corruption, *The Regulation of Lobbying, Access and Influence in New South Wales: A Chance to have your Say* (2019) 9.

<sup>175</sup> Interview with Bruce Hawker, 25 October 2024.

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 go around and say to their friends, “I didn't know that XYZ was a war criminal”. Mr Hawker noted that that's the sort of thing that has been done in election campaigns, which did not fall into the category of advertising, but is still in that realm of trying to spread wrongful information in order to get a political advantage.<sup>176</sup> 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 misinformation and increase susceptibility to fake news stories.<sup>177</sup>

Another issue is the deceptive use of AI and deepfakes which do not fall within the category of political advertising, as they are generally not authorised by political parties.

### 5.1.3 Temporality

A further consideration is whether politicians should only be subject to truth in political advertising laws during election periods. An example is the New Zealand law, which only applies in a strictly time-limited period to advertisements issued for the three days up to polling day. However, the New Zealand law is seen to be ineffective due to its overly strict temporal coverage, which excludes the vast majority of ads.<sup>178</sup>

The South Australian Electoral Commissioner notes that section 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. Therefore, the intent and contents of the advertisement and the proximity of an election are taken into consideration when assessing complaints against section 113.

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

Julian Burnside argues in a submission to the Victorian Electoral Matters Committee that it should be an offence for politicians to engage in conduct with is ‘misleading or deceptive’, and that such conduct should be prohibited for politicians at all times, even beyond the election period.<sup>179</sup> SA State Secretary Aemon Bourke supports the extension of TiPA laws to be without temporal limitation; otherwise he contended that inaccurate statements ‘could be made for 3 years and 9 months out of 4 years’.<sup>180</sup>

### 5.1.4 Materiality

Materiality is embedded in the SA Act and the ACT Act through the requirement that advertising must be inaccurate and misleading ‘to a material extent’. Materiality counterbalances breadth by building in consideration of the effect of the advertising. It does ‘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’.<sup>181</sup>

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<sup>176</sup> Interview with Bruce Hawker, 25 October 2024.

<sup>177</sup> Gillian Murphy et al, ‘Push Polls Increase False Memories for Fake News Stories’ (2021) 6 *Memory* 693.

<sup>178</sup> Lisa Hill, Max Douglass and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022) 60.

<sup>179</sup> Julian Burnside, *Submission No 12*, 1–2, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 108 [4.109]–[4.110].

<sup>180</sup> Interview with Aemon Bourke, 28 August 2024.

<sup>181</sup> 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 347, 395 [237]–[238] (Bleby J).

Renwick and Palese consider that the requirement of 'material extent' tempers the vagueness of the 'inaccurate and misleading' standard.<sup>182</sup> This is supported by evidence that materiality is a basis to dismiss claims about statements that are only marginally misleading. In South Australia, for example, a complaint alleged that a claim of overspending by \$5 million was untruthful when the actual amount was \$3.8 million. This complaint was not considered 'material'.<sup>183</sup>

However, materiality also raises administrative difficulties. In 2009, the Electoral Commission of South Australia expressed that s 113 of the SA Act should be amended to remove the 'misleading to a material extent' component. In their view, materiality posed an 'onerous burden' that 'divert[s] attention away from managing the election'. Repeal of 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'.<sup>184</sup>

### 5.1.5 Target of Regulation

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

In South Australia, the offence of misleading advertising applies to a person who 'authorises, causes or permits the publication of an electoral advertisement'.<sup>185</sup> This wording captures the authors or creators of the ad, such as political parties, unions and third party campaigners seeking to affect electoral outcomes. Thus, publishers or intermediary platforms (e.g. social media platforms) are not the target of regulation.

The truth in political advertising law of the ACT also does not apply to publishers.<sup>186</sup> This approach is supported by the News and Media Research Centre, which considers 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.<sup>187</sup> In 1984, the Joint Select Committee on Electoral Reform also considered that the liability on publishers could be removed.<sup>188</sup> It referred to views that an expansionary concept of liability would require extend the lead time for advertisements due to doubts about compliance.<sup>189</sup> Further, Baltutis posits that holding publishers liable might increase constitutional risk by discouraging publication of political advertising.<sup>190</sup>

By contrast, in New Zealand, complaints of untruth in political advertising can be made against broadcasters for regulation by the Broadcasting Standards Authority (BSA).<sup>191</sup> This approach is supported by commentators who believe that holding publishers liable enables more effective enforcement. Beck is of the view that publishers, such as social media platforms, should be liable for failing to remove

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<sup>182</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 22.

<sup>183</sup> Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of Evidence*, Melbourne, 18 August 2009, 8–9, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 53–4 [3.17].

<sup>184</sup> Electoral Commission of South Australia, *Frome By-Election* (Election Report, 17 January 2009) 22.

<sup>185</sup> *Electoral Act 1985* (SA) s 113(2).

<sup>186</sup> Electoral Matters Committee, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria's Electoral Administration* (September 2021) 120, citing Supplementary Explanatory Statement, Electoral Amendment Bill 2018 (ACT) 3.

<sup>187</sup> News and Media Research Centre University of Canberra, *Supplementary Submission 75.1*, 15–16, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 83 [4.122].

<sup>188</sup> Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 16 [2.44].

<sup>189</sup> Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 15–16 [2.40]–[2.41].

<sup>190</sup> Ravi Baltutis, 'South Australia's Truth in Political Advertising Law: A Model for Australia?' (2021) 42(2) *Adelaide Law Review* 597, 608–9.

<sup>191</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 35.

advertisements.<sup>192</sup> The Victorian Electoral Matters Committee also considers 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.<sup>193</sup> The benefit of holding publishers liable is that it provides an enforcement mechanism where the authoriser or creator of an advertisement is uncooperative.<sup>194</sup>

However, there may be issues in achieving compliance and enforcement of laws for social media companies based overseas such as Facebook/Meta or Twitter/X, with reports by interviewees of social media platforms not consistently complying with take-down requests.

In September 2024, the Commonwealth government introduced the Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2024 (Cth), which aims to increase digital platform transparency and accountability. This bill requires platforms to self-regulate at first instance, but empowers the Australian Communications and Media Authority (ACMA) to create digital platforms rules in the event that self-regulation is ineffective, and requiring platforms to publish media literacy plans outlining the steps a platform is taking to combat misinformation and disinformation on their service. Significant, the bill covers electoral misinformation that reaches the threshold of 'serious harm'. However, the reliance on industry self-regulation is problematic, as digital platforms profit from misinformation, disinformation, and other harmful content on their services.<sup>195</sup> The bill has since been withdrawn by the government, due to Senate opposition.<sup>196</sup>

By contrast, the European Union's (EU) Digital Services Act is mandatory and requires digital platforms to abide by rules, including to remove illegal content and introduce mechanisms for "flagging" unlawful content and challenging content moderation decisions.<sup>197</sup> Platforms in breach may face significant fines of up to 6% of global annual turnover.<sup>198</sup>

Further, the EU has a strengthened voluntary code of practice on disinformation in 2022, which requires demonetising the dissemination of disinformation (to ensure that purveyors of disinformation do not benefit from advertising revenues), guaranteeing the transparency of political advertising, and strengthening the measures to reduce manipulative behaviour used to spread disinformation (e.g. fake accounts, bot-driven amplification, impersonation, malicious deepfakes).<sup>199</sup> It also requires users to be provided with accessible, effective tools and procedures to flag disinformation with the potential to cause public or individual harm, with those flagged having an appropriate and transparent mechanism to appeal and seek redress.<sup>200</sup> However, Twitter/X pulled out of the EU disinformation code in 2023,<sup>201</sup> highlighting the weaknesses of a voluntary code. Nevertheless, Twitter/X is still subject to the mandatory EU Digital Services Act.

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<sup>192</sup> Luke Beck, *Submission 65*, 2, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 81 [4.114].

<sup>193</sup> Electoral Matters Committee, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria's Electoral Administration* (September 2021) 121.

<sup>194</sup> See, eg, Electoral Matters Committee, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria's Electoral Administration* (September 2021) 121.

<sup>195</sup> Human Rights Law Centre, *Rights-First: Principles for Digital Platform Regulation* (2024) 8.

<sup>196</sup> Josh Butler, 'Labor Dumps Misinformation Bill after Senate Unites against it', *The Guardian* (online, 24 November 2024) <https://www.theguardian.com/australia-news/2024/nov/24/labor-dumps-misinformation-bill-after-senate-unites-against-it>.

<sup>197</sup> European Union, *Digital Services Act*, arts 3(h), 9(1).

<sup>198</sup> European Commission, The Enforcement Framework under the Digital Services Act <<https://digital-strategy.ec.europa.eu/en/policies/dsa-enforcement>>.

<sup>199</sup> European Union, The Strengthened Code of Practice on Disinformation (2022) <<https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>>.

<sup>200</sup> European Union, The Strengthened Code of Practice on Disinformation (2022) <<https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>> 25.

<sup>201</sup> Natasha Lomas, 'Elon Musk takes Twitter out of the EU's Disinformation Code of Practice', *Tech Crunch* (online, 27 May 2023) <<https://techcrunch.com/2023/05/27/elon-musk-twitter-eu-disinformation-code/>>.



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

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

### 5.1.6 Overlap with Other Laws

It should also be considered how TiPA laws interact or overlap with other laws, such as that of defamation and trade practices law.

#### 1. Defamation

In the absence of truth in political advertising laws, defamation laws are among the few examples of legislation which govern the 'content' of advertisements.<sup>202</sup> Historically, defamation has also been viewed as an alternative to introducing truth in political advertising laws, or as sufficient protection against false statements in the absence of truth in political advertising laws. In its 1984 report, the Joint Select Committee on Electoral Reform concluded that the federal truth in political advertising provision in s 329 should be repealed, 'effectively leaving the decision as to whether political advertising is true or false to the electors and to the law of defamation'.<sup>203</sup>

In jurisdictions that have enshrined truth in political advertising, defamation operates alongside truth in political advertising laws. In the SA Act, for example, the Court is empowered to declare an election void on the basis of misleading advertising as well as if the result of the election was, on the balance of probabilities, affected by defamation.<sup>204</sup>

In comparison to truth in political advertising laws, defamation is targeted toward a narrower form of falsity, being false statements that are specifically injurious to a particular person and their 'reputation'.<sup>205</sup> This is demonstrated in the statutory provision which prohibits the defamation of candidates in the ACT Act, which provides in s 300 that a person shall not make 'a false and defamatory statement about the personal character or conduct of a candidate'.<sup>206</sup> For this reason, defamation may also have consequences for the constitutionality of truth in political advertising laws if their legislative designs are too similar. For example, Pender considers that a truth in political advertising law specifically focussed on 'false commentary on a politician's personal life or conduct' may face concerns at the necessity stage, 'given defamation law already provides remedies for political candidates maligned in electoral campaigning'.<sup>207</sup>

In further contrast to truth in political advertising, an action in defamation is also typically enforceable by the person who is defamed. In Victoria, an election candidate who has been defamed may seek redress

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<sup>202</sup> Sarah Miskin and Richard Grant, Department of Parliamentary Services, *Political Advertising in Australia* (Research Brief, 29 November 2004) 2.

<sup>203</sup> Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 27 [2.81].

<sup>204</sup> *Electoral Act 1985* (SA) s 107(4)–(5).

<sup>205</sup> See, eg, George Williams, *Submission No 7*, 1, cited in Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 71.

<sup>206</sup> *Electoral Act 1992* (ACT) s 300.

<sup>207</sup> Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 21.

under the *Defamation Act 2005* (Vic).<sup>208</sup> Under the ACT Act, s 300 can be enforced through both prosecution and a suit for injunction by the candidate who is defamed.<sup>209</sup>

In proposed US laws, a prohibition against deceptive AI is directly linked to defamation. Under the US Protect Elections from Deceptive AI Act, a violation of the prohibition on the distribution of materially deceptive AI shall constitute defamation.<sup>210</sup> Outside of this kind of deeming provision, it is difficult to succeed in a US defamation action in a political context. Ross considers that actions for defamation 'are unlikely to bring relief in the face of campaign lies', because they are unlikely to be resolved before the election, and defamation jurisprudence makes it 'extremely difficult' for plaintiffs to prevail over public figures such as political candidates.<sup>211</sup>

## 2. Australian Consumer Law

The Australian Consumer Law is a single national consumer protection law that applies consistently at the federal level and in each state and territory. Amongst other matters, the Australian Consumer Law prohibits misleading or deceptive conduct in trade or commerce (which also includes conduct that is likely to mislead or deceive) e.g. false or misleading advertising in relation to the supply or use of good or services, or the sale of land.

However, the Australian Consumer Law does not apply to political advertising, because political advertising is outside the scope of 'trade and commerce'.

- a 1990 decision in NSW considered the effect of a provision in NSW that was similar to the current 'misleading or deceptive conduct in trade or commerce' provision in the context of a statement made by a politician during an election campaign.
- the decision found that the provision did not apply, because politics was not a business or commercial activity, and therefore the politician was not engaging in 'trade or commerce'.<sup>212</sup>

Although this case was decided before the Australian Consumer Law took effect in 2010 and subsequent years,<sup>213</sup> the Australian Consumer Law contains a similar provision, so it is likely that if a similar allegation arose today, a court would decide it in the same way.

Including truth in political advertising laws in the Australian Consumer Law requires careful consideration, as truth in political advertising laws may not align with the purpose and operation of the Australian Consumer Law. Potential issues include:

- Legislative misalignment
  - The Australian Consumer Law is aimed primarily at consumer protection, and including truth in political advertising laws in the Australian Consumer Law may not align with the purpose of the Australian Consumer Law, which increases the potential for legislative complexity and can undermine good governance and public administration.

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<sup>208</sup> Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) [2.13].

<sup>209</sup> *Electoral Act 1992* (ACT) s 300.

<sup>210</sup> Protect Elections from Deceptive AI Act, § 2.

<sup>211</sup> Catherine J Ross, 'Ministry of Truth? Why Law Can't Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns' (2017) 16 *First Amendment Law Review* 367, 379–80. This is particularly due to the defamation rules set down in *New York Times v Sullivan*, 376 US 254 (1964), which requires a showing of 'actual malice or reckless disregard for truth' to establish defamation in the US.

<sup>212</sup> See *Durant v. Greiner* (1990) ASC S156-100, as cited in Warren Pengilly, 'Unconscionable and Misleading Conduct: How the *Trade Practices Act* is used and the duty to advise' [1992] *Queensland University of Technology Law Journal*, volume 6, 35, available at <https://lr.law.qut.edu.au/article/download/358/347/358-1-699-1-10-20120920.pdf>.

<sup>213</sup> NB – the *Trade Practices Act 1974* and equivalent state and territory legislation was the precursor to the Australian Consumer Law.

- Implications for the Australian Consumer Law
  - The substantive protections in the Australian Consumer Law (including those relating to false or misleading representations in the course of trade or commerce) are incorporated into the relevant federal legislation as a schedule, and every other state and territory has passed equivalent legislation so that it has similar effect.
  - Amending the Australian Consumer Law to include truth in political advertising laws may have implications and/or unintended consequences.

The 2001 federal election provides a good example of why imposing Australian Consumer Law standards to political advertisements is not appropriate. Exceptionally in that election, the Federation of Australian Commercial Television Stations (FACTS) (now ClearAds) vetted television advertisements during the election in the belief that the then *Trade Practices Act* applied to political advertising, in relation to prohibiting misleading or deceptive advertising. For that campaign, any ad that the parties wanted to put on television had to be approved by an expert who they appointed, a professor of trade practices.

Former Labor Party campaign strategist Bruce Hawker argued that this approach severely disadvantaged the Labor Party, which was in opposition at the time.<sup>214</sup> Broad claims such as “under a Labor government, you’ll be better off than under the Liberals” or “for a fairer Australia, vote for the Labor Party” were overruled because the adjudicator would say that you cannot make any claim that you cannot substantiate and cannot prove.

Mr Hawker stated that ads that essentially appealed to people's emotional or philosophical bent, such as “life would be better under a Labor government because we will redistribute wealth more fairly than a Liberal government” were disallowed.<sup>215</sup> You could say, “we have a plan which, if successful, would have the effect of improving the quality of life of people if all the above considerations worked properly”. But it was covered with so many caveats that as a piece of advertising, it became useless.

Hawker argued that this created a very unlevel playing field where if you were the opposition and you didn't have the benefit of a government department to say, in the last 12 months, we have improved the standard of living of men in the 40 to 45 age bracket by 2%, if you didn't have a department to substantiate the claim that you'd made, then it wouldn't be accepted by the adjudicator.<sup>216</sup> They would say, you can't put that out to air without substantiation. The government could do that because it could ask its public servants to provide substantiation. Hawker stated that: “Essentially it just became extremely difficult for the Labor Party to create any sort of hard-hitting ads, ads with real punch in them because they just kept getting ruled out by the adjudicator. And we had to come up with really anodyne style of ads in order to get them put to air at all.”<sup>217</sup>

Following the election in 2002, FACTS wrote to the political parties stating that in light of a recent Legislation Committee report and legal advice obtained by FACTS, FACTS would no longer seek substantiation for statements made in political advertisements and will not consider complaints regarding the accuracy of such statements.<sup>218</sup> The current vetting for television ads is now only a low-level consideration against the risk of defamation. It is noted that the Australian Consumer Law standards applied in the 2001 federal election were more stringent than the truth in political advertising provisions in South Australia, which Mr Hawker stated did not at all affect the Labor Party's ability to run aspirational or opinion-based ads.<sup>219</sup>

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<sup>214</sup> Interview with Bruce Hawker, 25 October 2024.

<sup>215</sup> Interview with Bruce Hawker, 25 October 2024.

<sup>216</sup> Interview with Bruce Hawker, 25 October 2024.

<sup>217</sup> Interview with Bruce Hawker, 25 October 2024.

<sup>218</sup> Joint Standing Committee on Electoral Matters, *The 2001 Federal Election: Report of the Inquiry into the Conduct of the 2001 Federal Election, and Matters Related Thereto* (2003) 129.

<sup>219</sup> Interview with Bruce Hawker, 25 October 2024.

## 5.2 Operation

The SA Act is the most longstanding example of a truth in political advertising law. Reviews of its operation find an increasing trend of complaints and investigations. The South Australian Electoral Commissioner has also identified recurring issues in managing the operation of the law.

In the ACT 2024 general election, where the TiPA laws were operational for the first time, there were only three complaints, and one was upheld (discussed at p 26-7 above).

The focus of the discussion below will be in the SA law, which has had a longer period of operation.

### 5.2.1 Operational Processes and Issues

#### 1. Complaints

The SA Electoral Commission does not have the resources to proactively monitor electoral advertising, so they rely on complaints.<sup>220</sup> Once they receive a complaint alleging a breach of section 113, further information is sought from the complainant, as to why it is misleading. The SA Electoral Commission then goes to the publisher of the material (normally political parties or candidates, although third party campaigners are also covered) to seek their views.

The main complainants are the major political parties.<sup>221</sup> The SA Electoral Commissioner noted that political parties are actively observing each other and lodging complaints.<sup>222</sup>

The table below outlines information about the number of complaints relating to inaccurate and misleading political advertising in South Australia since 1997.<sup>223</sup> The information is based on the number of complaints in election years (noting that the South Australian provision is not limited to election years, but the wording of the provision references a matter ‘*calculated to affect the result of an election*’, so is more likely to practically operate in an election year).

		1997	2002 <sup>224</sup>	2006	2010	2014	2018	2022
<b>Complaints</b>	Number of complaints to South Australian Electoral Commission	40	53	32	63	90	35 <sup>225</sup>	117
<b>Outcome of complaints</b>	Number of retractions / withdrawals requested	6	N/A	N/A	2	N/A	7	9
	Number of requests for no further publication	N/A	N/A	N/A	N/A	11	9	11
	Number of remedies requested	N/A	N/A	N/A	N/A	0	1	2

<sup>220</sup> Interview with Mick Sherry, 6 August 2024.

<sup>221</sup> Interview with Mick Sherry, 6 August 2024.

<sup>222</sup> Interview with Mick Sherry, 6 August 2024.

<sup>223</sup> Sourced from [https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/184\\_-\\_doing\\_democracy\\_better.pdf](https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/184_-_doing_democracy_better.pdf), and South Australian Electoral Commission reports on the 1997, 2002, 2006, 2010, 2014, 2018 and 2022 SA elections, which are available at <https://www.ecsa.sa.gov.au/state-and-by-election-reports>.

<sup>224</sup> The South Australian Election Commission’s *South Australian Elections 2002 Report* states that “no complaint actions were pursued following the 2002 election though party attention was drawn to cases where it was considered that the boundaries of what was misleading or inaccurate material were fully tested” (see page 42, available at <https://www.ecsa.sa.gov.au/state-and-by-election-reports>).

<sup>225</sup> NB – the 2014 SA Election report notes that it used a different method for calculating complaints in 2018 than it did in 2014.

	Number of warnings issued	N/A	N/A	N/A	2	0	3	2
	Number of complaints that were not upheld	N/A	N/A	N/A	N/A	N/A	9	83
	Number of complaints with insufficient evidence	N/A	N/A	N/A	N/A	N/A	14	10
	Number of prosecutions	N/A	N/A	N/A	0	0	0	0

There is a general trend of complaints about inaccurate and misleading material increasing over time. For example, complaints increased from 35 in 2014, to 38 in 2018,<sup>226</sup> and then to 122 in 2022.<sup>227</sup> In 2009, the SA Electoral Commission stated that ‘the categories of inaccurate or misleading material and authorisation proved to be the highest complaint categories’, and that ‘[a]most half of all complaints received related to section 113’.<sup>228</sup>

The SA Electoral Commissioner attributes this increase to social media: “Previously electoral material were flyers in a letter box drop. Now there are Facebook pages and posts, and the complaints have skyrocketed.”<sup>229</sup>

The SA Electoral Commission has previously expressed that the SA Act is ‘particularly challenging ... to administer’, especially due to this increase in the number of complaints.<sup>230</sup> In the lead up to the election, the Commissioner predicts the complaints and resources needed to administer the TiPA laws, but it is hard to predict the resourcing required. For example, there was a big jump in complaints from 2018 to 2022, and some complaints are complex and take time to resolve.

The SA Electoral Commissioner noted that problems in compliance have arisen mainly in local government, as council elections have more than 1,000 individual candidates and they have a lower awareness of these laws compared to the major political parties, even with Electoral Commission briefings.<sup>231</sup>

Former SA Premier Jay Weatherill noted that in terms of Electoral Commissioner determination of complaints, there is an issue about materiality, where minor or technical breaches are given the same degree of notoriety as gargantuan breaches, such as a really big lie about a really central issue in the campaign: they are both found to be false and misleading.<sup>232</sup> He noted that, ‘some trivial breaches have been elevated to the same status as significant breaches, and creating a false equivalence, which is a flaw’.<sup>233</sup>

The threshold of materiality ensures that minor misleading comments can be dismissed, and it is desirable to dismiss minor or vexatious complaints, in order to prevent the laws being misused by opportunistic political parties.

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<sup>226</sup> Electoral Commission of South Australia, *2018 South Australian State Election* (Election Report, 2019) 78.

<sup>227</sup> Electoral Commission of South Australia, *Committee Hansard*, 30 November 2022, 1, cited in Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 76 [3.36].

<sup>228</sup> Electoral Commission of South Australia, *Frome By-Election* (Election Report, 17 January 2009) 21.

<sup>229</sup> Interview with Mick Sherry, 6 August 2024.

<sup>230</sup> Electoral Commission of South Australia, *Committee Hansard*, 30 November 2022, 1, cited in Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 76 [3.36].

<sup>231</sup> An equivalent provision governs local council elections in SA (*Local Government (Elections) Act 1999* (SA), section 28), rather than section 113 of the *SA Electoral Act 1985* (SA).

<sup>232</sup> Interview with former Premier.

<sup>233</sup> Interview with former Premier.

## 2. Investigations

The investigation of complaints is ordinarily outsourced. In practice, the Crown Solicitor's Office is engaged to provide advice on further action and to engage in additional investigative work.<sup>234</sup> The result of the investigations is usually to dismiss the complaint. In 2009, the SA Electoral Commission concluded that '[m]ore often than not the response provided by [the Crown Solicitor's Office] determined that the statements in question could not be proven to be misleading to a material extent'.<sup>235</sup>

The SA Electoral Commission has also noted that there are difficulties in the process of investigation, particularly because the onus lies on the complainant. The SA Electoral Commission 'is unable to materially investigate matters to help make determinations and relies on the information provided by the complainant'.<sup>236</sup> However, in the 2018 election, complainants 'either failed to provide sufficient information or failed to articulate exactly what they alleged to be misleading'.<sup>237</sup> Where complainants did not respond to requests for information, files were closed unresolved.<sup>238</sup> These delays were compounded by the need to seek comment from the subject of the complaint,<sup>239</sup> and from the respondent disputing a request for cessation or retraction.<sup>240</sup> The SA Electoral Commission observes that the practice of disputing requests became 'more common throughout the [2022] election than it had been previously'.<sup>241</sup>

There is intense time pressure for the Electoral Commissioner to make determinations. If it is a week out from polling, it is less urgent compared to polling day, where the Commissioner requires a response within two hours.<sup>242</sup> If it is one week to polling day, the Commissioner may give until tomorrow morning to respond. There are very short timelines.<sup>243</sup>

Timely retraction depends on the complexity of the material. If there is a misleading ad on polling day, the Electoral Commission still needs to be considered in its decision-making.<sup>244</sup> Sometimes parties are unhappy about the time it takes to resolve a complaint. But it depends on whether the complainant has provided all the information, and getting legal advice takes time.<sup>245</sup>

There has been an increase in legal representation of candidates and parties who engage lawyers, which creates delays in making determinations.

The level of compliance by political parties to determinations of the Electoral Commissioner has been good. Generally, once the Commissioner makes the decision, the parties will comply.

### 2.1.1 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

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<sup>234</sup> Electoral Commission of South Australia, *Committee Hansard*, 30 November 2022, 2, cited in Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 76 [3.37]–[3.38]. See also Electoral Commission of South Australia, *Frome By-Election* (Election Report, 17 January 2009) 22.

<sup>235</sup> Electoral Commission of South Australia, *Frome By-Election* (Election Report, 17 January 2009) 22.

<sup>236</sup> Electoral Commission of South Australia, *2018 South Australian State Election* (Election Report, 2019) 80.

<sup>237</sup> Electoral Commission of South Australia, *2018 South Australian State Election* (Election Report, 2019) 80. See also Electoral Commission of South Australia, *2022 South Australian State Election and 2022 Bragg By-Election* (Election Report, 2023) 82.

<sup>238</sup> Electoral Commission of South Australia, *2018 South Australian State Election* (Election Report, 2019) 80.

<sup>239</sup> Electoral Commission of South Australia, *2018 South Australian State Election* (Election Report, 2019) 80; Electoral Commission of South Australia, *2022 South Australian State Election and 2022 Bragg By-Election* (Election Report, 2023) 82.

<sup>240</sup> Electoral Commission of South Australia, *2022 South Australian State Election and 2022 Bragg By-Election* (Election Report, 2023) 82.

<sup>241</sup> Electoral Commission of South Australia, *2022 South Australian State Election and 2022 Bragg By-Election* (Election Report, 2023) 82.

<sup>242</sup> Interview with Mick Sherry, 6 August 2024.

<sup>243</sup> Interview with Mick Sherry, 6 August 2024.

<sup>244</sup> Interview with Mick Sherry, 6 August 2024.

<sup>245</sup> Interview with Mick Sherry, 6 August 2024.

issues: the effect of the law on freedom of speech, and the use of truth in political advertising laws as a political tool.

While any design of truth in political advertising 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 truth in political advertising laws.

## 1. Freedom of Speech

Critics of truth in political advertising laws refer primarily to its 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 a truth in political advertising law can be justified at all.<sup>246</sup> 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. Further, rules 'may enhance rather than detract from ordinary citizens' freedom to act autonomously', particularly if regulation of misinformation is 'genuinely independent of political control'.<sup>247</sup>

In addition, knowingly false statements may not attract human rights protection, for example, under Article 10 of the European Convention of Human Rights.<sup>248</sup> 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.<sup>249</sup>

However, there are also more specific speech concerns surrounding whether truth in political advertising 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'.<sup>250</sup> That risk emerges particularly from drafting that is vaguely worded,<sup>251</sup> 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.<sup>252</sup> Dr 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'.<sup>253</sup> Dr 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 and where those making them can be judged negatively by those who care

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<sup>246</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 40.

<sup>247</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 40.

<sup>248</sup> *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL) 20.

<sup>249</sup> *Ibid* 238.

<sup>250</sup> Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 22.

<sup>251</sup> Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 23.

<sup>252</sup> Jacob Rowbottom, 'Lies, Manipulation and Elections: Controlling False Campaign Statements' (2012) 32(3) *Oxford Journal of Legal Studies* 507, 525.

<sup>253</sup> Parliament of Tasmania, House of Assembly Standing Committee on Government Administration B, *Inquiry into the Electoral Disclosure and Funding Amendment Bill 2024 (No 9)* (2024) <https://www.parliament.tas.gov.au/committees/house-of-assembly/standing-committees/government-administration-committee-b/inquiries/inquiry-into-the-electoral-disclosure-and-funding-amendment-bill-2024-no.-9>, 48.

about honesty in politics'.<sup>254</sup> However, this argument is geared towards broader TiPA laws that extend beyond statements of fact to opinion.

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. Dee Madigan, who has written hundreds of political ads for 24 electoral campaigns in the Commonwealth, ACT, NT, and Queensland, and has done union ads in election campaigns in every other state, stated that her ads in South Australia did not differ from other jurisdictions.<sup>255</sup> Likewise, Bruce 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 South Australia were no impediment to running political ads, and he ran elections in the same way in all Australian jurisdictions.<sup>256</sup> Mr Hawker worked on about four elections in South Australia from 1997 through to 2010, and does not recall them being different in any way.<sup>257</sup> In addition, all political participants interviewed in South Australia and the ACT have agreed that they did not feel constrained in their electoral campaigning and free speech.

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 falls foul of its constitutional protection. There is a constitutional risk that a truth in political advertising law would be struck down for infringing the implied freedom if its scope is overly broad,<sup>258</sup> although there is precedent for validity.

Specifically, in *Cameron v Becker* ('*Cameron*'), the Supreme Court of South Australia upheld the constitutionality of the SA Act.<sup>259</sup> There, Lander J stated that, although the legislation burdens political communication, it does so for 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'.<sup>260</sup> 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.<sup>261</sup> 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.<sup>262</sup>

Since *Cameron* was decided, other commentators have considered whether truth in political advertising laws would survive more recent formulations of the implied freedom. Pender considers that a court would likely accept that truth in political advertising laws burden the implied freedom to a modest extent,<sup>263</sup> and serve a legitimate purpose of ensuring that the electorate is 'properly informed and not unduly influenced by falsehoods'.<sup>264</sup> On balance, he concludes that the SA Act and ACT Act are reasonably appropriate and adapted to advance their legitimate purpose. Particularly, it is unlikely that the benefits of counteracting

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<sup>254</sup> Parliament of Tasmania, House of Assembly Standing Committee on Government Administration B, *Inquiry into the Electoral Disclosure and Funding Amendment Bill 2024 (No 9)* (2024) <https://www.parliament.tas.gov.au/committees/house-of-assembly/standing-committees/government-administration-committee-b/inquiries/inquiry-into-the-electoral-disclosure-and-funding-amendment-bill-2024-no.-9>, 48.

<sup>255</sup> Interview with Dee Madigan, 14 August 2024.

<sup>256</sup> Interview with Bruce Hawker, 25 October 2024.

<sup>257</sup> Interview with Bruce Hawker, 25 October 2024.

<sup>258</sup> See, eg, Mark Polden, *Transcript of Evidence*, Melbourne, 18 August 2009, 5, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 101 [4.84]. In the United States, a similar concern is raised under the First Amendment: see, eg, Catherine J Ross, 'Ministry of Truth? Why Law Can't Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns' (2017) 16 *First Amendment Law Review* 367, 388–401.

<sup>259</sup> *Cameron v Becker* (1995) 64 SASR 238.

<sup>260</sup> *Cameron v Becker* (1995) 64 SASR 238, 255 (Lander J).

<sup>261</sup> Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 3.

<sup>262</sup> Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 21.

<sup>263</sup> Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 12.

<sup>264</sup> Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 12.



the impact of misleading advertising on democratic norms will be ‘manifestly outweighed’ by their ‘modest burden’ on the implied freedom.<sup>265</sup> Baltutis considers 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’.<sup>266</sup> However, he nonetheless concludes that the law could be refined to withstand constitutional risks.<sup>267</sup>

## 2. Politicisation

Another concern is that parties might ‘weaponise’ truth in political advertising laws as a political tool ‘to serve their own interests’,<sup>268</sup> including through the use of complaints ‘as a method of disrupting their opponents’ campaign — notwithstanding that there [is] no merit in the claim’.<sup>269</sup> In 2009, the SA Electoral Commission suggested that complaints raised under s 113 ‘appeared to degenerate into a “tit for tat” distraction’.<sup>270</sup> The Liberal Democrats have also expressed concern about the risk of ‘tit for tat’ complaints, ‘creating workload for the Electoral Commission that will divert attention away from managing the election’.<sup>271</sup>

Based on the interviews conducted for this report, there is evidence of political parties using TiPA laws as a political tool in the last two elections in South Australia (2018 and 2022), with parties lodging numerous complaints against their political opponents to try to stymie them, and publicising 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. As David Gully explained: ‘as 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”’.<sup>272</sup>

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’.<sup>273</sup>

However, meritless claims can backfire on the parties that raise them. Former State Secretary of the South Australian Labor Party, Reggie Martin, suggests that ‘a party’s case can be undermined if it makes a complaint that is not upheld’.<sup>274</sup>

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<sup>265</sup> Kieran Pender, ‘Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations’ (2022) 44(1) *Sydney Law Review* 1, 16. He also concludes that a calibrated scrutiny approach would also likely conclude that truth in political advertising laws are constitutional: at 19.

<sup>266</sup> Ravi Baltutis, ‘South Australia’s Truth in Political Advertising Law: A Model for Australia?’ (2021) 42(2) *Adelaide Law Review* 597, 608–9.

<sup>267</sup> Ravi Baltutis, ‘South Australia’s Truth in Political Advertising Law: A Model for Australia?’ (2021) 42(2) *Adelaide Law Review* 597, 611.

<sup>268</sup> Jacob Rowbottom, ‘Lies, Manipulation and Elections: Controlling False Campaign Statements’ (2012) 32(3) *Oxford Journal of Legal Studies* 507, 525.

<sup>269</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 27.

<sup>270</sup> Electoral Commission of South Australia, *From By-Election* (Election Report, 17 January 2009) 22.

<sup>271</sup> Standing Committee on Justice and Community Safety, *Inquiry into the 2020 ACT Election and the Electoral Act* (Report No 2, August 2021) 50 [7.90].

<sup>272</sup> Interview with David Gully, 6 August 2024.

<sup>273</sup> Interview with Sam Hooper, 7 August 2024.

<sup>274</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 27.

## 2.2 Enforcement of Truth in Political Advertising Laws

There are several elements to the enforcement of truth in political advertising laws: who is the appropriate arbiter, as well as sanctions and remedies.

### 2.2.1 The Appropriate Arbiter

Another design choice of TiPA laws is choosing the appropriate arbiter. Both the SA Act and the ACT Act 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.<sup>275</sup> However, other suggestions for appropriate arbiters have been proposed.

#### 1. The Electoral Commission

In both South Australia and the Australian Capital Territory, electoral commissioners are responsible for administering truth in political advertising laws. This is ordinarily justified by reference to their expertise in elections and their impartiality. For example, the Australian Institute argues that electoral commissions are ‘trusted, non-partisan, familiar with electoral processes and used to ramping up during election periods’.<sup>276</sup>

The former Attorney-General of South Australia, John Rau, has also expressed the view that no other independent institution apart from the SA 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’.<sup>277</sup> Rau acknowledges that it’s an invidious task for the Electoral Commissioner: “An Electoral Commissioner who’s not a judge, and who’s got other duties to do, has stop doing their main business and behave like they’re a judge and jury in the 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.”<sup>278</sup> Although Rau considers that the SA Electoral Commission is an ‘imperfect adjudicator’ in a ‘potentially conflicting position’, he concludes that ‘it appears to be the best of the set of choices’.<sup>279</sup>

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 judgements about candidates’ and parties’ material, and it could lead to accusations of bias by the AEC’.<sup>280</sup> The AEC has also raised practical issues with assuming a regulatory role. Although the SA Electoral Commission administers the SA Act, the AEC considers 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’.<sup>281</sup>

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<sup>275</sup> Kieran Pender, ‘Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations’ (2022) 44(1) *Sydney Law Review* 1, 24.

<sup>276</sup> Australia Institute, *Submission 122*, 5, cited in Electoral Matters Committee, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria’s Electoral Administration* (September 2021) 121.

<sup>277</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 27.

<sup>278</sup> Interview with John Rau, 7 August 2024.

<sup>279</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 27.

<sup>280</sup> Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Transcript*, 6 December 2019, 3, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 84 [4.124].

<sup>281</sup> Australian Electoral Commission, *Committee Hansard*, 3 November 2022, 12, cited in Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 85–6 [3.73].

This view is echoed by the Victorian Electoral Commission,<sup>282</sup> NSW Electoral Commission,<sup>283</sup> and other commentators.<sup>284</sup> For example, Costar warns 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’.<sup>285</sup> Overseas, the UK Electoral Commission has expressed the same concern about the compromise of its independence if it were to take on a role in policing truth in political advertising.<sup>286</sup>

The Australian Electoral Commission added a disinformation register on ‘The Voice’ referendum process about indigenous recognition in 2023 to correct inaccurate and misleading statements.<sup>287</sup> Following this, there were criticisms relating to the impartiality of the Australian Electoral Commission from the Liberal Opposition,<sup>288</sup> which has been unprecedented. This may point to a troubling new willingness of 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 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. That remark was subsequently withdrawn.<sup>289</sup> 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’.<sup>290</sup> Indeed, the interviews conducted for this report affirmed the strong reputation that the SA Electoral Commission continues to enjoy in the community and political participants, despite administering TiPA laws since 1985.

The 2024 Commonwealth TiPA Bill provides a middle ground solution, as it establishes an Electoral Communications Panel as an independent secondary statutory structure within the AEC.<sup>291</sup> The Electoral Communications Panel consists of a Chair (a retired Federal Court judge) and at least 3 and not more than 14 other members. This is a mechanism to provide a buffer to the AEC, and therefore protect its independence and impartiality, while being able to draw on the AEC’s resources and expertise. In addition, decisions are 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.

## 2. Tribunals

Another option is to make tribunals the arbiters of complaints under TiPA legislation, with the Electoral Commission performing the vetting function and then referring matters to the tribunal for their

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<sup>282</sup> Interview with Sven Bluemmel, 19 August 2024. See, eg, Electoral Matters Committee, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria’s Electoral Administration* (September 2021) 122–3.

<sup>283</sup> Interview with Matt Phillips, 4 September 2024.

<sup>284</sup> See, eg, Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 117–20 [5.5]–[5.16].

<sup>285</sup> Brian Costar, Coordinator, Democratic Audit of Australia, *Transcript of Evidence*, Melbourne, 18 August 2009, 2–3, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 54 [3.18]. See also Democratic Audit of Australia, *Submission No 6, 8*, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 101 [4.84].

<sup>286</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 21.

<sup>287</sup> Australian Electoral Commission, Disinformation Register - Referendum Process <<https://www.aec.gov.au/media/disinformation-register-ref.htm>>.

<sup>288</sup> 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>>.

<sup>289</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 28.

<sup>290</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 28.

<sup>291</sup> Electoral Legislation Amendment (Electoral Communications) Bill 2024 (Cth).

determination. David Gully, former SA Deputy Electoral Commissioner, noted that this proposal was considered by the SA government but did not progress to the bill stage.<sup>292</sup>

This is seen to be a more independent quasi-judicial mechanism compared to the Electoral Commission, however it remains to be seen if tribunals can make determinations in the short timeframes required for the enforcement of TiPA laws.

### 3. Courts

Courts are a proposed alternative to vesting oversight functions in the electoral commission. Professor George Williams considers 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'.<sup>293</sup> This might include a court.<sup>294</sup> Burnside and Coghill consider that courts could effectively enforce truth in political advertising laws, including because of their existing experience in determining what is 'misleading or deceptive' in the trade practices context.<sup>295</sup> However, Twomey argued that court proceedings take too long to be an effective response to misleading advertisements 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 and tying up finances and diverting attention to legal proceedings during an election campaign.<sup>296</sup>

Others have raised concerns about the involvement of courts in political judgments. The 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. Particularly, it is of the view that, unlike the regulation of commercial advertising, the regulation of political advertising 'seems necessarily to involve a political judgment, based upon political premises'.<sup>297</sup> Pearce considers 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'.<sup>298</sup>

However, these concerns may be overstated, given that Australia has an entrenched system of overturning election results based on the court of disputed returns, and this has not undermined the perception of judicial independence.

### 4. Other Regulators

Some calls have been made for other regulators to assume roles in regulating truth in political advertising, which 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 the electoral commissions. For example, in the federal context, Beck considers that the Australian Competition and Consumer

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<sup>292</sup> Interview with David Gully, 6 August 2024.

<sup>293</sup> George Williams, *Transcript*, 7 September 2020, 23, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 78 [4.102].

<sup>294</sup> George Williams, *Transcript*, 7 September 2020, 25–6, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 78 [4.103].

<sup>295</sup> Julian Burnside, *Submission No 12*, 1; Ken Coghill, *Transcript of Evidence*, Melbourne, 18 August 2009, 2, both cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 120 [5.18].

<sup>296</sup> Parliament of New South Wales, *Administration of the 2023 NSW state election and other matters* (2024) [https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3024#tab-reportsandgovernmentresponses\\_41-2](https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3024#tab-reportsandgovernmentresponses_41-2) [2.50].

<sup>297</sup> Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 21 [2.62].

<sup>298</sup> Michael Pearce, President, Liberty Victoria, Victorian Council for Civil Liberties, *Transcript of Evidence*, Melbourne, 18 August 2009, 3, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 121 [5.20].

Commission (ACCC) would be more suitable than the AEC if their role was 'slightly expanded', given their pre-existing experience dealing with misleading and deceptive advertising.<sup>299</sup>

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.<sup>300</sup> However, the ACCC may not be the most appropriate body to administer truth in political advertising laws. For example:

- although the ACCC may have expertise in determining allegations regarding false or misleading representations, this is in a business/commercial context, and false or misleading claims in the context of political debate are likely to be of a fundamentally different nature; and
- the ACCC's powers are tailored to the ACCC's role in relation to consumer protection, and these powers may not align with overseeing truth in political advertising laws (e.g. some existing powers and/or penalties may be disproportionate, or the ACCC might require bespoke powers/and or penalties that are appropriate for truth in political advertising laws).

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'.<sup>301</sup>

Another potential regulator could be the Australian Communications and Media Authority (ACMA).<sup>302</sup> 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;
- can investigate complaints in relation to the broadcasting sector (including radio and television), including assessing whether content is factually accurate; and
- has an existing role in relation to election, referendum and political advertisements (e.g. the regulation of advertisements broadcast over television during an election).

Responsible Technology Australia considers that regulators such as the Australian Communications and Media Authority, the eSafety Commissioner or the ACCC do not currently have the remit to 'neatly' capture regulation of political advertising. It is therefore necessary 'either to rethink the remit of some of those regulators or to think about new mechanisms for oversight'.<sup>303</sup>

In New Zealand, a self-regulatory approach to truth in political advertising vests greater power in industry bodies. Centrally, the New Zealand Advertising Standards Authority (an advertising industry body) is used to facilitate truth in advertising.<sup>304</sup> The Advertising Standards Authority prevents misleading advertising through voluntary self-regulation, codes of practice and the policing of compliance with these codes.<sup>305</sup> In

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<sup>299</sup> Luke Beck, *Submission 65*, 2, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 81 [4.115].

<sup>300</sup> NB – relevant state and territory bodies administer the Australian Consumer Law in their respective jurisdictions e.g. Consumer Affairs Victoria administers the Australian Consumer Law in Victoria in relation to relevant consumer protections.

<sup>301</sup> Rod Simms, Chair, Australian Competition and Consumer Commission, *Transcript*, 7 September 2020, 30, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 82 [4.118].

<sup>302</sup> The July 2022 Commonwealth Joint Standing Committee on Electoral Matters *Conduct of the 2022 federal election and other matters (interim report)* (available at [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportint/RB000012/toc\\_pdf/Conductofthe2022federalelectionandothermatters.pdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportint/RB000012/toc_pdf/Conductofthe2022federalelectionandothermatters.pdf)) 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 truth in political advertising legislation (see page 86-106).

<sup>303</sup> Christopher Cooper, Executive Director, Responsible Technology Australia, *Transcript*, 14 September 2020, 52, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 79–80 [4.108].

<sup>304</sup> Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 33.

<sup>305</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 30.

parallel, the BSA regulates broadcast advertising through its own codes of practice.<sup>306</sup> Renwick and Palese observe that the role of both bodies seems to be ‘marginal’, and that there have been no cases under s 199A against advertisers and no adverse decisions by the BSA for over 20 years.<sup>307</sup>

## 5. Specialised New Body

Another option is to create a separate statutory body to regulate TiPA laws. For example, Williams has suggested that an independent panel could be a suitable independent, non-electoral body to oversee truth in political advertising laws.<sup>308</sup> Hughes considers that this might include an independent statutory tribunal or an appointed Election Ombudsman.<sup>309</sup> 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.<sup>310</sup>

The benefit of this approach is that it would remove the burden the Electoral Commission in its busiest period and if well-resourced with appropriate expertise, the body would be able to deal with TiPA matters in a timely manner. However, as Twomey noted, the downside of a new body is that it would only be effectively operational only every 3-4 years when there is an election, meaning that it could not develop systems of expertise if new people were appointed each time.<sup>311</sup> Twomey 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.

### 5.3.2 Sanctions and Remedies

The appropriate enforcement mechanism for misleading advertising is also contested. Polling by the Australia Institute shows that the majority of respondents support financial penalties, retractions and the loss of some or all public funding.<sup>312</sup> In contrast, criminal charges do not have majority support and have not generally been used.<sup>313</sup>

## 1. Withdrawal and Retraction

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

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<sup>306</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 34.

<sup>307</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 37.

<sup>308</sup> George Williams, *Transcript*, 7 September 2020, 25–6, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 78 [4.103].

<sup>309</sup> Colin Hughes, *Submission No 13*, 1, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 122 [5.24]–[5.25].

<sup>310</sup> Parliament of New South Wales, *Administration of the 2023 NSW state election and other matters* (2024) <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3024#tab-reportsandgovernmentresponses> [2.32].

<sup>311</sup> Interview with Anne Twomey, 31 October 2024.

<sup>312</sup> Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 32.

<sup>313</sup> Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 32.

a) *Request by Electoral Commission*

The SA Act and ACT Act empower their electoral commissions to seek the withdrawal and retraction of misleading advertising.<sup>314</sup> In 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’.<sup>315</sup>

In South Australia, the SA Electoral Commissioner’s powers to seek withdrawal and retraction were introduced in 1997.<sup>316</sup> Previously, the courts decided cases under s 113 ‘well after the election was over’.<sup>317</sup> The Electoral Commission’s powers are now the primary enforcement mechanism in the SA Act. The Electoral Commissioner of South Australia ‘has requested content be withdrawn at most elections since 1997’.<sup>318</sup> In analysing data provided by the Electoral Commission, Renwick and Palese find that the Electoral Commission has generally required withdrawal or retraction in more cases over time.<sup>319</sup> The Australia Institute states that the SA Act ‘is mainly realised through the Electoral Commissioner’s requests for withdrawal and/or retraction, which appear to be largely honoured’.<sup>320</sup>

The SA 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.<sup>321</sup> For example, if the post was made on a Facebook account, the retraction has to be on the same account.<sup>322</sup> 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. In that situation the Commissioner determines an alternative method, for example, an ad in the *Advertiser* (daily paper), Facebook/Meta post, or a media release.<sup>323</sup> The Commissioner provides the wording of the retraction and writes to the authoriser.<sup>324</sup>

The requirement to issue the retraction in the same forum 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 counter-attack.

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 could issue the retraction at 11.59pm at night, or retractions can be buried under other subsequent posts.<sup>325</sup>

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

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<sup>314</sup> *Electoral Act 1985 (SA)* s 113(4); *Electoral Act 1992 (ACT)* s 297A(3).

<sup>315</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 23.

<sup>316</sup> The Commission ‘did not ask to be given the intervention powers that it received’: Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 25.

<sup>317</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 23.

<sup>318</sup> See Electoral Matters Committee, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria’s Electoral Administration* (September 2021) 117–18.

<sup>319</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 23.

<sup>320</sup> Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 7. See also Ravi Baltutis, ‘South Australia’s Truth in Political Advertising Law: A Model for Australia?’ (2021) 42(2) *Adelaide Law Review* 597, 604.

<sup>321</sup> Interview with Mick Sherry, 6 August 2024.

<sup>322</sup> Interview with Mick Sherry, 6 August 2024.

<sup>323</sup> Interview with Mick Sherry, 6 August 2024.

<sup>324</sup> Interview with Mick Sherry, 6 August 2024.

<sup>325</sup> Interview with Sam Hooper, 7 August 2024.

election campaign.<sup>326</sup> The Australia Institute has also notes that withdrawal and retraction may have limited effect given '[t]he short duration of election campaigns and the finality of an election result.'<sup>327</sup> To address these limitations, the Institute proposes the withdrawal of public funding from parties and candidates who have authorised misleading or inaccurate advertisements.

#### b) Injunctions

An alternative is an injunction for withdrawal or retraction after the commissioner applies to the Supreme Court, if an initial request for withdrawal and retraction fails.<sup>328</sup> In South Australia, the SA Electoral Commissioner 'has not taken legal action to achieve withdrawals/retractions'.<sup>329</sup> The SA Electoral Commission has also observed that a Supreme Court injunction is 'not practical during the last week of the election campaign due to the blackout provisions'.<sup>330</sup> 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.<sup>331</sup> Pender notes, 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'.<sup>332</sup>

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'.<sup>333</sup> 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'.<sup>334</sup> 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.<sup>335</sup> Consequently, an injunction in the final week of a campaign is effectively a final remedy.<sup>336</sup>

## 2. Financial Penalties

Both the ACT Act and the SA Act are enforceable through financial penalties for criminal offences which can be pursued through prosecution. 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.

#### a) Civil or Criminal

One issue is the appropriateness of imposing a financial penalty as punishment for a criminal offence. In the SA 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.<sup>337</sup> In the ACT Act, the maximum penalty is 50 penalty units.<sup>338</sup>

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<sup>326</sup> Australia Institute, *Committee Hansard*, 26 October 2022, 4, cited in Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 84 [3.69].

<sup>327</sup> Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 3.

<sup>328</sup> *Electoral Act 1985* (SA) s 113(5); *Electoral Act 1992* (ACT) s 297A(5).

<sup>329</sup> Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 7.

<sup>330</sup> Electoral Commission of South Australia, *State Election 2014* (Election Report, 2014) 57.

<sup>331</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 27.

<sup>332</sup> Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 24.

<sup>333</sup> Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 138 [5.93].

<sup>334</sup> Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 24 [2.70].

<sup>335</sup> Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 25 [2.74].

<sup>336</sup> Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 25 [2.75].

<sup>337</sup> *Electoral Act 1985* (SA) s 113(2).

<sup>338</sup> *Electoral Act 1992* (ACT) 297A(1).



Beck prefers that breaches of truth in political advertising laws only attract civil penalties, resembling current misleading or deceptive commercial advertising prohibitions.<sup>339</sup> Confining truth in political advertising laws to civil penalties might also aid its case for constitutional validity, as a more severe penalty would increase the risk of invalidity.<sup>340</sup>

However, there are also concerns that a lenient scheme would not be effective to prevent misleading advertising. Williams posits that penalties in federal truth in political advertising laws could be stronger than penalties in South Australian laws. He considers that there is 'too high a risk with the South Australian law that falsehoods will be just seen as a cost of campaigning' and raises the possibility of 'criminal sanctions ... or at least much, much higher fines'.<sup>341</sup> For instance, one person prosecuted in South Australia 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.<sup>342</sup>

Hill, Douglass and Baltutis consider 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'.<sup>343</sup>

There may be concerns that penalties that are too onerous may disproportionately impact upon minor parties or independents, who do not have the resources of major political parties to comply with TiPA laws. As a solution to this, Pender suggests 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.<sup>344</sup>

#### b) *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.<sup>345</sup> This may act as a stronger deterrent to political parties from making inaccurate and misleading statements. Ms Williams considered that any TiPA sanctions and remedies need to be strong because of the seriousness of voter choices and ultimately election outcomes being affected by disinformation.<sup>346</sup>

As a related issue, a former SA party official has raised the cost of issuing retractions, particularly mail, as impacting on their party's caps on electoral expenditure, which poses a deterrent in publishing inaccurate and misleading material.<sup>347</sup>

#### c) *Prosecution*

In South Australia and the Australian Capital Territory, financial penalties can be pursued through prosecution. If the commissioner is pursuing a prosecution, the commissioner must prove beyond reasonable doubt that an offence occurred.<sup>348</sup>

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<sup>339</sup> Luke Beck, *Submission 65*, 2, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 81 [4.114].

<sup>340</sup> Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 28.

<sup>341</sup> George Williams, *Committee Hansard*, 17 October 2022, 17, cited in Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 85 [3.72].

<sup>342</sup> Commonwealth Senate Finance and Public Administration Legislation Committee, Public Hearing of Inquiry into Charter of Political Honesty Bill 2000 (April 2001) 44.

<sup>343</sup> Lisa Hill, Max Douglass and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022) 125.

<sup>344</sup> Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 28–9.

<sup>345</sup> Interview with Liz Williams, 13 August 2024.

<sup>346</sup> Interview with Liz Williams, 13 August 2024.

<sup>347</sup> Interview with former party official.

<sup>348</sup> Electoral Commission of South Australia, *State Election 2014* (Election Report, 2014) 57.

Different SA Electoral Commissioners have had different appetites for prosecution in courts. While successful prosecutions have occurred in the past of both the major parties, they have been rarely pursued in recent times.<sup>349</sup> Since the late 1990s there were no prosecutions for a lengthy period until the prosecution of a local government candidate in 2018.<sup>350</sup> 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 Act.<sup>351</sup> He went on to state that ‘there have not been any’ prosecutions since the first election after the introduction of the Act.<sup>352</sup>

Similarly, in an international context, there have been no prosecutions under 199A of the NZ Act, which prohibits the publication of false statements to influence voters.<sup>353</sup> The only case ever to be brought under s 199A concerned the Electoral Commission’s failure to act.<sup>354</sup>

Further, the former SA Electoral Commissioner has expressed ‘serious concerns over prosecuting alleged offences’ due to the ‘significant public interest considerations in mounting a prosecution’. Further, ‘[c]ases may drag out in the courts for some time with legal expenses far outweighing the maximum fine’.<sup>355</sup> There would also be ‘no effect on the election results’ and ‘little benefit for the public in prosecuting’.<sup>356</sup>

On the other hand, several interview participants, including former SA Deputy Electoral Commissioner David Gully, have stated that prosecutions are desirable in order to have a deterrent effect on political parties from seeking to test the boundaries by putting forward misleading ads.<sup>357</sup>

### 3. Voiding the Election

Under the SA 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.<sup>358</sup> The Centre for Public Integrity believes that the SA Act represents a good model because ‘they have an independent Court of Disputed Returns that assesses allegations’. This ‘independent decision-maker ... makes it more difficult’ to weaponise truth in political advertising laws.<sup>359</sup>

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<sup>349</sup> See, eg, Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 7, 32.

<sup>350</sup> Interview with David Gully, 6 August 2024.

<sup>351</sup> Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of Evidence*, Melbourne, 18 August 2009, 5, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 52–3 [3.16]. See, eg, *State Electoral Office v Pigott* (Magistrates Court, 98/8658, 15 December 1998); *King v Electoral Commissioner* (1998) 72 SASR 172. See also the examples in Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 9–11.

<sup>352</sup> Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of Evidence*, Melbourne, 18 August 2009, 8–9, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 53–4 [3.17].

<sup>353</sup> Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 66 [3.59]. For a more recent restatement of that conclusion, see also Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 37.

<sup>354</sup> *Peters v Electoral Commission* [2015] NZHC 394. The Court decided that the Electoral Commission erroneously dismissed a complaint under s 199A based on an incorrect interpretation of the law. The Court issued a declaration to this effect: at [89]–[90] (Mallon J). See Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 36.

<sup>355</sup> Electoral Commission of South Australia, *State Election 2014* (Election Report, 2014) 57.

<sup>356</sup> Electoral Commission of South Australia, *State Election 2014* (Election Report, 2014) 57.

<sup>357</sup> Interview with David Gully, 6 August 2024; interview with Sam Hooper, 7 August 2024.

<sup>358</sup> *Electoral Act 1985* (SA) s 107(5).

<sup>359</sup> Hannah Aulby, Executive Director, Centre for Public Integrity, *Transcript*, 16 March 2020, 12, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 75 [4.95].

Former SA Attorney-General John Rau considers that the most serious remedy has to be an ex post facto remedy. He opined that ‘if 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 a court of disputed returns, 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 political system, the ultimate solution to that is to let the people have a vote again’.<sup>360</sup>

In practice, however, no election to date has been declared void since the introduction of the legislation in 1985,<sup>361</sup> although petitions have been received and heard.<sup>362</sup> Further, in *Featherston v Tully*, the Supreme Court of South Australia held that a breach of s 113 would not itself void an election, because ‘there is nothing in the Act which requires that the Court must declare an election void where a candidate has committed an offence against that section’.<sup>363</sup>

Twomey suggested that voiding of an election just because a party had been doing advertising was false and misleading was problematic as it might render the result of many elections uncertain.<sup>364</sup> As such, while the voiding of an election is possible under the SA Act, it does not appear to be a practical means of enforcing truth in political advertising laws due to the high threshold that conditions its usage. Thus, it should be considered whether this penalty should be removed from the SA legislation.

The capacity to void an election on the basis of defamation (rather than TiPA laws) is exemplified in *Crafter v Webster [No 2]*,<sup>365</sup> in which a candidate petitioned the Court of Disputed Returns to declare that the 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.<sup>366</sup> Mitchell J held that this language was defamatory,<sup>367</sup> and constituted undue influence — a ground to declare the election void.<sup>368</sup> Mitchell J 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 additional procedural breaches of s 109 of the *Electoral Act 1929-1976* (SA), which provides that voters should mark their vote in private.<sup>369</sup>

#### 4. Barring the Candidate

A further, alternative suggestion for a penalty that bars the candidate from standing for one election cycle. This is a model based on s 106 of the *Representation of the People Act 1983* (UK). A breach of s 106 is punishable by an individual being barred from standing for Parliament or holding elected office for up to three years, if the individual does not comply with requests for withdrawal or retraction.

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<sup>360</sup> Interview with John Rau, 7 August 2024.

<sup>361</sup> Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 77–8 [3.40]; Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 7.

<sup>362</sup> State Electoral Office of South Australia, *South Australian Election 18 March 2006* (Election Report, 29 March 2007) 47.

<sup>363</sup> *Featherston v Tully* (2002) 83 SASR 302, [163] (Bleby J).

<sup>364</sup> Interview with Anne Twomey, 31 October 2024.

<sup>365</sup> (1980) 23 SASR 321. Noting, however, that this case was decided prior to the passage of the *Electoral Act 1985* (SA).

<sup>366</sup> *Crafter v Webster [No 2]* (1980) 23 SASR 231, 331 (Mitchell J).

<sup>367</sup> *Crafter v Webster [No 2]* (1980) 23 SASR 231, 337 (Mitchell J).

<sup>368</sup> *Crafter v Webster [No 2]* (1980) 23 SASR 231, 338 (Mitchell J).

<sup>369</sup> *Crafter v Webster [No 2]* (1980) 23 SASR 231, 357 (Mitchell J).

Section 386 of the *Commonwealth Electoral Act* already 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.

Hill, Douglass and Baltutis recommend this option, as it could have 'a potentially greater deterrent effect' compared to financial penalties.<sup>370</sup>

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<sup>370</sup> Lisa Hill, Max Douglass and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022) 143.

## 6 Recommendations and Proposed Regulatory Model

Based on the analysis in the previous sections, truth in political advertising 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 'alternate facts', exacerbated by the rise of social media.

There are several harms in spreading lies in an election campaign. The first is damage to the candidate or political party in terms of reputation and electoral prospects, if negative lies are spread about them.<sup>371</sup> The second harm is to the integrity of electoral processes, if the lie causes people to change their vote based on false information, which may if aggregated influence electoral outcomes.<sup>372</sup> 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 the election campaign which could have been spent on more relevant or substantive issues.<sup>373</sup>

As former SA Attorney-General John 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'.<sup>374</sup> This was echoed by former SA Attorney-General Chris Sumner, who stated that, "If you can't rely on facts in a democracy for voters to be able to make up a decision about particular parties or policy issues, then the democracy is demeaned."<sup>375</sup>

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'.<sup>376</sup> 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 an equal communicative power and will reach the same audience, which will rarely be the case.<sup>377</sup> Another issue with the self-correcting argument is that people can still be manipulated in the short-term during an election campaign and false statements made close to election date may not have the opportunity to be rebutted and corrected before the election.<sup>378</sup>

Another argument is that governments should not regulate free expression, as it 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.<sup>379</sup> Restrictions on false speech arguably do not undermine the autonomy of the electorate, as the falsity of the statement itself is an attack on the voter's autonomy, as the deceptiveness of a campaign lie means that the voter lacks vital information to make a proper evaluation.<sup>380</sup> This contention is further undermined by the fact that other methods of false expression are regulated, through defamation and commercial laws prohibiting false advertising.

In this vein, former SA 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

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<sup>371</sup> Jacob Rowbottom, 'Lies, Manipulation and Elections: Controlling False Campaign Statements' (2012) 32(3) *Oxford Journal of Legal Studies* 507, 510-1.

<sup>372</sup> Jacob Rowbottom, 'Lies, Manipulation and Elections: Controlling False Campaign Statements' (2012) 32(3) *Oxford Journal of Legal Studies* 507, 511-9.

<sup>373</sup> Jacob Rowbottom, 'Lies, Manipulation and Elections: Controlling False Campaign Statements' (2012) 32(3) *Oxford Journal of Legal Studies* 507, 516-7.

<sup>374</sup> Interview with John Rau, 7 August 2024.

<sup>375</sup> Interview with Chris Sumner, 30 October 2024.

<sup>376</sup> Jacob Rowbottom, 'Lies, Manipulation and Elections: Controlling False Campaign Statements' (2012) 32(3) *Oxford Journal of Legal Studies* 507, 522.

<sup>377</sup> Jacob Rowbottom, 'Lies, Manipulation and Elections: Controlling False Campaign Statements' (2012) 32(3) *Oxford Journal of Legal Studies* 507, 522.

<sup>378</sup> Jacob Rowbottom, 'Lies, Manipulation and Elections: Controlling False Campaign Statements' (2012) 32(3) *Oxford Journal of Legal Studies* 507, 524.

<sup>379</sup> 7 T Scanlon, 'A Theory of Freedom of Expression' (1972) 1 *Phil & Public Affairs* 204, 217; 9 F Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982) 39.

<sup>380</sup> Jacob Rowbottom, 'Lies, Manipulation and Elections: Controlling False Campaign Statements' (2012) 32(3) *Oxford Journal of Legal Studies* 507, 524.

about medicines and drugs curing diseases when they cannot.<sup>381</sup> 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?'<sup>382</sup>

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'.<sup>383</sup> Digital platforms 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.<sup>384</sup> This suggests that 'leaving things to the market' will be insufficient to combat misinformation in elections. Laws combatting disinformation have been implemented to varying extents through a wide range of legislative models in Australia and overseas.

In the Australian context, truth in political advertising 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',<sup>385</sup> which includes combatting false election information that elevates the 'information costs' of voting.<sup>386</sup>

Accordingly, although there have been concerns expressed about the implementation of TiPA laws, this Report concludes that the advantages of TiPA laws outweigh the disadvantages and unintended consequences (including the practical effects and implementation). The SA 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.

Interview evidence in this Report has shown that TiPA laws have generally operated well in South Australia for the last 39 years, and has the in principle support of the SA politicians, party officials and electoral commissioners.

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 its narrow ambit that only covers statements of fact.

Although the laws are narrow in ambit, they are constitutionally valid based on the implied freedom of political communication, and are enforceable. It is difficult for a regulator to arbitrate on a broader scope such as opinions or predictions.

However, there are arguments for broadening TiPA laws to remove temporal limitations, so that it is impermissible for political parties to make inaccurate and misleading statements at all times.

To ensure efficacy, TiPA laws should apply to both traditional and online media, and be extended to generative AI and deepfakes. It should also apply broadly to anyone seeking to affect the outcome of elections, including political parties and third party campaigners such as unions, associations, resident groups and business groups.

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.

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<sup>381</sup> Interview with Mike Rann, 30 August 2024.

<sup>382</sup> Interview with Mike Rann, 30 August 2024.

<sup>383</sup> Lisa Hill, Max Douglass and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022) 27.

<sup>384</sup> Human Rights Law Centre, *Rights-First: Principles for Digital Platform Regulation* (2024) 8.

<sup>385</sup> Lisa Hill, Max Douglass and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022) 29.

<sup>386</sup> Lisa Hill, Max Douglass and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022) 30.

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, e.g. spurious referrals to anti-corruption commissions being used as a media story, and should not be a reason not to introduce such laws.

Regulatory mechanisms can be introduced to ameliorate such effects, such as enforcing a threshold of materiality (eg enabling the Electoral Commissioner to 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 the scope of TiPA laws are narrow and many forms of misinformation are not covered by these laws. 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 authorise their ads.<sup>387</sup> TiPA laws also operate within a legislative context where it is impermissible for electoral advertisements to mislead voters in relation to the method of casting their vote.<sup>388</sup> Further, push polling should be banned or severely restricted, as this is a means of spreading false information under the guise of polling.<sup>389</sup>

This report provides specific recommendations in terms of design principles relating to the scope of TiPA laws, its operation and enforcement, as well as other regulatory mechanisms below.

Other jurisdictions considering implementing TiPA laws should consider how these recommendations would fit or need to be adapted within their jurisdiction as appropriate, noting the particular political environment, context or circumstances of their particular jurisdiction.

## 6.1 Scope of TiPA Laws

### **Recommendation 1**

The scope of TiPA laws should remain narrowly focussed on false and misleading statements of fact, and not encompass opinions or predictions.

TiPA laws in SA and the ACT are limited to false and misleading statements of fact, and do not cover opinions and predictions. 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.

However, as discussed at p 49 of the Report, the SA law has been held to be constitutionally valid due to the narrow ambit of the law,<sup>390</sup> and a broader law risks breaching the implied freedom of political communication protected by the Australian Constitution. Further, as discussed on p 35-6 of the Report, a law that extends beyond statements of fact would be difficult to enforce by an adjudicator.

### **Recommendation 2**

TiPA laws should apply broadly to political advertising in all forms, including social media (Facebook/Meta, Twitter/X, Instagram and YouTube), streaming services, video on demand, bulk text messages, robocalls, broadcast radio and TV, and mail.

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<sup>387</sup> Eg *Commonwealth Electoral Act 1918* (Cth) s 321D.

<sup>388</sup> Eg *Commonwealth Electoral Act 1918* (Cth), s 161(e). See *Evans v Crichton-Browne* (1981) 147 CLR 169, 207.

<sup>389</sup> See 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 *Election Law Journal* 37.

<sup>390</sup> *Cameron v Becker* [1995] SASC 5149.

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. 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’.<sup>391</sup>

Thus, TiPA laws designed 39 years ago need to be updated to encompass modern forms of political advertising, including social media (Facebook/Meta, Twitter/X, Instagram and YouTube), streaming services, video on demand, bulk text messages, robocalls, in addition to traditional forms of media such as broadcast radio and TV, and mail. Under the SA and ACT laws, there may be a lack of clarity about paid advertisements compared to unpaid social media posts.<sup>392</sup>

### **Recommendation 3**

TiPA laws should be extended to materially deceptive AI-generated audio or visual media in carrying out an election for the purposes of influencing an election.

Rapid developments in the use of artificial intelligence (AI) has meant that there can be deceptive AI-generated content, such as deepfakes, which seek to influence electoral outcomes. For instance, in the recent United States 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.<sup>393</sup>

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’.<sup>394</sup> United Nations Secretary-General António Guterres has made a call to curb harm from AI mis- and disinformation.<sup>395</sup> As such, TiPA laws should be extended to materially deceptive AI-generated audio or visual media in carrying out an election for the purposes of influencing an election. This could be modelled on Zali Steggall’s Bill in 2021 (discussed at p 12 of the Report). Exceptions may be required for satirical content, which will increase the likelihood of such laws being compliant with the implied freedom of political communication.

### **Recommendation 4**

TiPA laws should not be temporally limited to the election campaign period, and should apply at all times. It should not be permissible to distribute inaccurate and misleading material outside of the election period, although the laws will primarily be applicable in the election period.

A TiPA law that has a tight temporal limitation such as New Zealand law, which only applies in a strictly time-limited period to advertisements issued for the three days up to polling day will be ineffective due to

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<sup>391</sup> Australian Government Department of Home Affairs, *Strengthening Australian democracy: A practical agenda for democratic resilience* (2024) 28.

<sup>392</sup> Parliament of New South Wales, *Administration of the 2023 NSW State Election and Other Matters* (2024) <https://www.parliament.nsw.gov.au/ladocs/inquiries/3024/Administration%20of%20the%202023%20NSW%20state%20election%20and%20other%20matters.pdf> 31.

<sup>393</sup> M Hammond-Errey, ‘Byte-sized diplomacy: AI-enabled elections or deepfake democracy?’, *The Interpreter* (online, 3 July 2024) <https://www.lowyinstitute.org/the-interpreter/byte-sized-diplomacy-ai-enabled-elections-or-deepfake-democracy>.

<sup>394</sup> United Nations, ‘UN launches recommendations for urgent action to curb harm from spread of mis- and disinformation and hate speech’ (2024) <https://www.un.org/sustainabledevelopment/blog/2024/06/global-principles-information-integrity-launch/#:~:text=United%20Nations%2C%20New%20York%2C%202024,Global%20Principles%20for%20Information%20Integrity>.

<sup>395</sup> United Nations, ‘UN launches recommendations for urgent action to curb harm from spread of mis- and disinformation and hate speech’ (2024) <https://www.un.org/sustainabledevelopment/blog/2024/06/global-principles-information-integrity-launch/#:~:text=United%20Nations%2C%20New%20York%2C%202024,Global%20Principles%20for%20Information%20Integrity>.



its overly strict temporal coverage, which excludes the vast majority of political ads.<sup>396</sup> The SA TiPA laws have 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.

As discussed on pp 38 of the Report, there is no justification for allowing false and misleading advertising outside of the electoral campaign period. Thus, it is recommended that all temporal limitations to TiPA laws be removed.

#### **Recommendation 5**

TiPA laws should extend to anyone seeking to affect the outcome of an election, including political parties and third party campaigners (including unions, associations, resident groups and business groups).

It is not just political parties that seek to influence the outcome of an election: there are a range of third party campaigners that seek to help promote or oppose a candidate, elected member or registered political party at an election, such as unions, business groups or lobby groups such as Advance Australia. Third party campaigners are regulated by electoral legislation.<sup>397</sup>

In SA TiPA laws capture the authors or creators of political advertising, including political parties, unions and third party campaigners seeking to affect electoral outcomes. These provisions have thus been enforced against third party campaigners such as unions, associations, resident groups and business groups.

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

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<sup>396</sup> Lisa Hill, Max Douglass and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022) 60.

<sup>397</sup> See e.g. *Commonwealth Electoral Act 1918* (Cth) Part XX.

**Recommendation 6**

Where the authors of inaccurate or misleading statements cannot be tracked or refuse to retract, the TiPA regulator should be empowered to order the social media platforms to remove the false or misleading posts.

The SA 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. However, in a small minority of cases, the authors of the inaccurate or misleading statements cannot be identified. 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 the TiPA regulator with 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 (see pp 30 and 37 of the Report). 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.

**Recommendation 7**

To ensure that TiPA laws remain fit for purpose in the context of modern digital campaigning, the laws should be regularly reviewed every four years.

As discussed in Recommendations 2 and 3, 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 regularly reviewed every four years. Some jurisdictions already have mechanisms for regular reviews of electoral regimes, such as the Joint Standing Committees on Electoral Matters (JSCEM) in the Commonwealth, Victoria, NSW and Tasmania, but not all jurisdictions have this review mechanism.<sup>398</sup>

## 6.2 Operation

**Recommendation 8**

Education and training of political participants is desirable to improve knowledge and awareness of the laws.

For TiPA laws to operate smoothly, all political participants (major parties, minor parties and independents) must be aware of their obligations under the legislation and be equipped to comply with the laws. For instance, the SA Electoral Commission runs parliamentary, party and candidate briefings to the major political parties, and a separate briefing for minor parties and independents regarding the electoral process, including truth in political advertising laws.

**Recommendation 9**

There should be more defined timelines for complaints to be resolved by the TiPA regulator, noting that some complaints raise more complex issues and that procedural fairness should be accorded.

Time is of the essence in an election campaign for false and misleading ads to be adjudicated upon. However, interviewees have complained about the timeframes of outcomes from complaints and noted

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<sup>398</sup> See eg the Commonwealth's Joint Standing Committee on Electoral Matters: <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Electoral\\_Matters](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters)>.

that delaying tactics have been utilised in the complaints process, including requests for reasons or further information, and the use of lawyers (see p 25 of the Report).

The SA Electoral Commissioner stated that they have resolved complaints as expeditiously as possible, and noted that some complaints raise more complex issues and he is reliant on parties providing information in a timely manner, with some parties delaying matters (see p 25 of the Report). The speed of resolution also needs to be balanced with the requirements of procedural fairness in allowing parties the opportunities to make submissions and respond to allegations.

Having more defined timelines for the resolution of complaints will allow more certainty for parties and hopefully reduce the delays experienced in the complaints process.

#### **Recommendation 10**

There should be a public website that allows the public (including political participants) to make complaints about breaches of TiPA laws.

A user-friendly complaints system on a public website that enables members of the public to make complaints about breaches of TiPA laws is essential for a workable scheme. This could be modelled on the SA Electoral Commission complaints page.<sup>399</sup>

### **6.3 Enforcement**

#### **Recommendation 11**

The Electoral Commission is an appropriate arbiter of TiPA laws, but requires sufficient resourcing to carry out this task.

Alternatively, an independent panel linked to the Electoral Commission or specialised new body could be created to adjudicate the withdrawal and retractions process, preferably linked to an existing administrative review body, with an electoral branch that is operational during the election periods, with staff engaging in other work in non-election periods.

The Electoral Commission is an appropriate body to arbitrate TiPA laws, given its proven record of impartiality and high trust within the community and amongst political participants, as well as expertise in electoral management. The SA Electoral Commission has done an admirable job in administering TiPA laws in an impartial manner. As exhibited from the interviews, the reputation of the South Australian Electoral Commissioner has remained untarnished although it has administered these laws since 1985 (see p 25 of the Report). Similarly, the ACT Electoral Commission's reputation for impartiality has not been negatively affected by administering these laws (see pp 28 and 52 of the Report). However, Electoral Commissioners from other jurisdictions have not been enthusiastic about taking on this role (see p 28-9 of the Report).

Alternatively, the approach of the 2024 Commonwealth TiPA Bill could be adopted of having an independent panel as a secondary structure to the Electoral Commission (see p 13 of the Report). This structure provides additional protection to the Electoral Commission, while being able to draw on the Commission's resources and expertise.

Another possibility is that a specialised new body could be created to adjudicate the withdrawal and retractions process (see discussion on p 55 of the Report). As this body would effectively mainly be operational during election periods, the body should preferably be linked to an existing administrative review body, with an electoral branch that is operational during the election periods, with staff engaging in other work in non-election periods.

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<sup>399</sup> See ECSA Complaint Form <<https://forms.sa.gov.au/#/form/61480f63ad9c595e90ad16ae/app/66d3de49011d7f1997c1fa50>>.

### **Recommendation 12**

The following sanctions and remedies should apply to breaches of truth in political advertising laws:

- power of the regulator to order withdrawal or retraction,
- power of the regulator to seek an injunction,
- fines of a greater magnitude than SA or ACT provisions, which are linked to the size of the political party (so that minor parties and independents are not unduly disadvantaged), and
- loss of public funding.

Sanctions and remedies are essential towards effective enforcement of the scheme. The SA Electoral Commissioner has advised that the vast majority of cases are dealt with by ordering withdrawals and retractions by the author of the political advertisement, and that compliance by the political parties has been good (see pp 25 and 47 of the Report). Retractions should be in the same forum as originally published, 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. The SA Electoral Commissioner has noted that injunctions are rarely used due to good compliance to the regime, but this may be necessary in different political cultures or if practices change.

Several interview participants have also noted the desirability for the Electoral Commissioner to further prosecute more egregious breaches in court to serve as a stronger deterrent (p 26 of the Report). 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 (p 58 of the Report). Thus, the 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 supported by several interviewees 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 (see pp 58-9 of the Report).

While the SA and ACT TiPA laws provide for the ability to overturn an election result for breaches of TiPA laws, 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 applied and is not a practical means of enforcing truth in political advertising laws (see p 60-1 of the Report).

### **Recommendation 13**

To reduce the risk of the laws being misused, the TiPA regulator should be empowered to dismiss vexatious complaints, with a requirement of materiality.

There has been evidence in the interviews that TiPA laws have been utilised as a political tool in the last two SA elections (see pp 24, 49-50 of the Report), although there was no politicisation in the ACT. To reduce the risk of TiPA laws being misused by political parties lodging numerous vexatious claims to bog down their opponents, there should be a requirement of materiality of a complaint, with the TiPA regulator legislatively empowered to dismiss vexatious complaints.

## **6.4 Further Reform Options**

As the interviews have indicated that the effects of TiPA laws may be limited, other mechanisms to support better quality information in electoral campaigns and political communication, or to address misinformation and disinformation have been suggested. It is noted that given that the interviews

focussed on TiPA laws, further research might be needed to consider the effects, implications and operation of some of these other potential reforms.

#### **Recommendation 14**

There should be bans on the distribution of materially deceptive AI-generated audio or visual media in carrying out an election for the purposes of influencing an election.

As discussed in Recommendation 3, advances in the use of AI has meant that there can be deceptive AI-generated content, such as deepfakes, which seek to influence electoral outcomes. Where deepfakes are used to deceive for the purposes of influencing an election, this may skew electoral outcomes. For example, a deepfake showing US House of Representatives Speaker Nancy Pelosi slurring her words during a news conference as though she were intoxicated or unwell went viral and was used by her political opponents to bolster a narrative that she was unfit to serve as the Speaker.<sup>400</sup>

Thus, there should be bans on materially deceptive AI-generated audio or visual media in carrying out an election or for the purposes of influencing an election. This could be modelled on the US Protect Elections from Deceptive AI Act of 2024 or the 2024 Commonwealth TiPA Bill.<sup>401</sup> Exceptions may be required for satirical content.

Several Australian jurisdictions have started to consider the implications of AI, with limited consideration of the impact of AI on democratic institutions, such as the Commonwealth,<sup>402</sup> South Australia,<sup>403</sup> and New South Wales.<sup>404</sup>

#### **Recommendation 15**

Transparency requirements should be introduced for deepfakes and AI-generated images, with a requirement for advertisements to explicitly state if generative AI was used.

Given the increasing use of deepfakes and AI-generated images discussed in Recommendations 3 and 14, and due to the fact that it is becoming increasingly difficult to determine whether an image is real or has been AI-generated,<sup>405</sup> there should be greater transparency on when generative AI is used in political advertisements.

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<sup>400</sup> Hannah Smith and Katherine Mansted, 'Weaponised Deep Fakes: National Security and Democracy' (2020) Policy Brief Report No 28/2020 <https://www.aspi.org.au/report/weaponised-deep-fakes>.

<sup>401</sup> Electoral Legislation Amendment (Electoral Communications) Bill 2024 (Cth) cl 321M.

<sup>402</sup> In October 2024, the Commonwealth parliamentary committee inquiry into artificial intelligence focussed on the implications of artificial intelligence for democratic institutions and electoral systems, and a dissenting report recommended that the Australian Government undertake a thorough review of potential regulatory responses to AI-generated political or electoral deepfake content, including mandatory codes applying to the developers of AI models and publishers including social media platforms, and prohibitions on the production or dissemination of political deepfake content during election periods, for legislative response prior to the election of the 49th Parliament of Australia: Senate Select Committee on Adopting Artificial Intelligence, Select Committee on Adopting Artificial Intelligence (Interim Report (2024), available at <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Adopting\\_Artificial\\_Intelligence\\_AI/AdoptingAI/Interim\\_report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Adopting_Artificial_Intelligence_AI/AdoptingAI/Interim_report)>. The dissenting report is at pages 35-38 ([1.1-1.29]).

<sup>403</sup> A South Australian parliamentary committee recently considered the implications of artificial intelligence for South Australia. This inquiry focussed more generally on artificial intelligence and the economic, social, and ethical implications for South Australia, and only briefly considered the implications of artificial intelligence for South Australia's democratic institutions. See South Australia House of Assembly Select Committee, Report of the Select Committee on Artificial Intelligence (2023), First Session, Fifty-fifth Parliament, available at <<https://www.parliament.sa.gov.au/en/Committees/Committees-Detail>>.

<sup>404</sup> NSW considered the implication of AI, but did not consider the impact on democratic institutions. Legislative Council Portfolio Committee No 1 – Premier and Finance, Artificial Intelligence in NSW (2023), Report 63, available at <<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2968/Report%20No%2063%20-%20PC%201%20-%20Artificial%20intelligence%20in%20New%20South%20Wales%20-%2025%20July%202024.pdf>>.

<sup>405</sup> James Vincent, 'Deepfake Detection Algorithms will Never be Enough', *The Verge* (online, 28 June 2019) <https://www.theverge.com/2019/6/27/18715235/deepfake-detection-ai-algorithms-accuracy-will-they-ever-work>.

Thus, transparency requirements should be introduced for deepfakes and AI-generated images, with a requirement for advertisements to explicitly state if generative AI was used. This could be modelled on the US AI Transparency in Elections Act of 2024 or the 2024 Commonwealth TiPA Bill.<sup>406</sup>

#### **Recommendation 16**

A disinformation register should be maintained by the Electoral Commissions to list disinformation where social media platforms refuse to take down misleading material.

As discussed at pp 28-9 and 52 of the Report, Electoral Commissions have been active in taking measures to combat disinformation in elections, including instituting disinformation registers. Disinformation registers are on the Electoral Commission's website, list prominent pieces of disinformation the Commission has discovered regarding the electoral process, and provide details of actions the Commission has taken in response.<sup>407</sup> Active steps by the electoral commissions to counter disinformation about the electoral processes is desirable to defend Australia's electoral system, which currently enjoys strong public trust.<sup>408</sup>

#### **Recommendation 17**

Blackout periods should be abolished if TiPA laws apply, as there is a need for correction of inaccurate or misleading statements.

Under the *Broadcasting Services Act 1992* (Cth), political advertising is banned on television or radio three days before an election, which is commonly referred to as the 'blackout period'.<sup>409</sup>

Blackout periods are not applicable to websites, social media, streaming services, robocalls and SMS/MMS notifications, which means that there is an unequal treatment of traditional media compared to other digital platforms including online media. Blackout periods are therefore not fit-for-purpose in a modern technological environment and, as Senate inquiries have repeatedly recommended, should be abolished.<sup>410</sup> This is particularly imperative if TiPA laws apply, as there is a need to correct inaccurate and misleading statements up to and including election day.

A less onerous possibility is to create an exception to blackout periods for correcting false and misleading statements, but the disjuncture between blackout periods for traditional and online media creates an unlevel playing field, and it is recommended that blackout periods be completely abolished. The 2024 Commonwealth TiPA Bill has a provision abolishing blackout periods.<sup>411</sup>

#### **Recommendation 18**

An independent and non-partisan parliamentary budget office (as exists in the Commonwealth and NSW) should be introduced to provide independent costings of policies proposed by political parties, which ensures accuracy of the cost of policy proposals by political parties.

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<sup>406</sup> Electoral Legislation Amendment (Electoral Communications) Bill 2024 (Cth).

<sup>407</sup> See eg Australian Electoral Commission, 'Disinformation Register' (website, online) <https://www.aec.gov.au/media/disinformation-register.htm>.

<sup>408</sup> Studies have shown that nine out of ten Australians trust the Australian Electoral Commission. Australian Electoral Commission, 'Reputation Management System' (website, online) [https://www.aec.gov.au/About\\_AEC/files/reputation-management-system.pdf](https://www.aec.gov.au/About_AEC/files/reputation-management-system.pdf).

<sup>409</sup> *Broadcast Services Act 1992* (Cth) sch 2.

<sup>410</sup> See eg Parliament of Australia, Joint Standing Committee on Electoral Matters, *Report of the conduct of the 2022 federal election and matters related thereto* (2023) 123-4; Parliament of Australia, Joint Standing Committee on Electoral Matters, *Report of the conduct of the 2019 federal election and matters related thereto* (2020) 101-2; Parliament of Australia, Joint Standing Committee on Electoral Matters, *Report of the conduct of the 2016 federal election and matters related thereto* (2018) p x.

<sup>411</sup> Electoral Legislation Amendment (Electoral Communications) Bill 2024 (Cth) sch 3.

One of the tactics of political parties to win elections is to make extravagant claims that they could never fulfil when in government due to the prohibitive costs of such policies.

Parliamentary budget offices (as exists in the Commonwealth and NSW) provide independent and non-partisan analysis of the financial implications of policy proposals.<sup>412</sup> This provides ‘transparency around the fiscal impact of election commitments and to help ensure that fiscal impacts are considered as party election platforms are developed’.<sup>413</sup>

#### **Recommendation 19**

Push polling should be banned or severely restricted.

As discussed at p 37-8 of the Report, push polling does not fall into the scope of political advertising.<sup>414</sup> This is where political parties commission people who claim to be pollsters to make statements like, “if you knew that Politician ABC was a war criminal, would that change your attitude towards them?” Mr Hawker noted that push polling has been done in election campaigns, which did not fall into the category of advertising, but is still trying to spread wrongful information in order to get a political advantage.<sup>415</sup> As discussed above, 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 misinformation and increase susceptibility to fake news stories.<sup>416</sup> Therefore, push polling should be banned or severely restricted.

#### **Recommendation 20**

Digital platforms should be subject to legal obligations to promptly delete illegal content, with significant financial penalties for non-compliance. Digital platforms should be obliged to enable users to flag illegal content, with those flagged having rights to challenge content moderation decisions through the platforms.

TiPA laws only cover a tiny sliver of disinformation that circulates in society, i.e. false and misleading statements of facts in political advertising, which is a very limited scope. In order to more comprehensively regulate disinformation, it is necessary to target digital platforms such as Facebook/Meta and Twitter/X.

Such regulation could be modelled on the EU Digital Services Act, which subjects digital platforms to legal obligations to promptly delete illegal content, with significant financial penalties for non-compliance. Under this regulation, digital platforms should be obliged to enable users to flag illegal content, with those flagged having rights to challenge content moderation decisions through the platforms. (see p 40-1 of the Report).

## **Recommendations for Reform of SA/ACT TiPA Laws**

The empirical interviews have found that the TiPA laws in SA have operated effectively in the last 39 years. The narrow scope of TiPA laws in only encompassing statements of fact, rather than opinions and speculation is appropriate, as it ensures the constitutionality and enforceability of these laws.

However, based on the regulatory model proposed above, the report provides the following refinements and recommendations for reform of existing SA/ACT TiPA laws:

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<sup>412</sup> See Commonwealth Parliamentary Budget Office, ‘About the PBO’ <<https://www.pbo.gov.au/about-the-pbo>>.

<sup>413</sup> See Commonwealth Parliamentary Budget Office, ‘About the PBO’ <<https://www.pbo.gov.au/about-the-pbo>>.

<sup>414</sup> Interview with Bruce Hawker, 25 October 2024.

<sup>415</sup> Interview with Bruce Hawker, 25 October 2024.

<sup>416</sup> Gillian Murphy et al, ‘Push Polls Increase False Memories for Fake News Stories’ (2021) 6 *Memory* 693.

### Recommendation 21

- *Temporality*: Temporal limitations should be removed from TiPA laws (i.e. the requirement that false and misleading advertising must affect an election), so that it is impermissible for political parties to make inaccurate and misleading statements at all times.

### Recommendation 22

- *Media Covered*: TiPA laws should be clearly expressed to apply to both traditional and online media and be extended to generative AI.

### Recommendation 23

- *Parties Covered*: TiPA laws should be clearly expressed to apply broadly to anyone seeking to affect the outcome of elections, including political parties and third party campaigners such as unions, associations, resident groups and business groups.

### Recommendation 24

- *Preventing 'weaponising'*: Regulatory mechanisms can be introduced to reduce the risk of TiPA laws being weaponised, such as enforcing a threshold of materiality (eg enabling the Electoral Commissioner to dismiss vexatious complaints), and having more defined timeframes for resolving complaints.

### Recommendation 25

- Other regulatory measures should be taken to more broadly combat disinformation in elections, such as bans on deceptive deepfakes and transparency measures for generative AI and deepfakes.

## 7 Conclusion

The 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'.<sup>417</sup> False information can alter elections, affect voting participation, silence minorities, and polarise the electorate.<sup>418</sup>

Truth in political advertising laws have successfully operated in South Australia for 39 years and have the support of the politicians, party officials, and electoral commissioners. These laws are narrow in ambit, but are constitutional and enforceable. These laws have also been introduced in the ACT, and there is growing interest in introducing these provisions across the federation.

This report has made 25 recommendations for the design, operation and enforcement of TiPA laws that can form a model for other jurisdictions considering implementing these laws. It is hoped that this report 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.

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<sup>417</sup> OECD, *Facts Not Fakes: Tackling Disinformation, Strengthening Information Integrity* (2024) 14.

<sup>418</sup> Lisa Hill, Max Douglass and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022) 54.



## Appendix A: List of Interviewees

### South Australia

- Jay Weatherill (Former Premier)
- Mike Rann (Former Premier)
- John Rau (Former Deputy Premier and Attorney-General)
- Chris Sumner (Former Attorney-General)
- Dan Cregan (Special Minister of State)
- Josh Teague (SA Member of Parliament)
- Mick Sherry (Electoral Commissioner)
- David Gully (Former Deputy Electoral Commissioner)
- Aemon Bourke (Labor Party State Secretary)
- Sascha Meldrum (Former Liberal Party State Director)
- Sam Hooper (Lawyer and Liberal Party Volunteer)

### ACT

- Andrew Braddock (Greens MP)
- Ash van Dijk (Labor Party State Secretary)
- Nick Tyrrell (Canberra Liberals President)
- Leigh Cox (Chief of Staff to Thomas Emerson MP, campaign director Independents for Canberra)

### Other Jurisdictions

- Paul Erickson (Labor Party National Secretary)
- Bruce Hawker (Former Labor Party Campaign Strategist)
- Nathan Rees (Former NSW Premier)
- Bob Carr (Former NSW Premier)
- Chris Rath (NSW Shadow Special Minister of State)
- Dominic Ofner (NSW Labor Party Secretary)
- Matt Phillips (Acting New South Wales Electoral Commissioner)
- Chris Stone (Former NSW Liberal Party State Director, reappointed 2024)
- Denis Napthine (Former Victorian Premier)
- John Thwaites (Former Victorian Deputy Premier)
- Sven Bluemmel (Victorian Electoral Commissioner)
- Liz Williams (Former Victorian Deputy Electoral Commissioner)
- Dee Madigan (Founding Partner, Campaign Edge)
- Bill Browne (Australia Institute)
- Catherine Williams (Centre for Public Integrity)
- David Meija-Canales (Human Rights Law Centre)
- Kiera Peacock (Marque Lawyers)
- Damien Freeman (Robert Menzies Institute)
- Anne Twomey (University of Sydney)

## Appendix B: Comparison of TiPA laws in Australia

The jurisdiction table below outlines current ‘truth in political advertising’ laws in South Australia and the ACT, the Federal Government’s law that was enacted and repealed in 1984, as well as the Federal Government’s bill that was introduced in 2024.

	SA (since 1985)	ACT (since 2020)	1984 Cth law	2024 Cth bill
<b>Scope of prohibition (communication, types of media etc)</b>				
<i>Spreading material</i>	✓ (authorises, causes or permits publication)	✓ (disseminates / authorises dissemination, including whether in print or electronic form)	✓ (print, publish, distribute, or cause, permit or authorise printing, publication or distribution)	✓ (authorises by approving or communicating the matter, including whether in written, visual or audio form)
<i>Electoral advertisement containing electoral matter</i>	✓ (calculated to affect the result of an election)	✓ (intended or likely to affect voting at an election)	✓ (electoral advertisement or anything intended or calculated to affect result of an election)	✓ (communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election)
<i>Statement of fact is inaccurate and misleading</i>	✓ (to a material extent)	✓ (to a material extent)	✓ (untrue, misleading or deceptive)	✓ (to a material extent)
<i>Time limitation</i>	x	x	✓ (issue of writ until close of polls)	✓ (authorised during an election period or authorised before an election period with the intention or knowledge of communication during the election period)
<i>Defence (did not determine content, and did not know that statement was inaccurate and misleading)</i>	✓	✓	✓	✓
<i>Application to Commonwealth referenda</i>	N/A	N/A	x	✓
<b>Enforcement</b>				
<i>Request to not disseminate</i>	✓	✓	x	✓
<i>Publish a retraction</i>	✓	✓	x	✓
<i>Penalties – fine (maximum)</i>	✓ (\$5,000 for a natural person; \$25,000 for a corporation)	✓ (50 penalty units) <sup>419</sup>	✓ (\$1,000 for a natural person; \$5,000 for a corporation)	✓ (1,000 penalty units) <sup>420</sup>
<i>Penalties – imprisonment</i>	x	x	x	x
<i>Enforcement body</i>	Electoral Commission	Electoral Commission	N/A	Electoral Communications Panel
<i>Judicial / administrative enforcement</i>	✓ (Supreme Court)	✓ (Supreme Court)	N/A	✓ (Federal Court)
<b>Supporting mechanisms</b>				
<i>Publication of guidelines</i>	✓ (on internet)	✓ (on internet)	N/A	N/A
<i>Publication of decisions</i>	x	N/A	x	✓
<i>Reporting</i>	✓ (annual report)	N/A	N/A	N/A

<sup>419</sup> A penalty unit in the ACT is currently \$160 for a natural person and \$810 for a corporation (see *Legislation Act 2001* (ACT), section 133), so the current maximum penalty is \$8,000 and \$40,500 for a corporation.

<sup>420</sup> A penalty unit in the Commonwealth is currently \$330 (see *Crimes Act 1914* (Cth), s 4AA), so the maximum penalty is \$330,000.

## Appendix C: Case Law on Truth in Political Advertising

In considering South Australia's truth in political advertising laws, courts have found that the laws:

- apply to political advertising that purports to be a statement of fact<sup>421</sup>
- do not apply to opinions or predictions<sup>422</sup>
- require that the statement must be inaccurate or misleading to a substantial or significant extent<sup>423</sup>
- do not intend to 'inhibit vigorous political debate and discussion or fair comment on relevant matters of political controversy in the context of an election campaign'.<sup>424</sup>

*Cameron v Becker* [1995] SASC 5149<sup>425</sup>

- A Labor representative authorised the publication of an electoral advertisement which claimed that the Liberal Party had stated that any school with less than 300 students would be closed.
- The Labor representative was convicted of breaching South Australia's truth in political advertising laws, and appealed to the South Australian Supreme Court.
- The South Australian Supreme Court found that:
  - the claim was intended to be a statement of fact
  - the claim was substantially inconsistent with the Liberal Party's statement on the issue
  - the conviction should be upheld.

*King v Electoral Commissioner (1998) 72 SASR 172*<sup>426</sup>

- An advertisement was published which claimed that a vote for a SA Labor MP, or '[t]hanks to preferences', an independent candidate or a Democrat, would result in the election of Mike Rann.
- The Court found that the advertisement breached section 113, because it gave the impression that preferences would automatically go to SA Labor, but a preference deal did not exist.

*Featherstone v Tully (2002) 83 SASR 302; Featherston v Tully (No 2) (2002) 83 SASR 347*<sup>427</sup>

- A candidate issued advertisements and how-to-vote cards denying that they would ever contemplate supporting a Labor Government, but then decided to support a minority Labor Government in a hung parliament following the 2002 South Australian Election.
- The South Australian Supreme Court held that the advertising did not breach the truth in political advertising laws, as the advertising was more a statement of future intentions, and was not misleading at the time that it was issued.

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<sup>421</sup> *Cameron v Becker* [1995] SASC 5149, [10].

<sup>422</sup> *Hanna v Sibbons & Anor* [2010] SASC 291, [9]-[13].

<sup>423</sup> *Cameron v Becker* [1995] SASC 5149, [10].

<sup>424</sup> *Cameron v Becker* [1995] SASC 5149, [10].

<sup>425</sup> Available at [https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASC/1995/5501.html?context=1:query=%22ea1985103%20s113%22;mask\\_path=](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASC/1995/5501.html?context=1:query=%22ea1985103%20s113%22;mask_path=) (access 12 June 2024).

<sup>426</sup> Cited in Ravi Baltutis, 'South Australia's Truth in Political Advertising Law: A Model for Australia?' (2021), *Adelaide Law Review*, 42(2), page 601; available at [https://law.adelaide.edu.au/system/files/media/documents/2022-01/alr\\_422\\_08\\_baltutis.pdf](https://law.adelaide.edu.au/system/files/media/documents/2022-01/alr_422_08_baltutis.pdf) (accessed 12 June 2024).

<sup>427</sup> As cited in Graham Orr (2015) *The Law of Politics: Elections, Parties and Money in Australia (2<sup>nd</sup> edition)*, pages 142-3.

*Hanna v Sibbons & Anor* [2010] SASC 291<sup>428</sup>

- A candidate brought proceedings alleging that various leaflets breached provisions of the *Electoral Act 1985* (SA), including the 'truth in political advertising' provisions in section 113, which made allegations that the candidate had '*failed on crime*' or was '*soft on crime*'.<sup>429</sup>
- The South Australian Supreme Court found that the leaflets did not breach the truth in political advertising provisions, as the claims in the leaflets involved assertions of opinion, rather than facts.<sup>430</sup>

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<sup>428</sup> Available at [https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASC/2010/291.html?context=1;query=%22ea1985103%20s113%22;mask\\_path=](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASC/2010/291.html?context=1;query=%22ea1985103%20s113%22;mask_path=) (accessed 12 June 2024).

<sup>429</sup> *Hanna v Sibbons & Anor* [2010] SASC 291, [9]-[13].

<sup>430</sup> *Hanna v Sibbons & Anor* [2010] SASC 291, [23]-[32].