

FINAL REPORT

TRUTH IN POLITICAL  
ADVERTISING LAWS:  
INTERVIEW SUMMARIES

Yee-Fui Ng

Associate Professor, Monash University

## Interview Summaries

This section provides the summaries of interviews undertaken for the purposes of the project.

It is noted that certain interviewees requested to be “off the record” and unattributed, so the interview summaries represent only those that have been expressly approved by the interviewees.

### 6.1 South Australian Interviewees

#### **Mike Rann**

##### **Premier of South Australia 2002-2011**

Mr Rann recounts the South Australian experience of John Bannon’s government introducing truth in political advertising laws in the 1980s, which represented an attempt to produce policy that could act as templates for other states and the nation. Mr Rann considers that truth in political advertising laws have been accepted and supported not only by the public, but by civil society and political parties. He is surprised that no other state has embraced truth in political advertising laws or improved upon them.

Mr Rann is of the view that the public support truth in political advertising laws, and they and democracy are protected by such laws. Truth in political advertising laws affect political discourse by making advertising agents, political consultants and strategists mindful that they need to tell the truth in their ads.

While other jurisdictions are warning of the effect of these laws on free speech, Mr Rann believes that the regulation of truthfulness is common in commercial claims and labelling. The protection of democracy through regulatory mechanisms is also an approach adopted in other jurisdictions such as Britain and New Zealand.

The South Australian laws in 1985 were initiated by Chris Sumner, the Attorney-General. The laws were not a reaction to something bad happening. The most recent election in 1982 had been run decently by both sides so it was not a reaction.

Mr Rann states that the laws have worked well. He has been in meetings where people have said that they cannot get away with making claims because they will not get past the Electoral Commission. The presence of the law therefore has a conditioning effect on the tone of campaigns in South Australia. There was one campaign in which an ad said that a vote for the Democrats, Greens or other political independents was a vote to elect Mr Rann because of preferences. That was untrue and challenged, with a determination against the Liberal campaign. It went all the way to court after what the Electoral Commissioner said. The Electoral Commission has, on several occasions, taken quite strong action against both major parties for clear breaches.

Mr Rann also considers that the laws condition those who are running campaigns and putting up ideas for ads. It has an educative impact on how campaigns are conducted.

However, Mr Rann is concerned about social media. On X, for example, totally false claims are made but there seems to be no enforcement. Many posters have pseudonyms yet may be acting on behalf of interest groups. Mr Rann also believes that the threat of AI to the running of election campaigns is now quite profound. In the US presidential election campaign, for example, deepfakes have been used and fake opinion polls are being retweeted. There should be electoral reform to target AI manipulation, identity theft and the fraudulent use of AI on social media.

Mr Rann has no particular concerns about truth in political advertising laws in South Australia, though noted that the Electoral Commissioner reported several years ago that much of what they have to do in a campaign is dominated by ensuring compliance with truth in political advertising rules. A lot of the time, breaches come not from major parties but from others. Overall, Mr Rann thinks that truth in political advertising laws have made a positive contribution to the marketplace of ideas. He expects overwhelming support of South Australia’s position from the public. One further thing could be to make

sure that truth in political advertising applies to all forms of advertising, including social media and newspapers.

Mr Rann considers that the scope of South Australian laws have worked well, but may need to be updated to address social media and AI.

Mr Rann thinks that another state seeking to emulate South Australian laws would need to take a long, hard look at penalties. Penalties may not be a deterrent to interest groups backed by billionaires. Penalties should have a deterrent effect and there should also be an educative effect to the laws.

If laws were to be applied in other states or nationally, it would be necessary to examine the changed landscape of the media. A \$10,000 fine would no longer be sufficient.

Another reason why people are careful under truth in political advertising laws is that being called out by the electoral commissioner in the middle of a campaign for telling lies is damaging to a campaign. Truth in political advertising laws have changed the tone of electoral advertising content and are a consideration in planning a campaign.

The manner for vetting ads during Mr Rann's tenure as Premier was that political consultants, strategists and advertising agencies would go to see Mr Rann as Premier and present a pitch. In the process of discussing the language used, the Electoral Act was a constant consideration. Mr Rann notes that all parties in South Australia had to be mindful of truth in political advertising laws and stick to facts rather than making spurious claims against opponents. An adverse determination from the Electoral Commissioner is damaging and so the end result of the legislation is the impact it has on the conduct of election campaigns. While there may still be exaggerations, candidates and political parties can no longer deliberately tell lies.

Mr Rann is concerned by some of the lies told by opponents of the Voice referendum nationally. Other campaigns, funded by billionaires, show that deliberate lies get told and present a distorted reality. He is particularly concerned by AI and identity theft. Anybody who uses deepfakes or false images should have punitive damages applied against them. There are difficulties in regulating this area due to anonymity and astroturfing. Any regulatory approach should cover advertising in all media, not just some.

Mr Rann considers that the South Australian Electoral Act has prevented bizarre examples of false information from occurring in South Australia, although they have occurred in other jurisdictions in Australia. He has not heard of any claim that the laws have been detrimental. If people disagree with the determination of the Electoral Commission, they can test it in the courts. There are examples of such cases being upheld and dismissed.

The inability to disparage opponents in a false way in South Australia is not just because of penalty, but also the embarrassment of being publicly named and shamed for telling lies. There is no free market for defamation as a result.

While there may be distortions in media reporting, a certain restraint is required of political advertising in South Australia.

In terms of the use of truth in political advertising laws as a political tool, Mr Rann considers that public complaints can occur if people think that their position has been totally, deliberately and unfairly presented. However, an independent commissioner will make a determination to ensure that such claims are tested independently. There are provisions to challenge the Electoral Commissioner in the event of disagreement with their determination. Mr Rann is not aware of parties putting in multiple complaints, and considers that the end result of truth in political advertising laws in South Australia is overwhelmingly positive.

Mr Rann believes that timely retractions have certainly happened in the election campaign period. It is in everybody's interests to get the issue out of the way to focus on running the election campaign. Often people say the ads have been withdrawn and there is an apology. The most important effect of the legislation is on the preparation process, which is often a more important impact on public discourse than a judgment.

Mr Rann believes that the electoral commissioner is the best body to enforce truth in political advertising laws. If the process was overseen by a court, the election would be over and lost.

Mr Rann does not have concerns about the enforcement of truth in political advertising laws apart from looking at upgrading penalties for fraud emerging from AI distortion and identity theft.

Mr Rann has no particular concerns with the impartiality of the South Australian Electoral Commission. Although everybody will complain, this comes from both sides and the Electoral Commissioner continues to fulfil their role.

Other actions or strategies to combat disinformation include looking at social media and AI. The focus on social media is enormous and social media is much more targeted than television or newspapers.

Mr Rann supports truth in political advertising laws targeting third party campaigners and social media platforms, because interest groups can be allies of existing political parties or fronts for them. Organisations that are spending tens of millions of dollars on election campaigns should be treated like political parties. Mr Rann notes that enforcement against social media platforms may be difficult but that this is being considered by France, the EU and the UK.

Mr Rann thinks that truth in political advertising laws have zero impact on free speech and that those who say that such laws impede free speech are seeking a licence to lie.

In terms of whether the South Australian law can be adopted in larger jurisdictions, Mr Rann notes the importance of adaptation to times and circumstances. It is worth having a look at South Australia's legislation and its implementation, and then to evolve it for modern times, including by covering all media.

The public also has a right to know who is behind multi-million-dollar third party campaigns, who are often a front for other political actors. There is difficulty regulating people who cannot be identified.

## **Jay Weatherill**

### **Premier of South Australia 2011-2018**

TiPA laws have had a quite a big impact in South Australia in the way in which political parties conduct themselves, largely in election campaigns. It makes political parties double-check their facts.

The practice inside the Labor Party is before they would publish any election material, it would first have to be approved by the party secretariat. The party secretariat wouldn't approve the material until it also had a supporting brief of evidence that could justify the claim that was made within the material.

And the reason why is the impact on accountability publicly. So for instance, if you make a complaint about a particular piece of, about a publication during an election campaign, and if the election commissioner is found to have, finds that to be false or misleading, and they publish that declaration together with a request that it be retracted, that creates a source of embarrassment for the political party that's the subject of the negative finding.

And the fact that during the course of an election campaign, you could have that finding made and published, is a real deterrent to publishing false and misleading information, because while it doesn't necessarily have a direct effect on the outcome of the election, it's more the political effect: the fact that there's one day where you're going to have a negative story in the course of a, you know, a four-week election campaign, which is really, could completely derail, an important, or every day during election campaigns is important, and for you to lose one of those days through an adverse finding, because an adverse finding of that sort is going to be, it's going to receive public notoriety, and it will, 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 in that you try and build an election campaign. So it's really something to avoid, and both political parties do take it seriously.

The negative side of it is that sometimes the findings that are made about false and misleading conduct are highly subjective, and probably a bit technical. So you can have a pretty minor breach, and then you can be found to have made a false and misleading statement, and that gets published, and it gets elevated to quite a high status.

Mr Weatherill considered that there is an issue about materiality, which, because sometimes the punishment is much worse than the crime. During an election campaign, you have a publication, even on a technical matter, that was a minor breach, and yet there might be some gargantuan breach, a really big lie about a really central issue in the campaign, and they're both given the same degree of notoriety, they're both found to be false and misleading.

Some trivial breaches have been elevated to the status, the same status as significant breaches, and creating a false equivalence, which is a flaw.

Whereas if there's been some spectacular example of a false and misleading conduct, then that needs to be focused on and held accountable in its own right. One strategy has been if you've been caught telling a pretty big fib, then you know you're going to get a finding against you. What you'll try and do is just delay, delay, and delay until that's presumably at a time when it's too late to matter.

And then if you can find some other trivial breach by your opponent, then you can say, a pox on both your houses. So, you can manipulate the system in that way. And Mr Weatherill considered that needed to be guarded against.

Another issue is the time it takes to get a finding of this sort. The Labor Party made a complaint about a claim that was made by our opponents about electricity pricing, maybe two months before the election, and it wasn't until a day before the election that the finding was handed down, false and misleading. And by then it was too late for the party to actually take advantage of it. By then it was too late in the campaign, and their political opponents just ignored the finding, basically, because they were able to, because it was just within the shadows of the election.

This was likely because the other side kept providing more and more information, and saying, you need to give us natural justice, and they just kept taking process points, and there didn't seem to be a process that was available to the Electoral Commissioner to bring that to an end.

Another thing the electoral commissioner might say is, they don't feel like they're really equipped to make these sorts of judgments. This is quite an unusual role that they're cast in, you know, being an arbiter of truth on a whole range of topics, which could be anything, like election campaigns throw up, energy policy, health policy, economic policy, social policy, and yet environment policy, yet they're asked to weigh in on the truth or otherwise of a statement in an area of expertise they may have little or no knowledge. The Commissioners would argue that they find that a burden.

Mr Weatherill considered that there are flaws in the legislation, as it's not entirely clear what the consequences are. The Labor Party has had findings in their favour, and their political opponents have just thumbed their noses at them and not made the retraction, largely because the advice is, well, what can they do to you? There's nothing really they can do to you. They can't disqualify you as a candidate. They can't invalidate the election.

The basis for invalidating the election is not on the basis of a negative finding and false and misleading conduct. It's just there are penalties under the Act, but they're rarely pursued. And in any event, if you've won the election, well, you put up with that, if you've been able to get away with it, then so be it.

Although having said that, do you really want elections overturned on the basis of false and misleading conduct? And how would you do that? How would you determine whether that made a material difference? And I think that does become problematic.

Mr Weatherill is comfortable that on balance, the South Australian model does some good, because it is embarrassing to have a finding against you in an election. And that does change conduct. The Labor Party has a very rigorous processes for capturing inaccurate material.

Mr Weatherill stated that the Electoral Commissioner has done a reasonable job administering the TiPA laws, and he is unsure who else could perform this role. He noted that it was a challenging job for them, especially given at the same time they're trying to run the election, and that they would argue they're probably not well resourced enough to do it, which he considered to be a fair point.

Mr Weatherill suggested that there needs to be some stronger powers to enforce the undertakings, the directions that are made, such as the direction to publish a retraction, which has been ignored.

And there should be ability to enforce that in the courts if they refuse to abide by the direction. Or if it is available, it's too hard to access.

There is a bit of an issue with the lack of consequence beyond the public embarrassment.

Mr Weatherill considers that the TiPA laws have absolutely been beneficial in reducing disinformation. The party has put in place administrative practices in response to the law. If parties change their behaviour, that tells you everything.

Mr Weatherill didn't think there was an enormous amount of false and misleading material published anyway, because if you do that, and you get it wrong, you'll be held accountable publicly in the media, apart from anything else.

But if it's a "he said, I said, he said" sort of thing, then nobody knows where the truth lies. Whereas if an independent authority weighs in and says, no, this is the truth, that obviously is important.

Mr Weatherill considered that to the extent that people think that they might have a claim which is a bit hard to justify, but they'll make it anyway, just because they think they might get away with it, that sort of behaviour has probably been reduced.

Mr Weatherill stated if you had a complaint made against you, there would be massive interest in trying to find a complaint against your opponent. And finding a trivial mistake and then weaponising that is a risk.

Mr Weatherill considered the issue of political parties manipulating the system was capable of being remedied, and that vexatious claims can be easily disposed of if the processes are robust enough.

Mr Weatherill recommended that a threshold of materiality be introduced, where if there's a trivial factual error, there should be a discretion in the commissioner to not make a finding.

Mr Weatherill was of the opinion that TiPA laws have a largely positive effect.

He thought the reputation of the Electoral Commission has not been negatively affected by administering the laws, and if anything, their reputation has been positively affected. He contended that anything that upholds the integrity of the system was viewed positively, and that's one of the great things about the Australian electoral system is that it's seen as plain and fair. And this is just another dimension of that.

Mr Weatherill did not consider there was any chilling effect on free speech, as if you can't justify something factually, you shouldn't say it anyway.

Mr Weatherill considered that that the scope of the laws is appropriate in terms of just focusing on false and misleading statements, because it is hard for an integrity authority to get too much into the merits of the matter. Opinions can be wildly exaggerated, but they're not false and misleading statements if they represent opinions as opposed to statements of fact.

Mr Weatherill expressed concern about other political parties using delaying tactics and diversionary tactics, like making complaints about relatively trivial matters and then delaying the findings, which means that they can effectively subvert the effect of the legislation.

He suggested that this could be remedied by more resourcing of the Electoral Commission and some mandates in the legislation around giving the Electoral Commission the authority to effectively act.

Mr Weatherill noted that timely determinations was an issue and generally speaking, it seemed to take a very long time to get a finding. And that, the problem with that is if a lie is out there for enough time, your ability to remedy that, even with an adverse finding, might be ineffective because it's become established, people have decided that it must be truthful because it hasn't been the subject of an adverse finding.

Mr Weatherill suggested that there could be a change of onus of proof for a false and misleading statement in a close election for the person who lied to be the one who has to establish it wouldn't have affected the result. The current law is that we have to establish it would have affected the result. And that's a very high burden because say the result was 150 voters, you've got to amongst the 20,000 odd voters, find 150 people, or 75 people plus one, who were, who changed their mind because of the lie, that would be very high burden. If you shifted the onus of proof, if the lie was made, you have to prove that it didn't affect the result, then the burden would fall on the perpetrator of the lie.

Overall, Mr Weatherill is supportive of the TiPA laws and think they will work in other jurisdictions, including those that are larger than South Australia.

### **John Rau**

#### **Deputy Premier of South Australia from 2011 to 2018 and 48th Attorney-General of South Australia from 2010 to 2018.**

Voting in an election, should be an opportunity for an electorate, informed by the facts, to come to a view about the direction they would like to see the politics take. This is of course assumes that voters are all interested and alert people. ( this is a very big assumption, because many of them are neither of those things.)

But, philosophically speaking, there should be an opportunity for rational and concerned 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.

At a high level, it's a proposition with which it's difficult to argue.

But in that respect, it's a little bit like world peace. It's something that you won't find a lot of people arguing that it's a bad idea.

But after that, it gets complicated.

Historically, the proposition always assumed that there was an objective truth, and assumed that there had been an objectively false reporting of it.

But now, with social media, Trump, the commentariat such as they are, it's really important to be clear, particularly in a political context, what does "*true*" mean? There are some things which are amenable to being reduced into objective facts. For example, has this person has said A, B and C? There's either a record of them having said that, or there isn't. That may be something that can be proven objectively.

They may then want to argue about what they meant, but the fact that they said those words may be objectively true.

But there are many things that are not like that. There are many things that quickly bleed into opinion.

Mr Rau considers that in a democracy we need to be very, very careful about penalising any expression of opinion, no matter how weird it might be, if that's what it is: 'just because I think another person's opinion is foolish doesn't mean that I should be given the capacity to stop them expressing that opinion'. Obviously, some expressions of opinion such as those meeting the definition of defamation and sedition, are properly regarded by the law as being beyond the legitimate scope of this principle.

Mr Rau argued that in a democracy, it's a contest of ideas, and it's important that all opinions, no matter how ridiculous, (provided they're not unlawful), should be given an opportunity to be heard.

He noted that one of the risks with this sort of legal framework is whether it is potentially constitutionally repugnant, because it breaches the implied freedom of political expression. To what extent is there a possibility that legislation of this type will actually cross that boundary?

So, the definition of what is "*political advertising*" is absolutely fundamental.

TiPA laws could be perversely abused, for example, by a regime hostile to democracy, that defines "*truth*" to fit its own self-interest, like North Korea. These laws could be actually be an attack on democracy.

On the other hand, if you don't have any such laws, perhaps you're not protecting democracy.

Very few people would say that the public should not be accurately informed about matters of current political interest. Most would agree that it is wrong for people to be lied to about matters of political interest.

But who gets to define the lie?

And what is the objective yardstick?

What is the test for whether something is untrue?

And who assesses it?

And then the last question is, and what are the consequences?

Now, in South Australia, the TiPA law has been in place for a long time. It certainly pre-dates the internet and social media. It has not been the subject of a great deal of controversy. It has not actually been used that often.

The fact that it exists however, may have had some effect in moderating behaviour. It may have made people sitting in campaign settings for the last 40 years think, "*oh, maybe I won't do that*".

And if that's the case, it's done a good job.

You can't just measure the law by how many times there's been a prosecution. The fact of it being there might have actually done good, without you being able to point to instances where somebody's made a mistake and they've been punished for it.

The TiPA law is only really relevant for a few weeks every four years. And, of course, time becomes critical in an election campaign.

From a purely practical point of view, the Electoral Commission is not designed as a body to make assessments of truth in political advertising. That is not a core function of the Electoral Commission. Their main problem is, how many polling booths have we got? Have we organised all of the workers to be there? Have we printed enough material?

In the case of advertising, they have to be able to do some research and come to a view. How long is that going to take? And if the offensive material lands late in the election, can it even be dealt with before the election has happened? And even if it is dealt with earlier, is there an opportunity, (if the remedy is take the thing down or stop publishing it), is there an opportunity to undo whatever damage that has done? And the answer to that, is almost certainly no.

You have to accept that the reality is that the Electoral Commission will have limited time and limited resources available to be able to deal with a complaint. And that's just the nature of the fact that it's occurring in the heat of an election campaign. 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.



In terms of remedies, Mr Rau considered that the solution in SA is a reasonable one, which is, if during the election period something which is so blatantly untrue is published, and you can persuade the electoral commissioner in the space of a day or two that that's untrue, the electoral Commissioner can direct you to stop doing it. But people need to be aware that in reality that will only be extreme examples that will be able to be dealt with in any timely fashion.

The electoral Commissioner simply doesn't have time within that short, intense period of an electoral cycle, between the issue of the writs and the close of the election. The electoral commissioner does not have a lot of time to be mucking around with other things. They certainly can't be doing a detailed investigations and all this sort of stuff, because they just don't have time.

Mr Rau considers that the most serious remedy has to be an ex post facto remedy. That is, if advertising is demonstrably untrue, (and that's different to just an opinion that you disagree with), and it's 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. This may lead to a by-election.

It will 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.

This is the remedy for one electorate. If it's across the whole State, if it's about a political party, that gets more complicated. What do you do then?

If there's a financial penalty, who gets the benefit of that?

And how is that helping the political system?

It might help the candidate, but if it's sufficiently bad, they've probably got a defamation action anyway.

When you have a financial penalty, you're starting to move towards almost a tortious remedy, where it's a variation on defamation. There may be a complete overlap here with defamation, where for example, you accuse somebody of being a murderer, and they're not. And that's put out in the context of an election. But it also is political advertising. So, there may be a complete overlap between untrue statements made in a political context and the laws of defamation. But there may also be other things which do not overlap in that way.

Mr Rau considers as a statement of principle, you shouldn't tell lies in political advertising. But the practical implementation of this is a very much more difficult question. There is a real danger here. If you make a law which has too broad a reach, and has serious, immediate consequences, it will just become a weapon for political tacticians to use against their opponents. Instead of being a shield, it will become a sword.

To some extent, if the consequences of this are dealt with in the relatively cool light of day after an election, that goes some way to preventing tactical abuse.

If, after an election you think there was false advertising and it's affected the outcome of the election, firstly, you've got plenty of time to assemble your arguments and plenty of time to get evidence.

Secondly, you don't have to give the job to the Electoral Commission. You give it to a judge, whose primary function is to hear evidence and make decisions on the law.

You will not get judges making these decisions during an election campaign for that very reason. Because judges do not want to be put in a position where they're making momentous decisions on little evidence and without proper process.

Mr Rau did not consider that the reputation of the Electoral Commission has been affected by these laws in terms of impartiality in the big picture. But at the moment in time, during the heat of an election

campaign when one of these complaints is made, the Electoral Commissioner gets a lot of unwanted attention. However, he did not consider that it has done any damage to the institution over time.

Mr Rau said there was no harm in having TiPA laws in other jurisdictions to set or attempt to set a standard of behaviour.

## **Chris Sumner**

### **Attorney-General of South Australia 1979, 1982-1993, Shadow Attorney-General 1994**

Chris Sumner was the Attorney General when the TiPA provision was introduced as part of the Electoral Act in 1984. At the time it wasn't particularly controversial. It went through with, at that time, mainly an objection from the Liberal Party and the Democrats to having the court involved in assessing and perhaps imposing injunctions during the electoral process. And that was taken out of the legislation at the time.

But then subsequently in 1997, a version of that was put back in. But at the time the TiPA provision was introduced in 1984, there wasn't a lot of principled or philosophical debate about the reason for it. Most people accepted that it was a good idea.

Reflecting on it now, Mr Sumner considered that the ethical underpinnings of TiPA laws are clear. 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.

Mr Sumner considered that in the community as a whole, not lying is really a fundamental ethical principle. It's in Christian religion and other religions. It's in daily discourse. If people went around lying to each other, society would very quickly collapse and become unworkable. And members of parliament or ministers can't lie to parliament. If they deliberately mislead the parliament, they're supposed to resign.

Mr Sumner agreed with Mike Rann's position that in a democracy you should be able to rely on the information you're provided as part of the democratic discourse in order to make a reasonable decision. And if the facts that are being placed out there are not accurate, then that decision-making process is affected.

Mr Sumner also makes the point that in commercial arrangements you're required to tell the truth. In contracts, you're required to tell the truth. And normally you're required to abide by contractual arrangements, which mean that you abide by promises you've made to someone in a commercial context. You can't sell a used car by misrepresenting the mileage that's been done on it. You can't sell consumer products by providing misleading or deceptive information about them. So the whole basis of society operates around an ethical principle of honesty, honest dealings, and telling the truth. Mr Sumner argued that this is the ethical basis for the prohibition on misleading advertising in politics.

Mr Sumner stated that the ethical basis at the time it went through wasn't actually outlined in those terms, or at all, really. The politicians just accepted it as a practical and important mechanism to enhance the democracy.

Mr Sumner referred to the Enlightenment and the importance of rational discussion, evidence-based discussion, which led to the notion of free speech being put in the US Constitution and elsewhere. It was really based about the idea of contesting opinions and points of view and discussions to arrive at hopefully a mutually agreeable position, but if not, at least having decisions made on the basis of facts where opinions may differ.

And that, from an ethical perspective, was also taken up by John Stuart Mill, who is the philosopher who's most preferred to in this area, and his perspective is all about rational discussion, debate, contesting opinions to arrive at, hopefully, a satisfactory point of view that's evidence-based. It wasn't about the freedom of speech to permit people to lie or mistake facts.

Mr Sumner contended that the problem we now have is that free speech is being used to really undermine democracy because, particularly in the United States where the jurisprudence began, it's extended beyond what was really intended. And now, in the US particularly, you can say what you like, whether it's accurate or not. And we know that with President Trump over things like the birthing issue with Barack Obama, which he just continued to repeat, which was never true.

Mr Sumner thought that free speech should be seen as a means to an end, the end being a functioning democracy where citizens can make up their minds based on facts that can be accepted, but about which they may have different opinions. But the way the jurisprudence seems to work out, particularly in the US, is anything goes, except perhaps the most blatant lying that might give rise to defamation.

Mr Sumner stated that we haven't gone that far here with the Australian High Court, and Australian Commonwealth and state legislators are entitled to put guidelines and guard rails around how the speech is conducted, and particularly how facts are dealt with. Mr Sumner suggested that South Australians have taken a pretty practical approach to it and introduced TiPA laws, which are now well-accepted in SA over many years.

In terms of the impetus of introducing the TiPA laws, Mr Summers was cognisant of the fact that you couldn't make misrepresentations in the commercial world. 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. You don't have to have truth in advertising. So there was that sort of equivalence with the commercial situation that he was aware of. But it wasn't actually put down and espoused in those terms in the legislation.

Mr Sumner reread the second reading speech and the TiPA laws just appears without much argumentation at all, which suggested to him that back then it was thought, at least by him and the government, to be something that was reasonably obvious. And there wasn't a great deal of discussion about the impact that it would have on free speech at the time in the debates that he looked at. A couple of members of parliament opposed it in principle, but it was never taken any further. In today's situation in parliament, you might see much more attention given to whether this was impacting on free speech or not. But in the early 1980s, it was before the implied rights came in from the High Court.

There wasn't really any thought that this was being an unreasonable or impermissible or having an impermissible effect on free speech. And Mr Sumner never saw it in those terms.

Mr Sumner could not point to one particular incident or paper or, a piece of advocacy or submissions that we got that suggested that the government should do it. It just seemed to him at the time that it was the right thing to do for the reasons he explained.

Having looked at what the legislation has done, Mr Sumner think it's worked reasonably well.

Mr Sumner considered that TiPA laws were not controversial at the time it was enacted. There were very few people who actually directly opposed it. One member opposed it in the second reading speech, but then never took it any further. So the TiPA law went through, at least in the basic principle, in an uncontroversial way, apart from this issue of the involvement of the Supreme Court in granting injunctions.

So the important thing was that it has never become, in the 30 years, an issue of party political controversy.

And importantly, it was supported by the major political parties and generally by the community. So there weren't any major debates or talk back radio in Parliament after elections. Overall, most participants in South Australia came to the conclusion that it was a useful piece of legislation to enhance the democratic process.

Mr Sumner stated that the TiPA laws hasn't really inhibited free speech at all, because if all you're doing is prohibiting misleading advertising, where the advertising is based on facts and not opinions,

and it appears only occurs during the election period, it could hardly be an impermissible impact on free speech.

Mr Sumner hopes that the High Court doesn't pick up more of the American jurisprudence and in the future, say this sort of legislation does interfere with free speech. In his view, that would not be consistent with the principles that he outlined, even back from the Enlightenment times, such as John Locke, but right through to John Stuart Mill, who were not talking about untrammelled free speech that enabled people in a democracy to say what they like, including to espouse blatant lies about facts to enhance their political position, and that's the stage we've got to in America, and that's where Mr Sumner thought the notion of free speech it's the tail wagging the dog. What we're looking for is to have a functioning democratic society where there can be opinions expressed, debate, discussion about those opinions, but not on the basis of facts that are just made up. He noted that if that's the way this society is going to go, then there's a serious impact on democratic processes, and that's what we're seeing in the United States in particular at the moment.

Mr Sumner thought the contention by some of the states that haven't introduced it or the Commonwealth that haven't introduced who stated it will impose additional resources on the electoral commissioner was not a view which would lead you to conclude that you shouldn't have the legislation, that's a matter of resourcing a legislative proposal properly to enable the electoral commissioner to implement it.

Mr Sumner noted the risk of the TiPA laws being weaponised by the political parties, and he considered that to be the greatest threat to the law in the long run, and it would be a terrible pity if the politicians who should be upholding this saw it as a means of gaining political advantage and, in effect, behaved in a manner that might be in their particular interests at that moment but which undermined the democratic process. He stated that it would be a pity, and a serious retrograde step. Mr Sumner stated that it's really up then to the political parties to make sure that it operates as it was intended to operate, and indeed it has operated over the last 40 years or so.

Mr Sumner considered that one way of reducing the risk of weaponisation would be to put in penalties for unjustified complaints. However, he contended that the best way of dealing with it is for people to do the right thing and behave as though they support democracy and not see an important piece of legislation as something that they can use to, in fact, distort the political process, which is if it's being used as a weaponised mode, then that's what they're doing. Mr Sumner noted that if it becomes commonplace over a period of time, then people might as well ask what the purpose of the legislation is, if parties are using it in this way.

In terms of sanctions and remedies, Mr Sumner considered that in more blatant cases that the Electoral Commissioner could consider taking matters to court, even though they might have been quickly resolved. He stated that if they're resolved reasonably quickly by the Electoral Commissioner's intervention, then that's the best way of dealing with them.

Mr Sumner thought the TiPA legislation has worked well, and should be introduced elsewhere around the country. Because if you can't have in your democracy a situation where the public can rely at least on some basic facts that have been put out there by the political parties, then naturally the democratic process is undermined.

Mr Sumner left Parliament in 1994, 10 years after the TiPA law was introduced, and had three elections under the law, and he didn't see anything in that time that caused him or the Parliament to have any real concerns about the way the legislation was operating. Mr Sumner considered that in the first 10 to 15 years after 1984 that the TiPA law worked well. It certainly worked well enough not to provoke a serious debate or conflict amongst the parties or in the Parliament. There was a prosecution taken that was upheld. This was the case of *Cameron v Becker* [1995] SASC 5149 where a conviction was recorded against the then Secretary of the Labor Party, Terry Cameron. That the first prosecution was taken successfully against an official of the Party that had introduced the legislation without subsequent complaint by him would suggest that it was working and accepted by officials of all Parties. In serious enough cases, prosecutions were launched.

Mr Sumner stated that the Liberal Party in 1997 made the changes to introduce the process of being able to get the advertisements withdrawn, and with the stick that if they weren't, then the Electoral Commissioner could take it to the Supreme Court. But that's worked since then without the need for court action, which he considered to be a good thing because it means the process is working. It means the parties are complying with the process.

There were a number of examples over the years of the Electoral Commissioner intervening and getting parties to withdraw statements of fact that are incorrect, which means that the legislation does operate as a tamping down of the more extremely inaccurate statements or factual inaccuracies that are made by the participants.

Mr Sumner stated that it follows from the 40 years of what's happened with no major complaints, parties complying generally, a prosecution that was successful, the interventions of the Electoral Commissioner now, particularly since 1997, in getting corrections and getting withdrawals, must all enhance the process of ensuring that the election is conducted on a more fact-based basis than it would otherwise have been.

Mr Sumner stated that he didn't accept that the TiPA law impacts adversely on free speech, given the principles and philosophical basis of the legislation in the first place, that in a democracy, people should be able to make decisions, take into account their own opinions, but at least based on correct information, on facts that are accurate and not distortions. He thought that is one of the greatest threats democracies around the world is where free speech trumps just about everything else. It trumps rational debate. It trumps making decisions based on factual accuracy. He argued that this then leads to a significant reduction in people's respect for democratic processes, which we've seen, particularly in the US and the UK, but to some extent in Australia. And it would be a pity if that was taken further by people being disillusioned about the way their political process was being conducted. And if people get disillusioned because they think you often hear promises, they all break their promises. They're all liars. Once this takes hold in a community, it's very corrosive.

As such, Mr Sumner thought that this legislation, in a modest way, at least does bring people back to the proposition that you should not, in a political, electoral context, be making statements that are factually inaccurate.

Mr Sumner didn't think that TiPA laws should be narrowed, but he was of the opinion that consideration could be given to extending it outside of the actual electoral period, because there's a lot of debate that goes on that's not actually involved in a debate about an election.

He thought that to expand it beyond matters of fact would be undesirable and probably be testing out the limits of free speech too much, and that we shouldn't be trying to restrict discussion about people's opinions on things, and once you get beyond dealing with facts, you get into a much more controversial area.

Mr Sumner thought that truth in political advertising laws are probably not adequate to capture the activities of modern digital campaigning, as when this legislation in South Australia was introduced 40 years ago, it would be surprising given what's happened to the way that news is disseminated since then if there shouldn't be some updating of it. And consideration needs to be given to the broader issue of misinformation, disinformation, the issue of internet advertising, and the question of third party advertisements as well.

Mr Sumner thought it was possible to achieve timely retractions within an electoral campaign period, as in South Australia that's shown to be the case. But, again, it depends on the approach that the politicians, particularly the major parties, take to the issue. If people play ball and decide that the legislation is desirable and should be enhanced in its operability, then there shouldn't be a problem. But if people see it as something they can play games with or exploit and refuse to take action when recommended by the Electoral Commissioner, then the whole thing can unwind. So, it depends a lot on the culture. First of all, it depends on the legislation, but then it depends on the culture operating within the political parties as to whether or not that works. From his experience in South Australia, people have complied. But if they all stop complying, then that could create problems. But once you

have people not complying with the law, and that's particularly the politicians who have passed the law, if they then start seeing it as something that can be exploited, then you're in trouble. Thus, Mr Sumner surmised that the experience in South Australia is that it can be done. It depends on acceptance by the people operating in the system, the members of Parliament, doing the right thing. It probably depends on the Electoral Commissioner being able to deal with issues quickly, being sufficiently resourced.

Mr Sumner did not think the South Australian Electoral Commissioner's role in enforcing the TiPA laws has affected their reputation for impartiality. He observed that when an Electoral Commissioner intervenes sometimes, the parties have a bit of a whinge at the time, but once the process is completed, the major political parties and the Greens support this type of legislation and there has been no serious issue by political parties about the impartiality of the Electoral Commissioner.

## **Aemon Bourke**

### **SA Labor State Secretary 2022-Present**

Mr Bourke's experience of truth in political advertising laws in South Australia comes down to the application of s 113 of the Electoral Act. He has had experience during the recent Dunstan by-election and state election. He notes that the electoral commission is sometimes in a difficult position in making an assessment as to whether the Act is breached, especially if a complaint comes in two days before an election. For example, Mr Bourke made a complaint approximately a week before polling day. People were already voting early and the Electoral Commissioner did not hand down a decision until 5pm on election day.

The wording of s 113, 'misleading to a material extent', is flexible enough for consideration. Mr Bourke considers that s 113 is sound wording because something that is potentially slightly wrong or out of context may not be misleading to a material extent.

In terms of concerns about the operation of s 113, Mr Bourke raises the example of the Liberal Party saying that Labor was introducing a new tax when they were not. The electoral commission found that, because the claim was not in an election campaign period and did not mention a candidate, it was not political advertising. Mr Bourke takes issue with how political advertising is only regulated during the election campaign period, because it means that anything can be said about opponents up until the campaign: it basically means you can say what you like three years and nine months out of a four year cycle, it's only during the election campaign that something is trying to persuade someone's vote.

Mr Bourke considers that truth in political advertising laws are adequate to capture the activities of modern digital campaigning, although work needs to be done. There are some jurisdictions in the United States that are looking at generative AI, where authorisations are required to say that a campaign ad has been digitally altered. That is the bare minimum required to identify where an opponent is using AI or digital alteration. Mr Bourke hopes that such AI is captured under the South Australian legislation, but there also needs to be some consideration of whether generative AI can be used only in positive advertising, not in negative advertising where the candidate cannot consent. Mr Bourke would err on the side of banning generative AI as much as possible, but also noted that AI is used now to generate subtitles. A nuanced approach is necessary to distinguish between positive and negative advertising, and to seek a candidate's consent.

Mr Bourke is not aware of generative AI being used in election campaigns. The risk of alteration is political but that risk is diminishing, and he believes that digital alteration is coming. It may not be done by a major party but might emerge from those who want to cause mischief and are open to doing it.

In Mr Bourke's account, the vetting of political ads in South Australia occurs through an approval process. If they are contrast ads or negative ads, they will be vetted for lawyers for advice about compliance with s 113 of the Electoral Act or other relevant Acts. External and in-house lawyers advise on ads.

Mr Bourke does not think that the South Australian legislation has brought about a change per se. Although the legislation has operated relatively well, Mr Bourke considers that it is necessary to be aware of generative AI, fake news and other forms of disinformation. As a small jurisdiction, South Australia may be relatively immune.

In terms of the approval process for advertising, Mr Bourke approves as the State Secretary. An ad may also be run past lawyers for advice, editing and script changes. An ad might be amended to ensure compliance with s 113 and defamation frameworks.

Mr Bourke believes that the Electoral Act and truth in political advertising laws has not changed much, but has held us in good stead. The tenor of political ads have not changed much over time, from Mr Bourke's 20 years in electoral campaigns and 7 years in a formal party office role.

In most cases, the Electoral Commission and Electoral Commissioner hand down a decision and the parties generally either accept it or assume the risk of court if they do not accept it. In 2022, the Electoral Commissioner decided that something was misleading and should be withdrawn. The Labor Party disagreed with the Electoral Commissioner's interpretation, replied with a letter and refused to change the ad. The Electoral Commissioner did not pursue the matter, although the Court of Disputed Returns may still be an available avenue. That is the risk of disagreeing with the Electoral Commission and making a judgment as to whether their interpretation is correct, although the election was not overturned in 2022. Mr Bourke notes that this was a relatively unprecedented case of the party disagreeing with the decision of the Electoral Commissioner, although there may be other examples. The statement in question had been out for at least eight weeks and the party was asked to pull it one week before election day.

Mr Bourke does not have concerns about the behaviour of major parties in relation to the operation of truth in political advertising laws, but has more concerns about minor parties and new entrants.

He also considers that we have not yet reached the point of deliberate intend to mislead or to roll out false information and fake news. But as soon as somebody crosses that threshold, that might force others to do so as well. Mr Bourke hopes that legislation can be passed to prevent that from occurring.

Mr Bourke thinks that the balance struck by the wording of 'misleading to a material extent' in the South Australian Electoral Act is appropriate. However, he has concerns about the recent interpretation of the Electoral Commissioner about material that was not trying to persuade a vote, such that the Electoral Commissioner decided that he would not have to rule on whether the advertising was misleading to a material extent.

There is a broader question about generative AI and fake news, which Mr Bourke does not think can be banned but could be regulated. If it is used, people should be notified and permission should be required for digital alteration.

Mr Bourke considers that truth in political advertising laws have been beneficial in reducing disinformation because regulating disinformation cannot be left to defamation law. There is a timing issue related to the fact that defamation cases may run for years after an event. A mechanism is needed to react to content in a timely manner. Rash decisions can be made nowadays due to social media, so the law may need to be updated to address that problem.

That may also make the job of an electoral commissioner harder, because the quantity and scale of messaging has increased. There are some processes to vet or monitor social media and to clear posts which are political and are talking about government policy or a political opponent. The institutions around approval processes are relatively established in the Labor and Liberal parties. It is unusual for a candidate to go rogue and send something that has not been authorised.

The processes in South Australia are not particularly different from other states or territories. But the problem is now with social media where there may be some authorisation but content can be produced more freely. It is much riskier to authorise a Facebook page and harder to regulate every post that goes up.

Overall, Mr Bourke thinks that s 113 has served us well and will continue to do so with adjustments. He does not think that s 113 has been weaponised in South Australia. He is also not aware of any unintended consequences related to the enforcement of truth in political advertising laws, as the law has been around for so long that it's just there as part of the furniture.

One issue is that the Electoral Commissioner has recently interpreted that every post on a Facebook page is itself an electoral advertisement and should therefore have an authorisation. This is an unintended consequence of the legislation which requires every post to be authorised, even though the homepage itself is authorised. That interpretation has changed between elections and may just need a change in legislation.

Mr Bourke also notes that complaints in relation to the lack of authorisation on individual posts can be used as a political tactic, and exchanges of complaints can tie up the Electoral Commissioner and also parties.

Mr Bourke does not think that truth in political advertising laws have a chilling effect on free speech.

Aside from truth in political advertising laws, other options include putting disclaimers at the bottom of ads that have been digitally altered without permission. That would ensure a level of self-regulation.

Mr Bourke believes that sanctions and remedies for breaches of truth in political advertising laws in South Australia are appropriate. If the party disagrees with a decision of the Electoral Commissioner, they can dispute the decision in court if necessary. If the penalties were extreme, the Electoral Commissioner would become a single arbiter of truth. The Electoral Commissioner should not be in that position.

If anything goes through to Mr Bourke about a complaint from the Electoral Commissioner, legal advice is sought. Recent circumstances, however, suggest that timely retractions are difficult to achieve. In the most recent by-election, the Electoral Commissioner stated that the Liberal Party had breached s 113 at about 5:30pm on polling day.

Early voting incentivises getting out a difficult message early, because if it breaches s 113, many people may already have voted. One fix that Mr Bourke suggests is reducing the length, as being able to pre-poll too far in advance of an election is too early. The last seven days may be an appropriate timeframe.

Mr Bourke is relatively confident that s 113 has served us well but notes the need to think about changes or adjustments between election cycles. Potential improvements include quicker turnarounds and ensuring that individual posts do not each have to be authorised.

Mr Bourke also notes more situations where astroturfing is occurring or where it is not clear where an incorrect or inaccurate message is coming from. The Electoral Commissioner should also engage with platforms to ensure that things can be taken down or to note that something is misleading. There are examples of Facebook responding but more limited examples of Twitter doing that.

### **Mick Sherry (South Australian Electoral Commissioner)**

#### **South Australian Electoral Commissioner 2017 to present**

In the lead up to a state election, the 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, in particular the nominations, voting and counting processes and timing. The requirements of Section 113, Misleading Advertising is also discussed.

During election time, a dedicated team is established to manage all complaints.

The SA Electoral Commission does not have the resources to proactively monitor electoral advertising, so they rely on complaints.



Once they receive a complaint alleging a breach of Section 113, further information is sought from the complainant, as to why it's misleading etc.

They then go to the publisher of the material (normally political parties or candidates, although third party campaigners are also covered) to seek their views.

The Electoral Commissioner makes a decision based on the information at hand, and may seek advice of the Crown Solicitor's Office.

If the Commissioner makes a decision that offending material is in breach, Section 113 allows for the Electoral Commissioner to request the advertiser to remove the advertisement from further publication and or publish a retraction in specified terms and in a specified manner and form. The decision in this stage is made on the balance of probabilities.

The Commissioner in most cases asks for the publisher to cease publication and issue a retraction, normally in the same way the material is published. Eg if the post was made on a Facebook account, the retraction has to be on the same account.

The Commissioner provides the wording of the retraction and writes to the publisher.

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's not practicable to get the retraction issued in the same form as there's no time. In that situation the Commissioner determines an alternative method eg ad in the *Advertiser* (daily paper), Facebook post, media release.

The publisher generally acts upon the instructions of the Commissioner in the majority of cases.

The Supreme Court can determine that a publication be withdrawn and a retraction issued under the Electoral Act. So the Electoral Commissioner can go to the Supreme Court to get an injunction.

Mr Sherry has never had to use the Supreme Court provisions, and is not aware of previous Commissioners using that provision.

Generally the publishers comply and withdraw the advertisement and issue a retraction.

After the election, the Commissioner reviews all complaints and determines whether to proceed with the prosecution. The decision to prosecute has to meet the threshold of being beyond reasonable doubt.

During the election, a person or party may commit a breach on the balance of probabilities.

Not many complaints are sent through for prosecution.

The South Australian Electoral Act defines electoral advertisement as an advertisement containing electoral matter. Electoral matter is defined as matter calculated to affect the result of the election. So s 113 applies to any form of advertisement, including social media.

Generally, the Electoral Commission does not have interaction with social media platforms or media companies, as they normally deal with those who issue the electoral advertisement. 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.

The Electoral Commissioner has not done this often.

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. 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.

Nevertheless, Mr Sherry stated that the Electoral Commission has maintained its strong reputation for political neutrality, which has not been affected by the implementation of TiPA laws. The political parties have never accused the Electoral Commissioner of not being impartial under his regime.

Another major challenge in administering the legislation are 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.

When a candidate or party lodges a complaint, they are aggrieved that the information is in the public domain, and want the issues to be addressed as soon as possible and the material to be taken down immediately.

But the Commissioner needs to be considered in decision-making and carefully consider all aspects of Section 113 and freedom of speech and expression etc.

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 State election report 2022 contained statistics showing that in 2018 there were 38 complaints, while in 2022 there were 117 complaints. Mr Sherry attributes the 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.

There are also challenges in achieving timely retractions of misleading material.

Timely retraction depends on the complexity of the material. If there is a misleading ad on polling day, the EC still needs to be considered in its decision-making. Sometimes people 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.

If it is a week out from polling, it is less urgent compared to polling day, where Commissioner requires response within 2 hours. If one week, the Commissioner may give till tomorrow morning to respond. There are very short timelines.

Mr Sherry is of the opinion that the truth in political advertising laws work well and are effective. Mr Sherry considers that the laws have changed the behaviour of political parties in a positive way. The laws have been in place in SA for a long time and everyone is familiar with them.

However, Mr Sherry said that it's hard to say if the TiPA laws reduce disinformation, as s 113 is limited to factual matters and excludes opinions, which means that misleading opinion-based advertisements fall outside the ambit of the law.

Mr Sherry considered it is appropriate for the law to focus on facts, rather than opinions, otherwise it could not be administered.

The main complainants are the major political parties. Political parties are actively observing each other and lodging complaints.

The level of compliance by political parties has been good. There has been an increase in legal representation of candidates and parties who engage lawyers. Generally, once the Commissioner makes the decision, the parties will comply in all cases.

Mr Sherry noted that problems in compliance have arisen mainly in local government, as council elections have more than 1000 individual candidates and they have a lower awareness of these laws compared to the major political parties, even with Electoral Commission briefings.

**David Gully**

### **Deputy Electoral Commissioner 1998-2023**

Mr 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're 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." Mr Gully considered that "the public deserves to have truthful statements put in front of it. Because particularly nowadays with social media and other unregulated communication methods, there's just so many channels that people can tune into and how do they know they're getting truthful information? You know the Donald Trump, fake news, fake news stuff, and even when it's truthful, they can run that argument of fake news. So the public has to try and come up with what's truthful and what's not. So if there's no administration looking after that, then it's a bit difficult."

Mr Gully suggested that political parties have used the law as a political tool: 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."

This was a more recent phenomenon, as in the late 2000s, up to the 2010 election, they didn't go holding letters up in front of TV cameras where a Party director who gets a letter from the Commissioner says an opposing Party published misleading ads. So, from 2014 onwards, they have been weaponising it.

Mr Gully stated that the Electoral Commission had contacted political parties about this behaviour and stated to the parties that the Commission may release its determinations in a media statement to pre-empt such behaviour.

Mr Gully stated that he was unsure that the TiPA laws changed the tone of electoral material, as the 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.

When Mr Gully started in the Commission, there had been successful prosecutions against both major parties, the Labor Party and the Liberal Party, eg Cameron, Piggott, Labor Party aligned union people had also pled guilty to distributing misleading material about Liberal member Sam Bass. However, since the late 1990s there were no prosecutions for a lengthy period until the prosecution of a local government candidate in 2018. The decision to prosecute lies with the Commissioner, on the advice of the Crown Solicitor, and different commissioners have had different appetites for prosecution.

Mr Gully noted that there been challenges in achieving timely retractions within the electoral campaign period due to delaying tactics by political parties.

Mr Gully noted that parties have sought to publish retractions but also rebutted the retraction in the same message, e.g. we're publishing the retraction, but we still believe the Party X was corrupt. The Electoral Commission reprimanded the political party and said that the retraction needed to be published separately without rebuttal in the retraction itself. If the party wanted to try and defend that decision, they needed to put this in other material separately, rather than in with the retraction.

The Electoral Commissioner has enforced the TiPA laws against third party campaigners, eg Unions, Associations, resident groups and business groups.

Mr Gully stated that the enforcement of TiPA laws has not adversely affected the Commission's reputation for impartiality and considered that the Commission has and continues to hold a very high regard in the community and in the political parties. MPs have stood up publicly on the record in parliament in Hansard and thanked the Commission for its work and its staff for everything it does.

Mr Gully has not seen anything necessarily that puts the Commission in a difficult position because of the administration of these laws, although he is aware of two MPs who have previously made negative

comments about different Electoral Commissioners in Parliament (Terry Cameron and Isobel Redmond), but these were isolated incidents, and Redmond subsequently withdrew her comments.

Mr Gully did not consider that administering TiPA laws has drawn the Commission into political controversy, but it just puts the Commissioner's position in the public discourse of the two warring factions of party A versus party B.

#### *Recommendations for Reform*

Mr Gully suggested that one option was to take enforcement of TiPA laws out of the Electoral Commissioner's purview, so that it is not wound up in this party A versus party B, as the middle person making decisions that they'll then make political gain from that in the media.

Mr Gully considered that a potential alternative option could be if it was given to a tribunal (eg SACAT) to deal with. Under this proposal, the determination of misleading advertising breaches under section 113 would be referred to SACAT rather than the Electoral Commissioner. The order of the tribunal should be subject to appeal. This was previously suggested as a law reform option in SA.

The Electoral Commissioner would still vet complaints as it was hard for the average person who wants to make a complaint about misleading advertising, to have to go to SACAT and lodge things, due to the formality of affidavits etc.

Another reform option would be for prosecutions to be proved on the balance of probabilities rather than beyond reasonable doubt.

Mr Gully considered that if there's 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. I think that would certainly lead towards people trying it on to say, well, okay, I'll go out and say what I like, because there is little prospect of being prosecuted.

#### **Sam Hooper**

Sam Hooper, lawyer, is a Liberal Party volunteer who worked on complaints under the *Electoral Act 1985* (SA) (TiPA laws) during the last two South Australian State elections (2018 and 2022) and the 2024 Dunstan by-election with the current and previous Liberal Party State Directors.

Overall, Mr Hooper considered that the TiPA laws have become a political tactic and a political tool: it's definitely being gamed. When the legislation was created no one may have thought of it, but it's just how it's evolved.

During the election periods now, each political party appears to put in complaints to 'bog the other side down'. However, one of the problems with this strategy is that when highly contentious and potentially election outcome impacting complaints come up, there appears to be no triage system to fast track such complaints and they become stuck in the queue.

Mr Hooper noted that: '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 the have not misled the public, and then this can be weaponised by the other side.'

The Liberal Party is extremely careful to ensure that political advertisements are not misleading or inaccurate. Ultimately the person responsible for authorising the political advertisement is the State Director. The State Director needs to satisfy themselves that the ad is accurate and not misleading. In recent times Mr Hooper and the current and previous State Directors have on many occasions reviewed ads and to ensure their accuracy.

In instances where the Electoral Commissioner makes a determination or a decision that parties do not necessarily agree with external lawyers can be engaged to provide advice.

Mr Hooper noted that there appears to also be tactics in terms of the timing of challenging complaints: 'Depending on where you are in the cycle. If it's at the very beginning, it's going to be important to fight it. If it's a day off, there are complaints that he would have lodged on the day of elections, which you never really heard anything more, because it sort of becomes moot. But you put them in, in case.'

Ultimately party officials would rather spend their time on better things, actually be out there campaigning, trying to sell the message, than defend it. And what's in the people's best interest. Because the TiPA law is a big distraction for everyone.

Following requests from the Liberal Party, the Electoral Commission has in some instances provided material that is the basis of the complaint to the party, which is consistent with procedural fairness and natural justice. But this can lengthen the complaints process.

Since TiPA laws were introduced, elections and campaigning have changed. Previously, if you wanted your politics, you got it from broadsheets, the Australian, or the ABC, or the radio, and that was probably easier to police.

But now there are many mediums: free to air television, Facebook, Twitter, text messages, Robocalls.

If it's a flyer, you then print another 20,000 and it's quite clear how to fix it. But how do you fix a Facebook post or a tweet, or what if it's a tweet that's been retweeted by 50 people.

If it's a Facebook post, then they do another one, but what if they have spent \$1,000 boosting that post? Should they have to spend \$1,000 boosting the retraction.

Or if it's a radio ad, played at prime time, do they have to, how do they retract that, or can they just, you know, do they have to play it at the same time the next week, or do they, can they just do it at 11.59 that night. So if someone actually does a retraction, they may do it late at night, or at the end of the day, or they'll post something, then they'll post the retraction, then they'll post the next thing, so that they try to bury it.

Mr Hooper considered that the Electoral Commission needed a lot more resources to administer the TiPA laws, and suggested that the Commissioner's authority be delegated to a deputy or another person, and have a Crown lawyer stand by during the election period.

Mr Hooper was of the opinion that TiPA laws needed to be streamlined. A potential reform is to introduce a much clearer, more structured process, and if there were set time frames. For example, if you put in a complaint, you know, it needs to be resolved within a certain timeframe, for example, two or three days.

Another potential deterrent is for the Electoral Commission to prosecute and if necessary get some case law from the courts so people might think twice about putting out misleading ads. The lack of prosecutions might make some consider there are no significant repercussions for breaching the laws and keep pushing the boundaries. If it is an absolute heinous misleading and inaccurate advertisement, then there should be penalties and implications, e.g. someone challenging an election. And until there is, people are probably just going to 'keep playing around the edges'.

Mr Hooper stated that the TiPA law definitely makes the party think about political ads. It definitely makes the author, the authoriser accountable. So that is a positive, there's no doubt about that. It's just the mechanics of how it works. It's hard to get that balance. Because it has a place and you can't just have people just making stuff up. But you're always going to have people spinning things.

## **Josh Teague**

### **SA Member of Parliament 2018-Present**

Mr Teague's experience of truth in political advertising laws in South Australia is that they are primarily a matter for party organisations in election campaigns. Between elections, there is an issue that comes up from time to time in respect of government advertising and the use of public funds by the

government to advertise what the government is doing. That is less related to truth in political advertising and more related to whether the expenditure of public money is in the public interest.

There has been some discussion of how electoral laws should not be limited to the election campaign, as misinformation may go beyond an election campaign. The election campaign is the pointy end of that. If there is a focus on campaign communications, the controversial question is where there is a claim that is made by the party about itself or to criticise an opponent. Party organisations tend to keep a close eye on opponents with a view to calling out incorrect claims and are otherwise tuned into what the Electoral Commissioner is making of communications. They may also need to respond from time to time to questions from the Electoral Commissioner.

Mr Teague believes that one concern with the operation of truth in political advertising laws is that, if an incorrect claim is made, time is of the essence in discovering the claim and then ensuring that it is able to be corrected or sanctioned. Even if something is identified, damage can be done by the time that remedies are applied. In the final days of an election campaign, a claim may be made that is a subject of complaint, but the election may be done by the time that anything can be done.

There are challenges in achieving timely retractions within an electoral campaign period. There are many examples of circumstances where the Electoral Commissioner might take a view or seek an explanation or retraction, but procedural fairness is necessary for the recipient to present their view and reasons. Sometimes the recipient will obtain legal advice or express an opinion about the Commissioner's view. The time that it then takes to adjudicate the claim is a challenge. The question also becomes moot if time has passed, given that the objective is to win the election and an incorrect claim might remain unresolved until the end of the election.

Mr Teague considers that there is room for improvement in truth in political advertising laws. An optimal set of circumstances might include the capacity for the Electoral Commissioner to express a view about something being an incorrect claim, and for different views to be aired so that people can at least know that there is controversy about the claim. The emphasis needs to be on the practical means by which an election is not influenced by an inaccurate statement that goes unremarked upon until after the event.

In a way, truth in political advertising laws have been beneficial to reduce disinformation in election campaigns. The difficulty is that the voting community can be lulled into a false sense of security. If there is an expectation that what you are hearing is true because there is oversight, we must be careful not to create an atmosphere in which false claims can be made and maintained until after the event. Mr Teague believes that truth in political advertising laws are good to the extent that they can be applied in real time. The unintended consequence of a false sense of security is that an electorate might expect greater levels of accuracy but the reality does not reflect that in real time.

The quality of truth in political advertising laws also comes down to the quality of their enforcement in practice and the quality of people's understanding of what they are capable of achieving.

Mr Teague thinks that truth in political advertising laws have changed the behaviour and strategies of political parties in their election campaigns. He hopes that they have not led to political organisations establishing means by which to understand how the enforcement process works to operate closer to the boundary lines.

Matters should at least be identified in a reliable and timely way so that they can be understood and debated, even if ultimate outcomes and sanctions are not applied until after the event.

Mr Teague does not recall evidence of political parties using truth in political advertising laws as a political tool against opponents.

It is possible for truth in political advertising laws to have a chilling effect on free speech. Greater transparency or awareness about the operation will make it more likely that these laws have a positive effect.

Mr Teague acknowledges that the Electoral Commissioner is placed in a political frame and there is a risk that they are in a controversial position, although this partly comes down to how well the task is

done. Taking responsibility for the laws inevitably means that the decision-maker is a source of potential controversy, but this comes down to confidence. The Electoral Commissioner should be a neutral role who is capable and competent to adjudicate these matters. The courts should be involved if necessary. There is no indication that the Electoral Commissioner has not been independent in South Australia.

Mr Teague also has no particular concerns about the behaviour of other parties in the operation of truth in political advertising laws. He highlights that time is of the essence so the laws are a practical challenge for political parties, individual candidates and independents. It is a practical challenge to identify communications and highlight potential controversy for the Commissioner to respond.

Mr Teague has no opinion on the scope of truth in political advertising laws or particular proposals for change. He thinks that there is a question of working on ways to apply the rules and calling out claims in a timely way. The actors and decision-maker all need to be doing all they can to ensure truth in political advertising, as the laws alone are not going to achieve that outcome.

Mr Teague believes that sanctions and remedies for breaches of truth in political advertising laws may be adequate, noting that there are some relatively serious penalties. However, there is less capacity to apply penalties for the future and an election is for a very short period of time. The most effective form of penalty is going to be an injunction which is rarely applied in practice. The second most effective might be the public attention that is brought to the statement. It is tough to make penalties effective.

Mr Teague is concerned about third party campaigners who are not accountable in the same ways that political parties are accountable. There is a problem where a third party says the things that political parties cannot because they are regulated. It is important to look at the regulation of third parties in campaigns, particularly where third parties are directly pursuing the same ends as a political party. The CFMEU, for example, has visibly advertised and influenced election campaigns and has provided cash support to the Labor Party. The Labor Party was pressured to return a campaign contribution towards the end of the election campaign. This was late but led to a public debate about that campaign contribution.

It would be good to see consistency between approaches to truth in political advertising in different Australian jurisdictions. People will be assisted by consistent application of the laws.

If there was something inaccurate or misleading, Mr Teague notes that the first point of recourse is the Electoral Commissioner. The Electoral Commissioner can respond to complaints and direct parties' participants to take down communications. Those retractions tend to be more effective if done by the party who posted it, where it is not a matter of going to the social media service provider.

Other actions and strategies to combat disinformation in elections include ensuring a level of understanding in the voting public about claims that are being made. Laws should also be applied and enforced to avoid a false sense of security. There should be means to ensure accuracy in political campaign statements so that the electorate can see that those matters are enforced. That might involve identifying controversial statements in real time.

## 6.2 ACT Interviewees

### **Nick Tyrrell**

#### **President, Canberra Liberals Party**

The 2024 general election was the first election that Mr Tyrrell had been through as an official of the party, so he can't compare it to the previous election.

Mr Tyrrell thought that for the most part, it never came up in conversation or in discussions about, do we think we can get away with this? Or do we think that we're going to get captured by this truth in advertising legislation or rules? Because typically, politicians and politics generally don't want to be

caught out in a lie anyway. So Mr Tyrrell is not sure that the TiPA law does much and he's not sure that it affected how they approached the election too much.

But Mr Tyrrell noted that, for the first time, one of their advertisements of the ALP in the ACT was captured by, and an action was taken under the truth in advertising laws, which required a ceasing of distributing the material and a retraction. But again, Mr Tyrrell didn't think that was particularly effective because the advertisements ran for weeks and they ran in in the football grand final, with the misleading statements. Essentially, it was an attribution of a statement to someone who didn't make it.

And so Mr Tyrrell thought the laws were ineffective because if you're going to pay tens of thousands of dollars or even hundreds of thousands of dollars to run those advertisements in primetime, and then all you're required to do is issue a statement or issue a retraction on social media, for example, that might be seen by a few hundred people. And you don't have to run the retraction in similarly high exposure environments like comparable media to where the advertisement was run in the first place, then he thought it's essentially ineffective because the ads have been allowed to run for weeks at a time and then, and in high penetration media, and then the penalty is minimal: it's just issue a retraction and put it on social media.

Whereas under the press council rules, which is a voluntary code, you have to give similar or equivalent prominence to a retraction as you gave to the original article. So if you said something on the front page of the newspaper and you led with it, and you're found to be in breach of the press council code of conduct, then you have to run the retraction on the front page.

And so, when you're trying to do the right thing, you're not really thinking about the law as it applies to truth in advertising. And if you're trying to get away with doing the wrong thing, the penalties aren't particularly effective at enforcing compliance.

The Liberal Party formally made one complaint, but did not receive any complaints under the TiPA law.

In terms of the process in the Liberal Party for vetting political ads for accuracy, that's something that sits between the campaign director and the agency. And so, there's a human element to it, you're always applying a subjective lens, but Mr Tyrrell didn't think the process will have changed from before the legislation to post-legislation.

Mr Tyrrell noted that the ACT laws sort of capture a fairly narrow band of potentially misleading advertising, and he thought that's how it should be. He considered where something is demonstrably false or where something's falsely attributed to someone, then there should be avenues for that person to dispute that. But he thought you get into dangerous territory when we're particularly with the sort of misinformation and disinformation, such in the proposed legislation federally, because you have to pick someone who's the arbiter of truth. And it's very difficult, as we've seen with the COVID example where, if it were up to the government of the day to decide what was truth and what was misinformation or disinformation, they may very well, and he believed probably did at the time, think that some things have turned out to be true, would have been categorised as misinformation or disinformation at the time, because it was contrary to government advice. So Mr Tyrrell thought that's a really dangerous place for politics to tread in becoming an arbiter of truth. He suggested that what Twitter does is a really good example of how it can be done in a way that no one had really thought of before in the community notes function.

Mr Tyrrell thought what would be more effective than the government deciding what's truth and what's not, through often obviously political lens, would be to encourage those tech giants, let's say, to implement something similar to the community notes function of Twitter or X, where the community can help point out the inaccuracy or misleading nature of advertisements in real time. Because inevitably what happens within a government-run system and a bureaucracy is that from the point at which someone makes a complaint to the point at which a determination is made and potentially a penalty issued can be weeks, if not longer. And in that time that false information as it was the case in the ACT during the last election can be disseminated and distributed very, very widely in that period of time.



Mr Tyrrell thought social media platforms should be regulated in terms of disinformation in elections to a degree, but if you've got to stand up a government department of 100 fact checkers to be monitoring every political ad on Facebook, he thought that's a less effective and still subjective way of monitoring compliance with, let's say, hypothetical truth in advertising laws, whereas he thought the crowdsourcing approach to fact checking and exposure of misleading information or misleading ads or disinformation or misinformation is much more effective because it happens in real time. And he thought advertisers will be much less likely to take that risk if every time they post this misleading advertisement on Facebook, it's accompanied by a sort of exposé of how inaccurate it is, so it loses its effectiveness.

Whereas he thought the ad that the ALP ran in the ACT that was captured by the truth in advertising laws was a very effective ad. And the penalties were so insignificant, including that they didn't have to run a correction or a retraction in the same sort of prime time slots as they ran the ads. If he was the ALP, he would think that was a win. He would think, well, we got away with that. Any political party that did it would think that we would do that again if we had to because the penalty was so insignificant. So you'd still you would still categorise that as quite an effective campaign because more people saw the campaign and potentially were influenced by the campaign than saw the retraction.

Mr Tyrrell thus considered the sanctions and remedies for breaches of truth in political advertising laws to be inadequate, as it operates in the ACT. He thought that like the press council rules, if you're found to be in breach of truth in advertising laws by running a particular advertisement, then you should have to you should have to quantify exactly how much you spent on promoting that advertisement and what platforms and how much reach you achieved. The penalty, he thought, should come close to whatever that was. So you can either pay a financial penalty or you can run the retraction or perhaps both. You should have to run the retraction or correction in comparable volume, reach, and spend to how you ran the ad in the first place, if it was misleading. The penalty needs to be significant enough that it encourages compliance and discourages breaches. And that the risk of the risk of being found in breach is greater than the reward of having been able to run the misleading material.

In terms of the scope of truth in political advertising laws in the ACT as being confined to statements of fact, Mr Tyrrell thought that they're about right. Because he thought it does create some significant issues as they relate to free speech or the expression of opinion if you broaden it.

So, some of those things that might have been categorised as misinformation at one point later on are found to be quite accurate. For example, there were a lot of a lot of advertisements or a lot of public health commentators suggesting that with quite a degree of authority that vaccines would stop transmission of COVID, that the disease would be less transmissible after you've had a vaccine. And that that was proven to be not true. And in a fast-paced environment, as it was then when everyone's learning how to how to deal with a pandemic that was moving at a a quick pace.

At times like that, you can imagine that governments will put a priority on shutting down opposing viewpoints. And so you would have to be very careful when making laws about what people can say and what who gets to define what is accurate or truth.

In terms of changes to TiPA laws, as far as the ACT goes, Mr Tyrrell wouldn't really change a lot, except strengthen the penalties to more appropriately penalise behaviour that's captured by what is already quite a narrow scope. This scope is quite narrow to only really capture where it's something that is demonstrably false or falsely attributed. And Mr Tyrrell thought when you have such a narrow definition, then the penalties can be more significant, because you don't have as many grey areas to worry about when it comes to applying penalties. You either misattributed this statement, or you made a demonstrably false statement. Therefore, you've known what you're doing, and you should pay a significant penalty, whether that's monetary or with a comparable spend on printing/publishing the retraction.

Mr Tyrrell thought the Electoral Commission was slow to respond, which is where potentially if we had a national system that prioritised something similar to the community notes function in Twitter, he thought that would resolve the response time, because it would essentially be in real time.

And then, secondly, because of that, and because of the low penalties, Mr Tyrrell thought it may be part of a party's calculus that the reward is greater than the risk.

Mr Tyrrell didn't think TiPA laws have made a difference yet. He didn't think they've even started to fix the problem. Because of those reasons he outlined earlier. It's too slow to respond, therefore, the false statements are out there already. And they're able to be disseminated and published and promoted before any action is taken. And the penalties are too insignificant for them to have made a difference.

Mr Tyrrell didn't think that truth in political advertising laws have been detrimental or led to suboptimal outcomes, certainly as it applies to the ACT. But any of the issues that existed prior to the implementation of the laws still exist today.

Mr Tyrrell also did not think that the truth in political advertising laws have changed the behaviour and strategies of political parties in their electoral campaigning, because the people who don't want to be misleading or be accused of being misleading, still maintain that focus. And the campaigners who want to fly a little close to the sun, still do so because the reward is greater than the potential risk.

Mr Tyrrell has not seen any unintended consequences from the enforcement of truth in political advertising laws. He has not experienced any weaponising of truth in political advertising laws.

Mr Tyrrell did not think truth in political advertising laws have a chilling effect on free speech, with its current narrow scope in the ACT.

But he thought they have potential to, if poorly implemented with a wide scope and establishing bureaucrats as the arbiters of truth. Mr Tyrrell was very reticent to put bureaucrats in charge of deciding what's truth and what's not because it's subjective. And so, he thought with a narrow scope, it's okay. Mr Tyrrell thought the way that the ACT has designed it as far as the parameters go are about right.

But a broader scope would have the effect of chilling free speech rights and give bureaucrats even more power than they already have, which he thought was anathema to a democratic country.

So Mr Tyrrell thought exposing misinformation or disinformation or false advertising, best sits with the general public, potentially users of the platforms, where that material is being disseminated, similar to the solution offered by Twitter, is probably the best way he could think of to do that because it doesn't place bureaucrats or employees of the platforms in a position where they're deciding what's the truth or not. It's allowing for the interested members of the public to question or point out the potential misinformation in an advertisement or material, which he thought then allows people to make better decisions about whether they believe it or not.

Mr Tyrrell didn't think it was possible to achieve timely retractions within an electoral campaign period, because it comes down to penalties. If you ran 20, 15 second ads during the AFL grand final that's a week out from an election, well, you're not going to have an opportunity to run the retraction 20 times during the next AFL grand final because that's going to be after the election. So he thought that if anything, what the truth in advertising laws have the potential to do is squeeze any sort of misleading or false or potentially misleading or false campaign activity into the last week or so, or a few days before an election, because there's that way there's no realistic opportunity for a meaningful retraction.

He thought there's potential the way the laws are now for the last seven days or so worth of campaigning to have more of a risk of false material, because it's unlikely that the electoral commissioner can respond within that timeframe. The commissioner has to go through due process where they'd be looking at the material, asking the people who might've been quoted or, or attributed quotes to asking them if they made those quotes. And then they have to give a reasonable timeframe for response. So he could understand how it takes time for the, for, for that to, that process to happen, which is why Mr Tyrrell is a fan of the crowdsourced community notes type of approach rather than a heavy handed bureaucratic approach.

Mr Tyrrell would support the TiPA laws as they stand in terms of the narrow scope, but increasing the penalties. He thought the scope is right, but the penalties are insufficient or remedies are insufficient to deter that behaviour.

Mr Tyrrell did not think that the operation of truth in political advertising laws changed the tone of electoral advertising content or campaigning tactics.

## **Leigh Cox**

### **Chief of Staff to Thomas Emerson MP, campaign director Independents for Canberra**

Leigh Cox was the campaign director for independence for Canberra, which fielded 20 candidates in the ACT election held on the 19th of October. His role was to coordinate key pieces of information to each of the candidates who were themselves effectively running independent campaigns. But as part of that, he was also the conduit for a range of administrative aspects of it, and that included engagement with Elections ACT when that was required and on two occasions specific engagement with Elections ACT regarding the Truth in Advertising Laws, where the Independents for Canberra chose to make a complaint on the basis of what we thought were misleading comments.

During the course of the campaign, the party in government at the time, who still is in government, the ACT Labor Party, ran a series of television commercials and social media advertisements which said a vote for an independent risked individuals' ability to access abortion services and euthanasia. The ACT has a voluntary assisted dying scheme that's coming into effect and the Labor ad said was that the Canberra Liberals have always had to rely on an independent in order to form government. So if you vote for an independent you're risking a move away on abortion.

Mr Cox stated that in actual fact, the first time the Liberals came to power, it was with a minor party. It wasn't with any independent. So it was explicitly untrue that the Liberals always had to form government with an independent, so on that basis they chose to make a complaint to Elections ACT.

The Independents for Canberra made that complaint to Elections ACT at three and a half weeks out from the election and 24 hours out from the election date they received a notice saying that the Commissioner found that the complaint was insufficient that it was not materially untrue, and that an individual could infer that a minor party is very similar to an Independent therefore the difference or the claim wasn't considered to be sufficiently misleading to warrant any further action.

Mr Cox noted that they were disappointed because one, they got that advice on the day prior or two days prior to the election, which meant they had no recourse. Mr Cox stated that he would have challenged that, but ultimately decided there was really no point because the election was the next day, and they've been running the advertising and the job was done at that point. He considered that the actual outcome defeated the purpose of a truth in advertising law, as it was untrue but the Commissioner looked at this very grey area and said well you know someone could infer a minor party is the same thing as an Independent even though that's just not true.

Mr Cox is very supportive of TiPA laws, and he stated that Thomas Emerson is very supportive of the laws in principle, that we're doing something about misinformation.

However, he raised issues around the implementation of TiPA laws. For example, if you make a complaint, you need a rapid decision to be made. He thought that they should have been notified a short time after having made the complaint, and stated that it's being bureaucratised or handled in such a way to not ruffle feathers.

Mr Cox worked on the election in 2016, but as part of a different group. He said there was still a lot of fear-based rhetoric out there in the 2024 election, and there was no material change in the tenor of political debate. Mr Cox stated that the practices within the Independents' offices did not change in terms of electoral campaigning or anything.

He noted that the 2024 election is the first time the Independents for Canberra group has been around, so it was the first campaign, and they took their truth very seriously, so often it provides direct evidence in the claims that they made. 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.

Mr Cox stated that every day, a volunteer in the party would do a media scan to try and understand you know the daily activities of their political opponents, and look at all the media and social media and videos. Mr Cox stated that most of the ads contain positive constructive media based on material, but occasionally you would see an attacker or a statement made, and depending upon the threshold of the issue in question, the party might have a conversation about it and in that particular instance he referred to above, they made a group decision to make a complaint.

Mr Cox stated that the Independents had a very limited budget, so they didn't put up many ads. They put up a couple of videos about the group. But they were not making claims about other parties, and it was very positive-driven, about Canberrans wanting better representation, and a lot of material about the group. They also did a couple of other videos that tried to help explain the model of how those individuals came together. They didn't run ads that made accusations against their opponents, and instead chose to run a campaign based on the ethos of the vision of the group primarily.

Mr Cox questioned the resources the Electoral Commission has to apply those laws in a fair and equitable way. He considered that the laws are fine, but they would have expected in their case to have had an outcome quickly, and that it was not right that people should find out a few hours before an election whether a complaint that they made many weeks prior was true or not, as it gave them no recourse and allowed that group to continue running those ads. Mr Cox stated that would have been very different had they had more resources internally.

In terms of whether it is harder for Independent candidates or groups to comply with truth in political advertising laws or make use of them, Mr Cox stated that Independents aren't all the same, and they had a lot of structure around their group and we set up a code of conduct and their culture and our way of working was good insofar as candidates actually used each other to check when they wanted to say something or do something. They had a couple of candidates who wanted to make an announcement, and those people said to other candidates, "heads up I'm going to do this tomorrow what do people think?" And that two-way interface was really positive and allowed people to go, "have you thought about this" or "have you thought about that". So that worked really effectively. All sorts of people will choose to run in an election, and Mr Cox didn't think it was any better or worse than a party. Parties might have more rules, but he thought they've got more to lose, as they're the ones that have the big money that are going to run the big ads, and they've got skin in the game. More often they're the ones trying to run the type of campaigns that might try to label the other person as something, so by virtue of who they are sometimes they're the ones that will want to run material sometimes that is questionable ethically.

Mr Cox thought that the scope of TiPA laws is right. From a practical perspective, if you were to expand it to opinions it would become impossible and very difficult to comply. He also didn't think the government really should be in the place personally of inhibiting someone's right to have an opinion, or limit a person's ability to express themselves fully.

Mr Cox distinguished this from statements of fact and deliberately misleading someone to garner a positive electoral outcome, and thus concluded that the scope of TiPA laws is adequate.

Mr Cox would recommend that the Commission be resourced properly and be provided with additional funding. He also considered that the Commission should explain to the community how they might be able to make a complaint.

Mr Cox thought it was right that the Electoral Commission are the ones to manage TiPA laws, as they're the ones that manage the electoral process across the board for the ACT, so he thought

they're the ones that need to kind of carry the mantle and be given responsibility for considering the integrity of the election broadly, and that includes truth in advertising.

Mr Cox suggested that there could be changes to the law specifying the time frame by which the Electoral Commissioner has to respond. He noted that particularly where there were potentially egregious ads that may be misleading and if a party is entitled and has funding to run an ad for a prolonged period of weeks, it is almost too late, as the message is out.

Mr Cox stated that for weeks right after the campaign people would come up to one of the Independent candidates and ask about their stance on abortion, and that was a common question. He stated that he had no doubt that that was as a result of the type of advertising that was run. So it shouldn't be the case that you find out a couple of nights before an election whether or not an action is going to be taken on what you've claimed to be misleading. As such, he considered that truth in political advertising laws in the ACT were working sub-optimally.

Mr Cox did not think that the ACT Electoral Commissioner's role in enforcing truth in political advertising laws has affected their reputation for impartiality.

Mr Cox noted that unintended consequences from the enforcement of truth in political advertising laws in the ACT with the status quo approach is that parties might be emboldened to continue doing what they're doing if matters aren't being taken seriously, and if people catch on to the process, then people will just continue to potentially mislead the pack.

Mr Cox stated that there's always a possibility any law could be weaponised by one group over another, but he didn't see any evidence of weaponisation or politicisation of TiPA laws in the ACT election, but by and large people were aware of it.

In terms of the effect on free speech, Mr Cox stated that people are free to express their opinions, and he didn't think people should be allowed to deliberately mislead the public, and if you consider the nuance that it doesn't actually inhibit anybody's ability to speak their opinion, it just means that they can't be presenting mistruths and trying to influence an outcome to garner legislative power, which actually goes against the intent of a healthy democracy.

Mr Cox thought overall the fact that TiPA laws exist is a good thing, because the intent of the laws is to keep people accountable to the material they're intending to convey to the public, and that should mean better integrity and a better-informed public who can make a decision at the ballot box in whatever way they want to, but have the correct information.

Mr Cox did not think that truth in political advertising laws have been detrimental or led to suboptimal outcomes in any way.

## 6.3 Interviewees from Other Jurisdictions

### **Paul Erickson**

#### **Labor Party National Secretary**

Paul Erickson is the National Secretary of the ALP. He has two roles: an administrative function where he runs the national secretariat of the party, which is attached to the Labor Party's national executive and organises the Labor Party's triennial national conference. He is also the campaign director in federal elections and related electoral events like by-elections.

Mr Erickson has been doing this role for five years, and was the campaign director in the 2022 election. And before that, he was one of the Labor Party's assistant national secretaries for five years preceding his appointment from 2014 to 2019. In that role, he worked on the 2016 and 2019 federal elections as Labor's director of target seats.

The Labor Party supports truth in political advertising laws and has had a commitment in their platform to introduce a truth in political advertising regime federally since the Labor Party's 2021 conference. The Special Minister of State Don Farrell is developing a bill that he intends to introduce.

The federal Labor Party advocates for the introduction and application of truth in political advertising.

It is the Labor Party's view that there are two reasons that a truth in political advertising scheme is necessary at the federal level.

First, the Labor Party thinks that having an independent authority who is able to mediate and arbitrate disagreement about whether people are telling the truth in a campaign is important to stamp out intentionally misleading advertising and campaign activity.

Second, the Labor Party thinks that if there was some truth in advertising, political advertising authority who was empowered by law to make sure that the claims people were making in their advertising were true, that that would give the public more confidence that when they see campaign material during a campaign, that parties aren't just lying or misleading them because there is some test that they've had to meet in putting together their campaign material.

Mr Erickson noted that it is very important that the detail is gotten right. And the first principal question that he thinks needs to be resolved and be made very clear in the bill that the minister puts forward is who is the authority that's responsible for enforcing truth in political advertising. And how does that role relate to the existing functions of the Australian Electoral Commission and of the courts in enforcing the provisions of the Commonwealth Electoral Act?

Mr Erickson noted that there are interesting questions about what sort of penalties people should pay, where if they're found to have misled people in their campaigning, either inadvertently or intentionally. He thought that we wouldn't want too draconian a regime, but we'd also want penalties in place that are significant enough to act as a real disincentive to people when they're campaigning to not, in bad faith, mislead voters.

As to which body might be the most appropriate arbiter for truth in political advertising laws, the first question is whether it is the Electoral Commission or whether it's some new or some other institution. Mr Erickson personally does not have an opinion on that, and noted that it was something that the minister and the parliament wanted to work through.

Mr Erickson thought that truth in political advertising laws would have a beneficial impact at the federal level on two levels where we've identified what the purpose of the objective is.

So first, it would stop parties and political actors from intentionally misleading voters. And the second benefit would be that it would give the public greater confidence that when they see advertising material during a campaign, that it meets a certain standard in terms of the truthfulness of the claim to containment.

Mr Erickson stated that there were obviously some potential pitfalls that need to be avoided, and this is where I think the detail of the drafting will come into things. He noted that we wouldn't want to see legitimate political debate be stifled by the prospect of penalties for people making claims that they believe are legitimate and within the bounds of the cut and thrust of robust political debate.

Mr Erickson also stated that there is the potential when you create an independent body and you invest them in power and authority to do a job like this, it's important that they enjoy the confidence of actors across the political spectrum who are engaged in campaigns. And so Mr Erickson thought that one potential downside could be the politicisation of this process where people might come to believe or claim that decisions made by an independent authority are not unbiased and are actually political in their own nature. As such, Mr Erickson considered that that's where the design of the scheme is really important because you want to set very clear parameters about what it is that an independent authority is looking for and what they're examining and what tests they apply and then empower them to do that job properly. But you don't want scope creep or mission creep where that starts moving into more subjective questions about policy or about the different arguments that I think legitimately parties put forward in an adversarial system in campaign.

In terms of penalties, Mr Erickson noted that in principle what you want are sanctions and penalties that act as a genuine disincentive and prevent people from knowingly engaging in false arguments in bad faith without being so onerous as to actually stifle free speech and have people withdraw from the political debate when they actually feel that they have something legitimate to say.

Mr Erickson thought that truth in political advertising laws were not adequate to capture the activities of modern digital campaigning. He noted that we shouldn't think that they're a catch-all or so that they're a one-size-fits-all solution to the challenges that come from digital campaigning.

The obvious point to make about truth in political advertising laws is that they will apply to all of the formal actors who are engaging in the system, running as candidates, registering as political parties, authorising in particular bar about what standards you expect from any job. The opportunities that digital campaigning represents to fly under the radar and spread misinformation or disinformation online without putting their own name to it and without being accountable for what they're doing or what they're saying. And obviously if they choose to operate in the darkness, then they're not going to be captured by a regime like that, but the problematic nature of their behaviour will still be there.

So I think that's always something worth keeping in mind when we think about how we regulate political campaigns, because you have to have a set of rules, but not everyone follows them.

Just as we have an authorisation regime in in the electoral act currently, if we were to introduce a truth in political advertising regime, by definition it will be those who have chosen to formally engage in the debate and nominate as candidates, register as political parties, authorise their materials would be captured by that regime.

And there is always the risk that there's another set of political actors out there who don't engage formally, who fly under the radar, who might spread misinformation online, who might engage in bad faith campaign activity. And if they choose to do that under the radar, their activities will not be captured by this regime.

Mr Erickson noted that a good example of that is the lie that was spread online in 2019 that Labor was going to introduce a death tax. No one ever put their name to that claim, it just spread via the algorithm on Facebook and on Messenger and that experience is part of the Labor Party's motivation for wanting to see truth in advertising laws introduced.

Mr Erickson stated that if that activity was to occur today, his guess is that the people behind it would simply not put their name to it and so would not find them and would not engage formally in placing advertising and so therefore they wouldn't be captured by this system. So it is never going to be a sort of comprehensive solution to all of the challenges that are posed by the nature of digital campaigning.

Mr Erickson noted that we see more of that behaviour of spreading disinformation without identification today because digital technology enables it than we did 15 or 20 years ago in the pre-digital era. But he stated that we shouldn't overstate its significance, and he thought that the vast majority of people make up their mind on the basis of their own assessment of the information that's out there and how the different choices on the ballot paper align with their values and interests.

And so whilst that bad faith behaviour is more prevalent today than it was 20 years ago because technology enables and allows it, it's not the dominant force in shaping voting behaviour or where people choose to put their support come election time. It's a factor but it's not the most significant factor.

Mr Erickson stated that the Labor Party is always vigilant about what claims other people are making, and considered that Clive Palmer and the United Australia Party in the last two electoral cycles made some misleading claims and stand out as a particularly malign influence, but he wouldn't single out any of the other parties as I think having a pattern of behaviour that is as problematic as that that we've seen from Clive.

In terms of the process for vetting political ads for the federal Labor Party, ads that are placed on broadcast media like television and radio need to go through a process called CAD, which is essentially like a risk management insurance mechanism that the TV and radio broadcasters make

you go through to ensure that you've validated the claims that you're making in your ad. They seek substantiation of any claims that are made in the ad, because our advertising agencies will often have to come back to us and ask questions that have arisen through the CAD process. So that's very much an industry standard that is enforced by the broadcasters. Interestingly, there's no equivalent standard that's enforced by digital platforms.

And then the federal Labor Party has their own internal processes to make sure that they are happy with their ads and that stand behind the claims that they make, and to ensure the ads are effective. And then the Party Secretary has to place their authorisation on the material so that they are accountable to the public for being responsible for it. The Electoral Commission enforces the authorisation requirements in the Electoral Act.

The federal Labor Party might have some people from our policy team and our legal team look at ads to make sure that the claims that we're making are factually correct, and to make sure that we're not engaging in any unnecessary legal risks. And then the campaign director will obviously have a view about wanting the ads to be politically very effective. And there might be some research done by the party to maximise the political impact, but it's very much done behind closed doors. The federal Labor policy team and clearance team would be careful to make sure that our ads are accurate and that there's a basis to the claims that we make. The party officials rather than the politicians run this process.

The federal Labor Party would communicate to their candidates what sort of standards and what they would expect them to observe in social media posts and what sort of quality they would want their social media content to have. But it wouldn't be possible or practicable for the party to vet every single social media post.

Mr Erickson thought it is possible in principle to achieve timely retractions within an electoral campaign period. He noted that it would really depend on the preparedness of candidates and parties to engage and on the level of resources that they're responsible for.

Mr Erickson's impression is that truth in political advertising laws in South Australia work well.

Mr Erickson's impression from afar is that administering truth in political advertising laws has not affected the South Australian Electoral Commission's reputation for impartiality. And he didn't believe that they are seen as any less impartial than the other electoral commissions, but he noted that he hasn't had a great deal of experience in state elections in South Australia, so it's not a strongly informed view.

Mr Erickson considered that there was the potential for unintended consequences from these laws, and that's where he thought getting the policy design right is really important.

He considered that there's an inherent risk that political parties may weaponise truth in political advertising laws as a political tool against their opponents, and that has to be weighed up. But his view is that the benefit from the introduction of truth in political advertising will outweigh that risk.

Mr Erickson did not think that truth in political advertising laws would inherently have a chilling effect on free speech, but there is the risk that they can, and managing that risk should inform policy design.

Mr Erickson was of the opinion that the South Australian model can be adopted in larger jurisdictions like the Commonwealth and there's no reason why it can't.

He thought that the laws should apply to paid advertising, where that paid advertising includes electoral content, and that should be blind to what platform that advertising is being placed on, or who is putting forward the argument in a paid advertising format, whether it's a political party or a third party.

Mr Erickson noted that from time to time he had seen third party campaign material that has been misleading, which is why it's important that third party campaign should be captured by, and should have the same standards applied to it.



Mr Erickson was of the opinion that the digital platforms as publishers would take a lot more responsibility for what content is published and shared on their platforms and for how that's promoted. In the campaign, there's always a robust dialogue between the parties and the digital platforms when parties see things that they've published that they believe are not appropriate and should be taken down. And the quality of the responses from online platforms can vary. The Federal Labor Party thus engages directly with social media platforms and the platforms' responsiveness has varied.

## **Nathan Rees**

### **Premier of New South Wales 2008-2009**

Mr Rees begins by distinguishing between different kinds of political advertising. There is a difference between the funded material which candidates are handing out and what appears on a television screen. In terms of mainstream media and social media that is not generated by the candidate and their supporters, Mr Rees thinks that truth in political advertising laws should exist. Material generated by the candidate is more difficult due to enforcement issues.

There are also issues about the contestation of truth and who is the designated arbiter. Many electoral commissions do not have the ability to properly determine truth in political advertising. It is unfair to require someone to apply a decision-making matrix to truth and much of it is retrospective, especially in social media. Mr Rees observes that the South Australian laws are quite narrow and apply only to statements of fact, not opinions or predictions. But, as demonstrated in the United States, people say we have 'alternative facts' and people can be selective with data. That makes the task of adjudication difficult for the Electoral Commission.

The big issue is that major media companies have no interest in getting rid of political advertising or having truth in it, because it is a major revenue stream. They will fight behind the scenes between election campaigns to ensure that advertising continues and do not care whether it is true.

There are a few sanctions available in South Australia. The one that is most commonly used is retraction, where the Electoral Commissioner asks the person to retract. The person normally retracts, but if they refuse, there may be prosecution after the election. Prosecution is not done often because compliance is good.

Determining what is true in politics is difficult. Mr Rees states that it should not be up to a bureaucrat to determine that. He would prefer to set up a body separate from the Electoral Commission, as they are already busy trying to run elections and do not need to be politicised. There is a risk that an aggrieved party can accuse the Electoral Commission of being politicised if it disagrees with a decision.

On the margins, Mr Rees considers that truth in political advertising laws have a beneficial effect. But the issue is that when people are fearmongering, the determination of truth is complicated by many factors. The extent to which something is true may not be able to be proved empirically, so many things are probably not caught under the ambit of truth in political advertising laws. The laws will still serve a political effect, but only on the margins. Political parties, particularly when in opposition, will play to people's fears.

Mr Rees cannot say that truth in political advertising laws have a detrimental effect, except to the extent that a lot of power is centralised in a particular body such that politically neutral bodies may be seen to act in a partisan way. A rogue operator in the assessment process is a problem.

Mr Rees has no concerns about introducing truth in political advertising laws but does not think they are effective. They are also inadequate in capturing the activities of modern digital campaigning. For example, the regulator cannot capture untrue political advertising being generated offshore. There are emerging nefarious issues with fake AI-generated images of politicians and no single regulator will be able to control it.

The issues would go away if all political advertising was gotten rid of, except for how-to-vote cards and other materials handed out by candidates or supporters in their own electorates. The centralised party machine could come up with some of the material but allow the candidate to distribute it. Every time there is an election, parties race to raise funds to put ads on air. The advertising is directed at the people who are least engaged. Mr Rees states that one strategy to combat disinformation in elections is to ban political advertising on mainstream media. Political advertising costs time and millions of dollars. Mr Rees does not see the value it adds to the political process when it is targeted at those who are the least engaged.

Political parties are always going to behave in a concerning way in relation to disinformation. Mr Rees can see an argument for self-regulation, where parties agree what can be done in a political campaign. That might involve signing up to a voluntary code of conduct. Third party campaigners should also be subject to transparency, but it may be difficult to capture them with truth in political advertising laws due to the costs of enforcement.

Mr Rees thinks that, often, it is not possible to achieve timely retractions during an election campaign period once the damage is already done.

He also sees the potential for compromise to the South Australian Electoral Commission's reputation for impartiality. There may also be unintended consequences from the enforcement of laws, such as a perception that the Electoral Commission is biased. If the Electoral Commission successively ordered the retraction of one political party's material, that might indicate bias.

Parties probably will not use truth in political advertising laws as a political tool, unless there was an egregious breach. The average politician will rely on the electorate to make their mind up.

Mr Rees does not consider that truth in political advertising laws will have a chilling effect on free speech.

Remedies and sanctions for breaches of truth in political advertising laws should be proportionate to the breach. The appropriate remedy or sanction depends on the breach. A serious untruth could be covered by defamation laws, but they may be problematic because the person still loses money and reputation. A serious untruth could also be treated as a criminal offence, but there may still be grey areas.

Mr Rees does not support the existence of political advertising, but may support truth in political advertising laws depending on the nature of the law. He proposes to ban political advertising to the extent that it is constitutional. Election campaigns should be publicly funded and there should be donations as well. South Australia is looking to ban donations. Large donations undermine confidence in the democratic system. Mr Rees is in favour of caps for donations.

It is difficult to enforce regulations on misinformation and disinformation on social media platforms.

Mr Rees thinks that there will not be any issues in adopting truth in political advertising laws in larger jurisdictions. He has been impressed by the way that governments have introduced and applied laws to X and Facebook.

## **John Thwaites**

### **Deputy Premier of Victoria 1999-2007**

Mr Thwaites does not have a concluded view on the desirability of introducing truth in political advertising laws in Victoria and it's not a topic that he has really investigated deeply. It's also a topic where he sits on the fence and wants to see evidence one way or the other. 10 years ago Mr Thwaites would have been opposed to legislation for two reasons. One, he didn't see a lot of evidence of gross misinformation in election campaigns and I haven't seen a lot of evidence that this sort of law is really needed.

But more recently Mr Thwaites has been really concerned about what we're seeing in the United States and the fact that just gross lies which we've seen with Trump and that type of politics seems to be so salient. It seems to work and there's no guarantee that we won't see that behaviour imported into Australia.

The other factor Mr Thwaites was influenced by towards favouring legislation is the growth of social media and the impact that that can have through total misinformation. Whereas before there was a filter of the mainstream media and even the advertising industry where blatant lies would at least be questioned, whereas now with social media you can go on and say anything. So while Mr Thwaites didn't see disinformation in elections in Australia as a huge problem now, there's no guarantee that it won't become more and more serious in the future.

And along with the growth of social media we've seen this fragmentation of politics and people getting all their information within an echo chamber and once again that further enhances the ability of misinformation and disinformation to play a role.

Mr Thwaites noted that truth in political advertising laws could be a dampener on free debate and also become a political tool in itself. But he is leaning towards supporting the legislation now because of the rise of Trumpism and disinformation and particularly through social media.

Mr Thwaites stated that he was definitely in favour of legislation in relation to deep fakes because there can be absolutely no justification for that. That's not about free speech, it's total fraud and the biggest problem there is how do you actually enforce it though when these deep fakes are often coming from bots on Facebook or Twitter and I don't know actually how you stop that unless you put the prohibition on the platforms themselves which of course becomes really challenging because the platforms object to any form of regulation. But Mr Thwaites thought we should be trying to regulate the social media platforms.

Mr Thwaites was of the opinion that 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. He thought that those words "demonstrably false" are really useful and that means if Trump is saying Kamala Harris is mentally unstable or something like that well that's demonstrably false. But if it's much more in the realm of normal political debate about what one or other parties are going to do Mr Thwaites thinks we should keep electoral commissioners out of it.

Mr Thwaites did not think truth in political advertising laws are adequate to capture the activities of modern digital campaigning, because if it's limited to just political advertising then you're not going to cover deep fakes for example that are put out by bots that you can't trace so I think there's another area apart from political advertising which should be looked at.

He thought deep fakes are a good start because there can be no justification around that whereas statements that are made by people that might be crazy or untrue or whatever on social media I think we should let them go through to the keeper but deep fakes which purport to be something that they're not I think should be regulated.

Mr Thwaites stated that his general feeling about the law of defamation is that we should allow more free speech and have less advantages to the plaintiffs that we have now so he wouldn't want to be making defamation any stronger.

Mr Thwaites considered that there needs to be really clear regulation of misleading conduct around electoral processes so there were cases of alleged conduct of people purporting to be or looking like AEC billboards in elections and trying to influence people in that way. He argued that we have to be really careful to protect the independence of the electoral commissions, because that's the great benefit in our democracy compared to the United States that we have a totally independent electoral commission.

As to who should be enforcing truth in advertising or misleading advertising, whether it should be the electoral commissions or some other tribunal, Mr Thwaites would probably favour some other tribunal

because he didn't want to see anything that might put our electoral commission too much in the political fray.

Mr Thwaites has sat on the fence and is leaning towards favouring truth in political advertising laws, and is of the opinion that on balance they would have a beneficial effect partly as a prophylactic against the sort of conduct that we've seen with Trump in the USA that it would make it more difficult for those sort of approaches.

Mr Thwaites considered that are two main risks of truth in political advertising laws.

The first risk is that they do interfere with ordinary political debate, particularly around those typical claims that parties make about what other parties are going to do if they get into government and that could have a dampening effect on what is said in elections and therefore reduce free speech and political debate. The second possible negative is around involving the AEC or the VEC in the political fray if they're the arbiter of these decisions.

Mr Thwaites considered that regulation it should be limited to statements of fact that are demonstrably untrue. It should be limited to political parties because if we were to try to stop any third party or person from saying things, where do you stop? But that's with one qualification that deep fakes wherever they come from should be prohibited.

For example, on deep fakes it's misleading and deceptive conduct where something purports to be something that it's not. So it's a video of Biden saying something when he didn't say it, which should be prohibited totally. But if you purported to be the AEC saying something or you're purporting to be another organisation that is essentially a fraud. So it's not political debate, it's not you're making a comment about something. You're deceiving people into believing that someone's saying something that they're not saying and Mr Thwaites thinks there should be some regulation around that.

Mr Thwaites is of the opinion that social media platforms should be regulated in respect of disinformation if it's deep fakes. But if there's some anti-vaxxer that wants to say vaccines are causing deaths, he would be very cautious about having any regulation about that.

Mr Thwaites considers that the sanctions and remedies for breaches of truth in political advertising laws as exists in South Australia are adequate, because the parties are following the law and the evidence is that they're very careful not to breach the law.

And that's because the biggest sanction is not the fine or whatever the sanction in the law is. It's being found to have misled the public or given disinformation is politically damaging. So that's effective.

But Mr Thwaites considered that this also indicates why it's necessary to distinguish between this sort of legislation which covers political parties and any attempt to regulate more broadly non-political parties. And so that's why something like deep fakes may need much more heavy penalties than the sort of penalties that are in this legislation because a fine probably isn't going to stop some of these types of people from doing it. And the most effective sanction will be to require the platform to remove it.

Mr Thwaites noted that it would be hugely difficult to achieve enforcement for social media companies, such as with Twitter and Brazil, although Brazil prevailed eventually.

This is why Mr Thwaites considers that the legislation needs to be extremely carefully and narrowly drawn because if you had very wide-ranging regulation then the social media platforms will have a lot of justification in saying that you're trying to impede free speech. They'll be the champions of free speech. But if you're narrowing it down in a very specific way, it's a lot harder for them to do that.

Mr Thwaites noted that South Australia would seem to indicate that it is possible to achieve timely retractions within an electoral campaign. And the most important impact seems to have been that it's prevented misinformation rather than requiring misinformation to be retracted.

Mr Thwaites is sure that political parties will weaponise truth and political advertising laws as a tool against their opponents. He considered that keeping the remit of the laws very narrow is probably the

best way, because the broader it is, the easier it is for a party to weaponise the legislation. So, for example, if you had the prohibition against misleading statements or misleading and deceptive statements, the other party can say just about any statement is misleading and deceptive. But if you have to show that it's a statement of fact that's demonstrably false, then that makes it less likely that it can be weaponised.

Mr Thwaites suggested that there potentially should be some ability in the legislation for the tribunal or commission to dismiss a claim as frivolous and make some sort of order of costs on that basis, so that if frivolous or political claims are made, then there's some sanction against the claimant. There should be an ability for quick dismissal with costs by the tribunal.

Every day in the American election, there are many of statements made that are concerning, but Mr Thwaites can't recall anything that in his career was particularly misleading or deceptive that had any impact. So, for example, the Liberal Party would say about the Labor Party when they're in opposition, that Labor would send the state broke, for example. And that is a political statement. Labor would say it's very untrue, but Mr Thwaites wouldn't want to try to legislate against that. That's part of the political argy-bargy and people can accept it or not.

But if someone had said, John Thwaites secretly owns a property which he's not paying tax on, and here he is calling for a new tax, and that was untrue, then Mr Thwaites thought that a quick withdrawal of that would be appropriate. But he had never experienced a direct lie like that, and he didn't think it's been a big factor in Australian politics.

In the Victorian Labor Party, because there's no truth in political advertising legislation, political ads are vetted for defamation and that would be the only legal sanction. It is rare that lawyers are brought in at all. But certainly there's an awareness that defamation is a real risk if you were to say things in advertisements which were potentially defamatory.

The process of running political ads is run by a small group, the campaign team, which is usually just the leader and maybe the deputy leader, the state secretary and a couple of campaign team members who might be ministerial advisers of experienced campaigners. Most politicians don't get involved in the advertising. It's a pretty ad hoc system, and it varies from party to party and election to election.

## **Chris Rath**

### **NSW Shadow Special Minister of State (2024), Member of Legislative Council (2022-Present)**

Mr Rath is concerned with truth in political advertising laws that are heavy-handed. While he does not oppose truth in political advertising laws, he would not support anything that stifles freedom of speech and political debate, which may happen if truth in political advertising laws are drafted broadly.

For example, Mr Rath does not believe that legitimate statements of opinion should be censored. An opinion may include a claim that a party is a better economic manager or better at managing our health system. Mr Rath considers that these statements are matters of opinion that should not be determined by the electoral commission, a court or other agency or tribunal.

Conversely, deliberate misinformation about the electoral system might appropriately be targeted by truth in political advertising laws. This might include statements that voting is unnecessary, incorrect instructions about numbering boxes, or saying that an election day is on a different day than it is.

Mr Rath is concerned that truth in political advertising laws, if introduced in New South Wales, would be overly restrictive in their implementation. He prefers a lighter touch compared to a heavy-handed approach.

Truth in political advertising laws may be beneficial to address the electoral system, targeting misleading statements about the nature of democracy and the political system. In terms of facts that are not specifically about the ability to vote or the process of voting, Mr Rath is of the view that determining truth, and the distinction between truth and opinion, is difficult. It should almost be left up

to political parties and the media to self-regulate or hold more extreme views to account through public debate.

Although Mr Rath expresses that he is not an expert in truth in political advertising laws in South Australia and the ACT, Mr Rath concludes that such laws seem to have worked. He understands that they have been in existence for a long time in South Australia and there have not been any grave concerns about their operation. The laws are comparatively newer in the ACT, so the test for the effectiveness of truth in political advertising laws will likely be the upcoming election.

Another potential issue with truth in political advertising laws is the risk of bogging down the electoral commission with spurious claims. The electoral commission should not deviate from its important functions because of political parties and MPs constantly referring each other to a commission to determine truth. Truth in political advertising laws should not be weaponised by parties so as to force the electoral commission to mediate petty disputes about matters of policy.

Mr Rath has run campaigns for individual seats before, including in the 2015 state election. When running a local campaign, campaigners often get access to an opponent's material. The head office also has to approve material and the local campaign is consulted about the material. If, for example, a flyer is being distributed in a local seat that may be misinformation, there is currently limited recourse in New South Wales. The exception is if the material is particularly offensive. In that case, a referral to the electoral commission may be available. Otherwise, there are no available means to take untruthfulness further in the same ways that are available in South Australia or the ACT under truth in political advertising laws.

The current approval process for political advertising is based in accuracy but also in the effectiveness of the advertising in winning the greatest proportion of votes, and whether the advertising is on message. The head office does not want a local campaign to be unaligned with the state-wide or nationwide campaign. The central party may want a different approach compared to the local campaign. But most of the time, material is co-designed between the local candidate and campaign together with head office.

Ultimately, more authority lies with the head office than with the local campaign. Accuracy is a huge part of the approval process, and Mr Rath considers that it might hurt a political party more to be inaccurate and misleading than benefit that party, because the party will be judged more harshly in the media for spreading lies. The risk therefore outweighs the benefit.

Mr Rath observes that it would be impossible for enforcement to target every single comment made by individuals on social media in the context of modern digital campaigning. It is much harder in a digital age where anyone can post, compared to an age before social media where all advertising was official, done through TV and radio, and authorised by political parties.

A politician's own Facebook page also tends to be authorised by the politician themselves. There is less control over social media than over traditional media, as the head office does not approve every single post that an MP makes. There are expectations around posting but social media posts are approved by the politician themselves. Mr Rath notes that in an election campaign in New South Wales, a Twitter or Facebook biography has to expressly refer to the politician's authorisation.

Although this is a process of self-approval, there are expectations that what is posted is on message. A message might be up temporarily if the head office is unhappy. The head office may also call to request that a post be taken down or to issue a reprimand. Part of this is accuracy, and there is some self-regulation in this space because of the potential reputational risk of inaccuracy.

Mr Rath also distinguishes between spin and lies. Most things that politicians post have political spin, but Mr Rath believes that few posts are deliberate, wilful lies.

In terms of sanctions or remedies for breaches of truth in political advertising laws, Mr Rath believes that, on the one hand, tough penalties are required for laws to be taken seriously, but on the other hand, tough penalties may be inappropriate. A fine that is too low could be viewed by a political party

as the cost of doing business. However, fines and penalties that are heavy-handed may be disproportionate to minor breaches.

Another issue is that the determination of whether a statement is truthful or untruthful could take place after the election, in which case it is completely ineffectual because the election has already been won or lost. Mr Rath notes that, if an ad is run on social media two days before an election, it is not subject to blackout laws and there is no way for the electoral commission or some other authority to effectively determine truth and remedy in that period of time. That may mean that parties run such advertising anyway because they may be more able to get away with it, and any determination would occur after the election.

Mr Rath considers that the ability to seek retractions is probably a good thing. It already happens in New South Wales, although it is not official law. There are many examples of people apologising when they do the wrong thing, and subsequently retracting or deleting their message. That is part of a self-regulatory process. Mr Rath does not know whether a commission is required to determine retraction because it already happens. The difference may be in getting an opposing party to follow that course of action, compared to, for example, a state director telling their own party to retract or delete a message. That ability is present to some extent through calling out the opposing party and asking for a retraction. Failure to retract in response to that would bear political consequences. Mr Rath thinks that it hurts a political party or candidacy more to stand by untruthful, misleading and offensive remarks than just to offer a retraction, apology or deletion.

Mr Rath is of the view that the electoral commission is the most appropriate body to enforce truth in political advertising laws, provided they are properly resourced. But an electoral commission cannot be expected to add further responsibilities on top of their existing responsibilities without an appropriate uplift in funding and resources, and very serious breaches would need to be determined by the courts. The courts could also hear appeals from decisions of the electoral commission. That being said, Mr Rath still questions the necessity of the laws generally, especially if they are too heavy-handed.

Mr Rath has concerns about the enforcement of truth in political advertising laws, including spurious referrals and weaponisation. He thinks that this already happens in integrity agencies in New South Wales, and particularly with ICAC. If truth in political advertising laws are introduced, Mr Rath prefers that they are more of a light touch. Mr Rath also thinks it is hard to stop the laws from being weaponised or misused, because political parties will use the laws as they exist. One potential option could be to make the process confidential so a matter cannot be publicly referred for investigation.

In terms of whether it is generally possible to achieve timely retractions within an election campaign period, Mr Rath believes that the open political debate process already achieves retractions to some extent. One other idea could be to have a hotline for an election day, where any breaches can be referred immediately to the electoral commission. The hotline could be accessed only by top-level election officials, such as state directors and senior campaign staff, rather than ordinary members of the public. Under this system, a deliberately misleading poster could be escalated to the state director by a volunteer at a polling booth, and the state director could raise the issue directly with the electoral commission. Mr Rath considers that damage can be done very quickly in the course of an election, and getting justice after the election result is no justice at all. Currently, there is only an ordinary electoral commission phone number, but Mr Rath believes that a hotline of this nature could be a way to address misinformation.

Although Mr Rath has not heard any grave concerns about truth in political advertising laws in South Australia, he speculates that this could be a sign that the laws are too light touch because many cases are slipping through the cracks.

Other actions or strategies to combat misinformation and disinformation in elections may include the Parliamentary Budget Office process, which occurs at a federal level and in New South Wales. The process requires political parties to put forward policies for costings to be independently reviewed by the Parliamentary Budget Office, who will verify whether amounts are accurate to prevent political parties from making up the cost of policies.

Mr Rath also refers to the need to review blackout laws, which he considers are not fit for purpose. While blackout laws prevent advertising in traditional media imminently before an election, there is nothing stopping politicians from advertising on social media in the same period. One issue with blackout laws is that there is an assumption that everybody votes on election day, where almost half of Australians are now voting early. A review should be done for blackout laws to consider expanding them to social media, although Mr Rath acknowledges that it would be more complicated to enforce on social media than traditional media.

Mr Rath believes that third party campaigners, activist groups and business groups should probably be captured by truth in political advertising laws. Equally, he considers this is harder to enforce. But such a scope might prevent a political party from setting up another entity or going to an existing entity to run advertising that falls outside truth in political advertising laws. In that sense, there should be some ability to capture third party campaigners.

Mr Rath's understanding of TV advertising is that it is vetted by both the Liberal Party and TV media advertising agencies, who would not want anything on their station that is deliberately misleading or advertising.

Mr Rath also notes potential unintended consequences of truth in political advertising laws, including the stifling of political debate and free speech, tying up too many resources of the electoral commission with spurious resources, and the difficulties of determining what is fact and opinion.

Mr Rath states that, in New South Wales, the concept of truth in political advertising laws probably only emerged for discussion within the Liberal Party in the last six months. Truth in political advertising laws are viewed as a relatively new or novel concept that the Liberal Party has not spent a long time debating. The Liberal Party may have to consider its position if Labor puts forward a discussion paper, bill or parliamentary inquiry, but there is no reason to have a political party position at this time. Truth in political advertising laws came up once in the Electoral Matters Committee's review of the 2023 state election in a tangential capacity, but have not achieved greater prominence.

## **Matt Phillips**

### **Acting NSW Electoral Commissioner 2024-Present**

Mr Phillips is impartial on the necessity of truth in political advertising laws so does not express a view on whether truth in political advertising should be regulated. It is a matter for government. But if government does proceed down that route, Mr Phillips has said that the Electoral Commission should not be vested with those functions without an understanding of the risks, impacts and necessary funding. Mr Phillips does not think the Electoral Commission should be the oversight body, but that it could be NCAT or some other Tribunal. The focus of the Commission should be on administering and regulating elections.

Mr Phillips stated that his agencies formal response to truth in political advertising was outlined in its submission to the current JSCEM Inquiry in to the 2023 State General Election.

Truth in political advertising laws and the resolution of complaints under those laws could divert resources, which appears (on face value) to be the South Australian experience. Mr Phillips believes that responsibility being assigned to the Commission would divert him from carrying out his statutory functions.

Mr Phillips is also concerned that by being an active party in regulating truth in political advertising, the Electoral Commission may be seen (unfairly) to have entered the political debate which could then compromise the Commission's impartiality.

There have been no attacks on the impartiality of the New South Wales Electoral Commission in recent elections.



The New South Wales Electoral Commission runs a disinformation register to combat disinformation in elections. There is a lot of social media listening and tools like the AEC. There is a stop and consider campaign in the media to make people think about the source of their information, which is running on social media and TV. The budget for the Stop and Consider campaign is \$400K – funded from a grant from the NSW Department of Premier and Cabinet.

The NSW Electoral Commission also benefits from its participation with the Electoral Integrity Assurance Taskforce.

Social media listening involves actively engaging with social media users. During a campaign, more communications people and social media people are hired. The typical response is very matter of fact – for example, in response to a claim by a sovereign citizen that you do not have to vote, the Commission responded that it is the law to vote in New South Wales and a person will be fined without a valid reason. The Commission does not engage in politics and is very matter of fact in its communications. Before campaigns, the Commission works on standard responses. New South Wales does not use AI tools but others are looking at AI now.

There are new technologies and approaches to ensure truthfulness in political messaging – Adobe's Content Authenticity initiative is an example. However, Mr Phillips is worried about AI and limited response mechanisms. There is space to investigate more powers because the Commission's ability to take action both during and outside an election is very limited, but other jurisdictions (see IDEA recent reports) seem to be implementing reforms which could inform policy development in NSW and elsewhere across the country.

The Commission meets with social media platforms before elections and have templated forms that social media companies receive. In the last election, (State general Election 2023) six requests were made to take down material and they were all effective. Sometimes people will go to other platforms such as Telegram, which is a closed network where the Commission has no influence or ability to view. Some ads are repeated there, but generally the response from platforms is good. There is also a protocol with the e-Safety Commissioner to take down material. A new offence has also been introduced relating to the harassment and intimidation of election officials, which arose out of a response to actions from sovereign citizens, fringe groups and conspiracy theorists at the State General Election in 2023.

Actions and strategies to combat misinformation or disinformation could include truth in political advertising if there is an independent umpire, but it tends to become legalistic. There are also concerns about weaponization of complaints. For example, in the recent Local government elections in NSW, the ICAC sent a letter to major political parties and candidates telling them not to weaponise ICAC during elections, including by making statements that a candidate has been referred to ICAC.

The New South Wales Commission's ability to engage with the community outside elections is limited because they have limited stakeholder engagement staff (1 ongoing employee). More needs to be done during intervening periods for civic education, and greater outreach with new migrant communities and other groups in the community facing additional barriers to participation to educate and inform them on the role of the Electoral Commission, and of the electoral process and to encourage greater participation.

A more appropriate body to enforce truth in political advertising laws could be the administrative tribunal in New South Wales, such as NCAT. Mr Phillips is worried about the time that would be required of the Commission and the potential for politicisation if that role were assigned to the Commission. He is uncomfortable with being drawn into the political debate, where a recommendation is immediately in social media, and believes that it could negatively impact integrity and impartiality. He is particularly concerned about the limited capacity to deal with issues, which diverts from effective administration of the election, especially in a jurisdiction such as New South Wales. The Commission is not sufficiently resourced to deal with many matters, including cybersecurity, staffing, licensing and maintenance.

Mr Phillips acknowledges that the Commission will fulfil its role if assigned a role in truth in advertising laws but outlined the considerable risks to integrity and the delivery of elections in this regard.

Mr Phillips is concerned that the laws are not keeping pace with AI and will not be able to counter AI during election events. The field is evolving to include deepfakes and social media, which is largely unregulated. It is important to make sure that messaging is appropriately authorised and that people can verify that information is coming from the Commission – examples from overseas were cited.

The Commission engages with X and Facebook during the election period but not other social media platforms. There is some work with LinkedIn but that is limited.

In New South Wales, Mr Phillips observes that parties are respectful of the political and electoral processes. There is no evidence that there is anything being distributed at the recent LGE or SGE that is misleading. Most material is on the disinformation register, which is constantly updated, and none of it has come from political parties, but has instead come from sovereign citizens and other groups/individuals.

Mr Phillips has noted that most of the disinformation comes from individuals importing anti-democracy rhetoric from US elections, sovereign citizens and other groups/individuals.

An unintended consequence of truth in political advertising laws is that the Commission will be politicised and may become part of the political process. Mr Phillips states that the Commission must remain neutral in these matters to enable it to deliver fair and impartial elections.

Mr Phillips has noted people are respectful of electoral processes, particularly established groups, political parties, political participants and third-party campaigners.

The Commission has been doing more with media and conferences to combat disinformation. People trust the Electoral Commission currently. But Mr Phillips warns that trust can be undone very quickly.

The Commission is also monitoring international developments in the electoral space pertaining to mis and disinformation and AI. These will be used to inform policy development.

Mr Phillips raised issues regarding sovereign citizens and other groups/individuals who have harassed electoral commission staff at the recent State general election in 2023. As a consequence, 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. It is a further offence for any person to publish or distribute (e.g. on social media) such a film or photograph.

Mr Phillips 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.

## **Sven Bluemmel**

### **Victorian Electoral Commissioner 2023-Present**

Mr Bluemmel has no clear view on the necessity of truth in political advertising laws. The Victorian Electoral Commission has previously stated in a previous parliamentary committee report that it does not seem to be the right time to introduce such laws. Mr Bluemmel considers there are good arguments both ways, but his strongest view is that, if there were such laws in Victoria, they should not be overseen by the VEC.

The reason for this is twofold. The first is that it risks politicising the work of the VEC, which would make it more difficult to deliver elections with impartiality and integrity. A claim about a breach of truth in political advertising laws is inherently political, and an outcome will make one or more parties

unhappy. If that outcome is determined by the VEC, the VEC may become an object of potential political attack. The second is that the work required to properly administer truth in political advertising laws would become particularly high in the lead-up to a major election. There would be a lot of pressure to resolve or make determinations quickly while maintaining a high-quality business. The ability for VEC to do so without compromising the quality of election delivery would be weakened by the VEC having to administer truth in political advertising laws.

Mr Bluemmel notes the spectrum of truth in political advertising laws, which extend from making a disprovable false statement versus a candidate or party's intention about what they would do if elected.

Mr Bluemmel thinks we do not have enough examples of truth in political advertising laws to conclude whether they would create a beneficial impact. They may conceptually be beneficial because misinformation is a real threat to the electoral system and democracy. But it is unclear whether truth in political advertising laws would lead to a higher quality debate and a more informed electorate.

There could also be negative effects, such as if the laws were regulated by an electoral management body. It could also distract important players during an election from the valid contest of ideas by tying them up in disputes about truth in political advertising laws. There is also a concern about misuse of the complaints process. Some concerns can be addressed through proper drafting and administration.

One way to address this may be to have a regulatory process that requires some hurdle before the full merit of a complaint is entertained.

A lot would also turn on the scope of the laws. For example, Mr Bluemmel notes that South Australian laws are deliberately quite narrow. He can see why South Australia began with a modest scale.

Sanctions and remedies also need to be an important part of the conversation, because their adequacy is critical to whether laws will achieve their aim. But if sanctions are too high, political debate could be unduly stifled. Retractions or injunctions could be appropriate for information about the electoral process and people's rights to vote. But Mr Bluemmel forms no view on what this does to the contest of ideas between candidates and parties.

A lot of proactive work is already done 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 are counted and why pencils are used. These claims were disprovable and VEC put information out there to disprove it. VEC also engages extensively with 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. 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.

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

VEC also asks social media platforms to take things down. 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.

Mr Bluemmel does not have a view on what alternative body could enforce truth in political advertising laws beyond the electoral commission. But he sees the potential policy argument and what such laws are trying to achieve.

Timely retractions within an election period may be possible depending on how the law is drafted, but it would be very difficult.

Although there have been some attacks on impartiality of electoral commissions globally, Mr Bluemmel does not think that those attacks have captured the mainstream in Australia. But 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.

Mr Bluemmel also notes that truth in political advertising laws could potentially have a chilling effect on free speech, although this depends on the scope and how the laws are drafted and what the sanctions are.

Mr Bluemmel states that the powers of the VEC in keeping electoral participants and workers safe are not sufficient. There should be sufficient tools to address disruption at voting centres to enable VEC to intervene. That may or may not be based on misinformation and disinformation, but this is a complementary area where more tools are needed.

Currently, VEC is not involved in instances of people astroturfing or producing deceptive material, unless the material talks about the electoral process. Online disinformation is addressed through various means, including through a misinformation and disinformation register.

## **Liz Williams**

### **Deputy Electoral Commissioner 2005-2021**

Ms Williams stated that if you had asked her 10-15 years ago whether TiPA laws were desirable, she probably would have said the campaign period was a chance for people to challenge positions and comments put forward by the various players and respond in time. It was part of the rough and tumble of election campaigning.

But her views have changed since seeing the power of social media in facilitating the rapid spread of information, and considering whether it is in fact realistic to pull something back in the space of a very short election campaign, like Victoria's 25 days. In addition, the fact that algorithms drive consumption, people may never consume information that responds to dis-information. If there is information out there that is presented as fact but is untrue, and that information influences voter choices and election outcomes, then something needs to be done.

A further consideration is the context that elections now involve public funding being used by some election participants for campaign purposes. It is unacceptable for public money to be used for advertising that is false or misleading in a material way. This should also be considered in terms of any response to the issue.

The best way to address the possible distribution of dis and mis-information is where Ms Williams is less clear. TiPA laws are one option but there may be other things that can be done including voter education. There are campaigns that the AEC and VEC and others have run in the lead-up to elections to increase voter awareness that material they are looking at may not be accurate.

While TiPA laws may be desirable, Ms Williams is concerned that challenges around ensuring effective enforcement can be addressed. It is a waste of time to introduce laws that cannot be effectively enforced. Ms Williams states that given social media is a significant vehicle for political advertising, questions around liability, responsibilities, responsiveness and identification in regard to authors and platform providers need to be worked through. For example, Ms Williams noted that gaining cooperation from social media platforms to respond rapidly to take-down requests would be necessary. Further challenges may exist where material emanates from external jurisdictions.

In terms of the right body to enforce TiPA laws, Ms Williams considered that it was arguable that the electoral commission is the right body because they are responsible for ensuring the integrity of an election. However, she ultimately concluded that the electoral commission may not be the right body for two reasons. First, regulatory intervention by an electoral commission during a fast moving election period may give rise to perceptions that question their impartiality. 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. Secondly, there may be capacity issues for electoral commissions in administering TiPA laws. While this is not insurmountable, larger numbers of staff with specialised skills than is currently the case would be required.

Electoral Commissions are often structured to keep a clear separation between election operations and the regulatory arm of the organisation. Even so, the fact that both arms report to the one commissioner may still not fully address this issue. Ms Williams strongly supports protecting the independence of commissions and the maintenance of high public confidence in election outcomes.

Noting the views of South Australian officials that the reputation of the SA electoral commission remains untarnished, Ms Williams expressed that this was positive. Electoral commissions could be appropriate adjudicators if they are well-resourced and have the capacity to deal with a growing number of complaints, while maintaining their reputation as impartial umpires. This may be more difficult however, in fast-moving election campaigns in larger jurisdictions.

In summary, Ms Williams supported the introduction of TiPA laws in Victoria or the Commonwealth, provided there are clear parameters, and they can be effectively enforced.

The scope of TiPA laws should be clear as a matter of enforceability, and capture false presentations of fact. They should apply to 'electoral matter'.

Ms Williams supports the Victorian definition of 'electoral matter'. This includes any material that is intended or likely to affect voting at an election including any comment on issues before the electorate.

Ms Williams also considers that TiPA laws should apply at all times. In reality, however, most activities occur in the campaign period, as complaints are most likely to arise then. Courts may be less likely to deem material as affecting an election if the election is temporally further away.

In addition, Ms Williams believed that false material, presented as fact, that relates to an electoral commission or election process should also fall within the scope of any TiPA laws. There were a number of such examples reported on by the VEC at the 2022 State election and many will be aware of the Dominion software issue in the US where statements were made that election software was rigged. It should not be lawful to undermine public trust in our electoral systems and election outcomes without supporting evidence.

As Victoria does not have TiPA laws, Ms Williams did not comment on whether the laws are adequate to cover modern digital campaigning or the scope of laws in South Australia and the Australian Capital Territory.

She nonetheless noted that social media is used more and more prominently in election campaigns today, and the ability to provide a variety of views to the same voter has become more challenging. Social media also complicates the question of liability and identification of the publisher, especially where there is no name or address linked to posts. It is also difficult to pursue corrective action within a short and fast moving election campaign period.

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. If participants who receive public funding are found to generate information that is untrue, there should be a remedy that is linked to public funding. Penalties need to be serious enough to be a deterrent.

When asked if TiPA laws pose a particular risk of political weaponisation, Ms Williams was of the view that political parties and candidates will always seek to gain advantage over their opponents where they can. Tying up opponents in responding to complaints or court actions might be one strategy, but this would not be unique to the introduction TiPA laws. There might be ways to minimise this kind of

behaviour, such as regulating vexatious complaints. It is in the public interest to have participants focussed on engaging with the electorate.

Ms Williams did not believe the introduction of TiPA laws in Victoria would have an impact on free speech given that free speech is about engaging in opinions, which people are free to do. TiPA should be confined to the publication of material that is presented as fact but is false.

Other ways to combat disinformation include voter education and regulation of AI generated material. A potential option could be a kind of certification to illustrate which material has been fact-checked. 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.

Designing a workable law is difficult. But there is an imperative to do so if electoral outcomes can be influenced by disinformation, including because of a lack of counter-messaging. Enforcement of TiPA laws requires that retractions can be issued to the same audience who received the dis or misinformation. For radio or TV ads for example, this would be at the same time if they were on prime time originally. This can be complicated by the short timeline of elections and early voting, where retractions might occur after somebody has already voted.

Ms Williams is aware that the AEC does not want to be involved in arbitrating TiPA laws. It is probably cleaner to not put electoral commissions in a position where their impartiality may be unfairly questioned. If there was another body, it would have to work very closely with the commission, but the separation might be useful. That said, a new independent body could also be open to perceptions of bias. Ms Williams could not identify any existing body that would be suitable for the role especially given that misleading and deceptive trade and commerce by the private sector is different from political advertising.

## **Chris Stone**

### **Former NSW Liberal Party State Director (reappointed in 2024)**

Mr Stone is fundamentally opposed to truth in political advertising laws because they paint a dim picture of people's ability to discern the truth. He believes that the area does not need to be regulated because the contest of ideas operates in a democracy with a healthy and rigorous media. In South Australia and the ACT, an unelected public servant can determine what is the truth. Mr Stone notes an example where an unelected body issued a statement indicating that the Liberal Party had misrepresented Labor's budget position despite the Liberal Party's disagreement.

Mr Stone notes the situation in South Australia, where bureaucracy has become part of an election campaign and candidates have to defend their public statements. The Electoral Commissioner also has to spend significant time dealing with challenges and diverting resources. Political parties then have to rectify to avoid committing a criminal offence. Mr Stone sets out statements by electoral commissioners rejecting the distraction and responsibility of truth in political advertising laws.

Mr Stone thinks that truth in political advertising laws are a solution to a problem that does not exist because people can make up their own minds. Such laws also drain public resources because the electoral commission diverts resources away from the actual conduct of an election.

When Mr Stone was a staff member of the Liberal Party, the publication of advertising was scrutinised every day. The media, opponents and influential stakeholders will pounce on any misstep, error or inaccuracy. Statements are also subject to defamation. There are a range of different checks and balances in the policy development process, communications process and creative process, where legal advice is also sought.

Mr Stone thinks it is a bureaucratic nightmare to get legal advice to back up every line in every ad. The average candidate, who may be a grassroots community advocate, may find it difficult to comply with the legislation. It disenfranchises those who want to participate in the political process but see laws as barriers to entry.

In terms of the process of approving ads, Mr Stone observes that materials for political campaigns are created in-house in conjunction with creative agencies. Mr Stone ultimately signed off as the authoriser. There are various stages of checking and an internal process to make sure a piece is accurate, truthful, legal and not defamatory. When there is doubt, legal advice can be sought. Advisers who work for politicians also fact-check. Researchers can also be engaged to research the particular policy matter to ensure accuracy. The state director also works with the premier or politician on political ads to ensure that the campaign reflects the platform and policy beliefs.

Mr Stone refers to several examples of the Labor Party campaigning on misrepresentations, including the Mediscare campaign and claims that Sydney Water is going to be privatised. Those claims were refuted in the course of the campaign. But Mr Stone believes that the nature of public discourse is that political candidates articulate their position and people refute claims with which they disagree.

Commenting on the South Australian law, Mr Stone notes the burden placed on colleagues during election campaigns and the time that needs to be dedicated by the Electoral Commission. If the laws have to be in place, they should not be for anything more than the regulated period of the election. There would also need to be dedicated resources.

Mr Stone also considers that such laws only provide an avenue for complaint in relation to modern digital campaigning, because the volume of material is enormous. There are questions as to whether sufficient resources can be dedicated. There are also questions about whether platforms can be contacted to take down material. Mr Stone also notes issues he has had with social media platforms censoring material.

Currently, Google and Meta have a political transparency program in place so that political candidates have to register. Paid advertising can only be placed after a candidate is approved through transparency rules. They also have internal checking processes. During a COVID-19 by-election, material was being rejected because the word 'COVID' was a red flag on platforms. Even when there were responses to platforms, the responses were not timely.

Mr Stone has previously refused to take down or change things. But in relation to the COVID example, ads had to be recut and reworded at cost.

Mr Stone believes that truth in political advertising laws will result in a very sterile election campaign where people will be conservative in their messages for fear of falling foul of the laws. If the electoral commissioner declares that material is not truthful, a party will be forced to comply.

Laws around defamation already exist and penalties for truth in political advertising laws will incentivise people to comply to avoid fines or other penalties. Truth in political advertising laws will also have a chilling effect on free speech and Mr Stone considers that it is a matter of time before they are challenged in the High Court.

It will also change the way that political candidates communicate, as they will think twice before expressing a view. Voters will lose out and political parties will weaponise truth in political advertising laws. Mr Stone thinks there is sufficient evidence in South Australia to prove that has already happened.

Any ambiguity in a statement is ammunition to go and make a complaint. There is evidence that it devolves into a tit-for-tat that means that the electoral commissioner must dedicate resources to these challenges.

Mr Stone has experienced astroturfing and fake political flyers in the past. At the state election in 2023, a person was convicted and a report was made to the electoral commission and police. There is a mechanism for these complaints and individuals face the full extent of the law where there is evidence to pinpoint the person, which can also be done digitally.

There are already provisions in the New South Wales Electoral Act to prohibit deception of voters in the casting of their vote. That could include producing material that purports to be from the electoral commission. The issue for truth in political advertising laws is that an independent, unelected umpire is given the responsibility to determine what is truthful. Mr Stone considers there are already protections for disinformation.

In relation to a body enforcing truth in political advertising law, Mr Stone considers that electoral commissions have publicly rejected adding this to their responsibilities. A new agency should also not be created.

Timely retractions already happen routinely within an electoral campaign period. If someone makes an error or goes too far, they may say so in a press conference or retract what they have said. This happens for both parties.

Mr Stone notes the challenges of the electoral commissioner being bogged down with complaints. There are already resourcing pressures in New South Wales to administrate the election and they may end up in a position where they make more errors and overlook more. There is a risk that truth in political advertising laws consume the electoral commission.

Mr Stone considers that electoral commissions are professional and are helpful, diligent organisations. Anything that distracts them from their current task is a problem in his view.

When a problem emerges on social media, electoral commissions might say it is not their responsibility. The only way to address the problem is to go directly to providers. Electoral commissions do not necessarily have a better chance of taking down material.

Mr Stone is concerned that future elections will involve interventions that sway elections. Many jurisdictions are finely balanced and the weaponisation of processes may cause perverse electoral outcomes because of questions about statements determined by an electoral commissioner.

## **Bruce Hawker**

### **Former Labor Party Campaign Strategist for all jurisdictions, federal and State**

In 2001, there was a group called FACTS, which is the Federation of Australian Commercial Television Stations, later called Free TV (now ClearAds). They established some new rules for the political parties when putting together their advertisements. So effectively, what FACTS was able to do, and Free TV still does, but FACTS would actually make the decision as to whether it would allow an ad to be put to air.

And generally speaking, the main thing was that you didn't make obviously misrepresent the facts by perhaps selectively quoting from an article or putting together a headline which might have had some parts of it removed. When these ads would go up on television, we'd traditionally have a newspaper article headline saying, Minister caught defrauding public purse so he could take a holiday on the Gold Coast or something like that, and that would be the basis for an ad. Or it might be just a factual-based ad that the Labor Party would want to support with ads or stories from newspapers which had been published and which they would put up to substantiate an allegation in order to put together a case for their side or against the other.

In 2001, FACTS introduced some new rules and essentially they said from now on for this election, the 2001 federal election, we're going to require any party putting an ad up to essentially comply with the Trade Practices Act which is a federal act that regulates appropriate commercial activities amongst those that tries to manage misleading or deceptive advertising. And so what they said to political parties was that for this campaign at least, any ad that the parties wanted to put on television had to be approved by an expert who they appointed, an eminent professor of trade practices.

So what FACTS did then was to look at the ads and then say to the Labor Party, you must substantiate this claim. And the sorts of claims that we might have been making would be under a



Labor government, you'll be better off than under the Liberals, a broad statement like that. Because we'll improve your quality of life through better paid arrangements, better social security etc. Essentially, that was the sort of broad claims that the Labor Party would make. And the Labor Party would have slogans that would go with that, for a fairer Australia vote for the Labor Party, for example.

But what happened then was that this adjudicator would say, you can't make any claim that you can't substantiate and can't prove. And that meant that if the Labor Party put an ad to air along those lines, which 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 would. That's it, you can't say that.

And so you can 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. So it was covered with so many sort of caveats, which you couldn't really establish that as a piece of advertising, it became useless. Now, the problem with that is that it 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 them. They'd say, well, you can't put that out to air without substantiation. The government, of course, could do that because it could say to its public servants, look, we need the substantiation for this.

And that sort of problem continued throughout the 2001 election campaign and it placed the Labor Party at a very real disadvantage as an opposition party compared to the government of the day. And that in part was reflected in the result, although the result was obviously dependent on lots of other things. But in terms of advertising, it became a very complicated thing.

So it wasn't like the Labor Party was making outrageous claims, but unless they had this level of certification and support, which, if it was covered by the Trade Practices Act, would have not reached that standard, then it was not allowed to operate. So they used the rules that applied to the Trade Practices Act to apply to political advertising. And essentially it just became too difficult for the Labor Party to come up with effective ads.

There were some problems created for the government of the day, but 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 government. And we had to come up with really anodyne style of ads in order to get them put to air at all.

At the end of, after the 2001 election, which Labor lost, FACTS did a review of its management of the advertising program and the Labor Party put in a submission, authored by Mr Hawker, which essentially said we would rather just leave it up to the public to form their own view as to the veracity or otherwise of a claim than to have to go through a process where we couldn't make simple claims like under a Labor government, your life will be better. So that was a real problem with the truth in advertising legislation or truth in advertising rules for that election campaign.

And after that, FACTS pretty much did go down a free for all sort of a route, and said the only real requirement that we're going to put in place is that it's not defamatory. And they would fact check, but it was pretty loose, the fact checking from that point onwards. And that probably made it easier for both parties to make claims. And if they went overboard, then Mr Hawker's view was, well, then let the public take a view about that. If it's silly, it'll be debunked by the other side.

Mr Hawker noted that truth in advertising is good in theory, and it might be good in fact, but it's important that at the end of the day, some concessions are made for the fact that political advertising does always contain an element of emotion. And it's very difficult to wash that out without actually making it hard for people to receive an equal, or for the political parties to have an equal sort of stand when it comes to the advertising, because it's very hard for an opposition with no real resources and no access to government agencies to verify information, to have the same sort of ability to meet those standards that a government can.

Mr Hawker noted that the 2001 federal campaign did create a very uneven playing field, and this should be reflected in any recommendations relating to truth in political advertising laws. And at the end of it, everyone agreed that it was pretty messy. It was very hard to get ads run on time. It created confusion in the minds of people who were making the ads, of the people who were authorising them, and so forth. And it did give an advantage to the incumbents.

Mr Hawker stated that it's important that we recognise that there's a difference between claims based on opinions, which you should be able to put out as part of the political process and advertising, and a claim that a manufacturer of a product might make which obviously is much more directed towards the quality of the product, that it's fit for purpose and so forth. He considered that trying to fit a political dialogue into the provisions of the Trade Practices Act was never really going to be a neat fit.

However, having said that, Mr Hawker noted that watching advertisements in United States now, that misinformation and disinformation are at levels which are just considered unimaginable before. And of course, now we've gone beyond that and you can just put whatever you like on the internet. And now we have AI, which is going to add further to that. So obviously there is a need to put some proper guide rails along political advertising. He considered that in this day and age, it's changed a lot since 2001, and there is a need for guard rails, but when constructing a set of rules to apply to political advertising, you really need to have a really close eye for what would be unintended consequences and have the effect of actually stultifying political debate and claim and counterclaim, which is part of the thrust and parry of political campaigning as against active disinformation and lying.

Mr Hawker considered that one of the things that government would need to look at if they were serious about actually trying to stop disinformation, they have to make laws which apply to the internet as well and social media. The days when TV, print and radio advertising dominated are well past us now. And unfortunately, there is no real filter for that, as we know. So people can get away with saying all sorts of things and it's a significant contributor to the incredible polarisation that we're seeing in the United States today. People are just being fed lies and then they operate within an echo chamber where they repeat them to their friends and potential friends and supporters.

Mr Hawker was the campaign strategist for elections in every state and territory jurisdiction, except the ACT, as well as federally. He has also worked on campaigns in various countries overseas, including New Zealand, Greece, and in East Timor on issues to do with the government, not strictly speaking on elections.

Mr Hawker 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. All the state jurisdictions essentially had the same rules. And apart from the 2001 election, the federal government pretty much had the same rules as well. And any television advertising was regulated through federal law anyway.

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.

With a lot of those ads, when somebody made a false claim or made a claim where they doctored, say a headline or something like that, or selectively quoted from an article, the way in which we dealt with that wasn't through forcing a retraction, although sometimes you could get it retracted. It was more that you embarrassed them by saying, well, they were lying in their advertising and this is how the lie has taken place.

And the media would always run that story if you could prove clearly that someone had put something up on a screen, a headline which had been altered in some shape or form or selectively quoted from, they would always run those ads. And if you could get them withdrawn, that was essentially proof that the ad was a pack of lies. Whereas the sorts of things that were being forced to be withdrawn in 2001 federal campaign weren't lies, they were just claims which it was impossible to prove. For example, under the X, Y, Z party, your life will be better. We couldn't even say that. So if there was a lie that was made in all jurisdictions, it's basically called out through the informal process and media.

Mr Hawker noted that it's incumbent on all political campaigns to make sure that they are sticking by the rules and that they're not making wilfully false statements about people.

Mr Hawker noted that some of the things that would be done aren't necessarily done in advertising campaigns, such as push polling, where parties would commission people who claim to be pollsters to say things like, if you knew that a certain politician, and they named them, was a war criminal, would that change your attitude towards them? And of course, not saying that he's a war criminal, but they're saying, if you knew that he was. And so they'll go and 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. It's a little bit different to advertising, but it's still in that realm of just lying in order to get a political advantage.

Mr Hawker stated that push polling became vilified, cracked down in the media as very inappropriate sort of political contact, because again, you're creating a rumour based on a falsehood.

Mr Hawker cautioned against becoming too prescriptive in proving every element of a claim or even a slogan, as it then becomes impossible to engage in political claim and counterclaim. For example, saying we are the party who will introduce the best healthcare service system that Australia has ever had. The Labor Party can't say that, even if they've committed to spend billions of dollars on healthcare in the next election, they can't make the claim that it'll be the best. All they can say is, we will spend this amount of money on healthcare if elected. Or you can't even say that. They would have said, it is our plan to spend a hundred million dollars on healthcare in addition to what we're already spending. That's basically as far as you could go. Couldn't say we will, because you can't prove that you will.

Mr Hawker considered that introducing truth in political advertising laws might have a beneficial effect, provided you take into account the fact that politics is a slightly different environment from normal advertising, because it does rely to some extent on people making claims, which may be inflated, but not necessarily false in order to try to gather support for your party, and also to reduce support for the other party. So at the end of the day, and he considered that's different from disinformation or misinformation, that's just a claim such as, we will present a better health system than our opponents. It's something which you should be able to make and then let people make a judgment as to whether you will or won't make it, have a better health system. Mr Hawker distinguished this from a claim which is dangerously wrong, which he considered to be in a different category.

In terms of penalties, Mr Hawker thought that fines should only be imposed if there are repeat offenders who just ignore the rulings of the commission. He supported retractions and having to place a prominent ad correcting what they did. So if it was done on TV, making them use that time slot that they put that ad on TV to do a retraction, maybe the same length of time would be a very powerful deterrent to people who engaged in wilful disinformation.

In terms of the appropriate arbiter, Mr Hawker thought that the electoral commissioner is more than capable of making decisions along those lines. The only question is whether the electoral commissioner would want that power because it is in effect a policing role and a quasi-judicial role in a sense, but he supported the electoral commissioner administering the laws as they had the expertise, provided the electoral commissioner was happy that they weren't being expected to perform functions that were beyond their capacity or that impinged on their other functions.

Mr Hawker noted that you've got to be very careful to make sure that political parties don't use those laws tactically to get an advantage.

Mr Hawker considered that truth in political advertising laws should apply to third party campaigners and social media platforms. Mr Hawker noted that the federal and state governments are now looking at regulating social media platforms and he thought they've just got to bite the bullet and start getting into that space. Because that's really where the most egregious examples of misinformation and disinformation are occurring. Mr Hawker thought the first thing they need to do is put responsibility on the platforms themselves to police them.

Mr Hawker noted that it should be taken into account that there's always going to be an element of emotional appeal and pull in political advertising that you can't regulate in the way you would regulate a product. It goes beyond the sort of rules that you would have for a food item, for example.

Mr Hawker stated that you don't want TiPA laws to be used in a way that actually stops political parties engaging in debate and claim and counterclaim. That's the cut and thrust of politics, and philosophical discussions. They're not always based on empirical evidence. They're based on people's beliefs about how we should act. For example, claiming that the Labor Party's health system is going to be better than the other parties. That's part of the cut and thrust of political campaigning that shouldn't really be the subject of this sort of regulation. Because at the end of the day, that's just a claim which you can believe or disbelieve. But you shouldn't be prevented from making it.

In terms of fact checking within the Labor Party, there was always a unit established within the campaign, which would fact-check their own ads and those of their opponents. So when an ad came up from the other side that appeared on TV, people would routinely look at that and test the veracity of the claims that were made in that. And if they could find something that showed that that was a false claim and deliberately so, then they could complain to FACTS about it or they could put an ad or they could put a story in the media showing how the ad was false.

## **Dee Madigan**

Dee Madigan is the founding partner of Campaign Edge. She has worked on 24 campaigns, and has written hundreds of election ads. She has worked on election campaigns in the Commonwealth, ACT, NT, and Queensland, and has done union ads in election campaigns in every other state.

The ads that she puts forward in South Australia are the same as other jurisdictions. She noted that you do not actually set out to lie in an ad, and you have to get it through CAD, because the stations are responsible for defamation if they platform something, so you have to be able to substantiate things anyway.

Ms Madigan is concerned that TiPA laws are not necessarily needed, as most of the inaccuracy in elections happens in unregulated spaces. Although an ad does not have to go through CAD to run online, the same ads are being run everywhere anyway. Ms Madigan considers that she would not be able to get an ad on air if it was untrue, because it would have to be substantiated. Ms Madigan has never had an ad pulled up for being untruthful.

The real problem, in her view, is that there is no black and white when it comes to truth. It is also unclear who would decide what is true in the middle of an election campaign. Advertising services are not going to, given they are an industry-led unpaid group. Anybody else would be in the firing lines of the parties.

A political party could accuse another of lying in an arguable claim about policy, such as whether a party is a better economic manager or whether privatising a section of the Medicare payment system is privatising Medicare. These things are contestable and part of democracy.

Most campaign lies happen in unregulated spaces such as WhatsApp groups, TikTok and Facebook community groups, where you have astroturfing and fake Facebook groups on issues that are not authorised. Because it is not authorised by the party, the party is not responsible for it. This is often done by bad faith players in the system.

Ms Madigan has concerns about TiPA laws because she wants to know who is deciding what is true and what is untrue, and how that would work in a fast-paced environment. She thinks that substantiating claims through CAD is enough. Although CAD could be stricter on the claims, they are already relatively strict. To take attention through TiPA laws might shut down debate about lies in other unregulated spaces.

CAD plays a major role in election campaigns because they require the substantiation of every claim made in an ad running on TV. Sources have to be provided and everything has to be backed up. If

something is running on TV, it will be running online as well. An option could be to introduce a similar CAD process for online ads. There is an assumption that most political ads do not have any process of truth but this is not the case. Ms Madigan has generally not used lawyers to check ads, apart from dealing with highly litigious parties, because she has never had a problem with an ad being pulled for being untrue.

In her view, introducing TiPA laws could shut down the ability to debate publicly using paid media. South Australian TiPA laws are narrow and do not achieve much. They make people think that a problem has been fixed when it has not, and might shut down elements of free speech. In her experience running ads in South Australia, Ms Madigan has had no problems getting ads when facing accusations that an ad is a lie. The TiPA laws in South Australia have never had any effect on her ads so emphasis on TiPA laws is potentially resource-heavy while achieving nothing.

At best, Ms Madigan considers that TiPA laws might stop some online videos from going out, but she believes that the CAD process is preferable, where supporting documents are required for claims.

Ms Madigan has not had to change the wording of her ads because of the CAD process, although she has provided more substantiation. She typically works within her political party with the campaign director, and with a lawyer to double-check ads for federal elections where there is a possibility of defamation. Part of the campaign is a clearance team who verifies everything before it is sent to CAD, comprised of policy experts to ensure that all claims are factual, who fact-check any paid media that comes through the party during a federal election campaign. Nothing tends to go back from CAD because they engage in a back and forth so that an ad is legally appropriate once submitted.

The scope of the South Australian TiPA law has not made a difference to Ms Madigan's work. A stronger CAD process should just be applied to all ads regardless of the platform. For social media posts, the Labor Party checks what goes out in every election campaign, and uses the same process for social media that is used for TV. There has never been a significant issue with defamation claims.

However, current laws are inadequate to capture activities in modern digital campaigning. More scrutiny of unregulated spaces is needed through a sort of CAD process. CAD may be an appropriate body because they oversee an apolitical process and are not a commission, so something that mirrors this approach may be suitable. CAD does not apply just to federal campaigns, as every ad on TV must go through CAD. The Labor Party has previously had an ad pulled in a state election by TiPA laws, but other ads that Ms Madigan has run have never been pulled and she has never dealt with the Electoral Commissioner.

Ms Madigan believes there should be sanctions and remedies if people are making misleading or false statements, such as something similar to ABC fact check, or retractions on the same platform to indicate a lie. While Ms Madigan would support a prohibition on false statements of fact, not opinion, she does not think it would change anything because CAD fulfils this function for broadcast TV through preventing ads from being broadcast.

Other strategies for combatting misinformation or disinformation in an election campaign could include exposing parties on Facebook and TikTok who are creating content without identifying themselves. A similar issue is occurring in WhatsApp groups and Telegram and other spaces set up like a chat but astroturfed by a political party. There should be absolute transparency where material is a political ad, and social media users should be open about being in contact with a party.

Third-party campaigns, such as union campaigns, are under the same rules and are required to go through a CAD process.

It would be difficult for CAD to issue sanctions once they have allowed an ad. There probably would need to be another party for sanctions or remedies, and this would probably need to be after an election. There was a case of defamation in Victoria for a political ad on TV that succeeded, but that happened after an election.

A big financial cost for lying might reduce misleading statements, but Ms Madigan could not think of a paid ad run on TV that would be considered a lie.

Ms Madigan expressed concern with behaviour from other parties, including claims in the 2019 campaign that elderly people were going to lose their superannuation. This was not a paid ad and went through social media. It is difficult to prove that these are not just concerned citizens because posters were not advertising themselves as part of any party.

Another way to address social media may be to establish a complaint system. However, Australia is slow to remove content and things can be across multiple platforms. In the Hunter Valley, Crosby Textor, who used to be a Liberal Party agency, admitted to setting up Facebook community groups and unbranded websites and Facebook pages purporting to be an independent news source. Ms Madigan is worried about these tactics because they are hard to police and this is where the real danger lies. AI might be useful to look at groups that have been set up to identify whether they are affiliated with a political party.

By contrast, TiPA laws impinge on free speech and may tie up campaigners in the middle of a campaign in defending ads. The free speech of advertisers should be defended as long as it is not inciting hatred or violence.

Further, the group deciding truth may weaponise TiPA laws to be ostensibly objective while concealing a political background. An electoral commission is still appointed by people in power, and may raise concerns about appointments and stacking. CAD does not seem to care about the political dimensions of ads, as they are focussed on substantiating claims.

If an ad is aired, a bad communication can hurt a political party by exposing them for who they are.

Every ad authorised by a political party should instead go through a CAD process before it goes to air, to avoid issues relating to pulling ads in the middle of a campaign. Ms Madigan has never had an issue with an ad being pulled from an election in the Australian Capital Territory. Overutilisation of TiPA laws may resource something that is not necessary and could be covered by a CAD vetting process.

The timing of the CAD process is usually 3-4 days, or 24 hours if extra money is paid. CAD is paid to vet ads and they make money from that, which could be a way to fund a CAD process that goes beyond broadcast TV. It also would not add complexity because the same claims on TV are being made on other platforms.

Ms Madigan believes that there is too much rigour relating to the last three seconds of an ad, but also that the rigour is appropriate for the substantiation of claims. It is as rigorous as it needs to be.

Ms Madigan supports debates where pros and cons can be pointed out, but does not think that advertisers set out to lie. It is risky for somebody to decide where the line is between opinion and fact.

A typical campaign is 30 positive ads, then 30-40 negative ads. Those would all be cleared through CAD for TV and cleared by an internal clearance process for online videos. Labor's clearance process involves a mix of policy and communications staff.

Although Ms Madigan considers that some other parties have engaged in untrue statements, they do not tend to run these statements on TV because they would not get through. There was a case of a former Victorian Liberal Party boss being fined \$40,000 over authorisation text that was too small. There are problems outside of advertising relating to identification and transparency.

Some other tactics to combat misinformation could include talking to major platforms about uses of AI that can flag new groups with a lot of members to check whether it is political.

Increasingly, Ms Madigan observes that people are looking at ads through streaming platforms and not broadcast TV, where CAD processes are not required. The CAD process should be for streamed ads, social media and anything authorised by political parties. Political ads are not allowed on TikTok, Spotify and LinkedIn, but Facebook, Instagram and YouTube are used as well as streaming services, video on demand, broadcast radio and TV. Mail is also used and always authorised.

## **Bill Browne**

### **Director, Democracy & Accountability Program, Australia Institute**

Mr Browne 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 has some concerns that people may have an overly sweeping idea of what truth in political advertising laws might cover. For example, truth in political advertising laws do not cover opinion. Recently, in Tasmanian parliamentary hearings, witnesses raised certain anti-vax sentiments as an example of something that may fall within the sphere of opinion. The average person may believe that such statements would be covered where this might not be the case. Another example is that advertising that is offensive, such as the use of racist advertising in South Australia, may not be misleading.

Other concerns are that an electoral commission could get it wrong, or a law could fail to capture the nuance of an election campaign. In the last state election, the Labor Party made claims about ambulance ramping that they assert were based on the best available evidence at the time. The government then released data that suggested those claims were wrong. The Labor Party understandably argued that their claims were not wrong and that it was unfair that a government could derail an opposition campaign by releasing data they had previously chosen to withhold.

Another major potential concern is politicised attacks on the electoral commission. Mr Browne states that this was not considered a tangible risk until 'no' campaigners politicised the electoral commission in relation to the Voice referendum. They implied that there was something suspect about the electoral commission's interpretation of ticks and crosses, which might suggest an appetite to politicise other decisions of the electoral commission, including on truth in political advertising grounds.

Other overseers of truth in political advertising laws could give the electoral commission some distance from arbitrating truth, such as the ACCC or a dedicated body within the ACCC or AEC. The AEC suggested a separate decision-maker in the 1990s. Other potentially controversial political decisions could also be decided by that body to relieve the burden on the AEC.

Mr Browne considers that truth in political advertising laws could have a beneficial impact. 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. When the ACT legislated truth in political advertising laws, various politicians asked that political players reflect the spirit of those laws through truthfulness even before the legislation took effect.

In practice, beyond the cultural change, misinformation campaigns have also been successfully nipped in the bud.

Mr Browne believes there are some small risks in truth in political advertising laws, as demonstrated, for example, by Labor's ambulance ramping advertising. But there are few such examples over 40 years of the South Australian legislation. Mr Browne considers that there are no substantial risks.

Mr Browne also notes the fact that South Australian laws allow an election to be invalidated in the case of misleading advertising, presumably even if the misleading advertising is produced by a political player other than the winner of the election. This issue was raised by a Tasmanian MLA. Mr Browne considers that this is not necessarily unfair because it gives voters a chance to remake the decision with new information, but is worth further consideration.

Mr Browne favourably refers to the balance struck in South Australia, which seems to be constitutional. A law can be designed so that 'opinion' is a broad category, where only more specific claims are classified as statements of fact or statements that are intended to be factual.

Mr Browne notes that other misinformation and disinformation should be addressed outside of truth in political advertising laws, but that this should be done through separate legislation targeted at those

purposes rather than truth in political advertising laws. He states that South Australian laws are broad in the sense that they cover other electoral actors and matter that falls beyond classic paid advertising, such as a leaflet or brochure.

Other strategies could include making social media platforms more responsible for the content they publish and for implementing codes of conduct. But Mr Browne believes that truth in political advertising laws are adequate to capture the activities of modern digital campaigning, but that it is worth doing more thinking about ways to stop the circulation of inauthentic material and parties maliciously putting out material outside of proper channels.

In New South Wales, for example, Mr Browne notes an example of a rival party putting out material that the Greens claimed appeared to be Greens material. Alongside truth in political advertising laws, it may be worth prohibiting material that is intended to be mistaken for another party's material.

Mr Browne also compared truth in political advertising laws to trade and commerce and the rules for misleading and deceptive conduct there. He noted that trade and commerce provisions are broader.

In terms of sanctions and remedies for breaches of truth in political advertising laws, Mr Browne notes that an issue is if a sanction is too late and the election has already taken place such that a correction does not serve its purpose. Other remedies such as fines or overturning the election result can allow for a longer timeframe for a remedy to be imposed. South Australia expressly permits an election result to be remade, while the ACT does not. In both places, Mr Browne considers that fines are quite low and allowing for a larger maximum fine may be an option to account for the scale or seriousness of the misleading advertising.

In almost all cases cases, Mr Browne believes that it is the adverse finding from the electoral commissioner that is the real penalty.

Mr Browne notes that in some jurisdictions politicians have proposed up to six months in jail for misleading advertising. One concern is that major parties who can afford in-house legal representation may be convinced that they will never fall foul of such a provision, whereas a chilling effect might operate in relation to small and volunteer campaigns.

Mr Browne also refers to proposals at the federal level, which include efforts to use language that already exists in federal statutes relating to misleading and deceptive conduct. Different jurisdictions may want to adjust their wording based on case law in those jurisdictions, or other successful regulations.

In terms of the enforcement of truth in political advertising laws, Mr Browne notes that there is a potential for discriminatory application but that danger is unlikely to exist in Australia with an independent electoral commission, a strong democracy and independent courts. The risk of politicisation is low as long as the courts exist as a safety net. Seeking injunctions from the court may be an appropriate remedy in addition to the power for the electoral commissioner to make requests.

One other reform that Mr Browne has suggested is allowing any complainant to bring a complaint to the courts, not just the electoral commissioner.

Mr Browne believes that it is possible to achieve timely retractions in an electoral campaign. An electoral commission may be delayed by the vagueness of a complaint but there is no inherent flaw in the electoral commission's processes. Although advertising may emerge in the last few days of a campaign, such advertising is less likely to impact the election – though some counter-examples exist from recent federal elections.

Mr Browne does not think that the South Australian Electoral Commission's impartiality has been compromised by their enforcement of truth in political advertising laws. He is not aware of any complaints of that nature. Although electoral commissions have been reluctant to take on these powers, they have remained with the South Australian Electoral Commission despite their protestations, because they have done a good job and no government has formed the view that the power needs to be removed from the commission. When given the choice in 2020, the ACT



Parliament also chose to vest powers in the electoral commission. Mr Browne considers that this is an strong evidence base that there is little need for concern.

Mr Browne also notes that truth in political advertising laws have been beneficial in reducing disinformation in South Australia. Although people sometimes raise misinformation that circulates outside of the scope of truth in political advertising laws and outside of parties, it is still important to address a transmission network that includes a political party or candidate as a node.

Although there are occasional concerns, Mr Browne does not think that there have been detrimental outcomes on the whole, because the remedy seems proportionate and appropriate. In practice, complaints always end with withdrawal and retraction, There might be concerns about proportionality if fines were handed out more routinely.

Further, if the electoral commission makes a wrongful determination, the commission might not take their case to the courts or a case could be plead in the courts if it is escalated. Election candidates also have standing to challenge an election result even if a commissioner does not take action in the moment, so both errors of omission and commission can be addressed.

Potential unintended consequences of truth in political advertising laws include potentially evasive language. Before the last election, for example, Facebook ads associated the Liberal Party with plans to put pensioners on the cashless debit card. A direct claim was not made but the association was there. The fact that these statements occurred even in the absence of truth in political advertising laws suggest that the laws themselves might not lead to that problem. Politicians already have an incentive to be indirect in their language to avoid a fact check. But Mr Browne considers that it is worth noting because introducing punishment for false statements of fact may lead to only making statements of opinion even when statements of fact would contribute to the public debate.

Conversely, statements that are predictions for the future would probably not be covered by truth in political advertising laws. It is desirable for parties and candidates to be able to make predictions about the future even if the other side has ruled out those predictions. That being said, Mr Browne also notes that some claims about plans can refer to the current situation, such as a misleading claim that the Liberals had a secret plan in relation to the GST. The ambit of the law might extend to a statement that something is planned where no evidence of a plan exists.

Mr Browne has not observed the weaponisation of political advertising laws in South Australia. He doubts that weaponisation would make a material difference. There is evidence that complaints in South Australia are upheld at roughly the same ratio that they used to be despite an increase in complaints, which suggests there is no greater prevalence of frivolous complaints.

The risk of a chilling effect on free speech is limited because withdrawal and retraction are reasonable requests. Mr Browne is only aware of two fines and at least one was imposed prior to the option for withdrawal and retraction. There is no great risk if laws are narrow enough not to capture statements of opinion.

Mr Browne also notes that the Victorian Electoral Matters Committee reiterated its call for truth in political advertising, but there are no clear movements in Queensland, Western Australia or the Northern Territory, although the Labor Party Conference called for the laws in Queensland. In Victoria, there has been a view of waiting for and copying a federal approach despite multipartisan support in Parliament for such laws. Politicians are not fully in support in New South Wales but there is good evidence for bipartisan support on the theoretical level.

## **Catherine Williams**

### **Executive Director, Centre for Public Integrity**

Ms Williams sees truth in political advertising laws as essential in the context of rising misinformation and disinformation. 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, Ms Williams observes that people with experience say that the culture is such that misleading and deceptive advertising is not an issue in the way it is in the federal jurisdiction and other jurisdictions.

Ms Williams notes that the selection of the regulator is important and that resourcing is also important. There are no concerns about the introduction of truth in political advertising laws if they are appropriately designed with a resourced regulator.

The most appropriate body seems to be the electoral commission, which works well in South Australia. Electoral commissions may take a different view. The AEC makes sense and is an important institution in Australian democracy. Taking on more of an arbiter role may be problematic for the commission, which Ms Williams thinks is an important consideration. But another option could be the NACC, like the ICAC in New South Wales which deals with the enforcement of some provisions of electoral law.

NACC is used to doing inherently political work and might not find it as challenging as the AEC. This might only be necessary if the electoral commissions are particularly reticent to take on the responsibilities.

A recent survey demonstrates that AEC is trusted and that trust should not be undermined by giving it a function that will appear to be political, even though it is primarily a function relating to the application of law. It may make sense to give it to NACC or to carve out a separate office in the AEC. Integrity commissions are the next logical choice after electoral commissions.

If drafted properly, truth in political advertising laws could have a beneficial effect. This includes appropriate penalties for breach of laws and regulators resourced to pursue breaches.

Mr Williams does not think that truth in political advertising laws are being weaponised much in South Australia. The risk of vexatious complaints is real and there could be something in the legislation to disincentivise vexatious complaints.

The scope of truth in political advertising laws in South Australia and the ACT is something that Ms Williams wants to see replicated in design at the Commonwealth level. They represent tried and tested models that have had a positive impact on culture, so appear to have an appropriate scope.

Ms Williams does not know how truth in political advertising laws are operating in relation to modern digital campaigning in South Australia and the ACT, but notes the broad scope of the laws such that there is no obvious reason for difficulty.

Ms Williams believes that the fines available under South Australian laws are not high enough. They need to be high enough that a well-resourced person or entity would be deterred from engaging in the conduct. A different penalty could apply for reckless conduct in comparison with conduct with intention. A substantially more punitive penalty could apply for intentional acts. Withdrawals and retractions are the minimum and should be the case all the time, in addition to fines. Ms Williams notes that the only change she would suggest is the potential scaling of penalties. There are some other questions about the nature of regulators and efficiency of regulators.

Ms Williams is unaware of how truth in political advertising laws are enforced and the frequency of enforcement. If there is an enforcement problem, it is likely that the regulator either does not have the enforcement mandate it needs or does not have sufficient resources.

Ms Williams thinks it is possible to achieve timely retractions. ECSA should be encouraged to have a protocol for dealing with these matters during elections as a matter of urgency.

Ms Williams also believes that truth in political advertising laws should target third party campaigners and social media platforms. Although it is difficult to enforce laws against social media platforms, they are publishing the false or misleading advertising.

Ms Williams does not think that the Electoral Commissioner's role in South Australia has affected their impartiality. People seem to have trust in their electoral commission. Those who receive an adverse

decision may feel partiality, but the wider public does not have that perception. There is no lower voting rate or turnout.

Truth in political advertising laws may have a chilling effect on advocacy, because people are scared of breaching the legislation. But Ms Williams does not know if they have materialised in South Australia, particularly since the laws are narrow. A chilling effect is less likely if a law applies only to statements of fact, as only speech that is misleading or deceptive would be chilled.

Other strategies for combatting disinformation include measures targeted at digital literacy, civics education and language education to mitigate the risk of misinformation. A big part of the answer lies in empowering the electorate to be less vulnerable.

## **David Mejia-Canales**

### **Senior Lawyer, Human Rights Law Centre**

David Mejia-Canales stated that the greater point is to make sure that we can have political conversations, or even just people can access information about political matters or electoral matters, that is reliable, and that is trustworthy, for reasons that are pretty well established. He noted that the whole ecosystem of political transparency needs some real strengthening in Australia, like lobbying reform laws and political donations.

Mr Mejia-Canales stated that the HRLC is absolutely on board for truth in political advertising, noting that we do have some laws currently in place. It is very much in line with human rights law and principles to make sure that people can make electoral decisions in an informed, fair, and transparent way. He thought that anything that makes the political conversations and electoral processes more fair, honest, and transparent, and reliable, is very much to be supported. So he considered that the laws are really necessary, but noted that it gets murkier in determining how the laws would actually work and who would be responsible for overseeing these things.

Mr Mejia-Canales raised concerns about adjudication of TiPA laws, particularly in the middle of a very heated political campaign. He thought it would be problematic if these laws sit with the Australian Electoral Commission, because the AEC's strength is its independence. He noted that placing thought into who is the regulator is absolutely fundamental to make sure that people can trust the process. Because trust is the fundamental vein running through all of it. And if people don't trust the adjudicator or the decision maker, then it's pointless.

Mr Mejia-Canales stated that it would probably need to be an independent body that doesn't currently exist, or one that could sort of be tasked with that role. He suggested that the Parliamentary Standards Commissioner might be well-placed to oversee these laws, as their job is to oversee the standards in Parliament, but could also be tasked to oversee the standards of the communication for people who want to be in Parliament.

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 a culture of making sure that truth exists in political advertisements and communications.

Mr Mejia-Canales noted the potential difficulty in introducing TiPA provisions in modern times. If we look at even just how conversations to combat mis and disinformation online, with 20,000 submissions to a single bill, which is almost unheard of, the difficulty now is that maybe we are too divided now to be able to kind of have the same benefit that the South Australian laws had. He noted that it does require a lot more thinking and a lot more kind of community participation to be able to so that everyone has a sense of ownership of these laws. He stated that we are now sort of stuck in this hyper-polarised world where people don't even trust what is true or not, let alone if we're having conversations about truth in political advertising in particular.

Mr Mejia-Canales supported the TiPA laws being framed in a similar way to South Australia, only covering statements of fact. He noted that another consideration to this, which is the online world

where you have these sort of digital platforms that are based elsewhere, and are not sort of subject to a lot of the laws here in Australia in the same way as other actors who are based here are. And the digital platforms where people actually consume most of their political communication and news. So it requires such a very careful moving through this minefield, because the way that we communicate now about political matters is very different to even 10 years ago. Sure.

Mr Mejia-Canales did not think that truth in political advertising laws are adequate to capture the activities of modern digital campaigning. He noted that for AI generated content, such as the videos that were made of the then-premier of Queensland very recently in that election, like deepfake videos that were satirical. People can have very different views as to whether they were in good taste or whether they were truthful and whatnot. But things like deepfake videos, doctored images, AI generated content, and content that is primarily kind of just thrown all over the internet by bots and other kind of inauthentic internet behaviour, Mr Mejia-Canales thought it's going to be very difficult to regulate this with a single piece of truth in political advertising legislation. He thought the whole ecosystem about information needs to be considered as well as part of a conversation about political communication, such as making sure the Online Safety Act, the Combating Mis and Disinformation Bill, and the AI principles of the Australian government, are going to contribute to whether a truth in political advertising law or political communication law is successful or not.

He noted the difficulties with particularly the digital platforms and how difficult it is to get them to take any sort of proactive steps to protect any type of communication that needs to be truthful, like political communication, but also health information and all manner of things, because the platforms do not have any type of incentive to do anything about this inflammatory content, because content drives engagement and engagement drives their profits. So Mr Mejia-Canales thought there is a strong argument to be made to extend TiPA laws to the platforms. However, he noted that at least with our current frameworks at the moment and the fact that mis and disinformation regulation on the platforms right now, and at least for the foreseeable future, is only based on a voluntary self-regulation basis.

Mr Mejia-Canales stated that digital platforms are not going to want to come to the table unless they're forced to. So a proposed law, whatever that looks like on truth political advertising, has to have some pretty solid sticks as well as carrots for the digital platforms to do the right thing. For instance, he stated that the combating mis and disinformation bill before the parliament has huge penalties for when platforms do the wrong thing, which is 22,000 penalty units for breaches or a percentage of annual global turnover. So if you're looking at the digital platforms, that's the kind of, a threat of punishment that they need for doing the wrong thing.

He noted that regulating digital platforms and truth and political advertising, those two things may not be the best fit for each other, and ultimately a separate legislation that regulates the platforms themselves might be necessary, because otherwise you're probably trying to shoehorn one thing into the other and may not actually achieve benefits for both. However, he thought that third party campaigners and civil society organisations should also be covered by TiPA laws.

On the scope of truth and political advertising laws, Mr Mejia-Canales considered that they're just right for the jurisdictions that they're in and also for the times that they were implemented, mainly because the South Australian law at least has been in operation for quite some time, before social media and AI deepfakes. He noted that greatest thing that the TiPA laws might have done is actually contribute to a culture of just telling the truth by default, not just because the laws exist, but the laws themselves have contributed to a culture that is established and settled, at least in those jurisdictions.

He noted that the jurisdictions are also quite contained, both ACT and South Australia, at least in population numbers, they're quite small jurisdictions. It gets a lot more difficult and tricky with larger, more complex jurisdictions, such as at the federal level.

Mr Mejia-Canales thought that the jurisdictions that have TiPA laws, they've been beneficial. And folks in those jurisdictions have stated that they're beneficial. But now we're in a very different information environment. He considered that these kinds of laws could operate effectively in larger jurisdictions, but it goes down to the detail. The complexity is just the information ecosystem in terms of advertising on social media. Mr Mejia-Canales referred to the Voice referendum, where verifiably false ads were

being targeted and hyper-targeted to people, based on data that they've given the platforms that they then sell on. So now you're actually not having one kind of political campaign. It's probably arguable that you never have had one political campaign. But you're actually, parties now are running hundreds of tiny campaigns to hyper-targeted audiences. And that becomes a lot more difficult to police for truth, if the platforms themselves are not transparent about the ads that they allow on their systems or on their services.

Mr Mejia-Canales suggested that if these laws were introduced, then ideally they would be reviewed periodically and then improved as time goes on. But it is very difficult with the ecosystem to verifiably prove that lies were being told, if political parties and others running for office are really hyper-segmenting populations and targeting such specific advertisements to people that in one way you probably have a different problem where there's maybe too much information to police as opposed to, you know, maybe 20 years ago.

Mr Mejia-Canales thought that a future consideration of these laws, particularly at the federal level, needs to also look at the digital platforms that are carrying, or at least enabling, lies about political matters to be spread so quickly. He suggested that bigger penalties might be needed for digital platforms, because otherwise digital platforms just won't care at all, unless they are forced to, by really significant penalties.

So any future consideration of the laws has to actually look at how you would actually hold digital platforms accountable that might be spreading this information, even though the penalties, as they currently are at least in South Australia, might be appropriate for political candidates themselves.

Mr Mejia-Canales suggested that the regulator who is enforcing TiPA laws has to be properly resourced to be able to deal with a high volume of complaints that can be generated using, for example, as we're talking about the misinformation bill.

For instance, 23,000 complaints about truth in political advertising could hit an independent regulator in the span of a couple of weeks, and that would completely overwhelm a regulator and almost largely make it ineffective because they are overwhelmed, not because they don't do a good job or they don't actually have impact.

Mr Mejia-Canales thought that with technological advances, like the rise of social media and AI, the current regulation do not fully address digital campaigning complexities in a really meaningful way. And they might not address it for any kind of technological changes that are going to happen even in the next two years. No one was talking about generative AI two years ago. And who knows what else we'll be talking about in two years that doesn't exist right now that is going to be important for political advertising.

Mr Mejia-Canales noted that the form of retractions or notices is important, for example, if they're just requirements to publish these as part of a public database or what have you, that's not as effective in a digital world where people just don't get their information from places like this.

Mr Mejia-Canales did not think that the South Australian or ACT Electoral Commissioner's role in enforcing truth in political advertising laws has affected their reputation for impartiality yet, given that they've been in operation for quite some time, it's become an accepted part of how these things are done in those jurisdictions. He thought that was really key, particularly with the Electoral Commissioner playing that role and playing that role for a long time. There would be people who've been voting who don't know otherwise, and they've been voting for quite some time. They don't know otherwise that for them, the Commissioner plays that role in SA or the ACT.

However, he noted the risk of politicisation if the Commissioner weighs in on a politically tricky contentious decision, like a real knife-edge parliament or there's a real risk of a hung parliament or whatever the case may be.

Mr Mejia-Canales considered that the risk of politicisation of the Electoral Commissioners is an argument for an independent body that isn't an electoral commission, so that the process of elections can happen independently of verifying whether electoral matter is true or not. Sure.

Mr Mejia-Canales stated that in the conversations that he's had with people in both of these jurisdictions, particularly with members of parliament, they're actually quite favourable of the laws, for the environment that they create. So he thought the laws are working really well there, but noted that that doesn't mean that that model or the way that they're drafted can be then translated, just cut and paste to other jurisdictions and definitely not at the federal level, because of the information landscape.

Mr Mejia-Canales considered that the truth in political advertising laws have been beneficial in South Australia and the ACT in reducing disinformation, even in just the conduct of campaigns and people running for office, and knowing that they do have a limit, or at least on some of the things that they can say, I think that's not just sort of benefit to the political process, but it's a benefit for everybody, because anyone who's going to be making an electoral decision or voting, they deserve to have information that is free, that is truthful. So it's benefited the whole system, not just those who might be running for office, because it just means that the trust is established, and at least there's a baseline of trust. And the whole electoral system relies on people being able to trust it. And that is an absolutely fundamental pillar. Mr Mejia-Canales noted that the fact that the TiPA laws contributed to trust, is the reason why they've worked so well, at least in those two jurisdictions.

Mr Mejia-Canales thought the broader public policy view is that anything that strengthens the way that people can communicate about electoral matters is really welcome, including TiPA laws, and there is no talk about repealing these laws in these jurisdictions because it is part of the culture. Mr Mejia-Canales considered that culture is the most important thing, because the culture is what builds trust. And then trust is what keeps the electoral system with its integrity.

Mr Mejia-Canales noted that we live in a world now, where it's very hard for people to even trust that what something is true is true, and going forward, that's actually going to be the problem, is that we're now starting to live in a world where people are starting to doubt what is true, even when it is verifiably true. And it's going to be harder for these laws to continue having a strengthening kind of positive outcomes if we start to fragment off as a polity.

Mr Mejia-Canales noted that we're seeing that now with how much misinformation is on platforms about anything, whether it's health information during COVID or indeed like political campaigning. I think that the problem that they're butting up against that is that people are starting to lose trust in institutions and trust in, indeed, government, particularly when government is saying this is true, and this is not true, even if it's verifiably true. Or false or whatever the case may be, people just don't believe that anymore. And that's just going to get worse. So I think that probably the laws are kind of coming up a bit of a cliff of their ability to kind of continue influencing the culture in a positive way.

Mr Mejia-Canales thought that political parties would weaponise truth in political advertising laws as a political tool against their opponents, and that he understood that sometimes the laws in the jurisdictions have been used to this way. But this was how these things happen now, and the strategic use of any kind of legal process is just part of the legal process. He considered that it becomes really important to how these laws are drafted to prevent the misuse of the laws as well.

To prevent misuse of the laws, Mr Mejia-Canales suggested that it was really important that these laws are drafted in a way where decisions can be made quickly. And if there is a dispute of the decision that these things can be adjudicated quickly within a very sort of set time frame. But also that whoever the regulator is, whether it's an independent body or whether it's some sort of commission, that they also receive kind of regular kind of ongoing training about how these laws can be misused for actual political processes. He suggested that it's really important that that is part of the process and that is part of the culture of enforcing these laws is that they're constantly on the lookout for the misuse of them. And that any kind of complaints or whatever the case may be, can be thrown out quickly if a determination is being made that it is actually being used as a strategic kind of political advantage for a party as opposed to actually seeking the truth. Mr Mejia-Canales considered that it is really important that there's mechanisms to sort of deal with complaints quickly to sort of throw out vexatious or kind of these sort of strategic kind of uses of the laws and that these things can be appealed within a set time frame.

Mr Mejia-Canales noted that lies are protected by the freedom of speech and even like gross offensive things are protected by the freedom, but the considerations about freedom of speech have to be in balance with the ability for other people to enjoy their rights, including the right to vote and the right to public participation. So there's always going to be an argument about the chilling effect, but the laws should also be grounded in human rights law, because human rights law provides a mechanism to balance someone's right to free speech with another person's right to receive or to participate in the public affairs and to vote. Just because someone has the right to free speech doesn't mean that they have a right to lie, to influence someone's ability to cast a free and fair ballot. And when these things are in conflict, human rights law actually provides a mechanism to balance these rights appropriately so that both can be affirmed. So any legislation has to be at least grounded in those human rights principles, because otherwise you have a situation where people who either misunderstand wilfully or otherwise the right to free speech use that as a weapon to prevent any kind of reform in this space. Even like free speech absolutists, because they do not consider, or at least they don't speak about as much, when the right to free speech is abused. And that also has to be considered. So could it have a chilling effect? Potentially, it depends on how those laws are drafted, but Mr Mejia-Canales thought that's why it's really important that they're grafted with human rights law and principles at their core to protect the right to free speech, but also other people's rights to access information that is correct so that they can cast a ballot.

Besides truth in political advertising laws, Mr Mejia-Canales argued that it's really important to demand transparency over the digital platforms in particular, noting right now that we have a combating misinformation bill before the parliament, and that's hopefully going to make its way through. But that bill won't really do very much about the actual problem.

It actually just ensures that platforms are transparent about the scope or the extent of misinformation on their platforms. So it's not about regulating content, nor should it be. The platforms themselves have to become more transparent.

And if you look at legislation like the Digital Services Act in the European Union, which has some really strong kind of transparency measures for the platforms to be constantly assessing their services for risks that they pose to fundamental human rights, including the right to vote and public participation. To report on those risks and also to note and explain how they are going to mitigate those risks on their platforms. And they have to publish these things on a periodic basis, and a failure to do so would land them with really significant penalties. So platforms themselves have to be made accountable in the way that the Digital Services Act does in the EU.

Mr Mejia-Canales also suggested that platforms be made to have a legislative duty of care to their users, to make sure that the platforms themselves are constantly assessing their systems for harm, not just to the users, but harms to our electoral processes, harms to social cohesion. So the platforms themselves need to be regulated, not so much the content on the platforms. Because once you actually start regulating the content, you start getting into discussions about free speech and then about the constitutional implied freedom. So the platforms themselves have to be made accountable in the ways that international jurisdictions have done.

Mr Mejia-Canales also suggested AI content needed to be regulated. So the developers and the deployers of artificial intelligence systems have to be transparent about how these systems are used, how they work. And if they're found to be breaching people's fundamental rights, right, to vote, right, to participate on affairs, then there has to be a mechanism to seek some sort of remedy for the harms that these things are causing. These technological considerations were not a factor when some of these laws about political advertising were introduced, but they're going to become the biggest factor from now onwards. So how we regulate how people receive information is going to be absolutely critical, especially because people receive all of their information now on social media.

Mr Mejia-Canales considered that the question about regulating the platforms is a big issue, as it is the ecosystem of how we receive and impart information that needs a really good consideration, not just truth and political advertising, that is a part of it, but all of it, particularly because of the world that we live in.

He also noted that often a lot of these sort of laws, whether they're about truth and political advertising or even just misinformation more broadly, has an assumption that we all speak English and that we're all fluent in English and fluent enough to be able to receive and impart information. But we forget that there's huge communities who are not often considered in these discussions, who are not fluent in English for various reasons, eg English is not their first language or people with disability. And how these communities receive and impart information, particularly with electoral matters, is really important to consider, because the truth and political advertising regulator might be very good at picking up information that is in English, but really struggle with information that is in different languages. And therefore, the harm that communities might experience because of lies is really different. So then we're actually making, in some ways, the problem worse by entrenching some folks that have access to truthful information, and others who don't have that same ability because English is not their preferred language, or because of disability or incapacity, they might not be as fluent in English, and we need to consider that as well.

## **Damien Freeman**

### **Fellow, Robert Menzies Institute, Honorary Fellow, Australian Catholic University**

Dr Freeman has mixed views about truth in political advertising laws. Partly, he doesn't think it would be a bad thing. But beyond that, he thinks it's going to be difficult to achieve.

Dr Freeman supports truth in political advertising laws that regulate facts, but not opinions.

However, he noted that sometimes the lines between facts and opinions are not clear.

He considers that truth in political advertising laws are necessary, particularly given the effect of the digital age, and how that's changed things and made it problematic and the need to be able to take steps because of that.

Dr Freeman considers that people have lost trust in political institutions, in parliament, in government, and insofar as truth in political advertising laws would help restore people's confidence, he thinks that would be a good thing.

However, he is unsure if these laws are going to be effective, because a lot of the things that are problematic have to do with speculations, not about facts. Mr Freeman expressed doubt that regulating statements of fact is going to solve the problem, because he thought all that will happen is people will refine how they speak to make sure that if anyone analyses it, it's clear that was a speculation, not a statement of fact.

Dr Freeman supports truth in political advertising laws being limited to just facts.

Dr Freeman is opposed to truth in political advertising laws being extended to opinions or speculations, rather than just facts, due to issues about who is going to regulate that and make those judgments. The conservatives are very concerned about the idea that courts make political decisions. And the idea is that's a bad thing, that that should be something that's done in Parliament, because legislators are accountable, have a democratic mandate, they're accountable to the people. Dr Freeman argued that a similar sort of problem is going to crop up here, because you're going to say: who's going to be the person that exercises judgment about this? When it's very black and white, if it's just about fact, when it's a matter that experts can rule on, that's fine. But once it moves, not just into opinion, but into this sort of realm of speculation, when does a statement move from being a statement of fact to a speculation about what might happen in the future? That's going to be a grey area, and it's not going to be clear cut, and someone's going to have to make a decision about that.

Because if the authority says, that was a statement of fact, not a speculation about what might happen in future, then it's subject to these laws. But if it's characterised the other way, then it won't be subject to the laws. And you can see now that that's going to involve judgment and who do you trust to make that decision and people's political values will affect how they make those decisions.



Dr Freeman raised the Voice referendum and the discussion of misinformation and disinformation in that context. Dr Freeman, who was a proponent for the “Yes” campaign, stated that many accused the “No” campaign of lying. He noted that they were being mischievous, and were raising speculations about what might happen or we don't know what might happen. But he didn't think that most of these were about fact. Sometimes it's just not clear in politics what the facts are.

Dr Freeman noted the effect of Trump, where he said drinking bleach can be a cure for COVID, and the expert, the chief medical officer, had to say, Oh, Mr. President, I don't, there's no evidence to support that. Dr Freeman said that this was a case where it's a very black and white thing of a politician making things up or lying. Dr Freeman noted that the fact that Trump, as a former and potentially future US President, will treat truth and fact in that way, justifies the need for regulation in this area.

Dr Freeman also noted that in the context of modern digital campaigning, he can see the problem about lies circulated so quickly and broadly, and this creates an urgency to regulate truth in political advertising.

In terms of penalties and remedies, Dr Freeman didn't think fines are going to be effective because, we're talking about political organisations, political parties, and he didn't think they're going to be affected by fines. He didn't think it's about criminality, but rather having proper elections run in the best possible way. Moreover, fines might take months or years to go through a court process, and the election would have long been concluded by then.

Dr Freeman thought a retraction was a better solution, as if what you want is to improve the elections, the mechanism needs to be something that ensures if something goes out that shouldn't go out, you need to stop it spreading.

Dr Freeman considered that the TiPA laws in South Australia seems to have worked effectively.

He considered that that, if TiPA laws are cast very narrowly to focus on statements of fact, the Electoral Commissioner is the right person to do it.

Dr Freeman is opposed to creating a new entity, as it costs money, and means putting resources into it. So, that's in itself a political decision. Do you think this is worth putting resources into? He also questioned what kind of body would this new body be? The Electoral Commissioner, at the absolute core of his role is to be impartial, is to avoid any kind of political judgment. They're very, very careful to avoid anything that might look political. If you create a new institution, is it going to be completely impartial like that or not? And it's going to depend how you set it up.

Mr Freeman considered that once a misleading lie has been disseminated, the damage is done. According to Malcolm Turnbull, who ran the referendum in 1999 for the Republic, the monarchists (of whom Freeman was one), said if Australia became a republic, it would leave the Commonwealth and they wouldn't be able to be part of the Commonwealth Games. Turnbull said that was not correct and dealt with it, but Turnbull said the damage was done. It got the headline that the “No” campaign wanted to get and by the time it was fixed up, it was too late.

The reality is once you make a big splash, it's very hard to undo that. But again, in that example, it was technically correct that if a country changes its constitutional arrangement, it technically it does need to reapply to be a member of the Commonwealth of Nations. If Australia had become a republic, so of course, there was a chance that they could say, no, we won't let you back in. But in reality, Australia was going to be let back in. It wasn't going to be a problem. But why it was technically correct that we that Australia's membership would have to be confirmed. And technically, it was possible that it might not be confirmed. But that would have been in reality been pretty hard because most of the countries in the Commonwealth are republics anyhow. But it was deceptive, as it gave the impression to people who didn't know a lot that Australia might not be able to be in the Commonwealth games. And so if you like the Commonwealth games and you don't want to risk not being in the Commonwealth games, then vote no to this. Turnbull has said repeatedly that the damage is done so quickly.

And so if it's effective, the damage isn't damaged truth, it isn't like a damage to the body of truth. It's the headline, the way it influences the public conversation, the fact that it gets people to pay attention who wouldn't otherwise pay attention. In that situation, retraction might not be effective.

Dr Freeman considered the SA TiPA laws worked there because it's narrow. And if you keep it to a very narrow role, he thinks it is consistent with impartiality.

He considered that the law should apply not just to political parties, but also third party campaigners, as if they're not captured, the whole thing's a waste of time, because, and all that will happen is the Labor Party will say to the unions, oh, our research says it would be good to do this. If we do it, we will get caught. So you put the advertisement out, unions. Or the Liberal Party will say to Advance Australia the same thing. We've heard that we're being advised that this would be very effective, but if we do it, it'll get caught. So you do it so that it doesn't get caught. If you want to prevent mischievous statements of fact in election campaigns, you'll have to include third party campaigners if you want it to work.

In terms of social media platforms, Dr Freeman questioned whether a social media platform is more like Australia Post or more like the editor of a newspaper. Australia Post doesn't exercise any judgment about what it carries. It just, it just takes things from one, it's just an instrument that you can use to move whatever you want to move. A newspaper is edited and the editor of the newspaper exercises judgment about what goes into the newspaper and what doesn't. There's two very different things. The social media platforms seem to say they're more like Australia Post than the Sydney Morning Herald. But Dr Freeman thinks it's become increasingly apparent that no, they are actually more like the Sydney Morning Herald, that there's an editor, that you need to exercise editorial judgment about what goes on your platform. There needs to be some responsibility by social media platforms for editing what is on it, where they need to exercise judgment.

Dr Freeman noted that political parties would try to weaponise truth in political advertising, and if they see a loophole, and see they might get some advantage, they'll certainly try to get an advantage.

Dr Freeman does not think that TiPA laws would diminish free speech, but he considered that populists and people on the extreme right would be making those claims that that's what's happening and that there's not a fair election campaign.

Dr Freeman didn't think elections are really about specific facts. What's really going on is people are being asked to say, whose judgment do you have more confidence in? Do you have more confidence in the Liberal Party or in the Labor Party to run the country? And Dr Freeman considered that these sort of quibbles about facts, don't really matter so much. What matters is do you think the person is truthful or not, right. So in a sense, it is important if someone is constantly lying, it's important that you should know that because you should understand that you can't trust the person. So this is all more about how do we cultivate an atmosphere of trust and confidence? And there's a real problem here, trying to hold people to the truth. Dr Freeman noted that this is about how people behave in public life and what they think is the role of truth. He considered that Trump is important here because he's such an extreme example that it's easy to say, look, we've got to call this out.

## **Kiera Peacock**

### **Partner, Marque Lawyers**

Ms Peacock is a lawyer in a private law firm who has worked with the Greens and independent candidates, Climate 200, and on the Yes campaign and Zali Stegall's Stop the Lies Bill. She has also helped run a case in the Court of Disputed Returns which clarified the law on misleading or deceptive advertising in elections.

Ms Peacock's general position is that more needs to be done to regulate behaviour which undermines trust in the electoral process. In every jurisdiction in which she has worked, including federally, and in New South Wales and Victoria, she has felt that there is an incredible gap in the system as people are able to produce completely false content without consequence. There is a twofold problem with the

current state of the system because there are few laws which prevent conduct that the majority of the electorate considers to be wrong, and there is a gap in that the only available tools to restrain such conduct are extreme, including restraining conduct with an urgent injunction or going to the Court of Disputed Returns after the election. An injunction can be expensive and a party may not have time to go to court. Relief from the Court of Disputed Returns does not stop the conduct, it can only invalidate the election result. These are high thresholds to cross so it is difficult for there to be any meaningful action to address some of those issues. There are alternative ways of addressing them which, if implemented properly, should not disproportionately burden the implied freedom of political communication.

Ms Peacock believes that truth in political advertising laws might have made a difference in the Voice referendum. A number of false statements were put out during the referendum, including that the referendum would secretly have two questions not one, that the AEC was biased when determining how it would assess an [X] on a ballot paper, and the length of the Uluru Statement from the Heart (that it was not one page by a 'secret' 26 pages). Some of these statements were made by politicians and found to be demonstrably false. They were objective statements capable of being rationally and factually tested. There was nothing to be done about false statements of this nature under the referendum laws. For the most part in political discourse, the only remedies are defamation or violations of other laws such as racial discrimination legislation. Remedies of this nature do not typically assist in stopping the conduct during the campaign, when it is most effective.

Ms Peacock considers that it is fundamental that truth in political advertising laws can be understood by a general person reading them – without a lawyer. Legislative complexity can mean that people who want to comply with the law do not engage in politics or engage to a much lesser extent because they are scared of breaching the law and do not understand how to avoid breaching it. There should be a clear and concise law and penalties should be proportionate so there is no chilling effect on people's participation in the political system. Criminalisation immediately creates a bit of a chilling effect, so and the law should be drafted to mitigate such a chilling effect.

There is also a risk that the laws will be weaponised as political tools to distract campaigns and create media attention. Creating a broader toolkit of remedies and sanctions may also assist in reducing the adverse effects of weaponisation of electoral laws. Being the subject of a complaint about false content would be less daunting if what was initially required was simply a response outlining the factual basis for the content, rather than being required to defend an alleged criminal offence. This achieves the dual purposes of ventilating false content and providing a mechanism whereby the public can understand the basis for certain statements/representations, whilst not unduly scaring political participants. Ms Peacock thinks that we should not avoid having a law for fear of weaponisation, as the idea that laws might be weaponised should be built into their design.

Creating a broader toolkit also assist the regulators. A regulator may be more hesitant to take action if the legislative penalties for breach of an electoral law are onerous and punitive, such as significant fines or imprisonment. Equally, a regulator who suspects a breach of the law may presently have no option but to threaten imprisonment, even if they consider it to be disproportionate.

An example of that was seen in the recent Tasmanian election by a media company who produces satirical videos about political matters. A video was made with the face of the Tasmanian Premier, which the regulator alleged breached a local law prohibiting the use of the name or image of a candidate without the consent of that person. The Commission requested that it be taken down failing which the media company could be criminally prosecuted. This was an extreme escalation for a person producing satirical political material about an upcoming election. The law has now been repealed because of the incident.

Creating a broader toolkit for regulators to address illegal conduct is necessary. That toolkit may include publishing notices of complaints made about certain conduct or of the use of show cause notices to persons who publish false electoral materials. The fact of a show cause notice being issued could be made public (as could any response). A measure such as this creates a layer of accountability without necessarily resorting to criminal consequence.

Ms Peacock considers that the laws in South Australia and the ACT strike a reasonable balance. Both of them have a requirement of there being a statement of fact (which is false), and a requirement that the material is misleading. The bill that Zali Stegall proposed draws on the SA and ACT laws, whilst including another provision that prohibits deepfakes and 'impersonations'; people presenting material as if it has been produced by someone that has not produced it. Ms Peacock favours starting small and seeing how the law changes and adapts rather than starting broad and narrowing the law.

Ms Peacock has no particular concerns about the scope of truth in political advertising laws in South Australia and the ACT. Provided that the regulator is appropriate (which may include the electoral commission), then there should not be any issues with adopting South Australian and ACT laws in larger jurisdictions, subject to some of the amendments suggested here.

Ms Peacock thinks there are two immediate problems with truth in political advertising laws capturing modern digital campaigning. One is being able to identify who is producing content. There are often materials that are not authorised and contain falsehoods, where the initial creator cannot be identified. AI is also something that Ms Peacock is conscious of and she thinks that a principled approach needs to be taken toward actions that should be prohibited. Zali Stegall's proposed law prohibiting representations that content has been produced by someone else may address some of the potential for improper AI use in electoral campaigns. Consideration should be given to disclosure of AI use in an election, as is now required by EU laws. It may not be necessary to prohibit AI altogether but people should be truthful about the content being disseminated.

Ms Peacock proposes that sanctions and remedies for truth in political advertising laws are not inadequate in the sense of their severity but that there is little that can be done to stop the contemporaneous dissemination of material. There need to be more tools to deal with material in the course of a campaign rather than waiting for the Court of Disputed Returns. Ms Peacock supports the staged approach in South Australia. Options for judicial review or AAT review of a decision by the AEC provide options to challenge any incorrect decisions of the AEC.

It is also necessary to examine how falsity is tested and to look at whether higher penalties should be applied to deliberate contraventions or contraventions by particular political actors. Tighter laws could apply to candidates, MPs, political parties or a significant third party, reflecting their sophistication in the political system as well as the higher standards society has for accountability by such persons. Higher sanctions could be applied for the leader of a political party than a charity engaging in advocacy or a social media poster. That could prevent chilling the participation of the everyday person while recognising that people in positions of political power and authority are more widely heard.

Ms Peacock believes that the most appropriate body to enforce truth in political advertising laws is a unit of the AEC. It makes sense to task the function of administering fair elections in one body, although Ms Peacock acknowledges concerns about the independence and integrity of the organisation.

Ms Peacock thinks that all major third party campaigners should be subject to the same truth in political advertising laws as any other key political player. Under federal laws, the definition of a significant third party would be someone who spends more than \$250,000 on electoral expenditure. For example, Advance Australia has previously put forward misleading materials, such as authorising a campaign which suggested that a vote for a candidate was effectively a vote for the Greens or for Labor, which looked like it was endorsed by the party. The AEC took the view that some of this material was illegal under the current s 329 of the Commonwealth Electoral Act and asked for the signs to be removed.

Ms Peacock believes that it may be difficult to achieve timely retractions within an election campaign period, but there is still benefit in the ability to have a retraction be requested and then ignored, as that creates public accountability. That would still only target the informed voter who is aware that there has been a refusal to retract, however.

The removal of content from social media platforms is difficult and entirely dependent on the platform's willingness to engage. Platforms already contribute to transparency to some extent through the

requirement (on Facebook, for example) that a person be registered to an account to produce paid political content. However, those mechanisms are only present if platforms want to engage. There might be scope to arrange for annotations to be put on content if required.

Ms Peacock is not aware of the South Australian Electoral Commission's reputation for neutrality being affected by truth in political advertising laws. It seems that laws are used sparingly.

The laws should be made as clear and succinct as possible, with clear guidance from regulators on how to comply. The potential chilling effect to free speech is offset by the dangers of corrosive free speech, where, in the context of AI, it is unclear who is producing content and what is truth. That issue needs to be addressed quickly.

## **Anne Twomey**

### **Emeritus Professor, University of Sydney**

Anne Twomey stated that on the one hand, from a theoretical point of view, yes, it would be lovely to have truth in political advertising. The difficulty is actually achieving it in any sensible way. There are real impediments at the practical level to be able to do this. The main problem is what it is that you're trying to prevent. Because most of the things that come up in political advertising are not statements of verifiable fact, they're opinion, they're promises, they're predictions, and those sorts of things can't be verified. So that's the main problem number one.

And there's also the subsequent problem, which is, if you do have people trying to decide what is truth, who decides it on what basis? And how do you do it? And what are the procedures for doing it? So all of those things are quite tricky.

Professor Twomey noted that people often refer to the South Australian model, but the South Australian model is very, very limited. It's limited only to advertisements themselves. So the same types of misleading comment can be made in many other ways: through social media, through speeches, and doorstops, through texts, through robocalls. Preventing you from making misleading or false statements in political advertising is really limited in the scheme of things for an election. And not only that, because it's limited to verifiable, it's limited to statements of fact, or things that purport to be statements of fact. Professor Twomey referred to the case of *Hannah v Sibbons*, where it was stated that a person was soft on crime, and that was not captured by the South Australian legislation, because it was an opinion. And an opinion can't be proved as a matter of fact, either way.

Therefore, Professor Twomey think there's all sorts of problems in relation to truth in political advertising laws. Primarily, they can just be avoided really easily. You don't have to make a statement of fact, you can ask a question. And a question itself can be enough to raise people's concern. Professor Twomey referred to an advertisement from Palmer United Party in the Voice indigenous referendum, which didn't make any assertions of fact, it said, will the voice have a veto over Australian law? Will it take Australia from its citizens? And just by asking questions, that's enough. And so any politician who's even vaguely competent should be able to avoid a truth in advertising law and still be able to smear opponents with statements that are effectively misleading, pretty easily.

Professor Twomey noted that all the people that campaign for truth in advertising laws don't quite understand that they're not actually going to get what they're wanting. She referred to the Medicare campaign against the Liberal Party and the death taxes campaign against the Labor party, had a huge impact on the election, which are normally given as examples of why TiPA laws are needed. But none of them would be unlawful under South Australian style laws, because they were predictions, they were opinions about what was going to happen, there were no verifiable statements of fact. So, it's not necessarily going to achieve what people seem to think it's going to achieve.

Professor Twomey stated that TiPA laws could nevertheless achieve some good things in a very small area, so she is not opposed to them. She noted that it's not the great saviour that people think it is.

Professor Twomey had concerns about people trying to tie up their opponents by challenging their advertisements, tying them up in court, getting them to be distracted in their focus from the election campaign, because they're having to lawyer up and deal with all these things, wasting their money and litigation so that they don't have money to actually spend on political advertising.

The second sort of risk is politicising the institutions that make important decisions on these things. If you make the electoral commissioner, someone who makes that kind of decision undermines trust in the electoral commissioner from political parties and others, and particularly at a time when election commissions are under a great deal of stress and pressure anyway. A lot of the stuff coming from the United States has caused distrust in electoral processes. So then having an electoral commissioner even do the first cut, so to speak, by saying, well, this looks like it's false or misleading, so we're going to have some kind of interim stop to it or I'm going to tell the advertiser, take it off or otherwise this will be something that's considered in future litigation, even that kind of a decision will get potentially politicised one way or the other. And so the dilemma in all of this is if you did, for example, using the Medicare argument, even if you took the view that that was an assertion of fact, which it wasn't, it was a prediction. But nonetheless, if you said it was an assertion of fact and then you went to the electoral commissioner and you said ban these advertisements or at least tell the advertiser that, you know, this is misleading and they should stop doing it. If the electoral commissioner then came back and said, well, actually, it's not within my jurisdiction to do it because it's not a statement of fact, then one of the parties would come along and say, well, look, our assertions that the Coalition was going to privatise Medicare, they have been upheld by the electoral commissioner because they haven't banned our ads.

So you can see whatever the electoral commissioner does, if they do say, well, this is false and misleading, it's going to be political. But when they don't, it will be political as well. And it will be used potentially in the advertising saying, oh, and by the way, look, we've been justified by the electoral commissioner.

Professor Twomey thought that kind of thing is really dangerous, and she understood why electoral commissions really don't want to be involved at all.

The courts are obviously the most relevant place to do it. They won't want to do it either. Professor Twomey referred to the courts doing its best to avoid having any involvement by reading down legislation in the Crichton Brown case.

Professor Twomey also pointed out that with courts, you've got problems in terms of timing during election campaign. No one's going to be able to run the full scale case about whether something is true or not in that period of time. So then you're looking at interim injunctions and then dealing with it later. But a second problem with it is also proof. So how do you prove whether someone's statement is true or false? So what if I say, well, such and such a party has a secret plan to introduce a death tax? How do you prove that that's not true? Does that mean you then have to do discovery and then seize all the WhatsApp communications and secret communications on Telegram or whatever between members of that political party to ascertain whether or not they did have a secret plan? Well, you can imagine that that would be in itself a major problem for political parties.

The problem is you can't prove that someone doesn't have a secret plan because the plan of its nature is secret. There's not going to be evidence in it.

And, if you're looking at these things in terms of some kind of a criminal offence, then you've got to prove beyond reasonable doubt. And how do you prove that? It's going to be difficult. And what sort of evidence do you use?

Having said that, Professor Twomey noted that South Australia has had such a law for a period of time, and it doesn't seem to have necessarily had as many problems as she is suggesting there might be. But the other side of it is that South Australia is not as viciously political a jurisdiction as maybe some of the other ones are.

Professor Twomey stated she spoke to a senior person involved in South Australia in advising on these issues, who said don't go anywhere near it with a barge pole, and that it was an absolute

disaster and not to touch it, and they were not happy with the way the law operated there. So Professor Twomey thought there are genuine issues with it.

Professor Twomey stated she was quite sceptical because a lot of people who are advocating for TiPA laws are saying everything's roses and bunnies and rainbows, but are not seriously thinking it through, particularly in the context that people in political parties will spend an awful lot of time trying to manipulate any law to their advantage, and they will do that to this kind of a law as well. So on the one hand, it'll be easily avoided. But on the other hand, it could be easily weaponised. And that's the real risk.

Professor Twomey thought that truth in political advertising laws would have a beneficial impact to the extent that they weed out the obvious lies. So it might deter people from just making outrageous statements that are clearly untrue. But she noted that they are easily avoided by anyone with any level of sophistication.

Professor Twomey didn't think it would achieve a lot, might achieve a little bit. And from that point of view, maybe go ahead and do it. However, she noted that you have to balance the little bit it would achieve against the risks on the other side in terms of politicisation and how it's used.

In terms of the scope of truth in political advertising laws in South Australia and the ACT, Professor Twomey thought they're deliberately narrow, partly to ensure their validity. So here we get to the constitutional issues. When they tried to challenge the South Australian provisions, it was pointed out that the limitations on those provisions helped to bolster its validity. The South Australian provision, because it was restricted to statements of fact and it didn't include opinion, prediction etc, because it was restricted to advertisements only and it didn't cover all the other ways in which people communicate. And because there is also a common law defence about honest and reasonable mistake of fact, those were the factors that meant that this kind of restriction on political advertising didn't render it invalid.

If you did try to make TiPA laws broader, then you might run up against the issues of the third layer of the implied freedom of political communication test. These laws would significantly burden political communication, assuming that you accept that communication that's false and misleading is protected, and that's still uncertain, but assuming that it is, then such laws do burden it. But there would be a legitimate purpose of protecting the community from being misled. Where you have the difficulties is at the next level when you're looking at whether it's reasonably appropriate and adapted, and is it reasonably necessary, and proportionate. And so having defences and having sort of limits on how it applies are actually important from that point of view.

But the flip side is because it's limited, it's not catching everything, and it's only catching a small amount.

Professor Twomey did not think that truth in political advertising laws in South Australia are adequate to capture the activities of modern digital campaigning. There's an awful lot of modern political campaigning that falls outside advertisements. And so a lot of it would be communications through social media, as well as interviews on television and radio, speeches, doorstops, robocalling and texting.

Professor Twomey stated that it depends also on the meaning of advertisement, with some material on social media falling within the category of advertisement if the relevant party actually paid for the statements, but there's an awful lot of social media that gets sent around that wouldn't fall within that category.

In terms of the sanctions or remedies for breaches of truth in political advertising laws, Professor Twomey did not think they are adequate?

The fines are low. And there was at least one case in a Commonwealth parliamentary hearing where the person said it was great value for money. They paid their \$5,000 and they got an enormous amount of publicity. So the fines themselves at the moment are too low really to be a deterrent. I

mean, \$5,000 for the kind of publicity that you might get with those kind of false statements is cheap. So fines are not adequate.

Retractions and removing the material might help a bit, doesn't help to the extent that it's already been seen.

Imprisonment might be more of a deterrent, but then that leaves you with the difficulty of who you imprison. So is it the agent of the relevant party? In which case, you're not going to find anyone who wants to be an agent, which is already a problem. Or is it particular politicians? Or is it the volunteers who hand out the pamphlets? Or, you know, put the advertisements in letterboxes? It's problematic about who you would imprison for that kind of thing. So that's not terribly helpful either.

The other possibility is voiding an election, where there's been misbehaviour of this kind. But that's a problem as well, particularly if there's a lack of certainty about how the law applies and what it applies to. Professor Twomey referred to the comment in the *Evans v Brown* case, that the result of many elections could be rendered uncertain if you had that kind of a law. So as a penalty, the voiding of an election just because someone's been doing advertising that was false and misleading is also problematic.

Professor Twomey is of the opinion that the South Australian law, to the extent that it's already been tested and is quite limited, is probably about the best you're going to get because you've got all those other problems if you take it broader from a constitutional point of view.

In terms of the appropriate arbiter, Professor Twomey didn't think courts are a great option. There's the possibility of having a sort of a standalone body. But the problem with that is because elections only come up every few years, you couldn't have them as an ongoing body and then you wouldn't be able to develop any kind of systems etc, to do that. So that's problematic as well, particularly if you're appointing people every time, you know, for a new one, it would again politicise the process.

If this was done, it might be advisable to tack it on to existing ongoing administrative review bodies, eg ART/NCAT, with an electoral branch that pops up into play every now and again, whenever you need it, with the same people doing other stuff for the whole rest of the period in between. Professor Twomey suggested that the sort of people who are independent, quasi-judicial, but not a court (such as the ART and NCAT), can work quickly in a practical sort of way, have ongoing positions and do other work as well.

Professor Twomey thought it would be difficult to achieve timely retractions within an electoral campaign period. Like the South Australian position, you need some kind of a carrot and stick. So it might be the case that, you know, you put pressure on people to withdraw advertisements in certain circumstances, because if they don't, then there are consequences later on once the thing's been resolved by a court. It's probably more a matter of putting the incentives in the right way to get people to withdraw because there might be greater consequences later on if they don't.

Professor Twomey stated that in the broader perspective, because the South Australian TiPA laws only apply to a very limited part of the field, and because they're very easy to avoid, she thought that the likelihood was that there would still be false or misleading material circulating in South Australia during an election campaign.

Professor Twomey did not think truth in political advertising laws may have a chilling effect on free speech to the extent that they're quite limited, she thought that people would just avoid them. So they'll still be able to speak, but they'll just do it through different means. If truth in political advertising was broader in its application and had serious penalties etc, then there is a potential for that.

Professor Twomey noted that there would be things that were legitimately contested that some people would say were false and other people would say, no, they're not false. And if you were just wiping that out of political discourse because of such laws, then yes, it would be really problematic. At the moment, you're not wiping anything out from discourse, because even if you can't use it in a political advertisement, you can use it in all sorts of other ways and places.



Professor Twomey thought that the difficult issue in the end was that if you really want to achieve an outcome of not having false or misleading materials sent to voters or received by voters, then you would need to make TiPA laws broader. But once you do make it broader in that way, potentially you are having a chilling effect on freedom of speech, and have problems with the implied freedom of communication as well.