

Truth in political advertising laws: operation and effectiveness.

INTERIM REPORT

Table of Contents

- 1 Introduction 3**
 - 1.1 Aims 4
 - 1.2 Structure..... 4
 - 1.3 Executive Summary 4
 - 1.3.1 Key Findings from Interviews 4
- 2 Current and Historical Regulation of Truth in Political Advertising Laws in Australia..... 6**
 - 2.1 South Australia..... 6
 - 2.2 Australian Capital Territory 6
 - 2.3 Commonwealth 7
 - 2.4 Tasmania 8
 - 2.5 Discussions in Other Jurisdictions 8
 - 2.5.1 Victoria..... 8
 - 2.5.2 New South Wales 9
- 3 Regulation of Untruths and Disinformation in Overseas Jurisdictions 10**
 - 3.1 Ireland 10
 - 3.2 New Zealand..... 11
 - 3.3 United Kingdom..... 12
 - 3.4 Canada..... 12
 - 3.5 United States..... 13
 - 3.6 European Parliament 15
- 4 Summary of Interviews 16**
 - 4.1 Methodology..... 16
 - 4.2 Summary of Interviews 16
 - 4.2.1 Operation of Truth in Political Advertising Laws in South Australia 16
 - 4.2.2 Views from Other Jurisdictions 20
 - 4.2.3 Recommendations for Reform by Interviewees..... 23
 - 4.2.4 Key Findings from Interviews 24
- 5. Design Choices for Truth in Political Advertising Laws in Australia 26**
 - 5.1 Scope of Truth in Political Advertising Laws 26
 - 5.1.1 Substance 27
 - 5.1.2 Form..... 28
 - 5.1.3 Temporality 29
 - 5.1.4 Materiality 30
 - 5.1.5 Target of Regulation 30
 - 5.1.6 Overlap with Other Laws 31
 - 5.2 Operation 33
 - 5.2.1 Operational Processes and Issues 33
 - 5.2.2 Unintended Consequences 36
 - 5.3 Enforcement of Truth in Political Advertising Laws..... 39

5.3.1	The Appropriate Arbitrator	39
5.3.2	Sanctions and Remedies	43
6	Conclusion	50
	Appendix A: List of Interviewees	51
	Appendix B: Comparison of TiPA laws in Australia	52
	Appendix C: Case Law on Truth in Political Advertising	54

1 Introduction

In recent times, there has been significant concern about disinformation or untruths being peddled by political parties to influence electoral outcomes in their favour. A salutary example is the online campaign of misinformation from then President Trump, who falsely claimed that the 2020 Presidential Election had been 'stolen'. This led to Trump's supporters storming the US Capitol Building on 6 January 2021, resulting in five deaths.¹

The spread of disinformation in an electoral campaign undermines the public's ability to make informed choices in casting their vote, and is detrimental to electoral integrity and democratic processes.

One mechanism for regulating disinformation is to introduce 'truth in political advertising' laws. By targeting or prohibiting disinformation in elections, the main goal of truth in political advertising laws is 'to protect the integrity of the electoral process: most importantly, to curtail the potential manipulation of voters at the individual level and to prevent the campaign debate being skewed in irrelevant directions'.²

Truth in political advertising (TiPA) laws already exist in South Australia³ (since 1985) and the ACT⁴ (since 2020), and the Commonwealth government has committed to introducing such a law before the 2025 federal election. Truth in political advertising laws have thus been operational in South Australia for 39 years, and will be utilised for the first time in the October 2024 ACT election. Representative polling by the Australia Institute shows that 84% of Australians support truth in political advertising laws.⁵

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

This interim report presents the findings from the interviews with politicians, party officials, electoral commissioners and civil society organisations. Interested parties are encouraged to contact the author of the report at yeefui.ng@monash.edu if they wish to provide additional information. Following additional interviews and further consultation, a final report will be delivered that will provide recommendations on the design, operation and effectiveness of truth in political advertising laws.

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

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

² Jacob Rowbottom, 'Lies, Manipulation and Elections: Controlling False Campaign Statements' (2012) 32(3) *Oxford Journal of Legal Studies* 507, 519.

³ *Electoral Act 1985* (SA) s 113.

⁴ *Electoral Act 1992* (ACT) s 297A.

⁵ Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 4, 31.

1.1 Aims

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

The project will examine and report on:

- a summary of the interviews that were undertaken for the project;
- responses to the key research questions;
- an assessment of and conclusions about the impact of the laws;
- recommendations for reform of existing schemes or design of future schemes (NB – to be included in the final report); and
- summarise academic literature and international examples, where relevant.

1.2 Structure

The report is structured as follows:

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

1.3 Executive Summary

1.3.1 Key Findings from Interviews

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

- TiPA laws have undoubtedly changed the face of electoral campaigning in South Australia, with state party directors/secretaries working with the premier and lawyers to closely scrutinise the wording of all political ads to ensure that they are accurate and do not breach the laws.
- The level of compliance with the Electoral Commissioner's determinations is good, with political parties generally following the Commissioner's directions in issuing retractions.
 - There was an incident of a political party disagreeing with the Electoral Commissioner's decision and refusing to retract in 2022, based on detailed legal advice from a King's Counsel, but this was seen to be unprecedented.
- The rise of social media has led to an increased number of complaints to the Electoral Commissioner in the most recent 2022 election.
- There are indications that TiPA laws have been used as a political tool, particularly in the last two elections (2018 and 2022), by political parties seeking to gain electoral advantage. Prior to this (before the 2014 election), there was less indication of TiPA laws being weaponised.

- Political parties have made multiple complaints against their opponents to distract them, delaying tactics have been employed, and parties have sought to embarrass their opponents by publicising electoral commissioner findings of false and misleading statements in the media.
- The South Australian participants were unanimous that the TiPA laws have had no ‘chilling’ effect on freedom of speech. This could be because the laws are narrowly formulated to statements of fact, rather than opinions or predictions.
- The South Australian participants were unanimous that the South Australian Electoral Commission’s reputation for impartiality over time has been unaffected by administering TiPA laws, and that the Electoral Commission continues to enjoy strong public confidence for neutrality.
- Several participants have noted the desirability of more serious breaches of TiPA laws being prosecuted in the courts, in order to have a stronger deterrent effect.
- Several interviewees have noted that the current SA laws may not be fit-for-purpose in several respects, including in dealing with aspects of misinformation/disinformation that are not covered by political advertising, blackout periods being ineffective with early voting, AI and deepfakes.
- The TiPA laws are generally supported in principle in South Australia by most political participants, who believe that the laws have a positive effect. This is consistent with previous empirical research from 2019, where Renwick and Palese found that both parties ‘support the principle of s 113’.⁶

The project has made the following findings from other jurisdictions:

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

⁶ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 27.

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

At present, truth in political advertising laws only exist in South Australia and the Australian Capital Territory. The Commonwealth has previously had a truth in political advertising law in 1984, but this was repealed soon after its enactment. However, the Commonwealth has now committed to re-introducing truth in political advertising laws before the 2025 federal election. In Tasmania, a private member's bill has been introduced that incorporates truth in political advertising provisions, but is unlikely to pass without the support of the major parties.

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

2.1 South Australia

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

The SA Act provides that it is a defence to prove that the defendant took no part in determining the content of the advertisement,⁷ and could not reasonably be expected to have known that the statement was inaccurate and misleading.⁸

In 2019, Renwick and Palese described the SA Act as going 'further than any other [democratic polity] in seeking to ban misinformation in election campaigns'.⁹

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

2.2 Australian Capital Territory

Similar wording is used in s 297A of the *Electoral Act 1992 (ACT)* ('ACT Act'), which provides that it is an offence if a person 'disseminates, or authorises the dissemination of, an advertisement containing electoral matter' and 'the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent'.¹⁰ Section 297A was introduced in 2021 following the passage of the *Electoral Amendment Act 2020 (ACT)*.

Like the SA Act, the ACT Act provides that it is a defence to prove that the defendant took no part in deciding the content of the advertisement,¹¹ and could not reasonably be expected to have known that the statement was inaccurate and misleading.¹²

⁷ *Electoral Act 1985 (SA)* s 113(3)(a) ('determining').

⁸ *Electoral Act 1985 (SA)* s 113(3)(b).

⁹ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 22.

¹⁰ *Electoral Act 1992 (ACT)* s 297A.

¹¹ *Electoral Act 1992 (ACT)* s 297A(2)(a) ('deciding').

¹² *Electoral Act 1992 (ACT)* s 297A(2)(b).

2.3 Commonwealth

In 1984, the Commonwealth Parliament inserted s 329(2) into the *Commonwealth Electoral Act 1918* (Cth), under which it was an offence to print, publish, distribute or broadcast an electoral advertisement containing a statement that was untrue or was, or likely to be, misleading or deceptive.¹³ The Joint Committee on Electoral Reform called for the repeal of s 329(2) in August 1984,¹⁴ based on concerns about legislative interference; the distinction between facts, predictions and opinions; the impact of the law on publishers; and the misuse of interim injunctions.¹⁵ Following that call, s 329(2) was repealed in October 1984, eight months after its assent.¹⁶

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

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

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

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

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

More recently, the Commonwealth Parliament's Joint Standing Committee on Electoral Matters *Conduct of the 2022 Federal Election and Other Matters* interim report recommended that the Commonwealth Government develop legislation to implement 'truth in political advertising' reforms, with consideration given to the South Australian laws.¹⁷

In 2022, the Labor government promised that truth in political advertising laws will be introduced ahead of the next federal election in 2025.¹⁸ Federal Opposition Leader Peter Dutton has indicated in-principle support for 'truth in political advertising' laws,¹⁹ despite Opposition MPs on the Commonwealth Parliament's Joint Standing Committee on Electoral Matters opposing 'truth in political

¹³ Department of Parliamentary Services (Cth), *Political Advertising in Australia* (Research Brief, 29 November 2004) 8–9.

¹⁴ Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 27 [2.82].

¹⁵ Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 14.

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

¹⁷ Parliament of Australia Joint Standing Committee on Electoral Matters, *Conduct of the 2022 federal election and other matters (interim report)* (2023), available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/~/_link.aspx?id=D40F0DDBF8234F8C8683CB06C5104FD8&z=z, recommendations 11-12 and pages 70—106.

¹⁸ See, eg, Paul Karp, 'Labor Aims to Legislate Spending Caps and Truth in Advertising, Says Don Farrell', *The Guardian* (online, 10 July 2022) <<https://www.theguardian.com/australia-news/2022/jul/10/labor-aims-to-legislate-spending-caps-and-truth-in-advertising-says-don-farrell>>.

¹⁹ Paul Karp, 'Peter Dutton Says Truth in Political Advertising "Probably Welcome" But Criticises Labor as Scare Campaign "Experts"', *The Guardian*, 14 March 2024, available at <https://www.theguardian.com/australia-news/2024/mar/14/peter-dutton-truth-in-political-advertising-laws-labor-policy> (accessed 12 June 2024).

advertising reforms'.²⁰ Crossbench MPs have indicated that they support 'truth in political advertising' laws,²¹ and various Private Members Bills have been introduced into Parliament.²²

2.4 Tasmania

A Greens Private Member's Bill relating to truth in political advertising has been recently introduced into the Tasmanian Parliament in 2024.²³ This law is based on the SA and ACT provision, and makes it an offence for an advertisement to contain a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.

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

Without the support of the major parties, this Bill is not likely to pass.

2.5 Discussions in Other Jurisdictions

2.5.1 Victoria

A 2010 parliamentary committee inquiry decided not to recommend 'truth in political advertising' reforms in Victoria.²⁴ A subsequent inquiry in 2021 by the same parliamentary committee noted that electoral advertising had evolved since 2010 and that transparency was not sufficient to guard against inaccurate information,²⁵ and recommended that the Victorian Government introduce a form of 'truth in political advertising' legislation.²⁶

²⁰ See Parliament of Australia Joint Standing Committee on Electoral Matters, *Conduct of the 2022 federal election and other matters (final report)* (2023), available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/~link.aspx?id=B0EB44BCE6544D4488F8F90E44E0AA37&z=z (accessed 12 June 2024), page 222.

²¹ See e.g. Paul Karp, 'Peter Dutton Says Truth in Political Advertising "Probably Welcome" but Criticises Labor as Scare Campaign "Experts"', 14 March 2024, available at <https://www.theguardian.com/australia-news/2024/mar/14/peter-dutton-truth-in-political-advertising-laws-labor-policy> (accessed 12 June 2024).

²² See Commonwealth Electoral Amendment (Stop The Lies) Bill 2022 (Cth), available at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=BillId:r6947%20Reconstruct:billhome> (accessed 12 June 2024); Electoral Legislation Amendment (Restoring Trust) Bill 2023 (Cth), available at https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r7067 (accessed 12 June 2024); Electoral Legislation Amendment (Fair and Transparent Elections) Bill 2024 (Cth), available at https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r7168 (accessed 12 June 2024).

²³ See e.g. Electoral Disclosure and Funding Amendment Bill 2024, available at <https://www.parliament.tas.gov.au/bills/bills2024/electoral-disclosure-and-funding-amendment-bill-2024-9-of-2024> (accessed 14 June 2024), clause 16.

²⁴ Parliament of Victoria Electoral Matters Committee, *Inquiry into the provisions of the Electoral Act 2002 (Vic) relating to misleading or deceptive political advertising* (2010), available at <https://www.parliament.vic.gov.au/4af9b0/contentassets/8c7922ab6e284c75ac65e702424f5a56/final-report.pdf> (accessed 12 June 2024).

²⁵ Parliament of Victoria Electoral Matters Committee, *Inquiry into the impact of social media on elections and electoral administration* (2021), available at <https://www.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-the-impact-of-social-media-on-elections-and-electoral-administration/reports> (accessed 12 June 2024), pages 114-124.

²⁶ Parliament of Victoria Electoral Matters Committee, *Inquiry into the impact of social media on elections and electoral administration* (2021), available at <https://www.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-the-impact-of-social-media-on-elections-and-electoral-administration/reports> (accessed 12 June 2024), pages 114-124.

The Victorian Government supported the recommendation from the 2021 inquiry,²⁷ but noted that it would undertake consultation with key stakeholders (such as the Victorian Electoral Commission), and consider the recommendation further (such as potential human rights and constitutional implications).

The Victorian Government has not made any legislative amendments to implement the recommendation.

2.5.2 New South Wales

A NSW parliamentary committee inquiry is currently considering matters relating to the administration of the 2023 NSW State Election, which includes consideration of the desirability of the introduction of truth in political advertising laws in its terms of reference.²⁸ The inquiry is due to report by May 2025.²⁹

²⁷ Government Response to the Recommendations made by the Electoral Matters Committee in its 2021 Report on its Inquiry into the Impact of Social Media on Victoria's State Elections and Electoral Administration https://www.parliament.vic.gov.au/49c44c/contentassets/31239935f05343109b7ce3c6e07b5691/attachment_-_government_response_to_the_electoral_matters_committee_recommendations_dqjthyt.pdf, pages 2-3.

²⁸ See Parliament of New South Wales, Administration of the 2023 NSW State Election and Other Matters <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3024>.

²⁹ See Parliament of New South Wales, Administration of the 2023 NSW State Election and Other Matters <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3024>.

3 Regulation of Untruths and Disinformation in Overseas Jurisdictions

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

3.1 Ireland

On 25 July 2022, Ireland passed the *Electoral Reform Act 2022*. Part 5 vests powers in their new Electoral Commission (An Coimisiún Toghcháin) to regulate online political advertising, including through monitoring, investigating and combatting disinformation and misinformation.³⁰ These functions are broader than analogous provisions in both the SA Act and ACT Act, and operate as part of the Electoral Commission's remit rather than setting out a particular prohibition.

The Commission is empowered to issue take-down notices³¹ or correction notices³² for online electoral information or process information that constitute disinformation. The Commission can also issue labelling orders (which require an online platform to state that its subject content is being investigated)³³ or access-blocking orders (which require an online platform to disable access to information that constitutes disinformation).³⁴ The Commission can apply to the High Court for an order directing compliance with these notices or orders.³⁵

The *Electoral Reform Act 2022* also includes a more specific offence of disinformation and misinformation. Specifically, a person is guilty of an offence if they, during an election period and with the intention of influencing the results of the election, makes or publishes a false statement of withdrawal, a false statement of fact with the intention of causing voters to abstain from voting, or a statement that purports to be from another person.³⁶

In proposed amendments to the *Electoral Reform Act 2022*, this offence applies to all of the above categories as well as a false statement with the intention of causing voters to inadvertently spoil their ballot papers, electoral process disinformation or manipulative or inauthentic behaviour.³⁷

The penalty for this offence is a) on summary conviction, a class A fine or imprisonment for a term not exceeding 12 months or both, or b) on conviction on indictment, to a fine or imprisonment for a term not exceeding 5 years or both.³⁸

Summary proceedings may be brought and prosecuted by the Electoral Commission, but all proceedings can only be instituted with the consent of the Director of Public Prosecutions.³⁹ The effect of this section is untested, as there is no intention to implement the enforcement powers in Part 5 prior to the next general election (which is to be held no later than March 2025).⁴⁰ Due to the ongoing

³⁰ *Electoral Reform Act 2022* (Ireland) ss 145, 150.

³¹ *Electoral Reform Act 2022* (Ireland) s 153.

³² *Electoral Reform Act 2022* (Ireland) s 154.

³³ *Electoral Reform Act 2022* (Ireland) s 155.

³⁴ *Electoral Reform Act 2022* (Ireland) s 156.

³⁵ *Electoral Reform Act 2022* (Ireland) s 158.

³⁶ *Electoral Reform Act 2022* (Ireland) s 166.

³⁷ General Scheme of the Electoral Reform (Amendment) Bill 2024 (Ireland) s 166(1).

³⁸ *Electoral Reform Act 2022* (Ireland) s 166(2).

³⁹ *Electoral Reform Act 2022* (Ireland) s 169(1)–(2).

⁴⁰ Joint Committee on EU Affairs, *Report on EU Elections, Voting Rights and Disinformation* (May 2024) 20.

dialogues between Irish authorities and the European Commission, Parts 4 and 5 have not commenced.⁴¹

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

On 5 July 2022, the European Commission issued a detailed opinion that Part 4 of the Act is incompatible with arts 14 and 15 of *Directive 2000/31/EC* ('e-Commerce Directive'). Article 14 provides for an exemption of liability for service providers storing information at the request of the recipient of the service who do not have knowledge of illegal activity or information (or who act expeditiously to remove or disable access to the information upon obtaining such knowledge).⁴² Article 15 provides that member states shall not impose a general obligation on service providers to monitor information.⁴³

The Commission considered that Part 4, which requires online platforms to verify the identity of buyers of online political advertising and to prevent access to buyers where there are reasonable grounds that the person is prohibited, effectively required online platforms 'to monitor all the advertisements available in their services ... to assess whether it fulfils the notion of "for political purposes"'.⁴⁴

Subsequently, on 30 August 2022, the European Commission issued comments that Part 5 of the Act expressing similar concerns that the scheme of notices, orders and offences might not comply with arts 14 and 15, but that its concerns would be mitigated if the law accounted more fully for clarifications by Irish authorities that Part 5 is not intended to make service providers liable absent actual knowledge, and that there is no obligation on service providers to proactively seek out information to reach a state of actual knowledge.⁴⁵

On 7 December 2023, the Minister for Housing, Local Government and Heritage noted that, given the European *Proposal for a Regulation of the European Parliament and of the Council on the Transparency and Targeting of Political Advertising*, both Parts 4 and 5 of the *Electoral Reform Act 2022* would be examined and adjusted to align the Act with the requirements of the European proposal.⁴⁶ On 3 July 2024, Ireland notified its General Scheme of the Electoral Reform (Amendment) Bill 2024, which proposes amendments to align Part 5 with the EU regulatory scheme.⁴⁷ No comments have yet been issued by the European Commission.

3.2 New Zealand

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

As a corrupt practice, breach of s 199A is punishable by up to two years imprisonment and/or a fine of up to NZD40,000.⁴⁸

⁴¹ See, eg, Houses of the Oireachtas, *Dáil Éireann Debate* (7 December 2023) <<https://www.oireachtas.ie/en/debates/question/2023-12-07/66/>>.

⁴² *Directive 2000/31/EC of the European Parliament and of the Council* [2000] OJ L 178/1, art 14.

⁴³ *Directive 2000/31/EC of the European Parliament and of the Council* [2000] OJ L 178/1, art 15.

⁴⁴ *Detailed Opinion from the Commission regarding a Rule on Services (Article 6, Paragraph 2, Third Indent, of Directive (EU) 2015/1525* (5 July 2022) 3.

⁴⁵ *Observations from the Commission (Article 5, Paragraph 2 of Directive (EU) 2015/1535* (30 August 2022) 3–4.

⁴⁶ Houses of the Oireachtas, *Dáil Éireann Debate* (7 December 2023) <<https://www.oireachtas.ie/en/debates/question/2023-12-07/66/>>.

⁴⁷ *Notification 2024/0374/IE* (3 July 2024).

⁴⁸ Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 18–19.

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

The operation of the New Zealand laws has been criticised as ineffective. Some were unaware that s 199A even existed.⁴⁹ Those that recalled the provision viewed it as 'impractical', unlikely to be proven, and as 'an inappropriate interference with free speech'.⁵⁰ Renwick and Palese conclude that '[i]t can be readily seen ... that section 199A has no impact'.⁵¹

In parallel, the Advertising Standards Code requires 'truthful presentation' of advertising.⁵² Rule 2(b) expands upon what is meant by 'truthful presentation', noting that obvious untruths or hyperbole that are unlikely to mislead 'may be acceptable'.⁵³ This is overseen by the Advertising Standards Authority, and constitutes a mode of 'private regulation' which 'exposes political ads to significant analysis and the real threat of withdrawal'.⁵⁴

3.3 United Kingdom

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

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

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

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

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

3.4 Canada

In Canada, s 91 of the *Canada Elections Act* provides that no person shall, with the intention of affecting election results 'make or publish, during the election period, a false statement' that a

⁴⁹ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 37.

⁵⁰ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 37.

⁵¹ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 38.

⁵² Advertising Standards Authority, *Advertising Standards Code* (as of 1 February 2019) principle 2, particularly r 2(b).

⁵³ Advertising Standards Authority, *Advertising Standards Code* (as of 1 February 2019) 10.

⁵⁴ Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 18–19.

candidate has committed an offence, or a false statement about the ‘citizenship, place of birth, education, professional qualifications or membership in a group or association’ of a candidate.⁵⁵ The prohibition is specifically confined to false statements about a candidate rather than political issues (similar to the UK provision) and is limited to the election period.

A previous version of the law that did not require false statements to be ‘knowingly’ made was struck down in 2021 by the Ontario Superior Court. It was found to be incompatible with freedom of expression in s 2(b) of the *Canadian Charter of Rights and Freedoms*. Davies J found that the ‘distribution of false information during elections can threaten our democracy’, and that s 91(1) constituted part of ‘Canada’s overall response to the threat posed by misinformation and disinformation during elections’.⁵⁶ However, the removal of the requirement of knowledge of falsity of statements was not a justifiable limitation on freedom of expression. The law was then amended to only cover false statements that were knowingly made.

Hill, Douglass and Baltutis consider that s 91 ‘seems to have had little impact on the Canadian electoral landscape’ and ‘there is little evidence that it has been successful’.⁵⁷

3.5 United States

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

The position of truth in political advertising in the United States is also affected by the Supreme Court decision of *United States v Alvarez* (*‘Alvarez’*).⁵⁸ In *Alvarez*, the Supreme Court considered the constitutionality of an Act which forbade false representations of military medals or honours. The Court held that ‘Government has not demonstrated false statements generally should constitute a new category of unprotected speech’. Consequently, the statute conflicted with the First Amendment.⁵⁹

Consequently, Professor Catherine Ross noted that the ‘First Amendment poses a virtually insurmountable obstacle to government regulation of deceptive campaign speech’, meaning that the ‘state cannot become the arbiter of truth, even where misleading statements are nothing more than straight-out lies’.⁶⁰ Likewise Staci Lieffring suggested that US Courts would find ‘any attempt to regulate false, non-defamatory statements of political speech unconstitutional’.⁶¹

As Hill et al note, ‘[t]he United States’ political tradition of individualised free speech and expression rights protection, as codified into its political landscape through the First Amendment of the American Constitution has meant that any attempt to regulate political speech and, by extension, election advertising, has encountered fierce cultural, legal and constitutional resistance’.⁶² As such, various

⁵⁵ *Canada Elections Act*, SC 2000, c 9, s 91.

⁵⁶ *Canadian Constitution Foundation v Canada (Attorney-General)* [2021] ONSC 1224, [2]–[3].

⁵⁷ Lisa Hill, Max Douglass and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022) 67.

⁵⁸ (2012) 567 US 709.

⁵⁹ *United States v Alvarez* (2012) 567 US 709, 722 (Kennedy J).

⁶⁰ C Ross, ‘Ministry of truth? Why law can’t stop prevarications, bullshit, and straight-out lies in political campaigns’ (2017) 16(1) *First Amendment Law Review* 367.

⁶¹ Staci Lieffring, ‘First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After *United States v Alvarez*’ (2013) 97 *Minnesota Law Review* 1047, 1061.

⁶² Lisa Hill, Max Douglass, and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave MacMillan, 2022) 67.

State legislation attempting to regulate false electoral speech have been struck down as unconstitutional.⁶³

The situation is different in Australia, where various electoral legislation have been held to be consistent with the implied freedom of political communication, including truth in political advertising laws.⁶⁴

Recently in 2024, three bills on election regulation were introduced to target disinformation in United States elections.⁶⁵

First, the *Protect Elections from Deceptive AI Act* proposes to prohibit the distribution of materially deceptive AI-generated audio or visual media in carrying out a federal election for the purposes of influencing an election or soliciting funds. The prohibition is enforceable through a civil action by the person whose voice or likeness appears in, or who is the subject of, materially deceptive AI. Available relief includes injunctive or other equitable relief prohibiting the distribution of materially deceptive AI, or an action for general or special damages.⁶⁶

Second, the *AI Transparency in Elections Act of 2024* proposes to require advertisements to state if generative AI was used.⁶⁷ The Federal Election Commission is responsible for enforcing any violations of this disclosure requirement by requiring a person to pay a civil money penalty.⁶⁸

Third, the *Preparing Election Administrators for AI Act* proposes to require the Election Assistance Commission to develop voluntary guidelines for administering elections that addresses the use and risks of artificial intelligence.⁶⁹

Broadly, each of these bills targets the intersection of technology and disinformation in the election context. Both deepfakes and AI have been recognised as posing risks to elections. Wilkerson considers that an absence of deepfake regulation 'leaves the nation vulnerable to election tampering and political dismantlement'.⁷⁰ AI may be more effective at microtargeting and influencing individuals.⁷¹ AI can also constitute election interference: for example, if it is used to generate fake news to impact voter behaviour.⁷²

Simultaneously, the regulation of these technologies also raises First Amendment considerations. For example, deepfakes may be protected if parodic, and some false statements which relate to political speech may be covered as well.⁷³

⁶³ Eg *Commonwealth v Lucas* ((2015) 472 Mass 387); *Susan B Anthony List v Ohio Elections Commission* ((2014) 45 F Supp. 3d 765); *281 Care Committee v Arneson* ((2014) 766 F3d 774)., based on the approach in *United States v Alvarez* ((2012) 567 U.S. 709. See discussion in Lisa Hill, Max Douglass, and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave MacMillan, 2022) 67-71.

⁶⁴ *Cameron v Becker* (1995) 64 SASR 238.

⁶⁵ Noting, however, that none of these bills have yet been enacted into law.

⁶⁶ *Protect Elections from Deceptive AI Act*, S 2770, 118th Congress, § 2.

⁶⁷ *AI Transparency in Elections Act of 2024*, S 3875, 118th Congress, § 2.

⁶⁸ *AI Transparency in Elections Act of 2024*, S 3875, 118th Congress, § 2.

⁶⁹ *Preparing Election Administrators for AI Act*, S 3897, 118th Congress.

⁷⁰ Lindsey Wilkerson, 'Still Waters Run Deep(fakes): The Rising Concerns of "Deepfake" Technology and Its Influence on Democracy and the First Amendment' (2021) 86(1) *Missouri Law Review* 407, 432.

⁷¹ Sarah ML Bender, 'Algorithmic Elections' (2022) 121(3) *Algorithmic Elections* 489, 513.

⁷² Sarah ML Bender, 'Algorithmic Elections' (2022) 121(3) *Algorithmic Elections* 489, 513-14.

⁷³ Lindsey Wilkerson, 'Still Waters Run Deep(fakes): The Rising Concerns of "Deepfake" Technology and Its Influence on Democracy and the First Amendment' (2021) 86(1) *Missouri Law Review* 407, 414-18.

3.6 European Parliament

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

Chapter II of *Regulation 2024/900* imposes transparency and due diligence obligations for providers of political advertising services (including traditional media providers such as newspapers, television, and radio as well as online platforms), including by identifying whether advertising services are political advertising services,⁷⁴ and by keeping records on their provision of political advertising services.⁷⁵ Publishers are also obliged to ensure that political advertising provides information in a 'clear, salient and unambiguous way', including by stating that it is a political advertisement and the identity of its sponsor.⁷⁶

Political advertising should also contain a transparency notice with details such as benefits received by providers of political advertising services and whether the political advertisement uses targeting or ad-delivery techniques on the basis of personal data.⁷⁷ *Regulation 2024/900* also restricts the instances in which targeting and ad-delivery techniques can be used, including through permitting these techniques only where the controller collected data from the data subject.⁷⁸

⁷⁴ *Regulation 2024/900 on the Transparency and Targeting of Political Advertising* [2024] OJ L 1/44, art 8.

⁷⁵ *Regulation 2024/900 on the Transparency and Targeting of Political Advertising* [2024] OJ L 1/44, art 9.

⁷⁶ *Regulation 2024/900 on the Transparency and Targeting of Political Advertising* [2024] OJ L 1/44, art 11.

⁷⁷ *Regulation 2024/900 on the Transparency and Targeting of Political Advertising* [2024] OJ L 1/44, arts 11–12.

⁷⁸ *Regulation 2024/900 on the Transparency and Targeting of Political Advertising* [2024] OJ L 1/44, art 18.

4 Summary of Interviews

This project has conducted 21 interviews with various stakeholders involved in truth in political advertising laws, such as current and former Ministers, Members of Parliament, Electoral Commissioners, political party directors/secretaries, and civil society groups.

Interviews were concentrated in South Australia, where TiPA laws have been in operation since 1985 and which is currently the only jurisdiction that has run election campaigns with TiPA laws in operation. The ACT laws were introduced in 2021 and will only be tested for the first time in the October 2024 elections. The views of stakeholders from other jurisdictions were also sought regarding TiPA laws. Some participants requested not to be attributed for comments.

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

4.1 Methodology

The author conducted qualitative interviews with current and former Ministers, Members of Parliament, political party officials, electoral commissioners and civil society organisations (listed in Appendix A). The qualitative methodology focuses on exploration and discovery rather than measurement and confirmation of predetermined hypotheses.⁷⁹ A semi-structured interview format was utilised and South Australian participants were asked about their experiences in terms of the scope, operation and unintended consequences of truth in political advertising laws, while participants from other jurisdictions were asked about their opinions about the scope, operation and unintended consequences of truth in political advertising laws. The data collected was transcribed for analysis. Analysis was conducted manually, with a thematic analysis utilised to code and annotate the data to identify, analyse, and report patterns or themes.⁸⁰ In addition to interview data, the research design incorporates parliamentary reports and other primary sources to triangulate between the different sources to enhance the reliability and validity of the study.⁸¹

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

4.2 Summary of Interviews

4.2.1 Operation of Truth in Political Advertising Laws in South Australia

Truth in political advertising laws have the in-principle support of the majority of stakeholders in South Australia, including politicians, party officials and electoral commissioners. Most of the political participants are positive about the TiPA laws and consider that they work well. As the law has been in place for 39 years, the major stakeholders are familiar with the TiPA law,⁸² and it has become 'part of the furniture'.⁸³

⁷⁹ S B Merriman, *Case Study Research in Education* (Jossey Bass, 1988) 17.

⁸⁰ J Lofland and L H Lofland, *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis* (Wadsworth, 3rd ed 1995) 189-97.

⁸¹ N K Denzin, *The Research Act: A Theoretical Introduction to Sociological Methods* (Prentice Hall, 3rd ed, 1989) 25.

⁸² Interview with Mick Sherry, 6 August 2024.

⁸³ Interview with Aemon Bourke, 29 August 2024.

Former Premier Mike Rann strongly supported TiPA laws, 'It's really important for there to be a free market of ideas in the political discourse. A free market of ideas, however, doesn't mean licensing a sewer of lies and fraud. And so, I think that in South Australia, we've been able through this legislation that we put in all those years ago, have been able to show that truth in advertising laws, that the public want it, the public support it, the public are protected by it, our democracy is enhanced by it'.⁸⁴

Former SA Deputy Electoral Commissioner David Gully argued that TiPA laws are necessary because if these laws did not exist, then it opened up opportunities for people to tell lies in politics.⁸⁵ He contended that if you can be sued for defamation for making untrue statements under the common law, then if you are telling untruths in a state election, or a federal election in a democracy, there should also be some penalty for doing so. Mr Gully stated: 'I don't think you should get a get out of jail free card, because it's just an election and I can say anything about you as an opposing candidate or party'.⁸⁶

Similarly, former SA Premier Mike Rann questioned why political parties want and need a licence to lie in order to win an election. He made an analogy between pharmaceutical companies making false claims about medicines and drugs curing diseases when they cannot.⁸⁷ He noted, 'Why should consumers and shareholders be protected from fraudulent and dishonest claims but not electors? Why don't you want electors to be able to make their judgements and cast their votes on the basis of facts and truthful arguments rather than deliberate falsehoods?'.⁸⁸

Former Premier Mike Rann argues that truth in political advertising laws have had a 'conditioning effect on the political discourse'.⁸⁹ A party official affirmed this point, stating that: 'Campaigns in other States or federally are run in a way that would not be possible in South Australia. The TiPA laws do restrict broad-based outrageous claims that are clearly false and misleading in South Australia. Parties need to justify what they are distributing. Overall, the laws have improved the tone of electoral campaigns'.⁹⁰

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

Truth in political advertising laws have undoubtedly 'changed the face of electoral campaigning in South Australia'.⁹¹ Political party state directors or secretaries work closely with the Premier and lawyers to ensure that the wording of political ads is accurate. For example, the practice inside the Labor Party is that election material has to be approved by the party secretariat before publication.⁹² The party secretariat would not approve the material until it also had a supporting brief of evidence that could justify the claim that was made within the material.⁹³

There is a huge disincentive for political parties to be found to be inaccurate and misleading by the Electoral Commissioner, as the reputational damage for parties deemed to be misleading by the

⁸⁴ Interview with Mike Rann, 30 August 2024.

⁸⁵ Interview with David Gully, 6 August 2024.

⁸⁶ Interview with David Gully, 6 August 2024.

⁸⁷ Interview with Mike Rann, 30 August 2024.

⁸⁸ Interview with Mike Rann, 30 August 2024.

⁸⁹ Interview with Mike Rann, 30 August 2024.

⁹⁰ Interview with former party official.

⁹¹ Interview with former party official.

⁹² Interview with former Premier.

⁹³ Interview with former Premier.

Commissioner is significant.⁹⁴ The media expose the outcomes of Electoral Commissioner decisions prominently. A political party claimed that they had wasted hundreds of thousands of dollars pulping material on the basis of one word or one sentence, because of the risk of reputational damage for the Electoral Commissioner saying they are misleading.⁹⁵

As a former Premier noted, the political impact was the real deterrent for publishing false and misleading information: 'Every day during election campaigns is important, and for you to lose one of those days through an adverse finding, within a four week election campaign, because an adverse finding of that sort is going to receive public notoriety, and if it doesn't lead the news that night, it will be a major story, and that will tend to have a negative impact on your momentum that you try and build an election campaign. So it's really something to avoid, and both political parties do take it seriously'.⁹⁶

There is unanimous agreement from South Australian interviewees that there was no chilling effect on free speech. Elections in South Australia are fought with the same bitter and combative style of politics as other Australian jurisdictions, with numerous attack ads. Former Deputy Electoral Commissioner David Gully noted that 2022 state election was particularly combative: 'probably the most rigorous and spiteful election I've seen in a long time', where it became more presidential, with more personal attacks.⁹⁷

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

There are, however, recent indications that TiPA laws have been used strategically by political parties as a tool against their political opponents. This has occurred in the last two elections (2018 and 2022), where each political party has put in multiple complaints to 'bog the other side down'.⁹⁸ A former party official noted that, 'The TiPA law is a tool in the toolkit to be exploited. All parties are using the same tactics, with the same bad behaviour. Both parties realised it was a tool to discredit other parties. Both parties are resourced with strong legal teams for claims and counterclaims'.⁹⁹ This has been a more recent phenomenon, as in the late 2000s, up to the 2010 election, there was no indication of such behaviour.¹⁰⁰

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

Some participants stated that there have been issues with timely determinations by the Electoral Commissioner. The SA Electoral Commissioner, Mick Sherry, has noted that all parties are in a rush to get an outcome, but he has to make a considered determination and not all complainants provide sufficient information.¹⁰¹ In addition, there have been delays occasioned by political parties using lawyers to challenge determinations and the wording of retractions.¹⁰²

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

⁹⁴ Interview with former party official.

⁹⁵ Interview with former party official.

⁹⁶ Interview with former Premier.

⁹⁷ Interview with David Gully, 6 August 2024.

⁹⁸ Interview with Sam Hooper, 7 August 2024.

⁹⁹ Interview with former party official.

¹⁰⁰ Interview with David Gully, 6 August 2024.

¹⁰¹ Interview with Mick Sherry, 6 August 2024.

¹⁰² Interview with David Gully, 6 August 2024.

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.¹⁰³ 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.¹⁰⁴

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.¹⁰⁵

Nevertheless, Mr Sherry is of the opinion that the truth in political advertising laws work well and are effective.¹⁰⁶ Mr Sherry considers that the laws have changed the behaviour of political parties in a positive way.¹⁰⁷

The level of compliance with TiPA laws by political parties has been good. There has been an increase in legal representation of candidates and parties who engage lawyers. Generally, once the Commissioner makes the decision, the parties will comply.¹⁰⁸ There was one incident where a political party refused to retract based on detailed legal advice, but this was seen to be unprecedented.¹⁰⁹

The South Australian interviewees were unanimous that the South Australian Electoral Commission's reputation for impartiality is untarnished by administering TiPA laws. SA Electoral Commissioner Mick Sherry affirmed that the Electoral Commission has maintained its strong reputation for political neutrality,¹¹⁰ while former Deputy Commissioner David Gully noted that the 'Commission has and continues to hold a very high regard in the community and in the political parties'.¹¹¹

Different SA Electoral Commissioners have had different appetites for prosecution in courts. While successful prosecutions have occurred in the past of both the major parties, they have been rarely pursued in recent times. Since the late 1990s there were no prosecutions for a lengthy period until the prosecution of a local government candidate in 2018.¹¹²

Some interviewees considered that increased prosecutions would serve as a stronger deterrent. Mr Gully considered that if there is no action taken and people are not accountable for misleading ads and there are no prosecutions, the view of the combatants out in the political world may be that the Electoral Commission is a 'toothless tiger'.¹¹³ Similarly, Sam Hooper, lawyer and Liberal Party volunteer, noted that the lack of prosecutions might make some consider there are no significant repercussions for breaching the laws and keep pushing the boundaries, while prosecutions would make 'people might think twice about putting out misleading ads'.¹¹⁴

Interview participants acknowledge that the TiPA laws were drafted in a very different context of political communications, where the only mode of communication was traditional media, such as

¹⁰³ Interview with Mick Sherry, 6 August 2024.

¹⁰⁴ Interview with Mick Sherry, 6 August 2024.

¹⁰⁵ Interview with Mick Sherry, 6 August 2024.

¹⁰⁶ Interview with Mick Sherry, 6 August 2024.

¹⁰⁷ Interview with Mick Sherry, 6 August 2024.

¹⁰⁸ Interview with Mick Sherry, 6 August 2024.

¹⁰⁹ Interview with political party official.

¹¹⁰ Interview with Mick Sherry, 6 August 2024.

¹¹¹ Interview with David Gully, 6 August 2024.

¹¹² Interview with David Gully, 6 August 2024.

¹¹³ Interview with David Gully, 6 August 2024.

¹¹⁴ Interview with Sam Hooper, 7 August 2024.

newspapers, television or the radio. However, modern digital campaigning has evolved to incorporate various platforms such as Facebook, Twitter, text messages and Robocalls.

Nevertheless, TiPA laws were drafted broadly enough to cover both traditional media and new forms of communication including social media (Facebook, Instagram and YouTube), streaming services, video on demand, bulk text messages, robocalls, broadcast radio and TV, and mail.¹¹⁵

Interviewees suggested, however, that there are gaps in regulation where there is the use of deceptive AI and deepfakes,¹¹⁶ as well as where there is astroturfing (where political parties hide behind 'pseudo grass-roots groups'),¹¹⁷ or where there is factually inaccurate material where the original source cannot be traced.

4.2.2 Views from Other Jurisdictions

1 Electoral Commissioners

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

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

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

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

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

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

The VEC responds to disinformation on social media platforms through tracking and through VEC staff who search for disinformation during the election campaign. Information can be rebutted through that

¹¹⁵ Interview with Mick Sherry, 6 August 2024.

¹¹⁶ Interview with Mike Rann, 30 August 2024; Interview with Aemon Bourke, 28 August 2024.

¹¹⁷ Interview with Dee Madigan, 14 August 2024. See A Paul Pross and Robert P Shepherd, 'Innovation Diffusion and Networking: Canada's Evolving Approach to Lobbying Regulation' (2017) 60(2) *Canadian Public Administration* 153, 169.

channel and it has to be done fast. The VEC also has a misinformation and disinformation register, which only covers the electoral process and not broader policy. VEC also asks social media platforms to take things down.

According to the VEC's report to Parliament, the VEC was active in addressing 'harmful mis- and dis-information during the election period, including collaborating with the AEC to develop guidance for electoral management bodies, establishing a misinformation register, and establishing an arrangement with online platforms to work together to reduce the impact of mis- and dis-information'.¹¹⁸

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

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

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

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

The Acting NSW Electoral Commissioner has raised issues regarding sovereign citizens and other fringe groups who have endangered electoral commission staff at the recent State general election in 2023 by harassing or intimidating them at polling places, posting photos and videos of them online with false accusations of stealing ballot papers, and creating physical disruptions during elections. Due to these issues, new offences have been introduced for the NSW local government elections which makes it an offence to film or photograph election officials and scrutineers while performing their duties in a way that would likely make the official or scrutineer feel intimidated or harassed.¹¹⁹ It is a further offence for any person to publish or distribute (e.g. on social media) such a film or photograph.¹²⁰

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

¹¹⁸ Victorian Electoral Commission, *Report to Parliament 2022 Victorian State election and 2023 Narracan District Supplementary Election* (October 2023) 5.

¹¹⁹ Local Government (General) Regulation 2021 (NSW) s 365A.

¹²⁰ Local Government (General) Regulation 2021 (NSW) s 365A.

2. Politicians, Party Officials and Advertisers

There are different levels of checking and vetting of ads for accuracy across jurisdictions without TiPA laws, with the federal level requiring the greatest degree of clearance of all paid media.¹²¹ State jurisdictions have a more variable level of vetting before ads are approved by the State Director/General Secretary, depending on resourcing levels.¹²² Generally, lawyers are only involved where ads are negative or there is a risk of defamation.

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

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

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

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

The debate about truth in political advertising laws is in its infancy in NSW, with the first consideration of this issue in a NSW parliamentary committee in 2023.¹²³ Parties do not have a defined position on this issue at this stage.

3. Civil Society Groups

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

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

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

Kiera Peacock from Marque Lawyers, who worked with independent candidates at the federal, New South Wales and Victorian state elections, and assisted Steggall on her private member's bill, and worked as a lawyer advising the 'Yes' campaign for the Voice referendum, stated that 'it is an incredible gap in our system, the type of content that people are able to produce without consequence'.¹²⁴ For example, the Uluru Statement from the Heart was described by a Liberal Party

¹²¹ Interview with Dee Madigan, 14 August 2024.

¹²² Interview with Dee Madigan, 14 August 2024.

¹²³ See <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3024>.

¹²⁴ Interview with Kiera Peacock, 4 September 2024.

Senator as being 26 pages rather than the one page that it is was a verifiably false statement of fact. Ms Peacock noted that in jurisdictions without TiPA laws, there was little that anyone could do about disinformation unless the conduct was defamatory or somehow violated discrimination laws.

4.2.3 Recommendations for Reform by Interviewees

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

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

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

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

4.2.4 Key Findings from Interviews

Operation of TiPA Laws in South Australia

- TiPA laws have undoubtedly changed the face of electoral campaigning in South Australia, with state party directors/secretaries working with the premier and lawyers to closely scrutinise the wording of all political ads to ensure that they are accurate and do not breach the laws.
- The level of compliance with the Electoral Commissioner's determinations is good, with political parties generally following the Commissioner's directions in issuing retractions.
 - There was an incident of a political party disagreeing with the Electoral Commissioner's decision and refusing to retract, based on detailed legal advice from a King's Counsel, but this was seen to be unprecedented.
- The rise of social media has led to an increased number of complaints to the Electoral Commissioner in the most recent 2022 election.
- There are indications that TiPA laws have been used as a political tool, particularly in the last two elections (2018 and 2022), by political parties seeking to gain electoral advantage. Prior to this (before the 2014 election), there was less indication of TiPA laws being weaponised.
 - Political parties have made multiple complaints against their opponents to distract them, delaying tactics have been employed, and parties have sought to embarrass their opponents by publicising electoral commissioner findings of false and misleading statements in the media.
- The South Australian participants were unanimous that the TiPA laws have had no 'chilling' effect on freedom of speech. This could be because the laws are narrowly formulated to statements of fact, rather than opinions or predictions.
- The South Australian participants were unanimous that the South Australian Electoral Commission's reputation for impartiality over time has been unaffected by administering TiPA laws, and that the Electoral Commission continues to enjoy strong public confidence for neutrality.
- Several participants have noted the desirability of more serious breaches of TiPA laws being prosecuted in the courts, in order to have a stronger deterrent effect.
- Several interviewees have noted that the current SA laws may not be fit-for-purpose in several respects, including in dealing with aspects of misinformation/disinformation that are not covered by political advertising, blackout periods being ineffective with early voting, AI and deepfakes.
- The TiPA laws are generally supported in principle in South Australia by most political participants, who believe that the laws have a positive effect. This is consistent with previous empirical research from 2019, where Renwick and Palese found that both parties 'support the principle of s 113'.¹²⁵

Findings from Other Jurisdictions re TiPA Laws

- There are disparate levels of fact checking of political ads by the major political parties in various jurisdictions without TiPA laws. Lawyers are generally only brought in for negative ads where there may be a risk of defamation.
- Political participants from non-TiPA jurisdictions have noted that they still aim to ensure the accuracy and truthfulness of their advertising and campaign material, as it is embarrassing to be found to have lied.
- Political parties in various jurisdictions have approached requests for retractions on social media platforms differently, with some approaching the social media platform directly, and others going through the electoral commission.

¹²⁵ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 27.

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

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

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

Scope: The scope of the laws will dictate the types of disinformation regulated. While a narrow law may fail to combat the multifarious forms of disinformation, a broad scope may chill political debate or fall foul of the implied freedom of political communication protected by the Australian Constitution.¹²⁶

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

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

5.1 Scope of Truth in Political Advertising Laws

The scope of a truth in political advertising law is malleable. It can be altered by, for example, limiting the law to statements of fact (altering 'the substance covered') or limiting the law to advertising (altering 'the form covered').¹²⁷

The way that a scope is defined and drafted in truth in political advertising laws has direct consequences for the effectiveness and constitutionality of the law. If scope is drafted too broadly, the law 'may punish statements that fall foul of the letter of the law, but which do not pose a threat of manipulation or distortion'.¹²⁸ While a broader law may be more effective, it will also result in a higher constitutional burden, making it more difficult for the law to pass constitutional scrutiny.¹²⁹

The tensions between effectiveness, protection of expression and constitutionality mean that a truth in political advertising law might only have a limited scope but can nevertheless be effective within the constraints of that scope. The Victorian Electoral Matters Committee considers that it is 'appropriate' for truth in political advertising laws to operate in 'limited and carefully selected circumstances'.¹³⁰ Similarly, Renwick and Palese conclude that truth in political advertising laws in South Australia and New Zealand involve a 'trade-off': 'in order not to impinge upon free speech, such interventions can be applied only where the inaccuracy of information is unambiguous'.¹³¹ The result of this trade-off is that

¹²⁶ Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1.

¹²⁷ Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 20.

¹²⁸ Jacob Rowbottom, 'Lies, Manipulation and Elections: Controlling False Campaign Statements' (2012) 32(3) *Oxford Journal of Legal Studies* 507, 525. In the United States, for example, Sellers suggests a relatively narrow set of circumstances for the regulation of lying, targeted at foreign interference, lies intended to undermine election administration, and lying on a mandatory disclosure form: Joshua S Sellers, 'Legislating Against Lying in Campaigns and Elections' (2018) 71(1) *Oklahoma Law Review* 141, 154–64.

¹²⁹ Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 22.

¹³⁰ Electoral Matters Committee, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria's Electoral Administration* (September 2021) 117.

¹³¹ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 20.

truth in political advertising laws may be able to 'operate without undue difficulty' but have 'constrained' benefits.¹³²

5.1.1 Substance

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

Submissions to the *Inquiry into the 2022 Federal Election* were 'generally supportive' of the South Australian model,¹³³ which centres on political advertising that is 'inaccurate and misleading'.¹³⁴ For example, Professor Luke Beck considers that wording similar to South Australian law, centring on standards of 'deceptive and misleading' or 'likely to deceive or mislead', are 'well established in Australian law', 'have applied in the commercial advertising context for decades' and 'are well understood'.¹³⁵

In terms of objectivity, there is a spectrum of types of communication that range from predictions, opinions, promises, unprovable assertions and verifiable facts.

Only verifiable statements of fact are covered by truth in political advertising laws in South Australia and the ACT, meaning that the scope of coverage is very narrow.

However, as Professor Anne Twomey argues, 'many political advertisements primarily contain promises (eg "no new taxes"), opinions (eg "X Party is incompetent and untrustworthy") and predictions (eg "interest rates will be higher under Y Party" or "Z Party will stop the boats")'.¹³⁶

All of these would be outside of the ambit of the SA and ACT Act, making the legislation ineffective in enforcing 'honest' advertising about statements about future action, such as campaign promises.¹³⁷

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

Mick Sherry, the SA Electoral Commissioner considered it is appropriate for the TiPA law to focus on facts, rather than opinions, otherwise it could not be administered.¹³⁸ Professor George Williams agrees that a truth in political advertising scheme 'can only be justified on very narrow terms' so as to be 'truly limited to clear statements of fact that are demonstrably false'.¹³⁹ Former SA Attorney-General John Rau argued that in a democracy, it is a contest of ideas, and it is important that all opinions, no matter how ridiculous (provided they are not unlawful), should be given an opportunity to be heard.¹⁴⁰

Both the SA Act and the ACT Act provide that it is a defence to prove that the defendant took no part in determining/deciding the content of the advertisement,¹⁴¹ and could not reasonably be expected to

¹³² Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 20.

¹³³ See, eg, Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 83–6 [3.64]–[3.73].

¹³⁴ *Electoral Act 1985* (SA) s 113.

¹³⁵ Luke Beck, *Transcript*, 16 March 2020, 16, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 78 [4.100].

¹³⁶ Anne Twomey, 'Truth in Political Advertising' (2010) 21(4) *Public Law Review* 232

¹³⁷ Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 22 [2.65].

¹³⁸ Interview with Mick Sherry, 6 August 2024.

¹³⁹ George Williams, *Transcript*, 7 September 2020, 23, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 78 [4.101].

¹⁴⁰ Interview with John Rau, 7 August 2024.

¹⁴¹ *Electoral Act 1985* (SA) s 113(3)(a) ('determining'); *Electoral Act 1992* (ACT) s 297A(2)(a) ('deciding').

have known that the statement was inaccurate and misleading.¹⁴² Thus the law does not penalise those who publish inaccurate and misleading statements of fact under an honest and reasonable mistake of fact. This is supported by Rowbottom, who contends that truth in advertising laws should not cover honest mistakes or negligent statements, as this would go 'beyond what is required to address harms to the electoral process' and may contribute to a chilling effect.¹⁴³ There is thus an intentionality requirement under TiPA laws.

5.1.2 Form

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

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

*2014 – Premier claim about free-range eggs*¹⁴⁴

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

*2021 – Opposition Leader claim about number of doctors and nurses*¹⁴⁵

- In 2021, then-Opposition Leader Peter Malinauskas claimed on social media that the South Australian Government was intending to reduce the number of doctors and nurses at South Australian hospitals.
- The South Australian Electoral Commissioner determined that the claim breached South Australia's truth in political advertising laws, and Mr Malinauskas published a withdrawal of the statement.

Generally, the South Australian Electoral Commission does not interact with social media platforms or media companies, as they normally deal with those who issue the electoral advertisement.¹⁴⁶ 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.¹⁴⁷ The Electoral Commissioner has not done this often, and the level of compliance is variable.¹⁴⁸

¹⁴² *Electoral Act 1985* (SA) s 113(3)(b); *Electoral Act 1992* (ACT) s 297A(2)(b).

¹⁴³ Jacob Rowbottom, 'Lies, Manipulation and Elections: Controlling False Campaign Statements' (2012) 32(3) *Oxford Journal of Legal Studies* 507, 529.

¹⁴⁴ Cited in University College London The Constitution Unit, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK be Improved?* (2019), available at https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/184_-_doing_democracy_better.pdf (accessed 12 June 2024), page 24.

¹⁴⁵ See SA Opposition Leader Peter Malinauskas Forced to Apologise for Facebook Post about Health Staff Numbers', *ABC News* (online, 7 July 2021) <https://www.abc.net.au/news/2021-07-07/sa-opposition-leader-forced-to-apologise-for-facebook-post/100273028>.

¹⁴⁶ Interview with Mick Sherry, 6 August 2024.

¹⁴⁷ Interview with Mick Sherry, 6 August 2024.

¹⁴⁸ Interview with Mick Sherry, 6 August 2024.

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

“has not been kept up to date over the years and is now showing its age and inability to deal with new situations that have arisen due to technological change, particularly the challenges surrounding digital campaigning. The current provisions of the Electoral Act predate the proliferation of social media, digital apps, and other digital channels never contemplated by legislators and are inadequate for regulating electoral advertising and commentary on these channels”.¹⁴⁹

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

Advertising director Dee Madigan considered that there are significant issues regarding dubious practices by political parties that do not fall within the ambit of political advertising. This includes astroturfing, i.e. where political parties hide behind ‘pseudo grass-roots groups’,¹⁵⁰ and utilise social media or fabricated “fake news” to project the appearance of genuine community support or opposition to an issue, with the intent to mislead voters.¹⁵¹ These activities are not regulated by TiPA laws as they do not fall within the category of political advertising.

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

5.1.3 Temporality

A further consideration is whether politicians should only be subject to truth in political advertising laws during election periods. An example is the New Zealand law, which only applies in a strictly time-limited period to advertisements issued for the three days up to polling day. However, the New Zealand law is seen to be ineffective due to its overly strict temporal coverage, which excludes the vast majority of ads.¹⁵²

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

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

Julian Burnside argues in a submission to the Victorian Electoral Matters Committee that it should be an offence for politicians to engage in conduct with is ‘misleading or deceptive’, and that such conduct

¹⁴⁹ South Australian Electoral Commission, *2022 SA State Election and Bragg By-election Report (2022)* 81 <<https://www.ecsa.sa.gov.au/state-and-by-election-reports>>.

¹⁵⁰ A Paul Pross and Robert P Shepherd, ‘Innovation Diffusion and Networking: Canada’s Evolving Approach to Lobbying Regulation’ (2017) 60(2) *Canadian Public Administration* 153, 169.

¹⁵¹ New South Wales Independent Commission Against Corruption, *The Regulation of Lobbying, Access and Influence in New South Wales: A Chance to have your Say* (2019) 9.

¹⁵² Lisa Hill, Max Douglass and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022) 60.

should be prohibited for politicians at all times, even beyond the election period.¹⁵³ SA State Secretary Aemon Bourke supports the extension of TiPA laws to be without temporal limitation; otherwise he contended that inaccurate statements ‘could be made for 3 years and 9 months out of 4 years’.¹⁵⁴

5.1.4 Materiality

Materiality is embedded in the SA Act and the ACT Act through the requirement that advertising must be inaccurate and misleading ‘to a material extent’. Materiality counterbalances breadth by building in consideration of the effect of the advertising. It does ‘does not involve a counterfactual inquiry into whether the election would have been decided differently’, but rather examines ‘whether it is likely that a substantial number of electors have been led astray by deceit’.¹⁵⁵

Renwick and Palese consider that the requirement of ‘material extent’ tempers the vagueness of the ‘inaccurate and misleading’ standard.¹⁵⁶ This is supported by evidence that materiality is a basis to dismiss claims about statements that are only marginally misleading. In South Australia, for example, a complaint alleged that a claim of overspending by \$5 million was untruthful when the actual amount was \$3.8 million. This complaint was not considered ‘material’.¹⁵⁷

However, materiality also raises administrative difficulties. In 2009, the Electoral Commission of South Australia expressed that s 113 of the SA Act should be amended to remove the ‘misleading to a material extent’ component. In their view, materiality posed an ‘onerous burden’ that ‘divert[s] attention away from managing the election’. Repeal of this aspect of s 113 ‘would also afford the Commissioner and her staff the opportunity to focus on administering the provisions of the Act in relation to the conduct of elections’.¹⁵⁸

5.1.5 Target of Regulation

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

In South Australia, the offence of misleading advertising applies to a person who ‘authorises, causes or permits the publication of an electoral advertisement’.¹⁵⁹ This wording captures the authors or creators of the ad, such as political parties, unions and third party campaigners seeking to affect electoral outcomes. Thus, publishers or intermediary platforms (e.g. social media platforms) are not the target of regulation.

¹⁵³ Julian Burnside, *Submission No 12*, 1–2, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 108 [4.109]–[4.110].

¹⁵⁴ Interview with Aemon Bourke, 28 August 2024.

¹⁵⁵ Ravi Baltutis, ‘South Australia’s Truth in Political Advertising Law: A Model for Australia?’ (2021) 42(2) *Adelaide Law Review* 597, 601, citing *Featherston v Tully [No 2]* (2002) 83 SASR 347, 395 [237]–[238] (Bleby J).

¹⁵⁶ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 22.

¹⁵⁷ Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of Evidence*, Melbourne, 18 August 2009, 8–9, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 53–4 [3.17].

¹⁵⁸ Electoral Commission of South Australia, *From By-Election* (Election Report, 17 January 2009) 22.

¹⁵⁹ *Electoral Act 1985* (SA) s 113(2).

The truth in political advertising law of the Australian Capital Territory also does not apply to publishers.¹⁶⁰ This approach is supported by the News and Media Research Centre, which considers that responsibility for truth in political advertising should lie with the authoriser, although publishers ‘might have ethical responsibilities as well’ in relation to enforcing compliance and countering malevolent uses of their platforms.¹⁶¹ In 1984, the Joint Select Committee on Electoral Reform also considered that the liability on publishers could be removed.¹⁶² It referred to views that an expansionary concept of liability would require extend the lead time for advertisements due to doubts about compliance.¹⁶³ Further, Baltutis posits that holding publishers liable might increase constitutional risk by discouraging publication of political advertising.¹⁶⁴

By contrast, in New Zealand, complaints of untruth in political advertising can be made against broadcasters for regulation by the Broadcasting Standards Authority (BSA).¹⁶⁵ This approach is supported by commentators who believe that holding publishers liable enables more effective enforcement. Beck is of the view that publishers, such as social media platforms, should be liable for failing to remove advertisements.¹⁶⁶ The Victorian Electoral Matters Committee also considers that legislation should prohibit publishers from continuing to publish an advertisement after it is determined to be inaccurate, although they should not be required to assess accuracy prior to publication.¹⁶⁷ The benefit of holding publishers liable is that it provides an enforcement mechanism where the authoriser or creator of an advertisement is uncooperative.¹⁶⁸

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

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

5.1.6 Overlap with Other Laws

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

¹⁶⁰ Electoral Matters Committee, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria's Electoral Administration* (September 2021) 120, citing Supplementary Explanatory Statement, Electoral Amendment Bill 2018 (ACT) 3.

¹⁶¹ News and Media Research Centre University of Canberra, *Supplementary Submission 75.1*, 15–16, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 83 [4.122].

¹⁶² Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 16 [2.44].

¹⁶³ Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 15–16 [2.40]–[2.41].

¹⁶⁴ Ravi Baltutis, ‘South Australia’s Truth in Political Advertising Law: A Model for Australia?’ (2021) 42(2) *Adelaide Law Review* 597, 608–9.

¹⁶⁵ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 35.

¹⁶⁶ Luke Beck, *Submission 65*, 2, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 81 [4.114].

¹⁶⁷ Electoral Matters Committee, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria's Electoral Administration* (September 2021) 121.

¹⁶⁸ See, eg, Electoral Matters Committee, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria's Electoral Administration* (September 2021) 121.

1. Defamation

In the absence of truth in political advertising laws, defamation laws are among the few examples of legislation which govern the 'content' of advertisements.¹⁶⁹ Historically, defamation has also been viewed as an alternative to introducing truth in political advertising laws, or as sufficient protection against false statements in the absence of truth in political advertising laws. In its 1984 report, the Joint Select Committee on Electoral Reform concluded that the federal truth in political advertising provision in s 329 should be repealed, 'effectively leaving the decision as to whether political advertising is true or false to the electors and to the law of defamation'.¹⁷⁰

In jurisdictions that have enshrined truth in political advertising, defamation operates alongside truth in political advertising laws. In the SA Act, for example, the Court is empowered to declare an election void on the basis of misleading advertising as well as if the result of the election was, on the balance of probabilities, affected by defamation.¹⁷¹

In comparison to truth in political advertising laws, defamation is targeted toward a narrower form of falsity, being false statements that are specifically injurious to a particular person and their 'reputation'.¹⁷² This is demonstrated in the statutory provision which prohibits the defamation of candidates in the ACT Act, which provides in s 300 that a person shall not make 'a false and defamatory statement about the personal character or conduct of a candidate'.¹⁷³ For this reason, defamation may also have consequences for the constitutionality of truth in political advertising laws if their legislative designs are too similar. For example, Pender considers that a truth in political advertising law specifically focussed on 'false commentary on a politician's personal life or conduct' may face concerns at the necessity stage, 'given defamation law already provides remedies for political candidates maligned in electoral campaigning'.¹⁷⁴

In further contrast to truth in political advertising, an action in defamation is also typically enforceable by the person who is defamed. In Victoria, an election candidate who has been defamed may seek redress under the *Defamation Act 2005* (Vic).¹⁷⁵ Under the ACT Act, s 300 can be enforced through both prosecution and a suit for injunction by the candidate who is defamed.¹⁷⁶

In proposed US laws, a prohibition against deceptive AI is directly linked to defamation. Under the US Protect Elections from Deceptive AI Act, a violation of the prohibition on the distribution of materially deceptive AI shall constitute defamation.¹⁷⁷ Outside of this kind of deeming provision, it is difficult to succeed in a US defamation action in a political context. Ross considers that actions for defamation 'are unlikely to bring relief in the face of campaign lies', because they are unlikely to be resolved before the election, and defamation jurisprudence makes it 'extremely difficult' for plaintiffs to prevail over public figures such as political candidates.¹⁷⁸

¹⁶⁹ Sarah Miskin and Richard Grant, Department of Parliamentary Services, *Political Advertising in Australia* (Research Brief, 29 November 2004) 2.

¹⁷⁰ Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 27 [2.81].

¹⁷¹ *Electoral Act 1985* (SA) s 107(4)–(5).

¹⁷² See, eg, George Williams, *Submission No 7*, 1, cited in Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 71.

¹⁷³ *Electoral Act 1992* (ACT) s 300.

¹⁷⁴ Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 21.

¹⁷⁵ Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) [2.13].

¹⁷⁶ *Electoral Act 1992* (ACT) s 300.

¹⁷⁷ Protect Elections from Deceptive AI Act, § 2.

¹⁷⁸ Catherine J Ross, 'Ministry of Truth? Why Law Can't Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns' (2017) 16 *First Amendment Law Review* 367, 379–80. This is particularly due to the defamation rules set down in *New York Times v Sullivan*, 376 US 254 (1964), which requires a showing of 'actual malice or reckless disregard for truth' to establish defamation in the US.

2. Australian Consumer Law

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

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

- a 1990 decision in NSW considered the effect of a provision in NSW that was similar to the current 'misleading or deceptive conduct in trade or commerce' provision in the context of a statement made by a politician during an election campaign.
- the decision found that the provision did not apply, because politics was not a business or commercial activity, and therefore the politician was not engaging in 'trade or commerce'.¹⁷⁹

Although this case was decided before the Australian Consumer Law took effect in 2010 and subsequent years,¹⁸⁰ the Australian Consumer Law contains a similar provision, so it is likely that if a similar allegation arose today, a court would decide it in the same way.

5.2 Operation

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

5.2.1 Operational Processes and Issues

1. Complaints

The SA Electoral Commission does not have the resources to proactively monitor electoral advertising, so they rely on complaints.¹⁸¹ Once they receive a complaint alleging a breach of section 113, further information is sought from the complainant, as to why it is misleading. The SA Electoral Commission then goes to the publisher of the material (normally political parties or candidates, although third party campaigners are also covered) to seek their views.

The main complainants are the major political parties.¹⁸² SA Electoral Commissioner noted that political parties are actively observing each other and lodging complaints.¹⁸³

The table below outlines information about the number of complaints relating to inaccurate and misleading political advertising in South Australia since 1997.¹⁸⁴ The information is based on the

¹⁷⁹ See *Durant v. Greiner* (1990) ASC S156-100, as cited in Warren Pengilly, 'Unconscionable and Misleading Conduct: How the *Trade Practices Act* is used and the duty to advise' [1992] *Queensland University of Technology Law Journal*, volume 6, 35, available at <https://lr.law.qut.edu.au/article/download/358/347/358-1-699-1-10-20120920.pdf>.

¹⁸⁰ NB – the *Trade Practices Act 1974* and equivalent state and territory legislation was the precursor to the Australian Consumer Law.

¹⁸¹ Interview with Mick Sherry, 6 August 2024.

¹⁸² Interview with Mick Sherry, 6 August 2024.

¹⁸³ Interview with Mick Sherry, 6 August 2024.

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

number of complaints in election years (noting that the South Australian provision is not limited to election years, but the wording of the provision references a matter ‘*calculated to affect the result of an election*’, so is more likely to practically operate in an election year).

		1997	2002 ¹⁸⁵	2006	2010	2014	2018	2022
Complaints	Number of complaints to South Australian Electoral Commission	40	53	32	63	90	35 ¹⁸⁶	117
Outcome of complaints	Number of retractions / withdrawals requested	6	N/A	N/A	2	N/A	7	9
	Number of requests for no further publication	N/A	N/A	N/A	N/A	11	9	11
	Number of remedies requested	N/A	N/A	N/A	N/A	0	1	2
	Number of warnings issued	N/A	N/A	N/A	2	0	3	2
	Number of complaints that were not upheld	N/A	N/A	N/A	N/A	N/A	9	83
	Number of complaints with insufficient evidence	N/A	N/A	N/A	N/A	N/A	14	10
	Number of prosecutions	N/A	N/A	N/A	0	0	0	0

There is a general trend of complaints about inaccurate and misleading material increasing over time. For example, complaints increased from 35 in 2014, to 38 in 2018,¹⁸⁷ and then to 122 in 2022.¹⁸⁸ In 2009, the SA Electoral Commission stated that ‘the categories of inaccurate or misleading material and authorisation proved to be the highest complaint categories’, and that ‘[a]lmost half of all complaints received related to section 113’.¹⁸⁹

The SA Electoral Commissioner attributes this increase to social media: “Previously electoral material were flyers in a letter box drop. Now there are Facebook pages and posts, and the complaints have skyrocketed.”¹⁹⁰

The SA Electoral Commission has previously expressed that the SA Act is ‘particularly challenging ... to administer’, especially due to this increase in the number of complaints.¹⁹¹ In the lead up to the election, the Commissioner predicts the complaints and resources needed to administer the TiPA

¹⁸⁵ The South Australian Election Commission’s *South Australian Elections 2002 Report* states that “no complaint actions were pursued following the 2002 election though party attention was drawn to cases where it was considered that the boundaries of what was misleading or inaccurate material were fully tested” (see page 42, available at <https://www.ecsa.sa.gov.au/state-and-by-election-reports>).

¹⁸⁶ NB – the 2014 SA Election report notes that it used a different method for calculating complaints in 2018 than it did in 2014.

¹⁸⁷ Electoral Commission of South Australia, *2018 South Australian State Election* (Election Report, 2019) 78.

¹⁸⁸ Electoral Commission of South Australia, *Committee Hansard*, 30 November 2022, 1, cited in Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 76 [3.36].

¹⁸⁹ Electoral Commission of South Australia, *Frome By-Election* (Election Report, 17 January 2009) 21.

¹⁹⁰ Interview with Mick Sherry, 6 August 2024.

¹⁹¹ Electoral Commission of South Australia, *Committee Hansard*, 30 November 2022, 1, cited in Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 76 [3.36].

laws, but it is hard to predict the resourcing required. For example, there was a big jump in complaints from 2018 to 2022, and some complaints are complex and take time to resolve.

The SA Electoral Commissioner noted that problems in compliance have arisen mainly in local government, as council elections have more than 1,000 individual candidates and they have a lower awareness of these laws compared to the major political parties, even with Electoral Commission briefings.¹⁹²

A former Premier noted that in terms of Electoral Commissioner determination of complaints, there is an issue about materiality, where minor or technical breaches are given the same degree of notoriety as gargantuan breaches, such as a really big lie about a really central issue in the campaign: they are both found to be false and misleading.¹⁹³ He noted that, 'some trivial breaches have been elevated to the same status as significant breaches, and creating a false equivalence, which is a flaw'.¹⁹⁴

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

2. Investigations

The investigation of complaints is ordinarily outsourced. In practice, the Crown Solicitor's Office is engaged to provide advice on further action and to engage in additional investigative work.¹⁹⁵ The result of the investigations is usually to dismiss the complaint. In 2009, the SA Electoral Commission concluded that '[m]ore often than not the response provided by [the Crown Solicitor's Office] determined that the statements in question could not be proven to be misleading to a material extent'.¹⁹⁶

The SA Electoral Commission has also expressed that there are difficulties in the process of investigation, particularly because the onus lies on the complainant. The SA Electoral Commission 'is unable to materially investigate matters to help make determinations and relies on the information provided by the complainant'.¹⁹⁷ However, in the 2018 election, complainants 'either failed to provide sufficient information or failed to articulate exactly what they alleged to be misleading'.¹⁹⁸ Where complainants did not respond to requests for information, files were closed unresolved.¹⁹⁹ These delays were compounded by the need to seek comment from the subject of the complaint,²⁰⁰ and from the respondent disputing a request for cessation or retraction.²⁰¹ The SA Electoral Commission

¹⁹² An equivalent provision governs local council elections in SA (*Local Government (Elections) Act 1999* (SA), section 28), rather than section 113 of the *SA Electoral Act 1985* (SA).

¹⁹³ Interview with former Premier.

¹⁹⁴ Interview with former Premier.

¹⁹⁵ Electoral Commission of South Australia, *Committee Hansard*, 30 November 2022, 2, cited in Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 76 [3.37]–[3.38]. See also Electoral Commission of South Australia, *Frome By-Election* (Election Report, 17 January 2009) 22.

¹⁹⁶ Electoral Commission of South Australia, *Frome By-Election* (Election Report, 17 January 2009) 22.

¹⁹⁷ Electoral Commission of South Australia, *2018 South Australian State Election* (Election Report, 2019) 80.

¹⁹⁸ Electoral Commission of South Australia, *2018 South Australian State Election* (Election Report, 2019) 80. See also Electoral Commission of South Australia, *2022 South Australian State Election and 2022 Bragg By-Election* (Election Report, 2023) 82.

¹⁹⁹ Electoral Commission of South Australia, *2018 South Australian State Election* (Election Report, 2019) 80.

²⁰⁰ Electoral Commission of South Australia, *2018 South Australian State Election* (Election Report, 2019) 80; Electoral Commission of South Australia, *2022 South Australian State Election and 2022 Bragg By-Election* (Election Report, 2023) 82.

²⁰¹ Electoral Commission of South Australia, *2022 South Australian State Election and 2022 Bragg By-Election* (Election Report, 2023) 82.

observes that the practice of disputing requests became 'more common throughout the [2022] election than it had been previously'.²⁰²

There is intense time pressure for the Electoral Commissioner to make determinations. If it is a week out from polling, it is less urgent compared to polling day, where the Commissioner requires a response within two hours.²⁰³ If it is one week to polling day, the Commissioner may give until tomorrow morning to respond. There are very short timelines.²⁰⁴

Timely retraction depends on the complexity of the material. If there is a misleading ad on polling day, the Electoral Commission still needs to be considered in its decision-making.²⁰⁵ Sometimes parties are unhappy about the time it takes to resolve a complaint. But it depends on whether the complainant has provided all the information, and getting legal advice takes time.²⁰⁶

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

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

5.2.2 Unintended Consequences

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

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

1. Freedom of Speech

Critics of truth in political advertising laws refer primarily to its effect on freedom of speech and the potential for regulatory overreach. In the first instance, there is a question of whether restrictions on free speech in elections are ever tolerable, and whether a truth in political advertising law can be justified at all.²⁰⁷ Renwick and Palese do not consider that this argument is feasible, given the state's regulation of advertising generally, as well as of other aspects of the electoral system. Further, rules 'may enhance rather than detract from ordinary citizens' freedom to act autonomously', particularly if regulation of misinformation is 'genuinely independent of political control'.²⁰⁸

In addition, knowingly false statements may not attract human rights protection, for example, under Article 10 of the European Convention of Human Rights.²⁰⁹ As Lord Hobhouse noted:

²⁰² Electoral Commission of South Australia, *2022 South Australian State Election and 2022 Bragg By-Election* (Election Report, 2023) 82.

²⁰³ Interview with Mick Sherry, 6 August 2024.

²⁰⁴ Interview with Mick Sherry, 6 August 2024.

²⁰⁵ Interview with Mick Sherry, 6 August 2024.

²⁰⁶ Interview with Mick Sherry, 6 August 2024.

²⁰⁷ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 40.

²⁰⁸ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 40.

²⁰⁹ *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL) 20.

There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed. These are general propositions going far beyond the mere protection of reputations.²¹⁰

However, there are also more specific speech concerns surrounding whether truth in political advertising laws may have the effect of silencing or 'chilling' political discourse. A broad law might 'act as a deterrent to speech that is not, in fact, covered by its terms: individuals will self-censor'.²¹¹ That risk emerges particularly from drafting that is vaguely worded,²¹² where costs to defend a legal action are high, or where an advertiser believes that they may not have the proof to support their statement in court.²¹³

Nevertheless, based on interviews with political participants, the risk of chilling speech has not eventuated in South Australia, and electoral discourse has been unaffected by TiPA laws. Dee Madigan, who has written hundreds of political ads for 24 electoral campaigns in the Commonwealth, ACT, NT, and Queensland, and has done union ads in election campaigns in every other state, stated that her ads in South Australia did not differ from other jurisdictions.²¹⁴ In addition, all political participants interviewed in South Australia have agreed that they did not feel constrained in their electoral campaigning and free speech.

In Australia, the risk of constraining free speech has constitutional implications due to the implied freedom of political communication, which provides a concrete mechanism to invalidate a law that falls foul of its constitutional protection. There is a constitutional risk that a truth in political advertising law would be struck down for infringing the implied freedom if its scope is overly broad,²¹⁵ although there is precedent for validity.

Specifically, in *Cameron v Becker* ('*Cameron*'), the Supreme Court of South Australia upheld the constitutionality of the SA Act.²¹⁶ There, Lander J stated that, although the legislation burdens political communication, it does so for the right 'that the elector is not led by deceit or misrepresentation into voting differently from that which the elector would have done if the elector had not been misinformed'.²¹⁷ However, the salience of *Cameron* is limited as a result of developments in implied freedom jurisprudence which have taken place since *Cameron* was decided in 1995.²¹⁸ Further, this

²¹⁰ Ibid 238.

²¹¹ Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 22.

²¹² Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 23.

²¹³ Jacob Rowbottom, 'Lies, Manipulation and Elections: Controlling False Campaign Statements' (2012) 32(3) *Oxford Journal of Legal Studies* 507, 525.

²¹⁴ Interview with Dee Madigan, 14 August 2024.

²¹⁵ See, eg, Mark Polden, *Transcript of Evidence*, Melbourne, 18 August 2009, 5, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 101 [4.84]. In the United States, a similar concern is raised under the First Amendment: see, eg, Catherine J Ross, 'Ministry of Truth? Why Law Can't Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns' (2017) 16 *First Amendment Law Review* 367, 388–401.

²¹⁶ *Cameron v Becker* (1995) 64 SASR 238.

²¹⁷ *Cameron v Becker* (1995) 64 SASR 238, 255 (Lander J).

²¹⁸ Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 3.

precedent may be affected by the rise of social media content, which might attract stronger protections due to being ‘ostensibly unofficial and personal’ in nature.²¹⁹

Since *Cameron* was decided, other commentators have considered whether truth in political advertising laws would survive more recent formulations of the implied freedom. Pender considers that a court would likely accept that truth in political advertising laws burden the implied freedom to a modest extent,²²⁰ and serve a legitimate purpose of ensuring that the electorate is ‘properly informed and not unduly influenced by falsehoods’.²²¹ On balance, he concludes that the SA Act and ACT Act are reasonably appropriate and adapted to advance their legitimate purpose. Particularly, it is unlikely that the benefits of counteracting the impact of misleading advertising on democratic norms will be ‘manifestly outweighed’ by their ‘modest burden’ on the implied freedom.²²² Baltutis considers that there is a greater risk of invalidation under structured proportionality testing if publishers are liable for removing misleading advertising, including because this may ‘generally discourage the publication of political advertising’.²²³ However, he nonetheless concludes that the law could be refined to withstand constitutional risks.²²⁴

2. Politicisation

Another concern is that parties might ‘weaponise’ truth in political advertising laws as a political tool ‘to serve their own interests’,²²⁵ including through the use of complaints ‘as a method of disrupting their opponents’ campaign — notwithstanding that there [is] no merit in the claim’.²²⁶ In 2009, the SA Electoral Commission suggested that complaints raised under s 113 ‘appeared to degenerate into a “tit for tat” distraction’.²²⁷ The Liberal Democrats have also expressed concern about the risk of ‘tit for tat’ complaints, ‘creating workload for the Electoral Commission that will divert attention away from managing the election’.²²⁸

Based on the interviews conducted for this report, there is evidence of political parties using TiPA laws as a political tool in the last two elections in South Australia (2018 and 2022), with parties lodging numerous complaints against their political opponents to try to stymie them, and publicising Electoral Commissioner’s findings against the other party by brandishing the Commissioner’s letter in the media and stating that the other party had lied. As David Gully explained: ‘as soon as the Commissioner writes a letter to one side upholding a complaint, the other side will get on TV that night and hold the letter up saying, “Here’s a letter from the Commissioner saying the other side’s told fibs”’.²²⁹

²¹⁹ Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 21.

²²⁰ Kieran Pender, ‘Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations’ (2022) 44(1) *Sydney Law Review* 1, 12.

²²¹ Kieran Pender, ‘Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations’ (2022) 44(1) *Sydney Law Review* 1, 12.

²²² Kieran Pender, ‘Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations’ (2022) 44(1) *Sydney Law Review* 1, 16. He also concludes that a calibrated scrutiny approach would also likely conclude that truth in political advertising laws are constitutional: at 19.

²²³ Ravi Baltutis, ‘South Australia’s Truth in Political Advertising Law: A Model for Australia?’ (2021) 42(2) *Adelaide Law Review* 597, 608–9.

²²⁴ Ravi Baltutis, ‘South Australia’s Truth in Political Advertising Law: A Model for Australia?’ (2021) 42(2) *Adelaide Law Review* 597, 611.

²²⁵ Jacob Rowbottom, ‘Lies, Manipulation and Elections: Controlling False Campaign Statements’ (2012) 32(3) *Oxford Journal of Legal Studies* 507, 525.

²²⁶ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 27.

²²⁷ Electoral Commission of South Australia, *From By-Election* (Election Report, 17 January 2009) 22.

²²⁸ Standing Committee on Justice and Community Safety, *Inquiry into the 2020 ACT Election and the Electoral Act* (Report No 2, August 2021) 50 [7.90].

²²⁹ Interview with David Gully, 6 August 2024.

Sam Hooper, lawyer and Liberal party volunteer who assisted in drafting complaints noted: 'There's a media story in it regardless. Because parties want to be able to go out and say, the Electoral Commissioner has said that the other side has misled the public, whereas the risk is the Electoral Commissioner says that they have not misled the public, and then this can be weaponised by the other side'.²³⁰

Further, meritless claims can backfire on the parties that raise them. Former State Secretary of the South Australian Labor Party, Reggie Martin, suggests that 'a party's case can be undermined if it makes a complaint that is not upheld'.²³¹

5.3 Enforcement of Truth in Political Advertising Laws

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

5.3.1 The Appropriate Arbiter

Another design choice of TIPA laws is choosing the appropriate arbiter. Both the SA Act and the ACT Act employ three-part solutions to arbitrate disputes: first, they empower the electoral regulator to request a withdrawal and retraction; second, the regulator can apply to the Supreme Court for an order; and third, a prosecution can be brought.²³² However, other suggestions for appropriate arbiters have been proposed.

1. The Electoral Commission

In both South Australia and the Australian Capital Territory, electoral commissioners are responsible for administering truth in political advertising laws. This is ordinarily justified by reference to their expertise in elections and their impartiality. For example, the Australian Institute argues that electoral commissions are 'trusted, non-partisan, familiar with electoral processes and used to ramping up during election periods'.²³³

The former Attorney-General of South Australia, John Rau, has also expressed the view that no other independent institution apart from the SA Electoral Commission has 'particular expertise in elections' or 'any likelihood of understanding the practical time constraints involved in the adjudication of a matter and the delivery of a remedy'.²³⁴ Rau acknowledges that it's an invidious task for the Electoral Commissioner: "An Electoral Commissioner who's not a judge, and who's got other duties to do, has stop doing their main business and behave like they're a judge and jury in the matter of a few days, on inadequate evidence, with highly agitated people yelling at them. But realistically, in that time frame, there is no one else who can do it."²³⁵ Although Rau considers that the SA Electoral Commission is an

²³⁰ Interview with Sam Hooper, 7 August 2024.

²³¹ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 27.

²³² Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 24.

²³³ Australia Institute, *Submission 122*, 5, cited in Electoral Matters Committee, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria's Electoral Administration* (September 2021) 121.

²³⁴ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 27.

²³⁵ Interview with John Rau, 7 August 2024.

'imperfect adjudicator' in a 'potentially conflicting position', he concludes that 'it appears to be the best of the set of choices'.²³⁶

However, other electoral commissions have opposed assuming a role in regulating truth in political advertising. The AEC has stated that it should not assess truth in political advertising, 'because it will involve ... making value judgements about candidates' and parties' material, and it could lead to accusations of bias by the AEC'.²³⁷ The AEC has also raised practical issues with assuming a regulatory role. Although the SA Electoral Commission administers the SA Act, the AEC considers that the scale of a state election is 'tiny' compared to the federal level, and that dealing with issues federally 'would require quite a large support team' and be 'complex and difficult'.²³⁸

This view is echoed by the Victorian Electoral Commission,²³⁹ NSW Electoral Commission,²⁴⁰ and other commentators.²⁴¹ For example, Costar warns against drawing the electoral commissioner into political debate, given that 'a major and important positive feature of our electoral system ... is that the electoral commissions are totally impartial'.²⁴² Overseas, the UK Electoral Commission has expressed the same concern about the compromise of its independence if it were to take on a role in policing truth in political advertising.²⁴³

In the Voice referendum about indigenous recognition in 2023, there were direct attacks to the impartiality of the Australian Electoral Commission by the Liberal Opposition,²⁴⁴ which has been unprecedented, resulting in the Australian Electoral Commission adding a disinformation register on the referendum process to correct these inaccurate and misleading statements.²⁴⁵ This may point to a troubling new willingness of political parties to attack the independent electoral commission to try to achieve electoral success.

In practice, however, it may be that challenges to the impartiality and independence of electoral commissions are not as likely as suggested. In their study of the SA Act, Renwick and Palese identified an 'isolated instance' of a South Australian politician describing the Electoral Commissioner as 'utterly corrupt' in the House of Assembly. That remark was subsequently withdrawn.²⁴⁶ Apart from this, a wider survey of media reporting on s 113 identified 'no direct accusations of Electoral

²³⁶ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 27.

²³⁷ Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Transcript*, 6 December 2019, 3, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 84 [4.124].

²³⁸ Australian Electoral Commission, *Committee Hansard*, 3 November 2022, 12, cited in Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 85–6 [3.73].

²³⁹ Interview with Sven Bluemmel, 19 August 2024. See, eg, Electoral Matters Committee, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria's Electoral Administration* (September 2021) 122–3.

²⁴⁰ Interview with Matt Phillips, 4 September 2024.

²⁴¹ See, eg, Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 117–20 [5.5]–[5.16].

²⁴² Brian Costar, Coordinator, Democratic Audit of Australia, *Transcript of Evidence*, Melbourne, 18 August 2009, 2–3, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 54 [3.18]. See also Democratic Audit of Australia, *Submission No 6, 8*, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 101 [4.84].

²⁴³ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 21.

²⁴⁴ Sarah Basford Canales, 'AEC hits back after Peter Dutton suggests voice referendum rules are 'rigged'', *The Guardian* (online, 25 August 2023) <<https://www.theguardian.com/australia-news/2023/aug/25/indigenous-voice-to-parliament-referendum-aec-poll-unfairness-claims-rejected>>.

²⁴⁵ Australian Electoral Commission, Disinformation Register - Referendum Process <<https://www.aec.gov.au/media/disinformation-register-ref.htm>>.

²⁴⁶ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 28.

Commission bias at all, and no attempts to undermine the Commission's legitimacy'.²⁴⁷ Indeed, the interviews conducted for this report affirmed the strong reputation that the SA Electoral Commission continues to enjoy in the community and political participants, despite administering TiPA laws since 1985.

2. Tribunals

Another option is to make tribunals the arbiters of complaints under TiPA legislation, with the Electoral Commission performing the vetting function and then referring matters to the tribunal for their determination. David Gully, former SA Deputy Electoral Commissioner, noted that this proposal was considered by the SA government but did not progress to the bill stage.²⁴⁸

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

3. Courts

Courts are a proposed alternative to vesting oversight functions in the electoral commission. Professor George Williams considers that 'it is better to have an independent, non-electoral body overseeing the scheme, because electoral commissions are always going to be wary about intervening'.²⁴⁹ This might include a court.²⁵⁰ Burnside and Coghill consider that courts could effectively enforce truth in political advertising laws, including because of their existing experience in determining what is 'misleading or deceptive' in the trade practices context.²⁵¹

Conversely, others have concerns about the involvement of courts in political judgments. The Joint Select Committee on Electoral Reform has also historically expressed concern that the involvement of the courts would require their entry into the political arena. Particularly, it is of the view that, unlike the regulation of commercial advertising, the regulation of political advertising 'seems necessarily to involve a political judgment, based upon political premises'.²⁵² Pearce considers that involving the courts might involve convergence with the American electoral system, creating the undesirable result of 'having elections decided by judges rather than voters'.²⁵³

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

²⁴⁷ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 28.

²⁴⁸ Interview with David Gully, 6 August 2024.

²⁴⁹ George Williams, *Transcript*, 7 September 2020, 23, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 78 [4.102].

²⁵⁰ George Williams, *Transcript*, 7 September 2020, 25–6, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 78 [4.103].

²⁵¹ Julian Burnside, *Submission No 12*, 1; Ken Coghill, *Transcript of Evidence*, Melbourne, 18 August 2009, 2, both cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 120 [5.18].

²⁵² Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 21 [2.62].

²⁵³ Michael Pearce, President, Liberty Victoria, Victorian Council for Civil Liberties, *Transcript of Evidence*, Melbourne, 18 August 2009, 3, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 121 [5.20].

4. Other Regulators

Some calls have been made for other regulators to assume roles in regulating truth in political advertising, which would allow the laws to be administered by a body with relevant experience and expertise, while limiting potential risks in relation to the integrity and independence of the electoral commissions. For example, in the federal context, Beck considers that the Australian Competition and Consumer Commission (ACCC) would be more suitable than the Australian Electoral Commission (AEC) if their role was 'slightly expanded', given their pre-existing experience dealing with misleading and deceptive advertising.²⁵⁴

The Australian Competition and Consumer Commission (ACCC) administers the Australian Consumer Law at the federal level, including in relation to false or misleading representations in relation to trade or commerce.²⁵⁵ However, the ACCC may not be the most appropriate body to administer truth in political advertising laws. For example:

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

The ACCC has itself rejected this remit, stating that it is 'in no position to deal with political advertising' in an area 'beyond trade and commerce'.²⁵⁶

Another potential regulator could be the Australian Communications and Media Authority (ACMA).²⁵⁷ ACMA's role and functions may more clearly align with the regulation of truth in political advertising, as ACMA:

- is a statutory authority that currently regulates matters relating to broadcasting, radiocommunications, telecommunications, telemarketing, and some aspects of online content;
- can investigate complaints in relation to the broadcasting sector (including radio and television), including assessing whether content is factually accurate; and
- has an existing role in relation to election, referendum and political advertisements (e.g. the regulation of advertisements broadcast over television during an election).

Responsible Technology Australia considers that regulators such as the Australian Communications and Media Authority, the eSafety Commissioner or the ACCC do not currently have the remit to 'neatly' capture regulation of political advertising. It is therefore necessary 'either to rethink the remit of some of those regulators or to think about new mechanisms for oversight'.²⁵⁸

²⁵⁴ Luke Beck, *Submission 65*, 2, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 81 [4.115].

²⁵⁵ NB – relevant state and territory bodies administer the Australian Consumer Law in their respective jurisdictions e.g. Consumer Affairs Victoria administers the Australian Consumer Law in Victoria in relation to relevant consumer protections.

²⁵⁶ Rod Simms, Chair, Australian Competition and Consumer Commission, *Transcript*, 7 September 2020, 30, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 82 [4.118].

²⁵⁷ The July 2022 Commonwealth Joint Standing Committee on Electoral Matters *Conduct of the 2022 federal election and other matters (interim report)* (available at https://parlinfo.aph.gov.au/parlInfo/download/committees/reportint/RB000012/toc_pdf/Conductofthe2022federaelectionandothermatters.pdf) noted that the AEC, ACCC and ACMA are existing bodies that have a role in relation to political advertising or false/misleading representations, but recommended that the Commonwealth Government consider establishing a division within the AEC to administer truth in political advertising legislation (see page 86-106).

²⁵⁸ Christopher Cooper, Executive Director, Responsible Technology Australia, *Transcript*, 14 September 2020, 52, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 79–80 [4.108].

In New Zealand, a self-regulatory approach to truth in political advertising vests greater power in industry bodies. Centrally, the New Zealand Advertising Standards Authority (an advertising industry body) is used to facilitate truth in advertising.²⁵⁹ The Advertising Standards Authority prevents misleading advertising through voluntary self-regulation, codes of practice and the policing of compliance with these codes.²⁶⁰ In parallel, the BSA regulates broadcast advertising through its own codes of practice.²⁶¹ Renwick and Palese observe that the role of both bodies seems to be ‘marginal’, and that there have been no cases under s 199A against advertisers and no adverse decisions by the BSA for over 20 years.²⁶²

5. Specialised New Body

Another option is to create a separate statutory body to regulate TiPA laws. For example, Williams has suggested that an independent panel could be a suitable independent, non-electoral body to oversee truth in political advertising laws.²⁶³ Hughes considers that this might include an independent statutory tribunal or an appointed Election Ombudsman.²⁶⁴

The benefit of this approach is that it would remove the burden the Electoral Commission in its busiest period and if well-resourced with appropriate expertise, the body would be able to deal with TiPA matters in a timely manner.

This proposal was considered by the Joint Select Committee on Electoral Matters in 1997. The Committee rejected a proposal for a separate statutory organisation to regulate political advertising on the basis that the AEC had ‘overstated’ its concerns regarding its neutrality, especially having regard to the ECSA’s administration of the SA Act.²⁶⁵

5.3.2 Sanctions and Remedies

The appropriate enforcement mechanism for misleading advertising is also contested. Polling by the Australia Institute shows that the majority of respondents support financial penalties, retractions and the loss of some or all public funding.²⁶⁶ In contrast, criminal charges do not have majority support and have not generally been used.²⁶⁷

²⁵⁹ Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 33.

²⁶⁰ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 30.

²⁶¹ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 34.

²⁶² Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 37.

²⁶³ George Williams, *Transcript*, 7 September 2020, 25–6, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 78 [4.103].

²⁶⁴ Colin Hughes, *Submission No 13*, 1, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 122 [5.24]–[5.25].

²⁶⁵ Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 122–3 [5.26]–[5.27], citing Joint Standing Committee on Electoral Matters, *Report of the Inquiry into the Conduct of the 1996 Federal Election and Matters Related Thereto* (June 1997) 84.

²⁶⁶ Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 32.

²⁶⁷ Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 32.

1. Withdrawal and Retraction

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

a) Request by Electoral Commission

The SA Act and ACT Act empower their electoral commissions to seek the withdrawal and retraction of misleading advertising.²⁶⁸ In practice, the Commission “almost always” seeks the retraction as well as the withdrawal of an advertisement where, following assessment, it is deemed to breach the rules’.²⁶⁹

In South Australia, the SA Electoral Commissioner’s powers to seek withdrawal and retraction were introduced in 1997.²⁷⁰ Previously, the courts decided cases under s 113 ‘well after the election was over’.²⁷¹ The Electoral Commission’s powers are now the primary enforcement mechanism in the SA Act. The Electoral Commissioner of South Australia ‘has requested content be withdrawn at most elections since 1997’.²⁷² In analysing data provided by the Electoral Commission, Renwick and Palese find that the Electoral Commission has generally required withdrawal or retraction in more cases over time.²⁷³ The Australia Institute states that the SA Act ‘is mainly realised through the Electoral Commissioner’s requests for withdrawal and/or retraction, which appear to be largely honoured’.²⁷⁴

The SA Electoral Commissioner in most cases asks for the publisher to cease publication and issue a retraction, normally in the same way the material is published.²⁷⁵ For example, if the post was made on a Facebook account, the retraction has to be on the same account.²⁷⁶ However, if flyers have been printed and hand delivered to 30,000 residents on the eve of polling day and the flyers contain material that is deemed misleading, it is not practicable to get the retraction issued in the same form as there is no time. In that situation the Commissioner determines an alternative method, for example, an ad in the *Advertiser* (daily paper), Facebook post, media release.²⁷⁷ The Commissioner provides the wording of the retraction and writes to the authoriser.²⁷⁸

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

²⁶⁸ *Electoral Act 1985* (SA) s 113(4); *Electoral Act 1992* (ACT) s 297A(3).

²⁶⁹ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 23.

²⁷⁰ The Commission ‘did not ask to be given the intervention powers that it received’: Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 25.

²⁷¹ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 23.

²⁷² See Electoral Matters Committee, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria’s Electoral Administration* (September 2021) 117–18.

²⁷³ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 23.

²⁷⁴ Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 7. See also Ravi Baltulis, ‘South Australia’s Truth in Political Advertising Law: A Model for Australia?’ (2021) 42(2) *Adelaide Law Review* 597, 604.

²⁷⁵ Interview with Mick Sherry, 6 August 2024.

²⁷⁶ Interview with Mick Sherry, 6 August 2024.

²⁷⁷ Interview with Mick Sherry, 6 August 2024.

²⁷⁸ Interview with Mick Sherry, 6 August 2024.

However, there remain loopholes reported by political participants. For example, Sam Hooper, lawyer and Liberal party volunteer, noted that radio ads played at prime time could issue the retraction at 11.59pm at night, or retractions can be buried under other subsequent posts.²⁷⁹

The time pressures toward the end of an election create issues in terms of enforcement of TiPA laws. The Australia Institute observes that there is 'little time' to stop and address ads that come out late in an election campaign.²⁸⁰ The Australia Institute has also notes that withdrawal and retraction may have limited effect given '[t]he short duration of election campaigns and the finality of an election result.'²⁸¹ To address these limitations, the Institute proposes the withdrawal of public funding from parties and candidates who have authorised misleading or inaccurate advertisements.

b) Injunctions

An alternative is an injunction for withdrawal or retraction after the commissioner applies to the Supreme Court, if an initial request for withdrawal and retraction fails.²⁸² In South Australia, the SA Electoral Commissioner 'has not taken legal action to achieve withdrawals/retractions'.²⁸³ The SA Electoral Commission has also observed that a Supreme Court injunction is 'not practical during the last week of the election campaign due to the blackout provisions'.²⁸⁴ This seems to support a more general criticism that vesting courts with decision-making powers will contribute to delays that are particularly problematic in an electoral context.²⁸⁵ Pender notes, for example, that '[i]t may not always be possible, or politically desirable, to face judicial intervention — particularly in the frantic final days of an election'.²⁸⁶

The injunction remedy has been strongly criticised in previous inquiries into truth in political advertising for its ancillary consequences on political discourse. The Victorian Electoral Matters Committee considered that an injunction remedy 'may cause injustice to political parties or candidates and may disrupt the election campaign process'.²⁸⁷ In 1984, the Joint Select Committee on Electoral Reform considered that an application for an injunction 'could prove an effective tactic for a candidate to obtain publicity for [themselves] and to disrupt the advertising campaign of another party'.²⁸⁸ This poses 'severe difficulties' for political advertising given the strict time constraints associated with the election period and the futility of an injunction once polls close.²⁸⁹ Consequently, an injunction in the final week of a campaign is effectively a final remedy.²⁹⁰

²⁷⁹ Interview with Sam Hooper, 7 August 2024.

²⁸⁰ Australia Institute, *Committee Hansard*, 26 October 2022, 4, cited in Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 84 [3.69].

²⁸¹ Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 3.

²⁸² *Electoral Act 1985* (SA) s 113(5); *Electoral Act 1992* (ACT) s 297A(5).

²⁸³ Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 7.

²⁸⁴ Electoral Commission of South Australia, *State Election 2014* (Election Report, 2014) 57.

²⁸⁵ Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 27.

²⁸⁶ Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 24.

²⁸⁷ Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 138 [5.93].

²⁸⁸ Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 24 [2.70].

²⁸⁹ Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 25 [2.74].

²⁹⁰ Joint Select Committee on Electoral Reform, *Second Report* (August 1984) 25 [2.75].

2. Financial Penalties

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

a) *Civil or Criminal*

One issue is the appropriateness of imposing a financial penalty as punishment for a criminal offence. In the SA Act, the maximum penalty for the criminal offence of materially inaccurate and misleading advertising is \$5,000 for individuals or \$25,000 for a body corporate.²⁹¹ In the ACT Act, the maximum penalty is 50 penalty units.²⁹²

Beck prefers that breaches of truth in political advertising laws only attract civil penalties, resembling current misleading or deceptive commercial advertising prohibitions.²⁹³ Confining truth in political advertising laws to civil penalties might also aid its case for constitutional validity, as a more severe penalty would increase the risk of invalidity.²⁹⁴

However, there are also concerns that a lenient scheme would not be effective to prevent misleading advertising. Williams posits that penalties in federal truth in political advertising laws could be stronger than penalties in South Australian laws. He considers that there is 'too high a risk with the South Australian law that falsehoods will be just seen as a cost of campaigning' and raises the possibility of 'criminal sanctions ... or at least much, much higher fines'.²⁹⁵ For instance, one person prosecuted in South Australia claimed that the small fine imposed for the false advertisement was great value for money given all the free publicity for the advertisement during the campaign.²⁹⁶

Hill, Douglass and Baltutis consider that private civil penalties are 'inappropriate' because 'they send the wrong message that the problem is of a private nature whereas it is a matter of profound public importance' in the context of the 'significant social costs of false election campaigning'.²⁹⁷

There may be concerns that penalties that are too onerous may disproportionately impact upon minor parties or independents, who do not have the resources of major political parties to comply with TiPA laws. As a solution to this, Pender suggests that a penalty could be expressed 'as a percentage of turnover', which may be more effective for deterring larger parties without unduly burdening smaller parties.²⁹⁸

b) *Withdrawal of Public Funding*

Another potential remedy is to reduce the amount of public funding to political parties that breach TiPA laws, as a more effective financial penalty. This was supported by former Victorian Deputy Electoral

²⁹¹ *Electoral Act 1985* (SA) s 113(2).

²⁹² *Electoral Act 1992* (ACT) 297A(1).

²⁹³ Luke Beck, *Submission 65*, 2, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 81 [4.114].

²⁹⁴ Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 28.

²⁹⁵ George Williams, *Committee Hansard*, 17 October 2022, 17, cited in Joint Standing Committee on Electoral Matters, *Conduct of the 2022 Federal Election and Other Matters* (Interim Report, June 2023) 85 [3.72].

²⁹⁶ Commonwealth Senate Finance and Public Administration Legislation Committee, Public Hearing of Inquiry into Charter of Political Honesty Bill 2000 (April 2001) 44.

²⁹⁷ Lisa Hill, Max Douglass and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022) 125.

²⁹⁸ Kieran Pender, 'Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations' (2022) 44(1) *Sydney Law Review* 1, 28–9.

Commissioner Liz Williams, on the basis that it is unacceptable for public money to be used for advertising that is false or misleading in a material way.²⁹⁹ This may act as a stronger deterrent to political parties from making inaccurate and misleading statements. Ms Williams considered that any TiPA sanctions and remedies need to be strong because of the seriousness of voter choices and ultimately election outcomes being affected by disinformation.³⁰⁰

As a related issue, a former SA party official has raised the cost of issuing retractions, particularly mail, as impacting on their party's caps on electoral expenditure, which poses a deterrent in publishing inaccurate and misleading material.³⁰¹

c) Prosecution

In South Australia and the Australian Capital Territory, financial penalties can be pursued through prosecution. If the commissioner is pursuing a prosecution, the commissioner must prove beyond reasonable doubt that an offence occurred.³⁰²

Different SA Electoral Commissioners have had different appetites for prosecution in courts. While successful prosecutions have occurred in the past of both the major parties, they have been rarely pursued in recent times.³⁰³ Since the late 1990s there were no prosecutions for a lengthy period until the prosecution of a local government candidate in 2018.³⁰⁴ In evidence before the Victorian Electoral Matters Committee in 2009, the Victorian Electoral Commissioner (who was formerly the Electoral Commissioner of South Australia) provided examples of successful prosecutions under the SA Act.³⁰⁵ He went on to state that 'there have not been any' prosecutions since the first election after the introduction of the Act.³⁰⁶

Similarly, in an international context, there have been no prosecutions under 199A of the NZ Act, which prohibits the publication of false statements to influence voters.³⁰⁷ The only case ever to be brought under s 199A concerned the Electoral Commission's failure to act.³⁰⁸

Further, the former SA Electoral Commissioner has expressed 'serious concerns over prosecuting alleged offences' due to the 'significant public interest considerations in mounting a prosecution'. Further, '[c]ases may drag out in the courts for some time with legal expenses far outweighing the

²⁹⁹ Interview with Liz Williams, 13 August 2024.

³⁰⁰ Interview with Liz Williams, 13 August 2024.

³⁰¹ Interview with former party official.

³⁰² Electoral Commission of South Australia, *State Election 2014* (Election Report, 2014) 57.

³⁰³ See, eg, Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 7, 32.

³⁰⁴ Interview with David Gully, 6 August 2024.

³⁰⁵ Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of Evidence*, Melbourne, 18 August 2009, 5, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 52–3 [3.16]. See, eg, *State Electoral Office v Pigott* (Magistrates Court, 98/8658, 15 December 1998); *King v Electoral Commissioner* (1998) 72 SASR 172. See also the examples in Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 9–11.

³⁰⁶ Steve Tully, Victorian Electoral Commissioner, Victorian Electoral Commission, *Transcript of Evidence*, Melbourne, 18 August 2009, 8–9, cited in Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 53–4 [3.17].

³⁰⁷ Electoral Matters Committee, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) relating to Misleading or Deceptive Political Advertising* (February 2010) 66 [3.59]. For a more recent restatement of that conclusion, see also Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 37.

³⁰⁸ *Peters v Electoral Commission* [2015] NZHC 394. The Court decided that the Electoral Commission erroneously dismissed a complaint under s 199A based on an incorrect interpretation of the law. The Court issued a declaration to this effect: at [89]–[90] (Mallon J). See Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (March 2019) 36.

maximum fine'.³⁰⁹ There would also be 'no effect on the election results' and 'little benefit for the public in prosecuting'.³¹⁰

On the other hand, several interview participants, including former SA Deputy Electoral Commissioner David Gully, have stated that prosecutions are desirable in order to have a deterrent effect on political parties from seeking to test the boundaries by putting forward misleading ads.³¹¹

3. Voiding the Election

Under the SA Act, the Supreme Court (sitting as the Court of Disputed Returns) may declare the results of an election void on the grounds of misleading advertising, if the result of the election was affected by that advertising on the balance of probabilities.³¹² The Centre for Public Integrity believes that the SA Act represents a good model because 'they have an independent Court of Disputed Returns that assesses allegations'. This 'independent decision-maker ... makes it more difficult' to weaponise truth in political advertising laws.³¹³

Former SA Attorney-General John Rau considers that the most serious remedy has to be an ex post facto remedy. He opined that 'if advertising is demonstrably untrue, (and that's different to just an opinion that you disagree with), and it is of such a quality and nature that it might have adversely affected enough of the voting population to possibly have produced a different result (for example a false accusation that the person is a murderer), then maybe the remedy is a court of disputed returns, which may lead to a by-election. This would be a sliding scale with two considerations. The first is the margin. So, if the margin is one vote, you don't have to prove very much. If the margin is 10,000 votes, you'd have to prove a lot. And then the other one is how serious was the lie. How damaging was that to you as a candidate? So, it's a combination of those two things. And if the point of this is to protect the political system, the ultimate solution to that is to let the people have a vote again'.³¹⁴

In practice, however, no election to date has been declared void since the introduction of the legislation in 1985,³¹⁵ although petitions have been received and heard.³¹⁶ Further, in *Featherston v Tully*, the Supreme Court of South Australia held that a breach of s 113 would not itself void an election, because 'there is nothing in the Act which requires that the Court must declare an election void where a candidate has committed an offence against that section'.³¹⁷ As such, while the voiding of an election is possible under the SA Act, it does not appear to be a practical means of enforcing truth in political advertising laws due to the high threshold that conditions its usage.

The capacity to void an election on the basis of defamation (rather than TiPA laws) is exemplified in *Crafter v Webster [No 2]*,³¹⁸ in which a candidate petitioned the Court of Disputed Returns to declare that the election was void, upon the ground that an Italian advertisement was defamatory of him by referring to another candidate as 'your Member of Parliament', despite the fact that he had not been

³⁰⁹ Electoral Commission of South Australia, *State Election 2014* (Election Report, 2014) 57.

³¹⁰ Electoral Commission of South Australia, *State Election 2014* (Election Report, 2014) 57.

³¹¹ Interview with David Gully, 6 August 2024; interview with Sam Hooper, 7 August 2024.

³¹² *Electoral Act 1985* (SA) s 107(5).

³¹³ Hannah Aulby, Executive Director, Centre for Public Integrity, *Transcript*, 16 March 2020, 12, cited in Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 75 [4.95].

³¹⁴ Interview with John Rau, 7 August 2024.

³¹⁵ Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) 77–8 [3.40]; Australia Institute, *We Can Handle the Truth: Opportunities for Truth in Political Advertising* (Discussion Paper, August 2019) 7.

³¹⁶ State Electoral Office of South Australia, *South Australian Election 18 March 2006* (Election Report, 29 March 2007) 47.

³¹⁷ *Featherston v Tully* (2002) 83 SASR 302, [163] (Bleby J).

³¹⁸ (1980) 23 SASR 321. Noting, however, that this case was decided prior to the passage of the *Electoral Act 1985* (SA).

elected at the time of the advertisement.³¹⁹ Mitchell J held that this language was defamatory,³²⁰ and constituted undue influence — a ground to declare the election void.³²¹ Mitchell J made such a declaration of voidness because the result of the election was 'likely to be affected' by the defamatory statement, particularly given the narrow margin of the election and additional procedural breaches of s 109 of the *Electoral Act 1929-1976* (SA), which provides that voters should mark their vote in private.³²²

4. Barring the Candidate

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

Section 386 of the *Commonwealth Electoral Act* already disqualifies anyone convicted of electoral bribery from holding a seat in parliament and from being a candidate for a period of two years from the date of conviction.

Hill, Douglass and Baltutis recommend this option, as it could have 'a potentially greater deterrent effect' compared to financial penalties.³²³

³¹⁹ *Crafter v Webster [No 2]* (1980) 23 SASR 231, 331 (Mitchell J).

³²⁰ *Crafter v Webster [No 2]* (1980) 23 SASR 231, 337 (Mitchell J).

³²¹ *Crafter v Webster [No 2]* (1980) 23 SASR 231, 338 (Mitchell J).

³²² *Crafter v Webster [No 2]* (1980) 23 SASR 231, 357 (Mitchell J).

³²³ Lisa Hill, Max Douglass and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022) 143.

6 Conclusion

The OECD has noted the ‘rapid and global spread of mis- and disinformation’, which ‘presents a fundamental risk to the free and fact-based exchange of information underpinning democratic debate’.³²⁴ False information can alter elections, affect voting participation, silence minorities, and polarise the electorate.³²⁵

Truth in political advertising laws have successfully operated in South Australia for 39 years and have the support of the politicians, party officials, and electoral commissioners. These laws are narrow in ambit, but are constitutional and enforceable. These laws have also been introduced in the ACT, and there is growing interest in introducing these provisions across the federation.

³²⁴ OECD, *Facts Not Fakes: Tackling Disinformation, Strengthening Information Integrity* (2024) 14.

³²⁵ Lisa Hill, Max Douglass and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022) 54.

Appendix A: List of Interviewees

South Australia

- Jay Weatherill (Former Premier)
- Mike Rann (Former Premier)
- John Rau (Former Deputy Premier and Attorney-General)
- Josh Teague (SA Member of Parliament)
- Mick Sherry (Electoral Commissioner)
- David Gully (Former Deputy Electoral Commissioner)
- Aemon Bourke (Labor Party State Secretary)
- Sascha Meldrum (Former Liberal Party State Director)
- Sam Hooper (Lawyer and Liberal Party Volunteer)

Other Jurisdictions

- Nathan Rees (Former NSW Premier)
- Chris Rath (NSW Shadow Special Minister of State)
- Dominic Ofner (NSW Labor Party Secretary)
- Matt Phillips (New South Wales Electoral Commissioner)
- Chris Stone (Former NSW Liberal Party State Director)
- Denis Napthine (Former Victorian Premier)
- Sven Bluemmel (Victorian Electoral Commissioner)
- Liz Williams (Former Victorian Deputy Electoral Commissioner)
- Dee Madigan (Founding Partner, Campaign Edge)
- Bill Browne (Australia Institute)
- Catherine Williams (Centre for Public Integrity)
- Kiera Peacock (Marque Lawyers)

Appendix B: Comparison of TiPA laws in Australia

The jurisdiction table below outlines current 'truth in political advertising' laws in South Australia and the ACT, as well as the Federal Government's law that was enacted and repealed in 1984.

	SA (since 1985)	ACT (since 2020)	1984 Cth law
Scope of prohibition (communication, types of media etc)			
Spreading material	✓ (authorises, causes or permits publication)	✓ (disseminates / authorises dissemination, including whether in print or electronic form)	✓ (print, publish, distribute, or cause, permit or authorise printing, publication or distribution)
Electoral advertisement containing electoral matter	✓ (calculated to affect the result of an election)	✓ (intended or likely to affect voting at an election)	✓ (electoral advertisement or anything intended or calculated to affect result of an election)
Statement of fact is inaccurate and misleading	✓ (to a material extent)	✓ (to a material extent)	✓ (untrue, misleading or deceptive)
Time limitation	✗	✗	✓ (issue of writ until close of polls)
Defence (did not determine content, and did not know that statement was inaccurate and misleading)	✓	✓	✓
Application to Cth referenda	N/A	N/A	✗
Enforcement			
Request to not disseminate	✓	✓	✗
Publish a retraction	✓	✓	✗
Penalties – fine (maximum)	✓ (\$5,000 for a natural person; \$25,000 for a corporation)	✓ (50 penalty units) ³²⁶	✓ (\$1,000 for a natural person; \$5,000 for a corporation)
Penalties – imprisonment	✗	✗	✗
Enforcement body	Electoral Commission	Electoral Commission	N/A
Judicial / administrative enforcement	✓ (Supreme Court)	✓ (Supreme Court)	N/A
Supporting mechanisms			
Publication of guidelines	✓ (on internet)	✓ (on internet)	N/A

³²⁶ A penalty unit in the ACT is currently \$160 for a natural person and \$810 for a corporation (see *Legislation Act 2001* (ACT), section 133), so the current maximum penalty is \$8,000 and \$40,500 for a corporation.

	SA (since 1985)	ACT (since 2020)	1984 Cth law
Publication of decisions	✘	N/A	✘
Reporting	✓ (annual report)	N/A	N/A

Appendix C: Case Law on Truth in Political Advertising

In considering South Australia's 'truth in political advertising' laws, courts have found that the laws:

- apply to political advertising that purports to be a statement of fact³²⁷
- do not apply to opinions or predictions³²⁸
- require that the statement must be inaccurate or misleading to a substantial or significant extent³²⁹
- do not intend to "inhibit vigorous political debate and discussion or fair comment on relevant matters of political controversy in the context of an election campaign"³³⁰

Cameron v Becker [1995] SASC 5149³³¹

- A Labor representative authorised the publication of an electoral advertisement which claimed that the Liberal Party had stated that the any school with less than 300 students would be closed.
- The Labor representative was convicted of breaching South Australia's 'truth in political advertising' laws, and appealed to the South Australian Supreme Court.
- The South Australian Supreme Court found that:
 - the claim was intended to be a statement of fact
 - the claim was substantially inconsistent with the Liberal Party's statement on the issue
 - the conviction should be upheld.

*King v Electoral Commissioner (1998) 72 SASR 172*³³²

- An advertisement was published was claimed that a vote for a SA Labor MP, or '[t]hanks to preferences', an independent candidate or a Democrat, would result in the election of Mike Rann.
- The Court found that the advertisement breached section 113, because it gave the impression that preferences would automatically go to SA Labor, but a preference deal did not exist.

*Featherstone v Tully (2002) 83 SASR 302; Featherston v Tully (No 2) (2002) 83 SASR 347*³³³

- A candidate issued advertisements and how-to-vote cards denying that they would ever contemplate supporting a Labor Government, but then decided to support a minority Labor Government in a hung parliament following the 2002 South Australian Election.

³²⁷ *Cameron v Becker* [1995] SASC 5149, [10].

³²⁸ *Hanna v Sibbons & Anor* [2010] SASC 291, [9]-[13].

³²⁹ *Cameron v Becker* [1995] SASC 5149, [10].

³³⁰ *Cameron v Becker* [1995] SASC 5149, [10].

³³¹ Available at https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASC/1995/5501.html?context=1;query=%22ea1985103%20s113%22;mask_path= (access 12 June 2024).

³³² Cited in Ravi Baltutis, 'South Australia's Truth in Political Advertising Law: A Model for Australia?' (2021), *Adelaide Law Review*, 42(2), page 601; available at https://law.adelaide.edu.au/system/files/media/documents/2022-01/alr_422_08_baltutis.pdf (accessed 12 June 2024).

³³³ As cited in Graham Orr (2015) *The Law of Politics: Elections, Parties and Money in Australia (2nd edition)*, pages 142-3.

- The South Australian Supreme Court held that the advertising did not breach the ‘truth in political advertising’ laws, as the advertising was more a statement of future intentions, and was not misleading at the time that it was issued.

Hanna v Sibbons & Anor [2010] SASC 291³³⁴

- A candidate brought proceedings alleging that various leaflets breached provisions of the *Electoral Act 1985* (SA), including the ‘truth in political advertising’ provisions in section 113, which made allegations that the candidate had ‘*failed on crime*’ or was ‘*soft on crime*’.³³⁵
- The South Australian Supreme Court found that the leaflets did not breach the ‘truth in political advertising’ provisions, as the claims in the leaflets involved assertions of opinion, rather than facts.³³⁶

Based on case law, the scope of the SA Act and ACT Act can be confined by reference to 1) substance (‘inaccurate and misleading’ statements of fact), 2) form (‘advertisements’), 3) temporality (whether the operation of the law is confined to the election period); 4) materiality (‘to a material extent’); and 5) the target of regulation (person who ‘authorises, causes or permits the publication of an electoral advertisement’).³³⁷ Each of these dimensions of scope will be considered in turn.

³³⁴ Available at https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASC/2010/291.html?context=1;query=%22ea1985103%20s113%22;mask_path= (accessed 12 June 2024).

³³⁵ *Hanna v Sibbons & Anor* [2010] SASC 291, [9]-[13].

³³⁶ *Hanna v Sibbons & Anor* [2010] SASC 291, [23]-[32].

³³⁷ See *Electoral Act 1985* (SA) s 113; *Electoral Act 1992* (ACT) s 297A.