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How and Why to Regulate False Political Advertising in Australia

Lisa Hill · Max Douglass · Ravi Baltutis

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To Fran Gale (from Lisa)

To Andy and Kate (from Max)

To Eugene Baltutis and Astrid Baltutis (from Ravi)

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Contents

Abbreviations

ACCC	Australian Competition and Consumer Commission
ACLU	American Civil Liberties Union
ACMA	Australian Communications and Media Authority
AEC	Australian Electoral Commission
ALP	Australian Labor Party
CCF	Canada Constitution Foundation
DIGI	Digital Industry Group Incorporated
DPI	Digital Platforms Inquiry
ECSA	Electoral Commission of South Australia
EMC	Electoral Matters Committee (Victoria)
JSCEM	Joint Standing Committee on Electoral Matters
JSCER	Joint Select Committee on Electoral Reform
LCARC	Legal, Constitutional and Administrative Review Committee (Queensland)
NZEC	New Zealand Electoral Commission
SCPHA	Standing Committee on Procedure and House Affairs
TIPA	Truth In Political Advertising
VEC	Victorian Electoral Commission

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CHAPTER 1

Introduction

> Free elections do not require the absence of regulation. Indeed, regulation of the electoral process is necessary in order that it may operate effectively or at all. Not only that, but some limitations upon freedom of communication are necessary to ensure the proper working of any electoral system. (*Levy v Victoria* (1997) 189 CLR 579, 608 (Dawson J))

Introductory Comments

In this book we explain the need for, and then propose a practical solution to the growing problem of false election information in Australia as well as other authentic democracies. Our aim is to help clean up the 'preference formation' stage of elections by developing a best practice regime to manage the problem of *authorised* political disinformation. This, of course, excludes the vast quantity of *un*authorised bad faith communication that is out there, but it is a start and a viable one. Crucially, our intent is to help clean up the election information environment in a manner that does not impair the free flow of accurate democratic speech that all democracies need in order to function properly. Neither do we want to propose any remedy that might violate the implied freedom to political communication under the *Australian Constitution*, not only because we do not want to recommend laws that are destined to be struck down but also because, at this point in Australian jurisprudence, we would take it as a sign that our proposed measures are probably an unjustified burden on

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political speech. Devising such laws is a difficult but not impossible task, as we will show.

We also offer in this book a detailed history of attempts to regulate election mis- and disinformation in Australia at both state and commonwealth levels as well as in other settings. This history is partly political history but it is also, in large part, legal history and we provide a fine-grained account of how truth in political advertising laws have been debated, enacted, implemented and understood from a legal point of view.

In this first chapter, we offer some background to the growing false election information problem in both Australia and other democratic settings and argue that it is an issue in need of urgent attention. We then do some ground-clearing preparatory to the main discussion by first clarifying the scope of our inquiry and exploring the kinds of statements that should, and can, be regulated by truth in election advertising ('TIPA') laws.

Background

Recent elections throughout the world have offered vivid demonstrations of the extent to which disinformation campaigns can distort democratic processes and undermine their legitimacy. The problem was especially pronounced during the 2016 US Presidential election campaign when the term 'fake news' entered the global political lexicon (Allcot & Gentzkow, 2017). Some of that disinformation emanated from the highest levels; for example, the *Washington Post* fact-checking service reported that, at the completion of his incumbency, US President, Donald Trump, had made more than 30,000 false and misleading claims during his term of office (Kessler et al., 2021). Such disinformation is thought to have changed the outcome of the election (see Gunther et al., 2016; Napoli, 2018). Democracies around the world are now witnessing the ascendance of what has been labelled 'post-truth' politics; a politics in which even the value of objective facts is disputed.

The media landscape and its political economy have eroded both the media's willingness to supply, and the consumer's demand for 'truth' in political discourse; fast-paced and 'bite-sized' communication increasingly dominates this new landscape of political communication. While social media has decreased barriers to entry and 'democratised' media platforms, it has also exponentially fostered the propagation of false and misleading

information in the spheres of politics, and more recently, public health. This has made the consumer's task of attempting to sift through considerable quantities of mis- and disinformation more difficult; an effect that has sometimes been exacerbated by the attitudes of those at the highest levels of government. Conspicuous examples include Kellyanne Conway's invocation of the idea of 'alternative facts' (Bradner, 2017) and Rudy Giuliani's assertion that 'truth isn't truth' (Pilkington, 2018).

Repeated claims of 'stolen elections' during the 2020 US presidential campaign generated distrust around the integrity of the electoral process and cast widespread doubt on the authenticity of the declared result, even among certain electoral authorities (Brown, 2021). Subsequent knock-on effects included significant social conflict (most notably, the storming of the US Capitol by violent protestors in January 2021) and a generalised undermining of the authority of the electoral victor; such problems persist to the present day (December 2021). Since the 2020 US presidential election, pre-emptive and baseless accusations of electoral fraud have become increasingly normalised in other contests.[1] Such a strategy is inimical to both trust in election processes and the healthy functioning of democracy.

If the election outcome is not accepted, this is a calamity in the sense that the election has failed to fulfil, arguably, its primary function: to permit the peaceful transference of power from one regime to the next. 'Peaceful' is the operative word here; elections are part of a procedural tradition that goes all the way back to Aristotle. According to Aristotle, by giving everyone an equal share in power in deciding who governs us, democracy operates as a mechanism for avoiding social conflict and 'political tragedy' (Hill, 2016). This is generally achieved by elections that are both inclusive and are perceived to have been properly run; but the outcomes of elections conducted in mis- and disinformation-rich environments are less easily accepted because voting choices based on faulty information are inauthentic. Outcomes are even less easily accepted when the false information takes the form of 'election conspiracism' or 'stolen election' type narratives. This creates instability and problems for incoming governments. Overall, then, false election information inflicts substantial damage upon the speech condition that enables democracies to function properly and elections to achieve their purposes.

These problems are not, of course, limited to the United States; in the first year following the 2016 US Presidential election, over 17 countries experienced election campaigns that were undermined by false information—'damaging citizens' ability to choose their leaders based

on factual news and authentic debate' (Kelly et al., 2017). During the UK 2016 Brexit referendum, the 'Leave' campaign misled the public by claiming that leaving the European Union would free up GBP350 million a week for healthcare—an unsupported claim that many believe tipped the public towards the 'Leave' option (Mason, 2017). Closer to home, the 2016 Australian Federal election was unduly influenced by false information disseminated by the Australian Labor Party ('ALP') in its 'Mediscare' campaign, which arguably eroded the Liberal Party's parliamentary majority (Elliot & Manwaring, 2018) and affected the election result, particularly in marginal seats (Carson et al., 2019). Similarly, during the lead-up to the 2019 federal election, the Liberal-National Coalition spuriously and fatally alleged that the ALP was intending to introduce a 'death tax' if elected.

Misleading and inaccurate information is perpetrated by actors across the political spectrum and more recently, in highly transmissible forms through the internet and social media. Publics the world over are increasingly subject to inaccurate information, often from sources that appear to be authoritative. In Australia, over two-thirds of Australian adult news consumers have reported seeing questionable news items that they considered to be deceptive, including misleading headlines and commentary; doctored photographs and serious factual errors (Hayden & Bagga, 2018). In one 2018 Australian study, a quarter of the sample claimed that they had seen stories that were 'completely made up' (Hughes, 2020). These figures are corroborated by equally troubling rates of disinformation exposure in other established democracies (Loomba et al., 2021).

This dynamic is exacerbated by increasing political, economic and cultural polarisation, the distorting influence on democracy of digitisation, and the rise in power of digital platforms. Ignoring disinformation is no longer an option because the stakes have become so high. False election information can undermine the autonomy of voters, delegitimise the electoral process, alter the course of elections and undermine trust in democracy (Rowbottom, 2012). As Ari Waldman puts it: 'democracy is under threat when the truth is no longer a check on power' (Waldman, 2018: 869).

Although most Australians think something should be done about political disinformation, solutions are not straightforward because, while mis- and disinformation pollutes the speech environment, any attempt to limit speech risks harming the free speech condition that is vital for

democracy's functioning. Without adequate freedom of political expression, democracy dies (Kelsen, 1961). Working out what 'adequate' means is therefore a central concern when considering the problem of how to manage false election speech.

In this book we tackle the problem by first establishing whether it is really a problem in need of a solution. We then consider different approaches with a focus on legal solutions. After canvassing the history and character of experiments in legal responses worldwide, we then concentrate on the Australian experience. Our focus throughout is on moral justifications for a legal response as well as how such laws can, do and might operate. Of special interest is the constitutionality or otherwise of laws enacted to combat false election information.

A Home-Grown Solution

One way of combatting false and misleading election claims is by the use of 'Truth in Political Advertising' laws. Broadly speaking, as their name implies, TIPA laws are designed to regulate the 'truth' content of political advertisements or statements within political discourse. As we will show, the content and therefore functionality of these laws varies significantly throughout the world. TIPA laws exist *de jure* throughout many mature democracies, but arguably the most effective—or perhaps, least controversial—TIPA regime exists in South Australia. South Australia's TIPA provisions are contained in s 113 of the *Electoral Act 1985* (SA) which reads:

113—Misleading advertising

(1) This section applies to advertisements published by any means (including radio or television).

(2) A person who authorises, causes or permits the publication of an electoral advertisement (an ***advertiser***) is guilty of an offence if the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.
Maximum penalty:

(a) if the offender is a body natural person—$5000;
(b) if the offender is a body corporate—$25,000.

(3) However, it is a defence to a charge of an offence against subsection (2) to establish that the defendant:

(a) took no part in determining the content of the advertisement and
(b) could not reasonably be expected to have known that the statement to which the charge relates was inaccurate and misleading.

(4) If the Electoral Commissioner is satisfied that an electoral advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent, the Electoral Commissioner may request the advertiser to do one or more of the following:

(a) withdraw the advertisement from further publication
(b) publish a retraction in specified terms and a specified manner and form

(and in proceedings for an offence against subsection (2) arising from the advertisement, the advertiser's response to a request under this subsection will be taken into account in assessing any penalty to which the advertiser may be liable).

(5) If the Supreme Court is satisfied beyond a reasonable doubt on application by the Electoral Commissioner that an electoral advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent, the court may order the advertiser to do one or more of the following:

(a) withdraw the advertisement from further publication;
(b) publish a retraction in specified terms and a specified manner and form.

In this book, we offer a broad outline of an ideal-type model for *TIPA* laws in Australia which we base on the South Australian system because it tells us a good deal about the benefits and pitfalls of TIPA laws and what to avoid and pursue in an ideal-type regime. However, in sketching out our preferred model, we offer a number of enhancing modifications to South Australia's framework, some of which were inspired by good practice (as well as shortcomings) in other common law jurisdictions. We conclude with a list of ten recommendations for a regime suitable for

adoption in all Australian jurisdictions with a close eye on ensuring that TIPA laws do not exert a chilling effect on the kind of political speech that it is designed to protect, and which is the lifeblood of a thriving democracy. In doing so we seek to resolve the democratic conundrum, neatly captured by Joo-Cheong Tham and Keith Ewing as the 'paradox of elections' whereby elections require 'both freedom and restraint if electoral purposes are to be served' (Tham & Ewing, 2021: 312). In other words, we are attempting to find a way to deter authorised untruths in election campaigns while at the same time preserving democratic speech freedoms. This is a difficult balancing act.

But before doing so, we set out our terms of reference and the types of speech that can and should be captured under TIPA legislation. We then provide a detailed justification for regulating false election speech. This entails outlining its democratic harms; especially its implications for democratic legitimacy. We also determine the psychological, political and economic dynamics of false election information. Following this, we look at the history and state of play of legal experiments with this kind of legislation both in Australia and other common law jurisdictions and conclude with a list of principles and guidelines for a regime suitable for adoption in all Australian jurisdictions; one that will be viable and effective, acceptable to the public, likely to meet with bi- and multi-party support and, crucially, is resistant to legal—and especially constitutional—challenge.

So, first, what kinds of statements do TIPA laws seek to regulate? And how does the kind of communication it seeks to regulate map onto the scholarly understanding of common 'information disorders' such as 'misinformation' and 'disinformation'.

Which Statements Are Captured?

Contrary to popular belief, so far TIPA laws have tended to be rather narrow in their scope. They are only applicable to *authorised* political advertising that is disseminated or published by a political party, person or body corporate prior to or during an election, with the potential to affect the result of the election. Captured statements can influence both the formation of opinion (the 'preference formation' stage of elections), as well as the expression of that opinion (the 'preference expression' stage of elections) in terms of the way in which the elector casts their vote. Political advertising can take a range of forms including television; radio; corflute boards or social media posts. TIPA laws do not apply

to political communication that cannot be properly characterised as an 'advertisement'. The definition of an 'advertisement' as a notice or public announcement does not encompass political debates, interviews or stump speeches, for example, but, as we demonstrate below, at times what looks like political commentary between elections can be deemed a form of electoral advertisement due to the likelihood that it will influence voting preferences.

Existing TIPA laws, both in Australia and around the world, are generally confined to authorised, demonstrably false statements of fact with the potential to influence the election outcome. They are not concerned with expressions of opinion or election-contingent predictions about policy outcomes. For example, in South Australia, the Supreme Court has stated that s 113 'is restricted to advertisements so that a person may make speeches that include statements of fact which are inaccurate and misleading'. It only applies to those who are identified as the author of a statement and does not penalise those who publish inaccurate or misleading statements of fact under an honest and reasonable mistake of fact.[2] The section, in all those circumstances, is directed to a '*very small class of persons in very narrow circumstances*' (*Cameron v Becker* ('*Cameron*') (1995) 120 FLR 199, 215 (Lander J)) (emphasis added).

Disinformation, Misinformation and 'False Campaign Statements'

When discussing false campaign statements in the context of TIPA laws, it is worth attempting to map them onto the dichotomy of 'misinformation' and 'disinformation'. Since the term 'fake news' came to the fore in the 2016 US Presidential Election, scholars and governments alike have struggled to delineate its precise attributes and distinguishing features. Use of the term 'fake news' has subsequently abated, and since 2018 the scholarly community has opted for the terms 'misinformation' and 'disinformation' to describe the two broadest categories of 'information disorders' (Wardle & Derakshan, 2017). Although the terms are often used interchangeably, they are distinct. Misinformation generally refers to the 'inadvertent or unintentional' spreading of false information, whereas disinformation is 'the subset of misinformation that is deliberately propagated' (Guess & Lyons, 2020: 11). The difference between them is fundamentally a question of intent.

Given that s 113 of the *Electoral Act 1985* (SA)—a law that plays a central role in this study—is a criminal offence, one could reasonably expect it to require intention, but this is not the case. Violation of s 113 is a strict liability offence, and the available statutory and common law defences are assessed objectively. For example, the statutory defence available in s 113(3) places an evidential onus on the defendant to prove that they *both*:

> (a) took no part in determining the content of the advertisement and
> (b) could not reasonably be expected to have known that the statement to which the charge relates was inaccurate or misleading.

Furthermore, in *Cameron*, the South Australian Supreme Court affirmed that 'there is nothing in the subject matter of s 113 of the Act which would preclude the common law defence of honest and reasonable mistake' (*Cameron*: 206 (Olsson J)). Both defences are objective tests. For example, in *Cameron* the Supreme Court examined a purported statement of fact in an electoral advertisement by comparing it with statements made by the plaintiff in a radio interview on which the defendant claimed the advertisement was based. The court, in dismissing the appeal, concluded that '[the statement was] substantially at odds with the Lucas statement and simply could not have been accepted, by any reasonable person, as a fair and accurate projection of the impact of that statement' (*Cameron*: 205 (Olsson J)). The function of this defence will be explored in further detail throughout the book.

To clarify, due to the strict liability condition found in s 113 (which we endorse), TIPA laws are applicable to *both* disinformation and misinformation (but not to malinformation, that is, information that is based in reality but whose sole purpose is to inflict harm). In terms of the way that the legislation operates, intent does not need to be proven and objective tests of reasonableness are applied to both the statutory and common law defences. It will always apply to examples of disinformation, where the defendant knew the statement was false or misleading and formulated the content of the advertisement. In a case of misinformation, where the spread of false information was inadvertent, the statutory defence would be available if the defendant did not formulate the content of the advertisement and could not have been expected to know that the statement

was inaccurate or misleading according to the objective test of *reasonableness*. As the offence relates to both misinformation and disinformation, following Jacob Rowbottom, we will refer to this narrow class of directed statements of fact in which intent is superfluous as 'false campaign statements' or 'false election information', and when aggregated in an electoral system, as 'false information'.

Therefore, when assessing the harms of false campaign statements, the intent of the propagating actor has little to no effect on the democratic harms imposed. A statement intended to smear a candidate will potentially affect voters' preferences regardless of whether the author knew the statements to be false or misleading. With this in mind, we can now explore the dynamics and harms of false campaign statements (whether intentional or unintentional) and canvass their effects on elections and democracy in general.

Notes

1. California's and New Jersey's recent gubernatorial races in September and November 2021, respectively, are illustrative of the power of accusations of 'stolen elections'. See, for example, Litt (2021).
2. This common law defence was first articulated in the Australian context in *Proudman v Dayman* (1941) 67 CLR 536.

Cases

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Proudman v Dayman (1941) 67 CLR 536.

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CHAPTER 2

The Effects of False Campaign Statements

Introductory Comments

Adopting both a theoretical and empirical perspective we now explore the negative effects of false election information on electoral and other democratic processes. We also determine the economic and psychological dynamics at play in order to show that false election information will be difficult to address without a well-crafted legal remedy.

There is an emerging interdisciplinary literature on the effect of false information on elections which largely borrows from the established tools of economic, sociological and psychological analysis. The theoretical literature on false campaign statements, as we briefly discuss below, provides some conceptual framing for our analysis and is supported by a growing empirical literature. The theoretical literature makes claims about how the forces at play in false campaign statements may interact, and therefore how the relevant channels may be suitably regulated.

While many commentators speculate that elections are increasingly affected by false campaign statements, there are surprisingly few studies that seek to empirically test this claim. However, scholars are now starting to recognise the necessity of empirically evaluating the effect of false information on elections. Clare Wardle suggests that academia must become 'central to [the] conversation' in building 'the research framework that will help us understand the scale and impact of [false information]' (Wardle, 2018: 952).

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A Theoretical Understanding: Or Should We Give Consumers What They Want?

Hunt Allcot and Matthew Gentzkow's 2017 model of fake news production and consumption is a useful heuristic for understanding the potential incentive structures embedded in the propagation of false information (Allcot & Gentzkow, 2017). In their model, media firms observe, with differing precision, the 'true' state of the world, in this case, how well a given candidate will perform in office. Firms subsequently publish their signals about the state of the world and are at liberty to add bias to these reports. Consumers of these reports have heterogenous 'priors' about the state of the world, meaning they each have differing intuitions about the performance capabilities of electoral candidates. In this model, the consumers' utility is defined in terms of two seemingly diverging motivations: first, to know the truth (receiving the 'truest' signals from media firms) and, second, having their heterogenous priors affirmed by corroborative sources.

Consumers therefore wish to know the true state of the world, while simultaneously, and sometimes *paradoxically*, wishing to have their biases confirmed. Given these goals, consumers then choose a news firm to maximise their utility—with frequently visited firms accruing larger sums of revenue. Biased corroborative 'news' is produced more frequently when: consumers' feedback about the true state of the world is limited; when the true 'quality' of a media firm cannot be gauged (see Gentzkow & Shapiro, 2006); and when consumers prefer psychologically confirmatory content (Mullainathan & Schliefer, 2005).[1] While it may seem far-fetched to claim that media consumers would prefer deliberately biased news, empirical studies in psychology affirm that cognitive dissonance and confirmation bias significantly affect our news consumption decisions (Pennycook & Rand, 2021).

The model suggests that there are perverse incentives within the information market to produce inaccurate and untrue information that confirms prior beliefs about the world (Braun & Eklund, 2019). These perverse incentives are even more salient in the digital age, where barriers to entry for news production and dissemination are at historic lows. For example, throughout the final three months of the 2016 US Presidential election, many influential false news stories were found to have originated from Veles, a small town in North Macedonia in which a

quarter of the residents live in poverty. Notably, the primary motivator for production was monetary profit rather than electoral distortion (Hughes & Waismel-Manor, 2020). Regardless of motive, the effect on the information environment was the same.

While candidates are motivated by ideology and the desire for an electoral advantage rather than financial gain, strictly speaking, in both the candidates' and disinformation entrepreneurs' cases, there are seemingly inescapable incentives to produce false information because both cases engage the same psychological mechanisms. The fact that there are powerful—and arguably ineradicable—motives for producing false information (Wardle & Derakhshan, 2017) suggests that the information environment needs to be regulated in order for democracy, and its key procedural moment—elections—to function properly.

In Allcot and Gentzkow's model, when the political information market is awash with 'fake' or biased news, there are a number of significant external social costs. Electors who believe fake outlets to be legitimate have less accurate beliefs. These less accurate beliefs lead to the election of poorer quality candidates or else candidates whose policies do not reflect the real interests of those who elected them. In turn, consumers become more sceptical of legitimate news producers, and these effects may be reinforced in equilibrium as demand decreases for legitimate news and fake news outlets proliferate (Allcot & Gentzkow, 2017).

Similar theoretical models suggest that, because false information changes voters' information environment and therefore policy preferences, it affects the way in which parties vie for the support of the electorate. This false information leads to a divergence in the policy positions of the parties as they compete for the support of the disinformed and informationally divided electorate, resulting in a lower level of welfare for the electorate as a whole, as enacted policies do not promote their true welfare understood in the absence of false information (Grossman & Helpman, 2019).

Other commentators suggest that competitive campaigns provide a 'short-term incentive to make defamatory statements in order to secure victory, regardless of the long-term potential for damages after an election' (Rowbottom, 2012: 510), and these statements may harm a candidate's reputation and standing well after the election period. According to Rowbottom, false statements can not only distort the entire electoral

outcome but even 'short circuit channels of accountability' for incumbents (Rowbottom, 2012: 512). They do this in the sense that, if voters would otherwise have voted for the opposition, but are convinced to retain the incumbent by a false campaign statement, then the democratic accountability mechanism—the election—has been effectively compromised: 'A politician responsible for deeply unpopular policies or guilty of some wrongdoing may avoid the penalty at the ballot box if a false statement about the opponent convinces enough people to vote for [them]' (Rowbottom, 2012: 510–516). The harm to democracy does not end here. False campaign statements can contribute to 'lower participation and increased cynicism' towards elections and even democracy in general (Dardis et al., 2008; Rowbottom, 2012: 517; Yoon et al., 2005).

William Marshall has argued that there are four cardinal harms that false campaign speech can inflict. First, it can distort the electoral process by causing electors to vote in ways they otherwise would not. Second, false statements can 'lower the quality of discourse and debate' by causing campaigns to degenerate into cycles of attack and denial rather than serious policy dialogue, with considerable resources being devoted to responding to falsehoods (Marshall, 2004: 294). Third, false statements lead to voter alienation and distrust in the political process more broadly. Fourth and finally, there are individual effects of false campaign statements insofar as they can 'inflict reputational and emotional injury upon the attacked individual' (Marshall, 2004: 296). While *prima facie* only an individual harm, such reputational damage may put off qualified candidates from seeking office and impose an unwarranted reputational cost on incumbent political leaders (May, 1992). All of this has implications for democracy in general. As Brennan J noted in the 1964 US Supreme Court decision *Garrison v Louisiana*: '[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected' (*Garrison v Louisiana* (1964) 379 U.S. 64, 75 (Brennan J for the Court)).

Before proceeding it should be noted that while theoretical research is obviously constrained in its ability to explain real-world electoral phenomena, it nevertheless provides a good start. Indeed, while the empirical literature on false electoral information is fledgling, we are observing a gradual convergence between the predictions of the theoretical literature, and the results of empirical studies. We expect the interplay

between these literatures to be fruitful to our understanding of false electoral information over the long term.

An Empirical Understanding

The impact of false information campaigns is long term and appears to be growing stronger in each successive election cycle as an increasing proportion of the electorate is exposed to election advertising through digital media. Two conspicuous examples are the 2016 US Presidential Election (Allcot & Gentzkow, 2017; Bovet & Makse, 2019) and the Brexit Referendum (Henkel, 2021) that same year, the outcomes of which were either affected or altered by false information campaigns. The dissemination of false news stories generally favoured Donald Trump in the United States and the 'Leave' vote in the United Kingdom, reaching a significant proportion of the electorate in both cases. Similarly, using panel surveys of voters, Fabian Zimmerman and Matthias Kohring's 2020 study of the 2017 German Federal election found that exposure to stories that were deliberately and verifiably false alienated voters from the governing party and drove them 'into the arms of right-wing populists' (Zimmermann & Kohring, 2020: 215).[2]

Even more worrying is the fact that exposure to false information during election campaigns coincided with lower levels of trust in news media and even politics itself. Another study drawing on panel surveys throughout the 2018 US midterm elections found that exposure to false information two weeks before the election could 'significantly predict the changes in political cynicism immediately after the election day' (Jones-Jang et al., 2020: 1). Although it is apparent that false information has an effect—albeit one that is difficult to measure—on voters' political preferences, these studies also underscore that exposure to false information has a longer-term corrosive effect on the democratic fabric. As more and more people use unreliable digital sources for their political news, the damaging impact of false information will undoubtedly increase even in a democracy as relatively strong and stable as Australia's. More people than ever are now getting their 'news' from sources published on the internet, especially from sources that are not even news outlets; for example, over 50% of Australians now turn to social media platforms for 'news' (Hughes, 2021). But false information does not need to be a mass phenomenon to cause harm because precision disinformation can have enormous payoffs providing it is directed at the right voters; this can be achieved

by the use of data enhancement and audience segmentation techniques that deliver custom-made disinformation to very narrow and specific audiences. In any case, it *is* fast becoming a mass phenomenon, and the exponential spread of disinformation, rumours and conspiracy theories is corroding public trust in government institutions, polarising the electorate and stoking populist, anti-democratic and extremist sentiment (Zimmerman & Kohring, 2020). It is also 'causing significant damage to the public sphere and shifting the acceptable bounds of political debate' (Roose & Khalil, 2020).

Notes

1. For a more recent empirical assessment of the motivations for spreading disinformation see Buchanan (2020). Note that those most likely to share false information were those who thought it likely to be true, or who had pre-existing attitudes consistent with it.
2. Note, however, that Michele Cantarella et al.'s (2019) study of the 2013 and 2018 Italian general elections found that exposure to false information had a negligible effect on populist voting (Cantarella et al., 2019).

Case

Garrison v Louisiana (1964) 379 U.S. 64.

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CHAPTER 3

Disinformation as a Democratic Collective Action Problem or Why a Legal Solution Is Warranted

Introductory Comments

We now examine how false election information violates democratic values and explore the extent to which and the manner in which false election information undermines the legitimacy of Australian (and other authentic) elections. We also argue that, because of the perverse incentives to produce false election information coupled with the significant social costs it entails, the problem should be approached as a collective action problem rather than as an issue of individualised rights. It therefore calls for state action to resolve it. This is consistent with public attitudes: the fact that there is very strong support among the public, politicians and the legal profession for regulation in Australia suggests that the majority of Australians also regard false election information as a collective action problem in need of state action. Exploring the democratic justification for why false election communication should be regulated illuminates the risks of over-regulating, on the one hand, and failing to regulate, on the other.

Democratic Criteria

A standard normative framework for assessing any practice or regulation around the delegation of power in democracy is Robert Dahl's classic theory of procedural legitimacy. Dahl formulates criteria for determining the legitimacy of processes that generate the decisive moment of

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representative democracy: elections. According to Dahl's account, certain conditions must be met in evaluating election procedures and he identifies five such conditions:

1. Political equality (i.e. that every vote should count for one and only one)
2. Effective participation
3. Enlightened understanding
4. Final control of the agenda by the *demos* (i.e. that the procedures should deliver an outcome that confirms the people as sovereign) and
5. Inclusiveness (i.e. that the procedures are universalistic and are not unjustifiably 'exclusivistic'. Universal suffrage is key here).

If a system's processes can satisfy these five criteria it can be regarded as a full 'procedural democracy' and the outcome generated by the procedure (elections) can be seen as legitimate (Dahl, 1979). It will therefore be accepted as the 'correct' outcome. For the purposes of the present discussion, criteria 2 and 3 are most relevant and so we focus on those.

'Effective Participation'

On this criterion, procedures are judged according to 'the adequacy of the opportunities they provide for, and the relative costs they impose on, expression and participation by the *demos* in making binding decisions' (Dahl, 1979: 102–103). This means that electoral participation should be relatively easy and not costly to individual voters. In particular, information costs should be low, and everyone should be able to be equally informed. When false information is at play, this capacity is seriously eroded because the information costs of becoming informed and knowing who to vote for go up. This is because much more work is required in attempting to sift the wheat from the chaff or the facts from the falsehoods. We need reasonably accurate information to make our voting decision, but that information is elusive when the market is flooded with inaccurate information. This dynamic disproportionately affects the poor and less educated because the socially disadvantaged face more challenges in gathering information about politics and voting and are typically less 'knowledgeable about politics'. This impacts negatively

on their electoral participation (Gallego, 2010) as well as their attitudes to democracy in general. This, in turn, further delegitimises the election procedures and outcomes because it also violates the 'political equality' criterion mentioned above (Hill in Brennan & Hill, 2014).

'Enlightened Understanding'

Enlightened understanding is closely related to the 'effective participation' criterion and requires that 'in order to express his or her preferences accurately, each citizen ought to have adequate and equal opportunities for discovering and validating…what his or her preferences are on the matter to be decided' (Dahl, 1979: 98–108). According to this criterion, every citizen should be attentive and engaged and it is unacceptable to 'cut off' or suppress information that could affect decisions made, or afford some citizens easier access to information of crucial importance. This makes it sound as though we should tolerate false information at election time and not 'cut it off'. But the situation is actually the opposite because with false election information, the false information is doing the cutting off of the accurate information. It is clogging the free speech condition that needs to exist in order for people to make their voting decision.

The Free Speech Condition

What exactly is the 'free speech condition'? We, along with many others, think it might be better to think of free speech, not as an individualised act exercised as a purely individual right, but as a social condition that we all inhabit and own and to which we are all subject and to which we also contribute. That condition is dependent on other things, including its proper use; imagine how quickly the condition would deteriorate in a universe full of irresponsible and untruthful speech. Pretty soon no one would bother to speak or listen and speech itself would lose all value. So, the free speech condition is synonymous with a kind of efficiency in the 'marketplace of ideas'. Such efficiency does not simply refer to free and unfettered flow, since such a flow could lead to a speech universe in which anything goes (including 'alternative facts') but in which speech eventually becomes meaningless.

Free speech only exists when certain social and political conditions are present to enable the speech to flow freely, enabling different ideas to

compete with each other and thereby promote the truth. This involves commitments like resolving never to mislead others intentionally and treating others with equal respect so that their good faith speech can be heard and heeded (Hill, 2007). It is worth emphasising that the marketplace of ideas underlying the social condition does not have to be completely unregulated in order to serve this condition; the term 'market-place' can be misleading because it conjures up the image of 'laissez-fairism'. In fact, a completely unregulated market will introduce distortions that are hurtful to both the free flow and the truth. Regulation of the market is therefore, in many cases, warranted: for example, it is justified to verify and police the content of articles published in scientific journals in order to serve the 'truth' while laws requiring that poor people be offered legal aid in criminal proceedings seek to address the speech power asymmetries to which an unregulated market for legal services gives rise (Goldman & Cox, 1996).

So, the social condition of free speech is not anarchic; rather, it is a balanced environment that offers, not only negative liberties like toleration of dissent and freedom of religious belief but positive freedoms that promote the condition. These can be brought about by legislation and might include the provision and defence of rights like the right to an education so that everyone can learn to communicate, hear and understand each other effectively or the right to equal employment opportunities and other institutions and laws that seek to address the social and economic barriers to equal speech access. The free speech condition is also dependent upon a culture of tolerance and respect, and this is also something that can also be enhanced by laws.

If we adopt the 'free speech as a social condition' approach, then any speech act that fails to promote, or which negatively affects the efficiency of the marketplace of ideas will fail to qualify as an act of free speech (Braddon-Mitchell & West, 2004: 460). It is therefore unworthy of the same protection as speech that promotes the overall condition. Lies and hate speech, for example, will generally fail to meet the test. But so too does false election information, especially if it comes from leaders who speak from extraordinarily privileged speech platforms and therefore have a vastly magnified capacity to clog up the speech condition and distort election processes. This power is especially amplified in the case of political incumbents in Australia; not only is their speech protected by parliamentary privilege within the house, but politicians are exempt from laws which constrain the rest of us, including the *Spam Act 2003* (Cth),

the *Privacy Act 1998* (Cth) and the Do Not Call Register. A case that underlined these extensive freedoms occurred in 2021 when the Hon. Craig Kelly repeatedly bombarded millions of Australians with spam election messaging. Although Kelly had been temporarily suspended from a number of social media sites due to his posting of COVID-19 disinformation, not all platforms had done so because the main mechanism for regulating digital speech—the DIGI code of conduct (see below)—is voluntary. Therefore, Kelly's actions were perfectly legal and the relevant regulator (ACMA) was powerless to act.

Markets as Regulators

It is worth pausing at this point to problematise the idea of markets as the natural (or even effective) regulators of bad information. For many, 'fake news' is a normal part of the marketplace of ideas that liberal democratic society is supposed to tolerate. On this view, consumer demand will cause the best ideas to 'rise to the top' while bad or faulty ideas will be rejected by rational consumers. However, there are major problems with this optimistic faith in information markets: first, as we have shown, consumer demand unconsciously tends towards the consumption of news that confirms existing prejudices therefore there are perverse incentives within the market to keep producing it; second, consumers are not always equipped to sift the information wheat from the chaff. A recent study undertaken in the United States of over 8000 subjects found that those 'who are most confident' of their ability to distinguish between legitimate and 'fake news' were also the most likely to both believe, consume and share it. The study authors also rated over 70% of subjects 'overconfident' (Grover, 2021). The idea that consumers will rationalistically regulate the market is therefore based on the faulty premises that consumers (a) have the time and energy to sift and assess every piece of information and (b) can and will always act in the rational manner predicted. Historically a source of security against threats to democracy, in the digital age, the marketplace of speech has become 'a principle weaponised against the ideals from which it sprang' (Stone & Schauer, 2021).

Market processes are therefore ineffective sifters of inaccurate political speech and in many cases are even the source of the problem (given that there is money to be made in disinformation). In any case, it is debatable whether markets should be expected to regulate facts in the first place: after all, as Ari Waldman points out '[t]he marketplace of ideas was always

meant to be a marketplace of *ideas*, not facts. There is no marketplace in facts. Indeed, no area of law permits a market in facts… Facts, like gravity, are not up for debate' (Waldman, 2018: 869). In other words, there is no such a thing as 'alternative facts' and it is incoherent to insist that false or inaccurate information can ever be a fact and therefore deserving of the same legal protection.

There are, and should always be, limitations on what can be said in the public domain because there are other competing values at stake such as the right to privacy, equality, dignity and to be free from speech that damages our social and civil standing. Markets are not particularly adept at respecting such values and even when market actors have signed up to codes of conduct in relation to them, they still fail.

Regulating false election speech by more definitive means is therefore warranted; this approach is hardly unprecedented because no society has ever existed where speech has not been limited to some extent in order to protect individuals and the public interest (Fish, 1994). Blackmail, coercive threats, invasion of privacy, sexual or racial intimidation and harassment, conspiracy, extortion, libel, discriminatory job advertisements, perjury, fraud and misrepresentation are all areas where we would probably agree that speech cannot always claim exemption from legal regulation or redress. So, despite how crucial free-flowing political speech is to the functioning of democracies, it cannot be assumed to be exempt from any constraint. Indeed, some constraint is needed to ensure authentic free flow.

But this is tricky to regulate. What if, for example, votes and entire elections really *are* being stolen? It is vital that citizens can draw attention to that publicly if it is really happening and so should any good faith whistle-blowing be protected. Therefore, any remedial regulations for 'bad' election speech will need to be rather conservative with high thresholds for proof and inbuilt redress mechanisms and they would have to carry with them safeguards and a high degree of epistemological scepticism. The regulator would also have to be trusted. There also needs to be a strong justification for regulation such as we have sought to provide here by arguing (a) that false election information inflicts significant harm and (b) that the market not only fails to remedy the situation but is often the cause of it.

Public Support

In Australia TIPA legislation has a good chance of meeting with bipartisan support, as occurred in South Australia and the ACT (Renwick & Palese, 2019). Further, a substantial majority of Australians want it to be enacted. Polling conducted by The Australia Institute found that 84 per cent of Australians support TIPA laws; significantly, such support is independent of party preference, with only 0.5 per cent separating Coalition and Labor voters on the issue (Browne, 2019a). Subsequent to its popular poll, the Australia Institute conducted an online petition for stronger TIPA laws; it received support from 29 prominent Australians including Supreme Court judges, politicians of various stripes and business leaders (The Australia Institute, 2020).[1] These sentiments are corroborated by a national ReachTEL poll conducted after the 2016 federal election which found that 87.7 per cent of Australian respondents want tougher TIPA laws (Australia Institute, 2016). Therefore a key justification for legal regulation is that there is broad support for it at all levels.

A State Duty in an Atypical Setting

A final justification for regulating false election speech is found in the fact that voting is compulsory in Australia. Although a clean information environment for elections is, for any democratic government, a matter that falls squarely within the purview of government responsibility, that duty is magnified in the Australian setting. Requiring citizens to vote places a special duty on the state to ensure that the imposed duty does not place an unreasonable burden on citizens; this is why, for example, Australians are exempt from the requirement to vote if they live more than 8 km from the nearest polling station or if some circumstance beyond their control makes it difficult for them to vote. Voting in Australia is a comparatively painless affair for voters because the Australian state meets almost all of the opportunity and transaction costs involved. The Australian state (via its state and commonwealth electoral commissions) assumes a high degree of responsibility for making feasible what it legally requires of electors. Our electoral commissions go to extraordinary lengths in order to accommodate ageing and immobile people, people experiencing homelessness, those living in remote regions, incarcerated citizens, people who have a disability, are ill or infirm, housebound, living abroad, approaching maternity, hospitalised, have literacy and/or numeracy problems or are from a

culturally and linguistically diverse background. There are special provisions for 'silent enrolment' (for those who believe that having their name on a public roll endangers either themselves or their families) and itinerant enrolment ('for people experiencing homelessness, or people who travel constantly and have no permanent fixed address'). In any federal election hundreds of mobile teams visit special hospital locations, remote outback locations and prisons; there will be easily accessible pre-poll voting centres and overseas polling places to which tonnes of election-related and staff training material will be air-freighted immediately prior to polling. To ease access, election day is always on a Saturday and Australian electoral commissions are extremely proactive in ensuring that everyone is enrolled to vote. They also provide electoral education; offer absent voting, early voting and postal voting; and ensure that polling booths are numerous and close at hand. All of this means that electors don't have to sacrifice much in terms of cost and lost opportunities for work or leisure in order to vote. No one in Australia, no matter how disadvantaged, isolated or immobile, is expected to meet the potentially high transaction and opportunity costs of voting which citizens in most other settings have to put up with because voting is voluntary in most other settings; apparently, voluntary voting states do not consider they are under the same obligation to make voting this easy (Hill, 2002, 2010).

False election information is now a major barrier to ease of voting because it pushes up the information costs of voting, making it harder and harder to know who is the best candidate to trust to represent our interests. Yet, however strong is the need for a legal solution for reducing these costs, we are mindful that great care needs to be taken in order to prevent regulatory measures around political speech from damaging the democratic conditions they are supposed to protect. After all, we know that some governments misuse anti-disinformation laws to suppress opposition. But there does seem to be a case for them. Notably, the Australian public agrees.

All such regulation encounters what may be referred to as the 'freedom-fairness' trade-off and the precise calculus of this trade-off varies considerably between established liberal democracies. But by tipping the scales towards 'fairness' (Tham & Ewing, 2021), TIPA laws, as constraints on political speech, can be designed to find this balance. When considering such laws in light of the implied freedom of political communication, the Australian High Court has struck a unique balance between speech 'libertarianism' and 'fairness' and is unusually accommodating to

TIPA-type speech regulation, so long as certain requirements are met. In Chapter 5 we show how this plays out in Australia and explain why it is an especially congenial setting for the accommodation of TIPA laws. But before doing so, we canvass how the problem is currently being managed here.

Note

1. These figures included Dr. John Hewson, Cheryl Kernot and Michael Beahan; former Supreme Court judges, The Hon. Anthony Whealy QC, The Hon Paul Stein AM QC and The Hon David Harper AM QC. See *An Open Letter to the Parliament of Australia calling for Truth in Political Advertising* 2020, The Australia Institute, viewed 22 November 2021, https://australiainstitute.org.au/wp-content/uploads/2020/12/Open-Letter-Truth-in-Political-Advertising-WEB.pdf.

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CHAPTER 4

Current Approaches to Combatting the Emerging 'Infodemic'

Introductory Comments

The mitigation of digital disinformation and its incentives has recently become a policy sphere in which national governments, including Australia's, and supranational authorities have understandably become more active. Yet, to date, most solutions to the disinformation problem have been either consumer-led or non-binding ones. These approaches, which we now canvass, are not incompatible with TIPA laws and should constitute part of the broader policy architecture in the fight against false information. But as they currently work, they are not enough. Neither is defamation law adequate to the task, as we will argue.

The ACCC Digital Platforms Inquiry

In Australia, the Australian Competition and Consumer Commission's ('ACCC') 2019 Digital Platforms Inquiry ('DPI') made notable inroads to enhancing our understanding of social media networks and the role they play in digital disinformation. While most of the Inquiry's recommendations pertained to areas such as mergers and acquisitions law, advertising, regulatory harmonisation and ensuring the long-term sustainability of existing media structures, in its 15th recommendation, the DPI report recommended the implementation of an 'industry code of conduct to govern the handling of complaints about disinformation' (ACCC, 2019: 34).

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The report suggested that the code be enforced by the Australian Communications and Media Authority ('ACMA') and that ACMA should be vested with the ability to gather information from signatories, impose sanctions to deter code breaches, provide public reports on the nature and scope of complaints and report annually to the government on the code's efficacy and members' compliance. It should be noted here that the ACCC recommended that the code only pertains to false information that causes 'serious public detriment' (ACCC, 2019: 22). While conceding that it is less of a threat in the Australian context, the report also indicated that 'malinformation' (information that is based in reality but whose sole purpose is to inflict harm) should be encompassed by the code.

While the term 'serious public detriment' was used multiple times throughout the DPI report, the term was never properly defined and its scope left indeterminate. The ACCC did, however, explicitly state that it would expect the code to encompass doctored and dubbed misrepresentations of public figures, incorrect information about time and location for voting in elections, and false allegations of a public individual's engagement with illegal activity.

Examples of situations in which the code *was not* expected to apply were more revealing in terms of its proposed nature. Specifically, the ACCC did not see it as applying to false or misleading advertising. This exception is understandable in the commercial realm, as such false representations are already governed under Australian Consumer Law. The omission does, however, mean that the code does not apply to false and misleading political advertising. Further, the ACCC did not see the code as applying to commentary and analysis that is 'clearly identified as having a partisan ideological or political slant' (ACCC, 2019: 371), a striking oversight that leaves false partisan claims made in the public realm unregulated. Finally, and perhaps most tellingly, the ACCC did not see the code as applying to 'incorrect or harmful statements made against private individuals' (ACCC, 2019: 371)—citing *existing protections under defamation law*. As will be explored later in the chapter, the argument that *all* harmful statements against individuals (even those in public office) should be addressed via defamation law, has been and continues to be applied in arguments opposing TIPA provisions. Such reasoning was most notably cited in the Joint Select Committee on Electoral Reform ('JSCER') 1984 report which recommended that Australia's short-lived federal TIPA provision be repealed.

The DIGI Code of Conduct

Later in 2019, in a response to recommendation 15 of the DPI report, the Federal Government committed to 'ask[ing] the major platforms to develop a code (or codes) of conduct for disinformation and news quality' (Australian Government, 2019: 7) and appointed ACMA to oversee the development of the code. In 2020 Digital Industry Group Incorporated ('DIGI'), the peak association for the Australian digital industry, sought to establish a voluntary code of conduct ('DIGI code') for their members pursuant to the government's request, but notably *against* the ACCCs recommendation that sanctions should be applied for breaches. The code was developed in consultation with its members, the University of Technology Sydney's Centre for Media Transition, as well as the media monitoring firm First Draft, and was implemented in February 2021. The code is wholly voluntary and underpinned by seven key objectives and seven desired outcomes (DIGI, 2021).

The seven objectives are:

1. Provide safeguards against Harms that may arise from disinformation and misinformation;
2. Disrupt advertising and monetisation incentives for disinformation;
3. Work to ensure the integrity and security of services and products delivered by digital platforms;
4. Empower consumers to make better-informed choices of digital content;
5. *Improve public awareness of the source of political advertising carried on digital platforms* (emphasis added);
6. Strengthen public understanding of disinformation and misinformation through support of strategic speech; and
7. Signatories publicise the measures they take to combat disinformation and misinformation (see DIGI, 2021: 10–16).

The seven corresponding desired outcomes are:

1. a) Signatories contribute to reducing the risk of harms that may arise from the propagation of and potential exposure of users of digital platforms to disinformation and misinformation by adopting a range of scalable measures; b). Users will be informed about the types of behaviours and types of content that will be prohibited and/or

managed by signatories under this code; c) users can report content of behaviours to signatories that violates their policies … through publicly available and accessible reporting tools; and d) Users will be able to access general information about signatories' actions in response to reports made;
2. Advertising and/or monetisation incentives for disinformation are reduced;
3. The rise in inauthentic user behaviours that undermine the integrity and security of services and products is reduced;
4. Users are enabled to make more informed choices about the source of news and factual content accessed via digital platforms and are better equipped to identify misinformation;
5. *Users are better informed about the source of political advertising* (emphasis added);
6. Signatories support the efforts of independent researchers to improve public understanding of disinformation and misinformation; and
7. The public can access information about the measures signatories have taken to combat disinformation and misinformation (see DIGI, 2021: 10–16).

Each objective is buttressed by a number of sub-objectives that attempt to provide clear and actionable self-regulatory behaviour. Signatories currently include Twitter, Google, Facebook, Tiktok, Microsoft, Adobe, Redbubble and Apple—each of whom released their code commitments (objectives to which they have 'opted-in') and transparency reports (steps taken to address the relevant objectives) in May 2021.

All seven objectives are of importance in combating the false information epidemic, although objective 5 is especially relevant to combating misleading election advertising since it seeks to '[i]mprove public awareness of the source of Political Advertising carried on digital platforms'. The corresponding outcome is that '[u]sers are better informed about the source of political advertising' (DIGI, 2021: 14). The objective contains three actionable items:

1. While Political Advertising is not Misinformation or Disinformation for the purposes of the Code, Signatories will develop and implement policies that provide users with greater transparency about the source of Political Advertising carried on digital platforms.
2. Measures developed and implemented in accordance with [objective 5] … may include requirements that advertisers identify and/or verify the source of Political Advertising carried on digital platforms; policies which prohibit advertising that misrepresents, deceives, or conceals material information about the advertiser or the origin of the advertisement; the provision of tools which enable users to understand whether a political ad has been targeted to them; and policies which require that Political Advertisements which appear in a medium containing news or editorial content are presented in such a way as to be readily recognisable as a paid-for communication.
3. Signatories may also, as a matter of policy, choose not to target advertisements based on the inferred political affiliations of a user (DIGI, 2021: 14).

The first two commitments are mere complements of the existing authorisation requirements for political advertisements. All political advertisements at the federal level are already required to inform the audience of their authoriser per the *Commonwealth Electoral (Authorisation of Voter Communication) Determination 2021*. This requirement extends to social media, video sharing and digital banner advertisements. The third outcome, per its unenforceability and stipulation that signatories 'may' choose not to target advertisements, is problematic. It is not clear why any platform with the ability to target voters of a certain political orientation, particularly when there is advertising revenue to be made, would comply with this outcome. The rationale here is probably related to the belief that voluntary codes can be important for building trust and mutual respect between governments and platform owners (Pamment, 2020). Guiding principles or industry-led standards can often have clauses of aspiration which, while unenforceable, create a framework for a conversation that may lead to the development of certain desirable goals. The objective of such a clause, with its opaque language, is not to secure compliance, but to achieve wider subscription in order to shape the conversation and help the industry move forward together. The effect of a provision such as this is to invite (rather than force) platforms away from doing as they please and to support industry principles and goals for the recognised long-term common good of the industry. Nevertheless, cl 5.23 would be unlikely to

have any immediate effect on regulating the truth of political advertisements and the inability of the clause to be enforceable does highlight the need for legislative intervention.[1]

While, as expected, signatories subscribed to all commitments relevant to their operations, the voluntary nature of the Code presents some potential future challenges. In Section 6.1D, the code explicitly mentions that '[s]ignatories may take into consideration a variety of factors in assessing the appropriateness of measures including … *whether the platform may receive a commercial benefit from the propagation of the content*' (DIGI, 2021: 16) (emphasis added). In other words, should commitments to preclude false information and its harms affect profits, firms are at liberty to abandon their commitments. This caveat does not appear to be congruent with the code's second objective, that is, to reduce the monetising potential of false information. The two signatories with the most market power and whose activities are most relevant to the propagation of political false information—Google and Facebook—are large publicly traded companies whose first duty, under corporation law, is to their shareholders rather than the public interest; therefore there is little incentive for them comply and it might even be argued that it would be irrational for them to do so.

The DIGI code is certainly a step in the right direction in terms of regulating false information, but its tangible effects remain to be seen especially given its non-binding character and internal inconsistencies. In the Government's response to the Digital Platforms Inquiry, it committed to evaluating the effectiveness of the voluntary code following its implementation, and to consider the need for further action if the voluntary measures are failing to 'adequately mitigate the problems of disinformation' (Australian Government, 2019: 13).

Similar codes have been developed in other jurisdictions such as India, Sweden and Canada, although the European Union Code of Practice on Disinformation ('EU Code') is generally considered to be the archetypal self-regulatory industry code. Indeed, when considering how an Australian counterpart code may look, both DIGI and the ACCC consulted the European Code as best practice in the policy area. The European Code covers five broad policy areas. These are:

1. Scrutiny of ad placement
2. Political advertising and issue-based advertising
3. Integrity of services

4. Empowering consumers
5. Empowering the research community.

The second policy area, as applicable to our focus here, distils into three commitments, namely: compliance with EU and national law regarding the presentation of paid advertisements; enabling public disclosure of political advertising; and devising means to publicly disclose 'issue-based advertising'.

As with the Australian code, the largest and arguably most culpable platforms and technology companies are signatories to the EU Code of Practice as of 2020. The EU Code has been criticised since its 2018 commencement as lacking uniform definitions and procedures for implementation as well as firm-side transparency. The European Commission expressed its dismay at the 'extent to which Facebook, Twitter, and Google failed to report success metrics for their efforts', euphemistically commenting that progress had been hindered by the fact that 'the different parties' had 'interests' that were 'divergent' (Pamment, 2020). Further, information published through its self-reporting requirements cannot be accurately verified (ERGA, 2020). It is, however, important to note that the EU Code constitutes just part of the fledgling European regulatory apparatus to combat false information (European Commission, 2018). By virtue of the Australian code's similarity to the European code, it appears to be vulnerable to similar criticism. At the time of writing (December 2021) the EU code is being strengthened due to suboptimal effectiveness and perceived weaknesses (Pamment, 2020).

While the problem of false information, particularly of a digital nature, is multifaceted and increasingly intractable, the DIGI Code is a welcome development in the sphere. Any attempt to mitigate digital information 'pollution', particularly at election time is always welcome but only if it is not being used as window-dressing for lack of action. It remains to be seen whether the code's fifth objective (to ensure 'users are better informed about the source of political advertising), as the pillar most relevant to the regulation of political advertising, will have any demonstrable effect on the character of political debate in Australia. The impending 2022 Australian federal election may prove a worthwhile test for the pillar's effectiveness. The Australian Government's recent conflict with Facebook and Google has shown that resisting the power of platforms has costs, as exemplified by the news 'blackout' following the passing of the 'News Media Bargaining Code' in February 2021 (see *Treasury Laws*

Amendment [News Media and Digital Platforms Mandatory Bargaining Code] Act 2021 [Cth]). On the other hand, the eventual backing down of Facebook and Google in this dispute could strengthen the resolve of authorities.

Alternative Remedies

Although we have discussed the use of voluntary codes and propose a legal remedy below, it is worth mentioning here that there are other, non-regulatory, non-codified means by which we can seek to inoculate people against damaging false campaign statements. For example, we could encourage consumers to stop getting their 'news' exclusively from Facebook or we could step up campaigns to ensure that independent and reliable public interest news providers (like the ABC and SBS) are still active in the news market and, importantly, properly resourced. Alternatively, we could adopt the approach used by public health organisations when trying to counter false information about COVID-19 vaccination on social media; such organisations aim, not to change the opinions of the people posting it, but to reduce misperceptions among those consuming it. A study published in October 2020 by two American researchers, Emily Vraga and Leticia Bode, tested the effect of posting an infographic correction in response to false information about the science of a false COVID-19 prevention method. They found that a bot developed with the World Health Organization and Facebook was able to reduce misperceptions by posting factual responses to false information when it appeared (Vraga & Bode, 2020). Social media platforms can also address COVID-19 false information by simply removing or labelling posts and de-platforming users who post it, a method that could readily be translated to the electoral context.

Other methods are driven by consumers and civil society; for example, a recent experimental trial launched by Twitter in Australia, the United States and South Korea allows users to flag content they consider misleading in the same way that other harmful content is currently reported; usefully for the electoral context, there is an option to flag whether the post is related to 'politics' (Newman & Reynolds, 2021). There are also independent watchdogs like Digital Rights Watch and third-party fact-checking services like the RMIT/ABC Fact Check collaboration which verifies 'the accuracy of claims by politicians, public figures,

advocacy groups and institutions engaged in public debate' (RMIT/ABC, 2020).

We could also regulate by other means: we could, for example, regulate media markets more robustly to prevent oligopolies and monopolies from excluding or crowding out other market participants. An additional quasi-legal—yet largely overlooked—means of regulating campaign speech is California's *Code of Fair Campaign Practice,* which operates more as a 'moral obligation' for politicians throughout the campaign than as an enforceable statute (Cal ELEC Code, Division 20, Chapter 5, § 3). All prospective candidates in California are given a copy of the code to sign, although subscription to the code is voluntary. The Code purports to promote 'open', 'sincere' and 'frank' campaigning and to prohibit the use of defamation, libel or slander pertaining to a candidate's personal life.

We could—and perhaps should—use all of the above methods but it is also worth considering a more decisive method that is able to send a clear message about the serious harms of false electoral information: legal regulation. Yet, according to some, the problem is already being legally regulated.

Are Defamation Laws Enough?

Some scholars have argued that the laws of defamation are sufficient to manage false campaign advertising (see JSCER, 1984), but this is controvertible. The effects of false campaign statements extend far beyond the scope of defamation law, which only addresses reputational harm (George, 2017: 93) and excludes relevant matters like broad policy issues about which spurious claims are often made. Further, in Australia, the *Electoral Act 1918* (Cth) currently prescribes a period between 33 and 68 days from the dissolution of the House of Representatives to polling day for Federal Elections. The campaign period is therefore short, yet cases under the laws of defamation can take months or even years to resolve. Since defamation remedies are largely *ex-post,* they do little to protect the informational integrity of the protracted preference formation stage of an election. Defamation law primarily provides a remedy of damages long after the fact, when what is really needed is the speedy withdrawal and retraction of misleading political advertisements to *prevent* damage prior to the election. Penalties imposed in defamation therefore offer unsatisfactory recourse to a disgruntled candidate whose campaign

was significantly affected by the false statements; the public will undoubtedly be equally dismayed to learn that their irreversible voting choices were based on faulty information. Although it might be said that an interlocutory injunction is available as an alternative to damages, as Hunt J stated in *Church of Scientology California Inc v Reader's Digest Services Pty Ltd*: 'an injunction will not [be granted] … which will have the effect of restraining discussion in the press … of matters of public interest or concern' ([1980] 1 NSWLR 344, 349). For these reasons, defamation law is inadequate and inappropriate to regulate political advertisements like the Mediscare and Death Taxes campaigns.

As political campaigning in Australia becomes more digitised, contested and decentralised, the threshold for candidates to seek a retraction and injunction for false campaign statements should change accordingly. For reasons explained later in this book, we also believe—consistent with the current South Australian regime—that criminal, rather than the civil penalties available under defamation, should apply to these types of statements. Therefore, due to their inability to deal with (a) the seriousness of the false information problem in (b) a timely manner, civil laws of defamation, as they currently stand in Australia, are unsuitable to effectively manage modern, and especially digital, political campaigning.

We now consider the degree to which Australia is able to accommodate TIPA-type laws.

Note

1. Many thanks to Sam Whittaker for his constructive insights on this point.

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CHAPTER 5

Why Australia Is a Great Place to Start: The Implied Freedom of Political Communication and TIPA Laws

Introductory Comments

We now argue that the Australian constitutional and jurisprudential approach to political speech, as embodied in the implied freedom of political communication, makes Australia a uniquely favourable setting for TIPA laws and the type of burden they place on political speech. We do so by laying out precisely how this implied freedom is conceptualised and operationalised in law and track in detail how such laws have resisted constitutional challenge. We conclude the chapter by summarising the arguments for TIPA-type laws as prosecuted in the first 5 chapters of the book.

Australia's Implied Freedom of Political Communication.

We have good reason to believe that properly designed and implemented TIPA laws are appropriate and will work in every Australian jurisdiction, including the Commonwealth. This is not just because the majority of Australians want them, but because they have a very good chance of withstanding constitutional scrutiny, as demonstrated in the South Australian experience, which we discuss in more detail in Chapter 8. This resilience to constitutional challenge is largely a function of the High Court's particular approach to political speech in Australia.

L. Hill et al., *How and Why to Regulate False Political Advertising in Australia*, https://doi.org/10.1007/978-981-19-2123-0_5

According to the Australian High Court, certain speech acts can be justifiably curtailed by the interest of the Australian people in enjoying other democratic 'rights and privileges' (*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 51 (Brennan J)) including their right to have access to accurate information in order to make a reasoned voting decision. Australian courts have said that election speech which is inaccurate or misleading can be justifiably regulated and that electors are entitled to protection 'from being misled and deceived' (*Cameron v Becker* (1995) 64 SASR 238, 252 (Lander J)).

The freedom of political communication implied in the *Australian Constitution* emerged in two cases decided in 1992: *Nationwide News Pty Ltd v Wills* ('*Nationwide*') ((1992) 177 CLR 1) and *Australian Capital Television Pty Ltd v Commonwealth* ('*ACTV*') ((1992) 177 CLR 106). These cases, along with historical Australian jurisprudence and cases decided since then, exemplify that freedom of communication in Australia is to be understood (as per our discussion in Chapter 3) as a social condition, rather than an individualised right. This unique jurisprudential understanding of the role of speech in a democratic society has normative implications for the way in which election campaigns should be understood, managed and most importantly, regulated.

In *Nationwide*, Deane and Toohey JJ found that legislation can be justifiably curtailed by 'what is reasonably necessary for the preservation of an ordered society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity' (*Nationwide*: 77). In the same case, Brennan J considered that the relevant considerations would include 'the extent to which the protection of the other interest itself enhances the ability of the Australian people to enjoy their democratic rights and privileges' (*Nationwide*: 51).

ACTV echoes parallel sentiments about the role of political speech in a free and democratic society and stipulates parameters for when regulation is both necessary and desirable. Contradicting the individualistic, libertarian and almost absolutist conception of 'free speech' that some citizens hold, particularly in settings like the United States, Mason CJ held that the 'freedom of communication is not an absolute [freedom]' and there is no guarantee that 'the freedom must always and necessarily prevail over competing interests of the public' (ACTV: 142). Indeed, *ACTV* suggested that electors' access to the information necessary to express their true preference was not only necessary, but *required* by the *Constitution*, per Dawson J: '[A]n election in which the electors are denied

access to the information necessary for the exercise of a true choice is not the kind of election envisaged by the Constitution' (*ACTV*: 187).

As false information becomes more ubiquitous and the costs associated with seeking credible information grow, the need for laws designed to ensure that electors have sufficient access to 'true' information becomes more urgent. While the suppression of false information may be construed differently to the promotion of 'information necessary', the sheer volume of information currently available to consumers necessitates both the promotion of the 'information necessary' and the mitigation of false information. Justice Gaudron in *ACTV* makes this point by contradicting the belief that there is an unassailable right in Australia to disseminate false political information, and affirming the validity of constraining it:

> [A]s the freedom of political discourse is concerned with the free flow of information and ideas, it neither involves the *right to disseminate false or misleading material nor limits any power that authorizes laws* with respect to material answering that description. (*ACTV*: 217) (emphasis added)

Subsequent case law has been congruent with Gaudron J's opinion that the proscription of false and misleading material is compatible with the implied freedom. For example, in *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* ((1993) 41 FCR 89), considering the restrictions on misleading and deceptive conduct in s 52 of the then-*Trade Practices Act 1974* (Cth), Hill J opined that: 'There is nothing in any of the judgements of their Honours in recent decisions of [*ACTV*] … and [*Nationwide*] … which suggests for a moment that a law prohibiting misleading and deceptive conduct could infringe any constitutional protection of free speech' (*Tobacco Institute v Australian Federation of Consumer Organisations Inc* (1993) 41 FCR 89, 113).

Since *ACTV* and *Nationwide*, the High Court's conceptualisation of speech and its role in an ordered society has given rise to a number of important corollaries regarding the regulation of political speech—particularly as it pertains to free elections. In *Levy v Victoria* ('*Levy*'), Dawson J expressly found that 'free' elections require anything but a '*laissez-faire*' approach to the regulation of speech:

> Free elections do not require the absence of regulation. Indeed, regulation of the electoral process is necessary in order that it may operate effectively or at all. Not only that, but some limitations upon freedom of

> communication are necessary to ensure the proper working of any electoral system. Apart from regulation of the electoral process itself, elections must take place within the framework of an ordered society and regulation which is directed at producing and maintaining such a framework will not be inconsistent with the free elections contemplated by the Constitution, notwithstanding that it may incidentally affect freedom of communication. In other words, the freedom of communication which the Constitution protects against laws which would inhibit it is a freedom which is commensurate with reasonable regulation in the interests of an ordered society. (*Levy*: 608)

In Dawson J's view, there is a need for communications to be regulated for the electoral process to work and that such limitations on speech are, in fact, contemplated by the Constitution. The effective and proper functioning of the electoral system must occur within a regulatory framework that constrains (and thereby paradoxically facilitates) the free flow of political communication in the interests of an *ordered society*. Justice Dawson's understanding is congruent with the nature of 'free speech' as understood in our discussion in Chapter 3 in that political communication should be regulated in pursuit of the 'overall condition' and 'interests of an ordered society'.

While Dawson J's comment was the most explicit opinion regarding the relationship between speech regulation and free elections, cases since have emphasised the desirability of regulating political speech within the context of the implied freedom. In *Coleman v Power* ('*Coleman*') ((2004) 220 CLR 1) the High Court further elucidated its understanding of political speech and its role in Australian society. Following the reasoning of Dawson J, and citing *Lange v Australian Broadcasting Corporation* ('*Lange*') ((1997) 189 CLR 520), Gleeson CJ affirmed that 'freedom [of speech] is not, and never has been, absolute' (*Coleman*: 185).

Justice McHugh concurred. Contradicting the view that any restriction on political speech is a burden on democracy, his Honour commented that in representative democracies such restrictions can positively enhance the overall democratic condition:

> Communications on political and governmental matters are part of the system of representative and responsible government, and they may be regulated in ways that enhance or protect the communication of those matters. Regulations that have that effect do not detract from that freedom. *On the contrary, they enhance it.* (*Coleman*: 52) (emphasis added)

Chief Justice Gleeson stated that '[v]arious constraints upon [free speech] have always been essential for the existence of a peaceable, civilised and democratic community' (*Coleman*: 297). Regulation of political speech, particularly as it relates to free elections as contemplated in the *Constitution*, has become a staple of Australian jurisprudence. The implied freedom of political communication is certainly not absolute and must be guided by an appropriate regulatory apparatus that is consistent with the character of Australian society. The High Court understands this regulation of election communication to be a requirement of (non-exhaustively); a peaceable, civilised, democratic and ordered society that protects individuals' legitimate claims to live with dignity—a society to which Australia does, and ought to, aspire.

This interpretation of free speech as a social condition as opposed to an individualised right is best understood by comparing it with the dominant conception in other mature democracies. TIPA-type provisions have often been tested in these jurisdictions but have encountered fierce cultural and constitutional opposition. While the operability of specific TIPA provisions in other jurisdictions is discussed later in Chapter 6, some comparative jurisprudence on speech liberties is worth foreshadowing here, especially as it applies in the United States where a near-absolutist conception dominates.

The First Amendment of the *United States Constitution* prohibits Congress making any law 'abridging the freedom of speech' (*United States Constitution* amend I). The clause was judicially toothless until the end of the First World War, after which cases in purported violation of the clause began to be heard; most notably, cases relating to the *Espionage Act of 1917* (Pub L No 65, 40 Stat 217 (1917)) and *Sedition Act of 1918* (Pub L 65, 40 Stat 553 (1918)). Since then, a unique speech jurisprudence, very different from the Australian understanding, has emerged. Abetted by the express rather than implied right in the *United States Constitution*, speech, as well as acts of expression, are understood and protected as inviolable individual rights upon which the government cannot, under almost any circumstances, infringe.

Such a conceptualisation of speech is inherently inattentive to the overall 'free speech condition'. We can reasonably assume that many cases in which political speech is protected in the United States would fail to receive the same protection in Australia—and are ostensibly incompatible with, among other things, a peaceable and civilised society. For

example, demonstrable lies with no social value (*United States v Alvarez* (2012) 567 U.S. 709), simulated child pornography (*Ashcroft v Free Speech Coalition* (2002) 535 U.S. 234) or even Ku Klux Klan-style cross-burning intended to intimidate, have all sought and obtained constitutional protection under the First Amendment (*R.A.V. v City of St. Paul, Minnesota* (1992) 505 U.S. 377).

The United States, constitutionally and culturally, has consistently prioritised the individualised right to free speech and held to a faith in the unreconstructed conception of a marketplace of ideas to manage problems around speech. The solution, in that setting, is not regulation but *more* speech to compete with and counteract false, misleading and hateful speech. This notion of 'counter-speech' was expressed by Brandeis J writing in the majority in *Whitney v California* ((1927) 274 U.S. 357), and has since remained influential in US jurisprudence. As Brandeis J opined: 'If there be a time to expose through discussion the falsehood and fallacies, to avert the evil by process of education, *the remedy to be applied is more speech, not enforced silence*' (*Whitney v California* (1927) 274 U.S. 357, 377, emphasis added). On this account, the best antidote to false speech is 'true speech'. Justice Brandeis' opinion, written in 1927, is better understood when read in conjunction with Holmes J's influential dissent in *Abrams v United States* ((1919) 250 U.S. 616) where his Honour upheld the concept of a 'marketplace of ideas' that would allow ideas to compete freely and the best to emerge victorious: '[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out' (*Abrams v United States* (1919) 250 U.S. 616, 630).

The 'marketplace of ideas' doctrine, paired with the 'counter-speech' remedy, continues to culturally and politically reverberate throughout the United States. Indeed, the American Civil Liberties Union ('ACLU') explicitly endorse it as their remedy to hateful speech: '[W]here racist, sexist and homophobic speech is concerned, the ACLU believes that more speech—not less—is the answer most consistent with our constitutional values' (ACLU, 2021). This understanding is consistent with an understanding of free speech as a negative right—that is—freedom from external speech restraints.

This constitutional, cultural and political commitment to the negative liberty conception of free speech has important implications for the way in which electoral 'speech' is regulated in the United States. For example, in

Citizens United v Federal Electoral Commission ((2010) 558 U.S. 310), the US Supreme Court held that restrictions on independent expenditures, from corporations or otherwise, were violations of free speech as protected by the First Amendment. In effect, the entity willing to spend the most money on campaigning is permitted to have the 'loudest' voice. Although, theoretically, this approach is consistent with the multiplicity of voices principle, in practice it means that very few voices can be heard above the din of monied communicators. Freedom is therefore favoured over fairness.

In Australia, things are very different: the Australian High Court's particular understanding of the role of speech in a free and democratic society has important implications for the way in which public debate is managed. There are many restrictions on political speech, including TIPA laws, which the High Court has found to be compatible with the implied freedom. There are numerous examples of laws that, while restricting speech, are not protected by the implied freedom. For example, the High Court has held that laws prohibiting advocacy for voting in ways that are almost certainly legal, but contrary to procedures outlined in the relevant electoral legislation, are constitutional despite their chilling effect on political communication (See *Muldowney v South Australia* (1996) 186 CLR 352 and *Langer v Commonwealth* (1996) 186 CLR 302). Similarly, a law prohibiting entry into a hunting area where animal rights activists sought to gain access in order to stage a protest was also found to be compatible with the implied freedom. In this case, the primary end of the law was to protect public safety, with the burden on communication being merely incidental (*Levy* (1997) 189 CLR 579). In *Coleman v Power* ((2004) 220 CLR 1), where a student handing out flyers alleging police corruption in Queensland was arrested under the *Vagrants, Gaming and Other Offences Act 1931* (Qld), the High Court held that words likely to provoke 'unlawful physical retaliation' could be suitably proscribed. While not adjudicated in the High Court, anti-vilification laws in Australia have been found to be compatible with the implied freedom. In *Islamic Council of Victoria, Inc v Catch the Fire Ministries* (2006) 206 FLR 56), the Supreme Court of Victoria held that the right to engage in robust discussion is not absolute.

The implied freedom of political communication therefore strikes a balance between speech as a 'negative' right and speech as a 'positive right'. The positive/negative liberty distinction, famously elaborated by Isaiah Berlin (Berlin, 2002: 121–122), works like this: negative liberty is

usually conceptualised in individualistic terms as freedom *from* constraints to an individual's freedom, while positive liberty concerns the freedom *to* act so as to realise one's own goals and plan of life. On this understanding, negative liberty can only be infringed by other persons therefore we would not say our liberty is being violated by weather that prevents us from going outside or by tone deafness that prevents us from becoming a celebrated singer. By contrast, the positive liberty to fulfil our potential is usually guaranteed by social arrangements, such as positive attempts to ensure universal access to an education. In Australia, laws must satisfy the former requirement in that they do not have a chilling effect on vigorous and *bona fide* communication on political matters. At the same time, it is possible to frame laws that are at once consistent with the implied freedom yet restrict speech that detracts from the overall free speech condition. Speech that operates as an impediment to the proper functioning of responsible, representative government will not, therefore, receive the same protection as speech that enhances it. In so doing, such laws can also enable previously occluded voices to be better heard thereby serving the following 'two basic principles':

> The first we may call the *noninterference or no censorship principle*: One should not be prevented from thinking, speaking, reading, writing or listening as one sees fit. The other I call *the multiplicity of voices principle*: The purposes of freedom of speech are realised when expression and diversity of expression flourish. (Lichtenberg, 1987: 334)

As the Australian example illustrates, commitments to these basic principles are not mutually exclusive and a healthy democracy must seek to balance them both. TIPA laws, when designed and implemented with care, are merely one of many laws that satisfy these two requirements; they do not detract from genuine communication on political matters and operate to prevent speech that negatively impacts the quality of political discourse and the free speech condition in which, ideally, speech that promotes the condition flows freely. When we speak to each other respectfully and truthfully, we are promoting that condition but when our speech is deceptive we are eroding it. When false speech becomes the norm, speech itself becomes worthless.

Australia's highly nuanced legal, constitutional, cultural and political approach to speech is fertile ground for TIPA laws. Further, Australia has already introduced other innovations of the 'positive liberty' variety

that enhance the free speech condition indirectly; for example, the partial public funding of political parties seeks to create a more 'level playing field' via mitigating the pressure from 'louder' private voices in the political arena. Such an approach ensures that politically viable, yet smaller and less financially resourced parties and candidates are able to campaign without capitulating to private, monied interests on whom they might otherwise rely for survival. Similarly, the presence of compulsory voting in Australia obligates all eligible voters to express their political preference at election time. There is a positive requirement for everyone, regardless of ideological leaning or social location, to express this opinion in order that: the democracy may benefit from hearing every voice, secure the full consent of the governed and serve the democratic values of political equality and representativeness. In order to ensure that this actually happens, the Australian state, through its electoral commissions, operates an elaborate affirmative action programme to facilitate access for every elector, no matter how marginalised, disadvantaged or isolated (see Chapter 3). Both of these policy innovations work to ensure Lichtenberg's 'multiplicity of voices principle'.

Australia, relative to the other anglophone democracies and particularly the United States, is uniquely positioned to appropriately regulate political speech.[1] The implied freedom of political communication adequately balances the competing demands of 'positive' and 'negative' speech liberty. The implied freedom is unique and ever-changing in its application—allowing it to effectively adapt to the changing media and cultural environment of the time. Indeed, this malleability is one of its most effective traits. The High Court's understanding of speech, especially as it relates to electoral regulation, is conducive to TIPA laws which infringe upon the 'negative' dimension of free speech but could be said to serve the positive right to enjoy a healthy free speech condition. South Australia's TIPA laws have withstood a constitutional challenge previously in 1995. It should be noted, however, that the evolving nature of the implied freedom of political communication renders the law vulnerable to challenge in its current form, as we argue in Chapters 7 and 8. Remedies to that vulnerability are also proposed.

Summary of Justifications for Legal Regulation of False Information

- For clarity, and before moving on to the next chapter, we pause to summarise our argument so far. We have argued in the last five chapters that false election campaign statements should be legally regulated because they produce a range of democratic externalities that inflict substantial damage upon the free speech condition that is necessary for any authentic democracy to function properly.

They can:

- Alter the course of elections;
- Raise the cost of voting participation, particularly among minorities and the less educated;
- Lower the standards of public discourse and incentivise defamatory statements;
- Silence minority voices;
- Contribute to voter cynicism;
- Aggravate low turnout among the disadvantaged and promote democratic disengagement more generally;
- Manipulate and mislead voters;
- Polarise the electorate and stoke populist and extremist sentiment;
- Lead to divergent policy outcomes;
- Place authentic electoral outcomes in doubt;
- Undermine the authority of elected representatives leading to problems in governing and social instability;
- Prevent elections from performing their primary functions; and
- Affect the way future elections are regulated and managed and even cause them to be rendered void.

Furthermore, false campaign statements impugn the legitimacy of the election process because:

- They represent deliberate interference with the ability of people to engage in 'effective participation';

- Undermine the equal capacity of citizens to enjoy the 'enlightened understanding' that enables them to know how to vote and participate more generally in democracy. In doing so, they infringe other legitimacy criteria such as 'political equality' and 'inclusiveness';

We have also argued that, because voting is compulsory in Australia, the state has a special duty to ensure that the information environment necessary for informed voting is not polluted. We are not suggesting that only citizens in compulsory voting settings are entitled to this condition because citizens in *all* democracies are entitled to it; but we *are* saying that the obligation on the state is stronger where citizens are required to vote, in the same way that the state is obligated to provide schools where it legally requires parents to ensure that their children are educated.

The fact that markets are ineffective in regulating false information, coupled with the additional fact that there are perverse—probably inevitable—incentives to produce false election information, makes false election communication a collective action problem. In turn, this means that a legal remedy is likely to be the most, and perhaps only, effective one.

Note

1. Some commentators have advised Australian jurists to exercise caution in relation to the free speech jurisprudence of the United States. For example, in 1994 Eric Barendt opined that: 'Australian lawyers should always consider what the Supreme Court says about freedom of speech, but it would also be advisable for them to consider other approaches to an understanding of that freedom' (Barendt, 1994).

Cases

Abrams v United States (1919) 250 U.S. 616.
Ashcroft v Free Speech Coalition (2002) 535 U.S. 234.
Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106.
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Citizens United v Federal Electoral Commission (2010) 558 U.S. 310.
Islamic Council of Victoria, Inc v Catch the Fire Ministries (2006) 206 FLR 56.
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.
Langer v Commonwealth (1996) 186 CLR 302.

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Nationwide News Pty Ltd v Wills (1992) 177 CLR 1.
R.A.V. v City of St. Paul (1992) 505 U.S. 377.
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CHAPTER 6

TIPA Experiments in Other Authentic Democracies

Introductory Comments

In this chapter we survey the trials and experiments in truth in election advertising legislation that have taken place in other comparable settings in order to see what lessons might be taken from them. Analysis of legislation in other jurisdictions reveals the multiple challenges facing this type of legislation and is instructive for those considering a similar legal approach. The relevant cases are New Zealand, the United Kingdom, Canada and the United States.

Although s 113 of the *Electoral Act 1985* (SA) is arguably the best-established example of TIPA legislation, there are cognate jurisdictions that have tested similar legislation with varying degrees of success. Throughout the deliberation and legislative process, the passage of such laws has often been welcomed with optimism, but they have invariably confronted problems of their compatibility with embedded political institutions and norms. For example, state legislation of this type in the United States has been consistently under-enforced and, when enforced, deemed unconstitutional by the Supreme Court as an infringement of the First Amendment.[1] Variations in the constitutional law of jurisdictions foreign to Australia have led to electoral advertisements being regulated through oblique means. Consequently, in some cases differing conceptions of defamation law and advertising standards have been implemented to regulate false campaign statements. Some settings have considered a range

L. Hill et al., *How and Why to Regulate False Political Advertising in Australia*, https://doi.org/10.1007/978-981-19-2123-0_6

of penalty provisions that could be usefully incorporated into Australian legislation. Others point to the importance of publicising the existence of TIPA-type laws.

New Zealand

The regulation of false campaign statements in New Zealand is managed by both regulatory and legislative power. The Advertising Standards Authority and Broadcasting Standards Authority regulate advertising complaints, with the latter handling all television and radio advertisements. Legislatively, since 2002, s 199A of the *Electoral Act 1993* (NZ) has provided statutory support in the prevention of false campaign statements. The law currently reads:

1. A person is guilty of a corrupt practice if the person, with the intention of influencing the vote of an elector,—
   (a) first publishes or republishes a statement, during the specified period, that the person knows is false in a material particular or
   (b) arranges for the first publication or re-publication of a statement, during the specified period, that the person knows is false in material particular.

The term 'specified period' denotes the period:

(a) beginning 2 days immediately before polling day and
(b) ending with the close of the poll.

Section 199A was added to the *Electoral Act 1993* (NZ) following the Parliamentary Justice and Electoral Committee inquiry into the 1999 election. Foreseeing the avalanche of false information that would descend in the digital age, the Committee found that, in the absence of such legislation 'there is a real danger … that electors will base their electoral choices on erroneous information'. The Committee further noted the increasingly damaging effects of false statements as an election approaches, providing the backdrop for a unique feature of the legislation: the '3 day prior' proviso. The Inquiry noted that 'there is… a temptation

for unscrupulous candidates to exploit the media and voters over the last few days of the campaign by issuing misleading statements' (Justice and Electoral Committee, Parliament of New Zealand, 2001). The '3 day prior' proviso is embodied in the proscription of false statements only in the 'specified period' demarcated above. 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.

Prima facie, the law appears to provide effective deterrence against false campaign statements, but the electorate and political actors in New Zealand are either unaware of or unconcerned about its existence. Indeed, when interviewed, Tim Barnett, New Zealand Labour Party General Secretary between 2012 and 2015, indicated that he had forgotten s 199A existed (Renwick & Palese, 2019). Graeme Edgeler, a Wellington-based barrister said he 'expected no one would ever be convicted under it' (Renwick & Palese, 2019: 37) given the difficulty in reaching the falsity threshold. He also expressed the view that it represents an 'inappropriate interference' with New Zealand's freedom of speech protections.[2]

To date, only one case has reached the courts under s 199A. This was *Peters v Electoral Commission* ('*Peters*') ([2016] 2 NZLR 690). Following the 2014 national election, Winston Peters, leader of the New Zealand First Party, alleged that opposing parties' statements had falsely represented the statements and policy positions of the New Zealand First Party and its candidates. These statements had *remained accessible* (but were not initially published) to the public on the 18th and 19th of September, prior to the election on the 20th. Peters complained to the New Zealand Electoral Commission ('NZEC') which responded that the section had not been breached because, although the advertisements had been accessible during the 'specified period' (see s 199A above), they had not been first published in the period. Consequently, Peters sought judicial review.

The High Court of New Zealand granted the request and held the NZEC's application to be 'wrong in law' (*Peters*: 691 (Mallon J)). The court's interpretation of the Act thus encompassed any election material *accessible* during the 'specified period'. In what might be interpreted as a backward step, the act was subsequently amended in accordance with the NZEC's original interpretation, effectively watering it down, with s 199A(2) now reading:

Subsection (1) does not apply if—

(a) the statement was first published before the specified period and remains available or accessible within all or part of the specified period; but
(b) the person did not, during the specified period, by any means,—

i. advertise or draw attention to the statement or
ii. promote or encourage any person to access the statement.

New Zealand's s 199A is rarely publicised and almost never invoked. Although the Act provides a strong basis in law against false statements and is attuned to the importance of compliance in the days approaching the election, the provision is generally considered inoperable and widely dismissed in its current form. A particular difficulty lies in the '3 day prior' proviso which appears to be too narrow a window for action and could even be interpreted as tacit endorsement of false campaign statements made *outside* of the window. The wording of the legislation and subsequent onus on the prosecution, in theory, presents more difficulties to the successful operation of the law. Unlike the South Australian law, there is no 'intermediate' step, such as a request for a retraction, between the publishing of the statement and the offence. Moreover, the fault element of knowledge would be extremely difficult to prove beyond a reasonable doubt.

It is our view that any aspirational or ideal-type law against false campaign statements should embody provisions and sanctions that cover the entirety of the election campaign. Further, the existence of such laws should be properly publicised. New Zealand's experience with the legislation, highlighted in *Peters*, underscores the importance of the political class and wider public being cognisant of such legislation and its practicalities and obligations.

United Kingdom

False campaign statements have been illegal since the 1895 amendment to the *Corrupt and Illegal Practices Act 1883* (UK), although the relevant section is now contained in s 106 of the *Representation of the People Act 1983* (UK). The provision in its current form reads:

1. A person who, or any director of any body of association corporate which—

(a) Before or during an election,
(b) For the purpose of affecting the return of any candidate at the election.

> Makes or publishes any false statement of fact in relation to the candidate's personal character or conduct shall be guilty of an illegal practice, unless he can show that he had reasonable grounds for believing, and did believe, that statement to be true.

An individual found to have breached the section commits an 'illegal electoral practice', punishable by a fine of up to GBP5000 (*Representation of the People Act 1983* (UK) s 159). A breach may also bar an individual from standing for parliament or holding elected office for three years (*Representation of the People Act 1983* (UK) ss 160, 173).

Apart from the potential sanction of disqualification, the other noteworthy feature of the British legislation is that it applies only to false *personal statements* about political candidates, rather than those of a political nature.[3] In this sense, the legislation provides more of an electoral complement to existing defamation law than a guard against electoral corruption. Personal statements are understood in the case law to encompass those which relate to family, religion, sexual conduct and business or finances, although, in reality, the line between personal and political is often blurred. Furthermore, the *ex-post* remedies typically used for defamation such as an apology and damages would appear to be of little help to a disgruntled election candidate relative to the more dynamic measures contained in s 106. The legislation's comparative effectiveness lies in the relative ease of obtaining an injunction compared to defamation law. A complainant can obtain an injunction where they can demonstrate 'prima facie proof of the falsity of the statement'—a much lower threshold than that which applies in defamation law (*Representation of the People Act 1983* (UK) s 106(3)).

Although charges were brought under the Act for statements made in a 2006 local government election (Tatchell, 2007), the sole parliamentary breach of s 106 of the 1983 Act concerns the 2010 election of Philip Woolas to the seat of Oldham East and Saddleworth in greater Manchester. Following Woolas' marginal victory, his Liberal Democrat opponent Elwyn Watkins petitioned against the result under s 106 (See *Watkins v Woolas (In the matter of the Representation of the People Act 1983)* [2010]

EWHC 2702 (QB)). Three items of election literature were found to have contained false statements, of which two were considered to be of a *personal nature* and therefore relevant to s 106. Notably, these statements were sufficient to render the election void and disqualify Woolas from standing for 3 years. On appeal, the Administrative Court leaned heavily on the reasoning of the 1895 parliament, particularly as it related to the decision to penalise only false personal, rather than political statements. The court opined that '[i]t was as self-evident in 1895 as it is today, given the practical experience of politics in a democracy, that unfounded allegations will be made about the political position of candidates in an election'. Further: '[T]he statutory language makes it clear that parliament plainly did not intend the 1895 Act to apply to such statements; *it trusted the good sense of the electorate to discount them*' (*R (on the application of Woolas) v The Parliamentary Election Court* ('*Woolas*') [2010] EWHC (Admin) 3169, [110] (Thomas LJ for the Court)) (emphasis added). The court noted that personal statements were distinct from political statements, and ought to be punished accordingly as 'the electorate would be unable to discern whether such statements which might be highly damaging were untrue' (*Woolas*: [110]).

The court approved the narrow scope of statements caught by the provision, noting a possible 'chilling' effect if the scope were too wide. Should the provision be applied to political statements '[i]t would be difficult to see how the ordinary cut and thrust of political debate could properly be carried on' (*Woolas*: [113]). The court concluded that the provision relating to false statements could 'only enhance the standard of political debate and thus strengthen the way in which a democratic legislature is elected' (*Woolas*: [124]).

A striking feature of the section is its capacity to cover non-damaging false statements of candidates. For instance, in 1997 a GBP250 fine was levied against a journalist who published false allegations of homosexuality against an election candidate (Lamont, 2001). While not strictly a defamatory statement, its potential to resonate with certain constituents' religious and/or personal prejudices may have been of detriment to the candidate, although, obviously, the statement is as prosecutable as an accusation of heterosexuality against an openly homosexual candidate. Such personal accusations are comparatively difficult to debate in the public realm relative to political statements, and this proposition underpins the reasoning of s 106.

Much like the New Zealand legislation, the existence of s 106 is little known, and it is rarely invoked. During the 2010 general election, 37 cases were reported to police, of which 23 required no action, 9 required investigation, 4 resulted in informal police advice and 1 (Woolas) resulted in conviction (Rowbottom, 2012). While the Act could apply to any person, the UK Law Commission has noted that it is 'plainly targeted at rival candidates and those affiliated to their campaign' (Law Commission et al., 2014: 250). The scope of the legislation may need to be widened as the issue of agency and authorship is becoming increasingly opaque in the age of social media campaigning. The non-monetary disqualification penalty, the strict focus on 'personal' statements rather than those of a political nature, as well as the concentration on the behaviour of candidates rather than the public provide a strong disincentive against false personal statements. The provision complements defamation law, although is more applicable to the electoral context due to the ease of seeking an injunction. It is, however, still insufficient. The Act's concern with personal statements reflects an awareness of the potential 'chilling effect' that constraints on political discourse may have—and which any legislation must carefully navigate—but is arguably too cautious.

Canada

Canadian electoral law has embodied provisions preventing the publication or making of false statements about candidates since 1908. Between 1908 and 1970, it was an offence for any person to 'make or publish any false statement of fact before or during an election about the personal character or conduct of a candidate for the purpose of affecting the return of a candidate'. Then, from 1970 until 2000 it was an offence for anyone to '*knowingly* make or publish a false statement of fact about the personal character or conduct of a candidate before or during an election' (see *Canadian Constitution Foundation v Canada (Attorney-General)* [2021] ONSC 1224, [11]–[18]) (emphasis added).

The *Canada Elections Act* (S.C. 2000, c. 9) was significantly overhauled in 2000, with s 91(1) of the English language version prohibiting the 'making or publication of any false statement in relation to the personal character or conduct of a candidate or prospective candidate with the intention of affecting the results of an election' (*Canada Elections Act* (S.C. 2000, c 9) s 91 as before 2001 overhaul). The English provision did not explicitly allude to any knowledge requirement like the offence as it

stood between 1970 and 2000. However, the French language version of the offence contained the word 'sciemment', which translates as 'knowingly'. The French language version therefore contrasted with the English language version in expressly stipulating a knowledge requirement for the offence. The linguistic discrepancy was resolved in 2001 with the addition of the word 'knowingly' to the English language version of s 91, which subsequently read:

> No person shall, with the intention of affecting the results of an election, knowingly make or publish any false statement of fact in relation to the personal character or conduct of a candidate or prospective candidate. (*Canada Elections Act* (S.C. 2000, c 9) s 91 as before 18 January 2019)

Section 91 was complemented by s 74 which forbade the publication of 'false statement[s] of the withdrawal of a candidate' as well as s 56 which relates to false publications or statements relating to false accusations of candidacy.

Much like the cognate laws in New Zealand and the United Kingdom, the law has sat largely dormant and was rarely publicised at election time. As such, while the specific provision existed as a *de jure* deterrent against false election statements, there are few examples of its application from 2001. In 2019, s 91 was amended by Bill C-76, known as the *Elections Modernization Act* (S.C. 2018, c 31), which had passed the year prior. The Bill was primarily concerned with data tampering and misuse, as well as campaign finance, both of which were, and remain, salient issues for electoral policymaking. However, the Bill also amended s 91 of the *Canada Elections Act* to read:

> 1. No person or entity shall, with the intention of affecting the results of an election, make or publish, during the election period,
>
> (a) a false statement that a candidate, a prospective candidate, the leader of a political party, or a public figure associated with a political party has committed an offence under an Act of Parliament or a regulation made under such an Act—or under such an Act of the legislature of a province or a regulation made under such an Act—or has been charged with or is under investigation for such an offence or

(b) a false statement about the citizenship, place of birth, education, professional qualifications or membership in a group of association of a candidate, a prospective candidate, the leader of a political party or a public figure associated with a political party.

2. Subsection (1) applies regardless of the place where the election is held or the place where the false statement is made or published (*Canada Elections Act* (S.C. 2000, c.9) s 91 as at 19 January 2019) (titles omitted).

The amendments substantively modified the previous version of s 91 in five notable ways: it proscribed a list of false statements; prohibited an entity from making false statements; specifically confined the prohibition to the election period; extended the ban to leaders of political parties; and removed the 'knowledge' requirement for the falsity of the statement.

The passage of the Bill, specifically the modifications to s 91, was highly controversial. Almost immediately, the Canadian Constitutional Foundation ('CCF') launched a legal challenge regarding the compatibility of s 91 with s 2(b) of the *Canadian Charter of Rights and Freedoms* which explicitly upholds 'freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication' (*Canada Act*, 1982 (UK) c 11, sch B, Pt I, s 2(b) ('*Canadian Charter of Rights and Freedoms*')). According to the CCF, s 91 was an undue interference with this freedom and it characterised the provision as 'ineffective and overly draconian'. The removal of 'knowingly' and the subsequent extension of liability to cases in which the actor was unaware of the falsity of their statement attracted criticism from some commentators who considered it too broad. As Evan Dyer noted: '[A] cursory search of Twitter quickly turns up countless examples of Canadians who have posted statements that appear to violate the law' (Dyer, 2019).

Even before the 2019 amendment to the Act, parliamentary sentiment towards the provision was sceptical. In their 2017 review into possible legislative reforms after the 2015 election, the Standing Committee on Procedure and House Affairs ('SCPHA') recommended the repeal of s 91 for several reasons including enforcement difficulties and the difficulty of assessing the intent to affect the general election result or that of a specific candidate. It suggested that 'serious cases of defamation or libel can be dealt with through alternative civil or criminal legal mechanisms' (SCPHA, 2017: 8). Notably, the opposition party at the time agreed that

the provision should be repealed in its entirety, claiming that '[i]t is [not] the place of government or executive branch agents to stand in judgement over the veracity of political speech outside or during an election period' (SCPHA, 2017: 22).

The prevailing sentiment of the legislature was that the provision was both inoperable and undesirable and that one could have reasonably expected it to be repealed in the near future. As it happened, in March 2021, the Ontario Superior Court struck down s 91(1) following the CCF challenge. The section was found to be incompatible with freedom of expression as protected by s 2(b) of the *Canadian Charter of Rights and Freedoms*.

In her ruling Davies J conceded 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' (*Canadian Constitution Foundation v Canada (Attorney-General)* [2021] ONSC 1224, [2]–[3]). The removal of 'knowingly', however, implied that 'the *mens rea* of the offence of contravening s 91(1) … [did] not include an element of knowledge that the statement in question is false'. Section 91 was therefore *not* a justifiable limitation on freedom of expression and could therefore not be saved under s 1 of the *Canadian Charter of Rights and Freedoms* which permits such limitations. Although the government requested the suspension of the declaration of invalidity, Davies J expressly dismissed the request. On 29 June 2021, Canada's Bill C-30 amended ss 486(3)(c) and 486(4)(a) of the *Canada Elections Act*, modified the offence from 'contraven[ing] subsection 91(1)' to 'knowingly contraven[ing] subsection 91(1)' (Bill C-30, An Act to Implement certain provisions of the budget tabled in Parliament on 19 April 2021 and other measures, 2nd Session, 43rd Parliament, 2021). In this amendment, the government seemed to be attempting to re-establish the intent of the offence in order to, once again, render s 91(1) constitutional.

Despite the government's attempt to 'fix' the provision, Yasmin Dawood of the University of Toronto has suggested that the offence may face additional constitutional hurdles from s 2(b) of the Charter (Dawood, 2020). Notwithstanding issues of intent, in *R v Zundel* ([1992] 2 SCR 731), the Supreme Court of Canada struck down a Criminal Code provision which prohibited the publication of false information or news and thereby affirmed that false speech is *constitutionally protected* under s 2(b) of the *Canadian Charter of Rights and Freedoms*. Given

that s 91(1) aims explicitly to ban false election speech, it may be subject to further constitutional challenge. Canada's s 91(1), while aspirational, seems to have had little impact on the Canadian electoral landscape. The provision attempts to prevent the publication of narrowly defined false statements about candidates, prospective candidates, and party leaders at election time—but there is little evidence that it has been successful in doing so.

The United States of America

The United States' political tradition of individualised free speech and expression rights protection, as codified into its political landscape through the First Amendment of the US Constitution has meant that any attempt to regulate political speech and, by extension, election advertising, has encountered fierce cultural, legal and constitutional resistance. While the Supreme Court is yet to rule directly on false campaign speech, in *Brown v Hartlage* ((1982) 456 U.S. 45), the court found that when a state 'seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment … requires that the restriction be demonstrably supported by, not only a legitimate state interest, but a compelling one' (*Brown v Hartlage* (1982) 456 U.S. 45, 54 (Brennan J)).

Multiple attempts at regulating political speech and advertising have been made in state jurisdictions, and although courts were initially divided over the constitutionality of such provisions, the seminal case of *United States v Alvarez* ('*Alvarez*') ((2012) 567 U.S. 709) in 2012 tipped the scales to the side of the First Amendment with long-term consequences for all such legislation.

Prior to *Alvarez*, a number of cases regarding TIPA laws had been decided in state courts. Examples of these include *State v 119 Vote No! Committee* ((1998) 135 Wn.2d 618) and *Pestrak v Ohio Elections Commission* ((1987) 670 F. Supp. 1368). Rick Hasen has noted that in these cases, judges had tended to agree that: any TIPA law must target statements made with 'actual malice'[4]; be decided under a higher evidentiary standard; and not impose prior restraint on the publication of political matters (Hasen, 2013). Beyond this, however, there was no consensus on whether false speech was generally entitled to any protection under the First Amendment. *Alvarez*, however, had important implications for the protection of false speech.

In *Alvarez*, the US Supreme Court struck down the Stolen Valour Act of, 2005 (Pub L 109–437, 120 Stat 3266–3267) as unconstitutional in a 6–3 decision. Although this case did not directly relate to false election speech it was nevertheless significant for it. Some explanation of the case follows: Xavier Alvarez was indicted in 2010 by the US District Court for the Central District of California for false statements made in 2007 about his claimed receipt of the Congressional Medal of Honor in 1987. Such statements were forbidden by the Stolen Valour Act of, 2005, which proscribed many forms of false representation of military medals or honours. The court rejected Alvarez' claim that the law was unconstitutional, although the decision was then reversed by a panel of judges of the United States Court of Appeals of the Ninth Circuit, which held the law invalid. The appellate court's decision was challenged by the government in 2012, and the case was subsequently heard by the Supreme Court in 2012.

Justice Kennedy, in the majority decision, opined that the 'Government has not demonstrated false statements generally should constitute a new category of unprotected speech' and therefore the 'reach of the statute puts it in conflict with the First Amendment'. Further, 'the statute would apply with equal force to personal, whispered conversation within a home' (*Alvarez*: 722). His Honor concluded that '[t]ruth needs neither handcuffs nor a badge for its vindication' (*Alvarez*: 729), which strikes us as complacent given that the case involved such egregiously fraudulent conduct.

Since *Alvarez* the argument that false campaign speech is entitled to no constitutional protection under the First Amendment is much less tenable and any false campaign speech law would now have to be narrowly targeted at false speech delivered with actual malice and proven at an elevated level (Hasen, 2013). According to Eugene Volokh, in light of *Alvarez*, 'general bans on lies in election campaigns would be struck down … but narrower bans on [certain] false statements … might be constitutional'. Such narrower bans may include false claims about when and where people can vote, false claims of incumbency or false claims about experience. Volokh concedes, however, that it is 'just hard to tell [which bans are permissible], given both the limited scope of the opinions and the … [Supreme Court] split' (Volokh, 2012).

Cases in lower courts since *Alvarez* seem to accord with Volokh's predictions. For example, in *Commonwealth v Lucas* ((2015) 472 Mass. 387) the Massachusetts Supreme Judicial Court struck down a state

law (Massachusetts General Laws ch. 56, § 42) which forbade false statements. At the time of the case the section read:

> § 42. False Statements.
>
> No person shall make or publish, or cause to be made or published, any false statement in relation to any candidate for nomination or election to public office, which is designed or tends to aid or to injure or defeat such candidate.
>
> …
>
> Whoever knowingly violated any provision of this section shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than six months.

The law was struck down under Article 16 of the Massachusetts Declaration of Rights, which stipulates that '[t]he liberty of the press is essential to the security of freedom in a state: it ought not, therefore, be restrained in this commonwealth' (*Massachusetts Constitution*, art XVI). While the law was not scrutinised regarding its incompatibility with the First Amendment, the judgement leaned heavily on Supreme Court jurisprudence on the matter, particularly on the permissibility of false statements as decided in *Alvarez*. The court concluded that the section 'is neither necessary nor narrowly tailored to advancing the Commonwealth's interest in fair and free elections, and chills the very exchange of ideas that gives meaning to our electoral system' (*Commonwealth v Lucas* (2015) 472 Mass. 387, 404 (Cordy J for the Court)).

Similarly, in *Susan B. Anthony List v Ohio Elections Commission* ((2014) 45 F. Supp. 3d 765), the relevant United States District Court found that an Ohio law which forbade an extensive list of knowingly made false campaign statements intended to affect the outcome of a political campaign was unconstitutional. Accordingly, the law was struck down and the Ohio Elections Commission was permanently disallowed from enforcing the law. Leaning on the precedent established in *Alvarez*, Black J concluded that 'we do not want the Government deciding what is political truth' and that ultimately, 'the voters should decide' (*Susan B. Anthony List v Ohio Elections Commission* (2014) 45 F. Supp. 3d 765, 769).

Another illustrative post-*Alvarez* case that exemplifies distinctly American judicial and constitutional tendencies as they relate to false campaign statements is *281 Care Committee v Arneson* ((2014) 766 F.3d 774). Decided in 2014, the case once again leaned heavily on the doctrines of *Alvarez*. The court found that the following Minnesota law was unconstitutional:

> A person is guilty of a gross misdemeanour who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false. (Minn. Stat. § 211B.06, subd. 1)

The court held that regardless of the state's interest in free and fair elections, and despite the prevention of fraud constituting a compelling state interest, the court determined that the statute was overbroad and not narrowly enough tailored and would therefore chill political speech (*281 Care Committee v Arneson* (2014) 766 F.3d 774). According to the court, the appropriate and less restrictive intervention was the application of counterspeech: 'Especially as to political speech, counterspeech is the tried and true buffer and elixir' (*281 Care Committee v Arneson* (2014) 766 F.3d 774, 793 (Beam J)).

In 2013 there were seventeen US states with statutes preventing false campaign statements, although this number continues to decline under the weight of the First Amendment; those that remain are dormant on state statute books. Scholars are generally in agreement that unless there is some modification to the way in which the First Amendment is interpreted in relation to false campaign statements, TIPA laws have little chance of constitutionally valid use. Given the protection afforded to false speech in *Alvarez*, this seems to be an accurate assessment.

Commentators are in general agreement that the First Amendment is a significant roadblock in the pursuit of constitutionally valid TIPA laws. But they differ in the extent to which it would invalidate different types of TIPA laws. For example, Catherine Ross has suggested that the 'First Amendment poses a *virtually insurmountable* obstacle to government

regulation of deceptive campaign speech' (Ross, 2017: 406) (emphasis added). Enshrined freedom of expression implies that the 'state *cannot* become the arbiter of truth, even where misleading statements are nothing more than straight-out lies' (Ross, 2017: 406) (emphasis added). Others are more optimistic about the fate of TIPA laws in the United States. Joshua Sellers, after analysing the post-*Alvarez* constitutional state of play for TIPA laws, posits three potential circumstances in which false campaign statements may be delimited: foreign nationals engaging in intentional false speech expressly advocating for or against the election of a candidate; the use of false speech to undermine election administration; and the intentional falsification of mandatory disclosure filings (Sellers, 2018).

Staci Lieffring is less optimistic, suggesting that a 'Court … [would find] any attempt to regulate false, non-defamatory statements of political speech unconstitutional' (Lieffring, 2013: 1061). She does say, however, that the First Amendment may permit defamatory action within the arena of campaign speech but, as we have mentioned, this is not a particularly appropriate or effective solution. James Weinstein's recent account of the issue arrives at similar conclusions. After canvassing First Amendment jurisprudence and theorising the constitutionality of various election speech prohibitions, Weinstein expects that almost all prohibitions—even those regarding time, place and manner of voting—would be found unconstitutional. However, like Volokh, Weinstein sees a possible narrow prohibition on false claims of incumbency as prima facie constitutional (Weinstein, 2018).

First Amendment jurisprudence, particularly since *Alvarez*, does not—and almost certainly will not—accommodate TIPA provisions. State TIPA laws have been consistently invalidated and remaining laws remain inactive with little to no chance of constitutionally valid use. While its roots are undoubtedly found earlier, post-2016 US politics appears to be undergoing an 'epistemic crisis' (Dahlgren, 2018). Demonstrably false statements of fact are now commonplace and seemingly part of normal political life, with the events of 6 January 2021 serving as a reminder of what can happen when such statements go unchecked. As exemplified by TIPA invalidation and the curious precedent set by *Alvarez*, the First Amendment has, and likely will continue, to obstruct efforts to confront twenty-first century challenges to the regulation of false campaign speech. In doing so, the founding document of American democracy may have sown the seeds of its demise.

Having explained how TIPA laws have fared outside Australia, we now turn to a close examination of the Australian case.

Notes

1. *Gitlow v New York* (1925) 268 U.S. 652 held that the 14th Amendment of the United States Constitution extended the First Amendment's protections of freedom of speech and freedom of the press to the governments of U.S. states.
2. The *Bill of Rights Act 1990* (NZ) prescribes Freedom of Expression and specific Electoral Rights to all citizens of New Zealand. The prerequisites for any infringement of the aforementioned rights are detailed in Section 5's *Justified Limitations* which state 'the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. Edgeler therefore posits that the undue infringement cannot be *demonstrably justified*.
3. The legislation was constrained to the regulation of 'personal statements' as speech restrictions regarding political character or conduct would have breached the Right to Freedom of Expression in Article 10 of the European Convention on Human Rights. Since the UK's departure from the European Union in February 2020, they are no longer bound by the Convention.
4. The 'actual malice' standard is a legal requirement imposed on public figures when they sue for libel. Such figures are required to prove a higher standard to succeed in a defamation lawsuit compared to other individuals (Goldman, 2008).

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CHAPTER 7

Australia's Experience

Introductory Comments

We now provide a detailed legal and political history of debates about—and experiments in—truth in election advertising in the Australian context, including two at the Commonwealth level (later repealed) and one at the state level (we explore South Australia's experience in Chapters 8 and 9). We also show that some jurisdictions have adopted what we refer to as 'pseudo' truth in political advertising laws that *appear* to perform the same function as authentic TIPA provisions but do not.

At various times, Australian jurisdictions—at the Commonwealth, state and territory level—have entertained the idea of introducing TIPA provisions. Notwithstanding the recent surge in popular support for TIPA laws discussed already, they have been passed and subsequently repealed at the federal level twice (in 1917 and 1983) and have been seriously contemplated by legislative inquiries in Commonwealth and state parliaments. The most notable of these inquiries are the Queensland inquiry of 1996, and the Victorian inquiries of 2010 and 2021. Since the repeal of the federal provision in 1984, routine federal election inquiries—particularly throughout the 1990's—often addressed, albeit dismissively, the possibility of TIPA laws. Narrowly speaking, nearly all Australian jurisdictions currently have what we would consider 'pseudo' TIPA laws. However, these laws have been rendered somewhat toothless by a notable High Court precedent that we explore in detail in the following section.

L. Hill et al., *How and Why to Regulate False Political Advertising in Australia*, https://doi.org/10.1007/978-981-19-2123-0_7

'Pseudo' TIPA laws

There are numerous state and Commonwealth provisions, some of which have already been mentioned, which may appear to be *prima facie* TIPA provisions. These include:

- *Electoral Act 2017* (NSW) s 216;
- *Electoral Act 2002* (Vic) s 84;
- *Electoral Act 1992* (Qld) s 185;
- *Electoral Act 1907* (WA) s 191A;
- *Electoral Act 2004* (Tas) s 197;
- *Electoral Act 2004* (NT) s 287.

While they differ in their structure, these provisions generally refer to statements that are false and/or misleading in relation to the casting of a vote. Such provisions are therefore interpreted in light of the *Evans* decision (see below) insofar as they only relate to the mechanical act of casting a ballot (preference expression) rather than the broader and more consequential process of forming a voting preference (preference formation) in the period preceding an election. This was recognised by George Williams regarding similar 'pseudo' provisions proposed in 1997: '[E]ach of the above provisions can only have a minimal impact on preventing false and misleading statements of fact during election campaigns' (Williams, 1997: 2).

It has been suggested that the Northern Territory's provision may be construed as a proper TIPA law (see Elections ACT, 2021: 54), but the Northern Territory Electoral Commission has explicitly rejected the claim (Northern Territory Electoral Commission, 2021). We therefore consider it as belonging in the 'pseudo' class.

Section 185(2) of the *Electoral Act 1992* (Qld) is the most unique of the 'pseudo' provisions. The section prohibits 'knowingly publish[ing] a false statement of fact regarding the personal character or conduct of the candidate'. Section 185(2) is yet to be invoked in a reported decision and would probably operate more akin to s 106 *Representation of the People Act 1983* (UK) than a TIPA law designed to prohibit false and/or misleading statements of fact calculated to affect an election result. Given that the provision has not been invoked since its passage almost thirty years ago, it is unlikely that it will be used any time soon.

South Australia, and more recently, the Australian Capital Territory are the only two jurisdictions with currently operable, non- 'pseudo' TIPA provisions. In order to partly explain why—or at least how—this is the case, we now investigate Australia's historical experience with these laws to identify patterns of hesitancy and concern and, in turn, further illuminate what an ideal-type regime should avoid or pursue. We first explore the history of the Commonwealth's often erratic relationship with TIPA laws.

Commonwealth

Early Developments

The Commonwealth's, and indeed Australia's, first experience with TIPA regulation occurred in November 1917. The regulation was passed under the *War Precautions Act 1914* (Cth) and read:

> 42.—(1) Any person who, on or before the polling day for the Referendum, makes or authorizes to be made, verbally or in writing, any false statement of fact of a kind likely to affect the judgement of electors in relation to their votes, or who prints, publishes, or distributes any advertisement, notice, handbill, pamphlet, or card containing any such statement, shall be guilty of an offence:
>
> Provided always that it shall be a defence to a prosecution for an offence under this Regulation if the defendant proves that he had reasonable ground for believing, and did, in fact, believe, the statement to be true.

In 1916, just a year prior, the first of Australia's conscription referenda had been defeated, leading to a split in the incumbent Australian Labor Party. A plebiscite on a similar proposition was eventually called for in December 1917, albeit on a much weaker proposition. The abovementioned TIPA regulation was passed one month before the second referendum and, being explicitly relevant to the second (1917) referendum and the disinformation that apparently surrounded it, the provision became defunct soon after. It was formally repealed with the *War Precautions Act 1914* (Cth) in 1920. A February 1918 article in the *Westralian Worker* named seven individuals charged with making false statements during the 1917 referendum campaign, including notable figures such as Queensland's then-incumbent premier Thomas Ryan;

according to the article, all had their cases dismissed (*Westralian Worker*, 1918). Other, early Australian electoral legislation also included content-based regulation which prevented, for example, 'any untrue or incorrect statement intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his vote' (See *Electoral Act 1902* (Cth) s 180(e) from 1911). For reasons outlined below, provisions such as these are not considered to be authentic TIPA laws.

Joint Select Committee on Electoral Reform ('JSCER')—First Report

The Commonwealth's next encounter with TIPA came over sixty years later in 1983 in the *Joint Select Committee on Electoral Reform's First Report into Electoral Reform*. In a brief discussion of misleading electoral matters, the Committee contemplated two notable submissions: one from Geoffrey Lindel, an academic at the Australian National University; the other from the Australian Electoral Office. The Committee condensed the argument of the former submission into three points:

> There is a need to review the prohibitions against misleading electoral advertising…There is a need to ensure that those prohibitions extend to electoral advertising by T.V. and radio broadcasting…There is a need to ensure that the Chief Australian Electoral Officer and any affected candidate can seek an injunction to prevent a threatened breach of the provisions against misleading electoral advertising. (JSCER, 1983: 180)

The submission of the Australian Electoral Office communicated similar sentiments and suggested that a 'provision of a right for candidates to seek an injunction to restrain misleading advertising' be passed. In light of these submissions, the Committee recommended, *inter alia,* that the '[Electoral] [C]omission be obliged to seek injunctive relief in issues such as misleading electoral advertising' (JSCER, 1983: 181).

Upon this recommendation, the TIPA provision was hastily passed in the Commonwealth Electoral Legislation Amendment Bill 1983, which amended s 161 of the *Electoral Act 1918* (Cth). The amendment added the following offence:

> (2) A person shall not, during the relevant period in relation to an election under this Act, print, publish or distribute or cause, permit

> or authorise to be printed, published or distributed, any electoral advertisement containing a statement—
>
> (a) that is untrue and
> (b) that is, or is likely to be, misleading or deceptive.

To prevent a violation of s 161(2), section 209A of the *Electoral Act 1918* (Cth) was amended in the same bill to vest the Australia Electoral Commission ('AEC') with power to grant injunctions where an electoral offence has been committed, is being committed or is proposing to be committed. This power related to violation of s 161(2) among other electoral offences; according to the bill's explanatory memorandum: 'New Section 209A makes extensive provision for candidates or the AEC to be able to seek injunctions … to restrain breaches or anticipated breaches of any Commonwealth law relating to elections' (Parliament of Australia, 1983: 72). The same explanatory memorandum was silent on the intention and proposed functionality of s 161(2). This silence may have been associated with the fact that in 1983 the implied freedom of political communication had not yet been found, and legislatures did not need to anticipate or even navigate constitutional hurdles related to communication on political matters.

The injunctive power mentioned was vested in a 'prescribed court', which s 209A defined as the Supreme Court of a State or Territory conferred with federal jurisdiction. The construction of the offence in s 161(2) was notable, compared to other current and historical TIPA provisions, in that it made a bold epistemological claim about the 'truth' of an impugned electoral advertisement. Most TIPA provisions are concerned with false and/or misleading statements but never go so far as to attempt to prohibit statements that are deemed to be *untrue*.

Section 161(2) was starkly similar to the offence contained in the amended s 161(1) which stipulated that:

> (1) A person shall not, during the relevant period in relation to an election under this Act, print, publish or distribute or cause permit or authorise to be printed, published or distributed, any matter or thing that is likely to mislead or deceive an elector in relation to the casting of his vote.

Sections 161(1) and 161(2) are distinguished by the content which they sought to, respectively, prohibit. Section 161(2) was concerned with 'electoral advertisements' that are 'untrue' and likely to be 'misleading or deceptive', whereas 161(1) was concerned with matters that are likely to 'mislead or deceive an elector in relation to the casting of [their] vote'. These appear *prima facie* to be very similar—almost identical—provisions. One could reasonably expect matters which are untrue, misleading and/or deceptive to significantly overlap with matters which mislead or deceive in relation to the casting of the vote. But a notable High Court case in 1981, *Evans v Crichton-Browne* ('*Evans*') ((1981) 147 CLR 169), made an arguably misplaced distinction between the matters contained in s 161(1) and s 161(2); that judgement continues to reverberate through Australian electoral law.

Evans v Crichton-Browne

Evans was a joint judgement by the High Court, sitting as the Court of Disputed Returns concerning three disputed election returns related to the 1980 federal election. The disputed returns were: Noel Crichton-Browne's election as Senator for Western Australia brought by Australian Democrats candidate, John Evans; former Prime Minister William McMahon's election to the House of Representatives seat of Lowe in New South Wales brought by Ronald Muscio; and Grant Chapman's election to the South Australian seat of Kingston brought by Richard Gun of the ALP.

All petitions concerned purportedly false statements claimed to have violated the pre-amendment s 161(e) of the *Electoral Act 1918* (Cth), which, in a similar fashion to the post-1983 amendment s 161(1), declared the following an illegal practice:

> (e) Printing, publishing or distributing any electoral advertisement, notice, handbill, pamphlet, or card containing any untrue or incorrect statement intended or likely to mislead or improperly interfere with any elector in or in relation to the *casting of his vote*. (emphasis added)

The joint judgement was concerned with the interpretation of 'in or in relation to the casting of his vote', and to what extent (if at all) it related

to false campaign statements that affected the process of preference formation. In the court's words:

> The question is, does s 161(e) refer to statements intended or likely to mislead or improperly interfere with an elector in or in relation to his choice of the candidate or candidates for whom he will vote, or does it refer only to statements intended or likely to mislead or improperly interfere with an elector in such a way that his choice when made is not properly expressed or given effect by the physical act of voting? (*Evans*: 201 (Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ))

This question was answered in *Evans,* and reasoning applied in the remaining two petitions. We will accordingly focus on the facts and subsequent judgement in *Evans*.

John Evans, the petitioner, claimed that 'untrue or incorrect' statements made by the Liberal Party, including assertions that 'Australian Democrat senators had in the last Parliament voted with the Labor Party eight times out of ten'; 'that a vote for the Australian Democrats could be a vote for the Labor Party and could give the Labor Party control of the Senate'; and that 'the Australian Democrat senators in the last Parliament had been absent for 52 votes out of 192 occasions' (*Evans*: 173), violated s 161(e) by misleading electors in relation to casting their vote. Evans' petition was in some sense an indirect petition; he had alleged that the statements would reduce the overall vote count of the ALP, and, in turn, affect the preference flows to the Australian Democrats.

Applying the apparent 'natural meaning' of the words 'cast a vote', as well as dictionary definitions, the court determined that parliament was 'concerned with misleading or incorrect statements which are intended or likely to affect an elector when he seeks to record and *give effect to the judgment which he has formed as to the candidate for whom he intends to vote, rather than with statements which might affect the formation of that judgment*' (*Evans*: 204 (Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ)) (emphasis added). The court accordingly remained agnostic on the truth of the impugned electoral matters because 'the question whether any of the statements was untrue or incorrect did not arise on the hearing of the stated cases' (*Evans*: 208).

This understanding of the phrase 'casting of one's vote' has remained the authoritative interpretation since *Evans*. It is solely concerned with the way in which a preference is expressed, rather than the formation

of the preference. Construed in this manner, misleading an elector in the 'casting of their vote' is confined to false statements about procedural matters affecting the election such as voting time, voting place, or the way in which one fills out one's ballot. Given that the pre-1983s 161(e) is almost identical so the post-1983s 161(1), we can see that the elements of the offence in the post-1983s 161(1) and s 161(2) are distinct. The former was primarily concerned with statements that mislead in the procedural, 'preference-expression' phase of the election, whereas the latter was primarily concerned with the much more elongated 'preference-formation' phase of the election.

Petitioners in the cases heard alongside *Evans* argued that this was an incorrect interpretation of the law. George Masterman QC, representing Ronald Muscio, submitted that the casting of the vote 'cannot be limited to the physical act of putting the ballot-paper in the ballot box, and that it embraces the mental decision accompanying the act—the making of the choice by the elector of the candidate in whose favour he will mark the paper' (*Evans*: 205). This is an interpretation we favour because preference formation and preference expression are intimately related events and the distinction made in Evans strikes us as arbitrary. Nevertheless, the petition was rejected by the court.

The High Court's decision in *Evans* remains an influential precedent, particularly as it relates to the 'casting of one's vote'. *Evans* has been cited in notable electoral cases since 1980 but was most recently considered in *Garbett v Liu* ('*Garbett*') ((2019) 273 FCR 1). *Garbett* revolved around the use of corflutes written in Mandarin in the seats of Kooyong and Chisholm at the 2019 Australian Federal Election. The corflutes, coloured in purple and white, imitated the official AEC signage colourway. They were therefore alleged to have violated s 329(1) of the *Electoral Act 1918* (Cth), which, word-for-word, contains the same offence as the post-amendment 1983s 161(1) (Fig. 7.1).

The corflutes were typically placed near or adjacent to AEC material, and the accepted translation was: 'The correct way to vote: Fill in 1 next to the Liberal Party candidate on the green ballot and fill in numbers from small to large successively in other boxes' (*Garbett*: 3–4). The court, in considering *Evans*, found that the corflutes did mislead electors in relation to the 'casting of their vote': '[T]he corflutes are properly read, not as an *encouragement* to vote 1 Liberal, but as a statement first, that to vote correctly … one *must* vote 1 Liberal, and, secondly, that there was *an official instruction of the AEC* that electors *must* cast their

Fig. 7.1 The impugned corflute in *Garbett*

votes as indicated' (*Garbett*: 38 (Allsop CJ, Greenwood and Besanko JJ)) (emphasis added). The corflutes were authorised by then-acting director of the Victorian Liberal Party, Simon Frost, and not by the Liberal Party candidates standing in the seats displaying the corflutes. The court held that it could not void the elections under s 362(3) of the *Electoral Act 1918* (Cth) because 'there was no real chance that the result of either of the two election was affected. In these circumstances, it is unnecessary to consider whether it be just that … [the candidates] should be declared not to have been duly elected or that either election should be declared void' (*Garbett*: 42 (Allsop CJ, Greenwood and Besanko JJ)). If the court had found that the corflutes did indeed affect the election result, then there would have been grounds for voiding the election even though the

corflutes had been authorised by Mr. Frost. Section 362(3) of the *Electoral Act 1918* (Cth) stipulates that an election may be voided, even if the illegal electoral practice was committed by a third party without the knowledge of the candidate, if the 'Court is satisfied that the result of the election was likely to be affected'. The court was not satisfied in this instance.

While we agree with the application of *Evans* in *Garbett,* its exclusive concern with preference expression, and its seemingly tacit endorsement of deceptive campaign statements is puzzling. Indeed, the Former Victorian Electoral Commissioner, Steve Tully, suggested that the judgement in *Evans* 'may have contributed to a feeling that anything goes' (Victorian Electoral Commission, 2009: 8).

Joint Select Committee on Electoral Reform—Second Report

The Committee's second report, in 1984, was markedly different in tone and depth from the first report. The Committee noted that their tentative recommendations for TIPA laws, influenced by Geoffrey Lindel's submission, had been swiftly passed through parliament upon release of the first report in 1983. Despite recommending the creation of the offence in s 161(2), the Committee sought to review its structure only a year after its passage. It should also be noted that there had not been an election between the amendment to s 161 and the Committee's second report so the Committee could only speculate on the performance of the provision in the absence of any meaningful case law.

The Committee first sought to differentiate between the offence in s 161(1) and s 161(2). Considering *Evans*, they came to the conclusion that the former related to statements which misled voters procedurally, whereas s 161(2) 'extend[ed] to statements which affect the elector in [their] decision of choice of candidates' (JSCER, 1984: 6). The Committee noted criticism of s 161(2) from industry bodies, particularly in relation to the potential burden on publishers (as opposed to authorisers) of the material—a persistent concern for TIPA provisions. Given the criticism, the Committee tasked itself with examining the legislative scheme in s 161(2) and the corresponding power of injunction in s 209. Accordingly, members set out to either retain, repeal or amend the provision based on their findings (Fig. 7.2). They produced the following scheme of options:

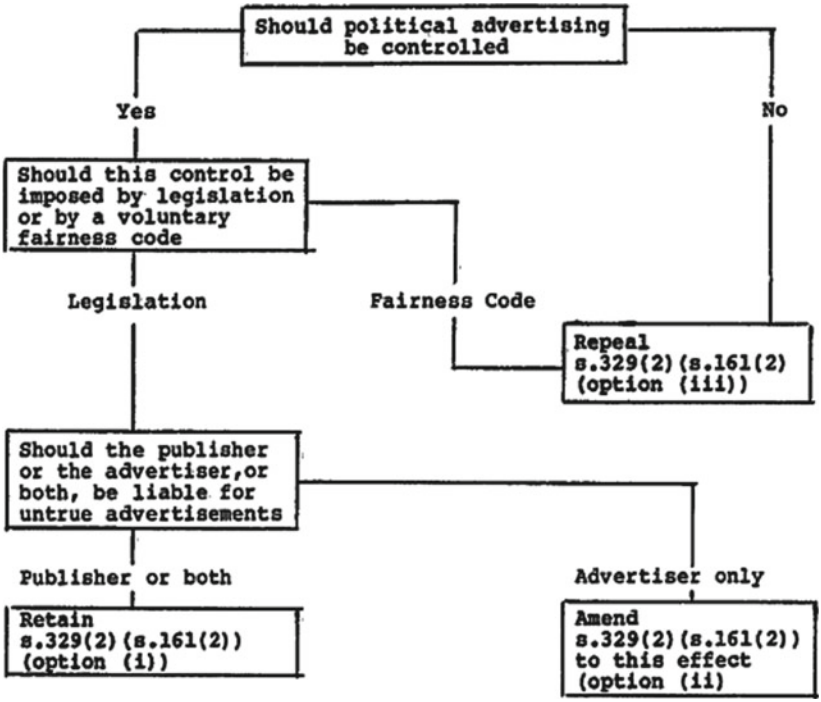

Fig. 7.2 A schematic representation of JSCER's deliberations when recommending the repeal of s 161(2) of the *Electoral Act 1918* in 1984 (JSCER, 1984: 9)

The Committee's first broad concern was whether political advertising ought to be regulated at all, although the proposition that it should was quickly accepted. But controversy remained as to *how* it should be regulated. The Committee deliberated on competing theories of 'truth' in a democracy. Would political 'truth' emerge through the usual cut and thrust of political debate? Or should informational integrity be protected by legislative controls like s 161(2)? The Committee remained agnostic on the former, but gradually came to reject the latter. A model of advertiser self-regulation was considered, but it was decided that the responsibility to protect political 'truth' should not be put in the hands of industry.

In relation to the wording of s 161(2), the apparent burden on publishers was also contemplated. Construed narrowly, s 161(2) could

exert a chilling effect on political discourse, with advertisers opting to not publish political advertisements at all for fear of violating the provision. It was suggested that, were the provision to be kept, 'placing responsibility for untrue advertising directly on the party or person responsible for the advertisement would be an improvement' with the qualification that 'it is based on the assumption that it is possible to enforce *truthful* political advertising by legislation' (JSCER, 1984: 17. Emphasis added). This latter consideration was especially salient: 'The Committee was particularly concerned to establish the criteria which would be adopted by a court to determine whether a political advertisement was "true"' (JSCER, 1984: 12–15). To address this concern, the Committee parsed s 161(2) and, given that no cases had reached the courts, relied heavily on submissions from then Attorney-General Gareth Evans, as well as existing electoral and commercial case law.

Three elements of the offence attracted the attention of the Committee and these all related to the meaning and scope of the following terms: 'a statement', '*untrue*' and 'misleading or deceptive'. *Evans* provided guidance to the Committee on the first matter. In *Evans* the court held that, in relation to the offence in the pre-amendment s 161(e), the term 'a statement' could be 'one of opinion, belief or intention as well as of fact, and there is nothing in the words of par. (e) to limit the provisions of that paragraph to statements of the latter kind' (*Evans*: 207 (Gibbs CJ, Stephen J, Mason J, Murphy J, Aickin J, Wilson J, Brennan J)). Section 161(2) therefore could encompass any class of statement, fact or otherwise. This is different to the current South Australian provision.

The second concern revolved around a statement 'which is untrue', which along with 'misleading *or* deceptive', constituted the first and second respective limbs of the offence. The Committee struggled to demarcate the types of statements the provision would encompass. They predicted that difficulties would arise in the court determining whether predictions or opinions, endemic to political campaigning, were 'untrue'. The two limbs of the offence also presented theoretical issues for the operation of the law. The Committee cited Brennan J's view in *World Series Cricket v Parish:* '[A] statement which is literally true may nevertheless convey another meaning which is untrue, and be proscribed accordingly' (World Series Cricket v Parish (1977) 16 ALR 181, 201 (Brennan J)). A statement could therefore fail the first limb and not be strictly 'untrue', yet still be highly electorally 'misleading or deceptive' and not be captured by the provision, as the offence required that both limbs be present.

The discussion of the phrase 'misleading and deceptive' reflected the Committee's negative sentiment towards the provision. While conceding that courts were apt for dealing with misleading commercial matters, they saw courts as inappropriate arbiters of the veracity of political statements. It was also feared that such a provision would violate the independence of the judiciary: 'The [C]ommittee is of the view that it is undesirable, both from the point of view of the courts, and the participants of the political process, to require the courts to enter the political arena in this way'. The Attorney-General's submissions argued that the section could be suitably restricted to false statements of present fact to mitigate these concerns about overreach. But the Committee rejected these proposals, claiming that even a revised version of the provision would 'penalise not the party with the dishonest intent to deceive the public but the party with poor legal advice'. It ultimately concluded that 'the section has such a broad effect as to be unworkable' (JSCER, 1984: 21–23).

The corresponding ability of the AEC or rival candidate to seek an injunction under s 209A of the post-amendment Act also fell foul of the Committee which speculated that 'an interim injunction could prove an effective tactic for a candidate to obtain publicity' and that 'the injunction remedy could cause grave injustice to political parties or candidates and could disrupt the normal political process, if available at the suit of any candidates'. The suggestion to limit the power of injunction to the AEC was also dismissed 'as it would require the Commission to enter the political fray in deciding whether to seek an injunction' (JSCER, 1984: 24–26).

The Committee, concluded, unsurprisingly, that while 'fair' political advertising was a noble and desirable objective, it was not possible to achieve such fairness by legislative means. It also expressed regret at its enthusiasm for political advertising controls in the First Report:

> The Committee notes with some concern the fact that these difficulties were not raised during the debate on the 1983 Bill. This oversight suggests the need for legislation committees to closely examine complex Bills such as this, to ensure that the Parliament is aware of the full implication of every provision. (JSCER, 1984: 26)

Repeal of the provision was therefore recommended as the safest course of action. Amendments to the section would 'be either ineffective, or would reduce its scope to such an extent that it would not prevent dishonest

advertising' (JSCER, 1984: 27). The Committee opined that false election information should be determined by the electors, and litigated via the law of defamation. Consequently, the short-lived section was repealed in October that year, never having seen a federal election.

Australian Democrats Senator Michael Macklin wrote a scathing dissent to the Committee's findings. Senator Macklin commented that he could 'find no support for the recommendation' and 'that the Parliament abandoned any attempt to regulate political advertising' (JSCER, 1984: 45). He did, however, agree that, had the provision been retained, the onus on publishers should be removed and that liability be confined to the authoriser of the advertisement. Macklin saw the regulation of political information as a legitimate and worthwhile pursuit for parliament, suggesting that '[i]t would be a denial of essential elements of democracy if all restraints on political advertising were removed'. Macklin accused the Committee and Parliament more broadly of hypocrisy with respect to the relationship between commercial and political advertising. He accused parliament of seeking to regulate the truth of others' statements, but not of their own: 'It will bring politics into further disrepute if Parliaments pass laws requiring others in the community to be truthful in their advertisements but to exempt its own' (JSCER, 1984: 45–50).

Macklin argued that, like commercial advertising, it was naïve to expect voters to be able to discern the 'truth' from a flurry of often bombastic political advertising . Macklin referenced the rationale for the passage of the *Trade Practices Act 1974* (Cth), that consumers should be properly informed, and extended it to political advertising: 'I believe that this argument holds true with regard to political advertising as much as it holds true for product advertising' (JSCER, 1984: 47). Macklin further argued that regulation was necessary to safeguard the informational integrity of elections given that '[t]he majority of citizens do not have access to sufficient documentation to enable them to arrive at a reasonable judgment concerning whether or not the advertisement is false or misleading' (JSCER, 1984: 46). Macklin criticised the Committee's underestimation of the courts' capacity to differentiate between statements of fact and opinions, pointing to examples in defamation, criminal and intellectual property law where courts frequently do differentiate. Macklin saw the faulty logic of the committee as amounting to a kind of moral and legal fecklessness: 'I cannot follow the logic that says that since we cannot stop all dishonest intent therefore we will not try to stop any' (JSCER, 1984: 47).

As will be shown in Chapters 8 and 9, the design of the South Australian regime addressed some of the concerns of the 1984 Committee and was legislated in the spirit of Macklin's dissent. It also considered the Committee's concerns about the potential burden on publishers of political advertisements, as we will also show.

Subsequent Developments

Since the review and repeal of the federal provision in 1984, federal TIPA laws have been mentioned in passing but have come to little. The mood had changed somewhat by the time of the 1990 Federal Election Inquiry when the Joint Standing Committee on Electoral Matters ('JSCEM') voiced its concerns about 'misleading and deceptive publications' throughout the election campaign and the 'casual flaunting of the Act with the production of such misleading documents' (JSCEM, 1990: 42). This was despite the fact that a parallel committee, albeit with a different membership, had repealed and repudiated a possible remedy six years prior. The inquiry recommended that penalties be increased in s 329(1) (the offence previously contained in s 161(1)), which prohibited misleading electors in relation to 'the casting of their vote'. But, as *Evans* highlighted, such a provision could only apply to material that misled electors procedurally in the 'preference-expression' phase of the election, rather than the 'preference-formation' phase.

The issue of TIPA laws was a particular focus of concern in the Inquiry into the Conduct of the 1993 Federal Election. The inquiry received numerous submissions around TIPA provisions, although 'none provided an argument to convince a majority of the Committee that legislation would be more workable than when [the provision] was repealed in 1984'. The Committee again voiced concerns about undermining the impartiality of the AEC, and echoed the view that '[v]oters … remain the most appropriate arbiters of the worth of political claims' (JSCEM, 1994: 107–109). The Australian Democrats members of the Committee dissented, pointing to the double standard between commercial and political advertising, in which parliament happily regulated the former but displayed consistent hesitancy in regulating the latter. Notably, the dissenters lauded the South Australian provision passed in 1983 as 'very effective' and a worthwhile federal model (JSCEM, 1994: 164).

In 1995 the Australian Democrats moved an amendment to the Electoral and Referendum Amendment Bill 1995 to reinstate the offence

previously contained in s 161(2), however the bill did not pass the House and lapsed when parliament was dissolved for the 1996 election.

Three years later the JSCEM's inquiry into the 1996 election encountered support for TIPA laws. Throughout the 1996 election the AEC had received complaints from candidates who assumed that s 329(1) prohibited false or misleading 'preference-formation' advertisements, but, once again, in light of *Evans*, this was a misapprehension.

The Committee also noted that a provision akin to the previous s 161(2) could possibly not be appropriately adapted to the *Australian Constitution* after the implied freedom of political communication had emerged in 1992. The inquiry considered several ways to curtail false political advertising. The first was regulation akin to that in the *Trade Practices Act 1974* (Cth), the second was to emulate South Australia's regime under s 113 of the *Electoral Act* 1985 (SA) and the third was to reinstate the short-lived Commonwealth law. To the Committee, the South Australian provision was a superior option to reinstating s 161(2) of the Commonwealth law. The South Australian provision was confined to statements of fact and had recently withstood Constitutional challenge in *Cameron*. The Committee commented, in passing, that '[a] version of the South Australian sanction should be introduced into the Commonwealth Electoral Act' (JSCEM, 1997: 83) and recommended the establishment of an *Electoral Complaints Authority* to administer the provision. The Committee envisioned an Electoral Complaints Authority as a neutral agency that could increase in size as the election approached, and would act as a bulwark against the perception that the AEC was politically active. The inquiry eventually recommended that 'the *Electoral Act* … be amended to prohibit, during election periods, "misleading statements of fact" in electoral advertisements published by any means' (JSCEM, 1997: 85). The Government did not support this recommendation in their response, deferring to the reasoning of the 1984 Committee and commenting that legislation 'would be difficult to enforce and could be open to challenge' (Australian Government, 1998).

Following the Government's commitment to not introducing TIPA legislation after the 1996 inquiry, the 1998 election inquiry included a terse and rather dismissive discussion of TIPA laws. It again noted the comparative success of the South Australia regime, but also noted the AEC's insistence in their submission that 'any regulation of the 'truth' of political debate would be unwise and unworkable' (JSCEM, 2000: 43). The inquiry into the 2001 election embodied a similar discussion,

also concluding that TIPA laws would be 'unwise and unworkable', albeit with the Australian Democrats once again dissenting (JSCEM, 2003: 133).

In 2002, the Senate Standing Committee on Finance and Public Administration tabled a report considering several other tabled bills aimed at increased probity in politics. One of the bills, the Electoral Amendment (Political Honesty) Bill 2000 [2002], introduced by Australian Democrat Andrew Murray, attempted to introduce a TIPA provision based on the South Australian model. The Committee accordingly discussed the viability of such a provision in light of the historical federal debate. The report canvassed typical themes in the debate such as the 1983 and 1984 reports, the operation of s 329(1) of the *Electoral Act 1918* (Cth) considering *Evans*, the potential for a model based on the notion of 'false or misleading' in the *Trade Practices Act 1974* (Cth) and the evolving constraint of the implied freedom of political communication. The report reflected positively upon the operation of the South Australian provision, particularly in light of its affirmed constitutionality in *Cameron* and conceded that greater control of advertising was necessary for electoral and informational integrity. However, the Committee opted to not recommend passage of the TIPA provision contained in the Bill, citing concerns about endangering the impartiality of the courts and the AEC, and concluding that 'in its current form it does not present an effective or workable solution to prevent dishonest political advertising' (Senate Standing Committee on Finance and Public Administration, 2002: 93).

The 2004 federal election inquiry again traversed typical concerns with this type of legislation, particularly concerning appropriate arbitration mechanisms. The inquiry concluded that TIPA legislation akin to South Australia's would risk violating the implied freedom of political communication and that civil proceedings would be preferable to deal with false campaign statements (JSCEM, , 2005: 83).

Between 2004 and 2019, federal considerations of TIPA were few and far in between. Following the hung parliament at the 2010 federal election, the Australian Greens' agreement with the ALP stipulated that the parties would work together to 'create a 'truth in advertising' offence in the Commonwealth Electoral Act', although nothing came of it (Rodgers, 2010). George Williams' largely overlooked submission to the 2016 federal election inquiry canvassed the state of play around TIPA and was particularly attentive to the South Australian model. While granting that TIPA laws could be both 'constitutionally valid and enforceable', Williams

did not endorse the passage of such laws and concluded that, if enacted, would likely need to be constructed in narrow terms and would 'serve little more than symbolic purpose' (Williams, 2016: 4).

In 2019 the federal election inquiry saw a marked change in direction from the 15 preceding years when the idea of TIPA laws was routinely dismissed. Multiple submissions from private individuals, academics, industry associations, political parties and thinktanks all expressed their concern at the volume of apparently misleading advertisements throughout the 2019 campaign. Professor Colleen Lewis of the Australian National University recommended that the South Australian regime be transplanted federally. This was seconded by the Centre for Public Integrity and the Federal Australian Greens and supported by the then-recently released report on TIPA laws by the Australia Institute . George Williams, sceptical in 2016, had changed tack: 'I think there are enough extreme cases … to suggest that we do now need something like this' (JSCEM, 2020: 78). By contrast, media industry associations expressed dismay in their submissions at the potentially onerous burden of scrutinising the 'truth' of advertisements (JSCEM, 2020: 78–80).

Notably, there was little agreement in the submissions on an appropriate arbiter for TIPA laws . Luke Beck submitted that, while imperfect, the ACCC would be best positioned to administer TIPA laws . The ACCC responded that this would be a 'terrible idea' and that the regulation of political advertising 'should be done by people who are in that sort of arena' (JSCEM, 2020: 82). The Australian Greens espoused support for informal 'fact-checking' services such as RMIT/ABC Fact Check. Free TV and SBS Australia argued that it was inappropriate that they be expected to determine the veracity of third party advertising, and this sentiment was supported by the News and Media Research Centre of the University of Canberra. The AEC expressed alarm at the prospect of being tasked with scrutinising election advertising, claiming it would 'lead to accusations of bias' and 'lead us … into a dark place' (JSCEM, 2020: 84). George Williams, in conceding that TIPA laws might be warranted, recommended an independent non-electoral body to oversee the scheme in order to obviate the politicisation of electoral commissions.

Despite many reputable voices recommending TIPA laws in some form or another, the Committee leveraged the relatively trivial disagreements about administration of the provision to wholly reject it. Invoking familiar bromides about the effectiveness of market forces and the collective wisdom of the electorate, the Committee concluded that 'the best

arbiter of truth in election campaigns is an engaged electorate, rather than another well-funded quango' (JSCEM, 2020: 91).

The ALP's 2019 campaign review also recommended that TIPA legislation based on the South Australian model be 'investigated and pursued in the Australian Parliament' (Emerson & Weatherill, 2019: 64). This general recommendation was carried through to the ALP's 2021 National Platform in which they claimed they would introduce TIPA laws to enhance the transparency of the electoral process and the integrity of the electoral system (Australian Labor Party, 2021: 71).

Renewed interest in TIPA laws from 2019 was seen both in the volume of submissions to the 2019 election inquiry, as well in the campaign rhetoric of candidates throughout the election. Zali Steggall notably defeated former Prime Minister Tony Abbott in the seat of Warringah campaigning on a 'honest politics' platform, a pillar of which was a promise to pursue TIPA legislation. Steggall and Liberal MP Jason Falinski made a joint submission to the 2019 election inquiry in which they reiterated their concerns at the volume of false information disseminated at election time and emphasised the necessity and practicability of TIPA legislation at the federal level (Falinski & Steggall, 2019).

Consistent with her election promise, Steggall has drafted the provision she tabled in the parliament as the Commonwealth Electoral Amendment (Stop the Lies) Bill in October 2021. The laws stipulated in Steggall's Bill are modelled on the South Australian legislation, drawing on initial research conducted by the authors of this monograph but with the addition of several 'modernising' clauses. It expands the scope of the offence to encompass imitations and 'deep fakes' which seek to affect the election result via negative, deceptive and often digitally aided impersonations of rival candidates. Unlike the South Australian law, the offence in Steggall's proposed law has a lower threshold. It punishes statements which are misleading *or* deceptive, rather than those which are misleading *and* deceptive. Steggall's Bill also encompasses statements of fact which are *likely* to be misleading *or* deceptive. The proposed law allows 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 the process of the Court'. 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.

At the time of writing (December 2021) the bill is before the House of Representatives.

Historically, the TIPA debate has not been restricted to the Commonwealth. States and territories have often contemplated, and sometimes even passed, TIPA laws. While unsuccessful, Queensland and Victoria's inquiries into TIPA laws have contributed significantly to the broader discussion. Addressing and understanding the respective inquiries' concerns, such as we aim to do here, is of vital importance in devising a more operable, effective and constitutional TIPA regime.

Queensland

Until the ACT's rapid and relatively undeliberated passage of TIPA laws, Queensland was the jurisdiction that came closest to passing its own provision, having recommended a near 'transplant' of the South Australian provision into its electoral machinery in 1996. A striking feature of the Queensland debates is their bipartisanship; TIPA laws have been considered and often supported, at one time or another, by both major parties.

Pre-1996 Developments

In 1991, the reports of Queensland's Electoral and Administrative Review Commission on the *Elections Act 1983* (Qld) from 1983 to 1991 laid the foundation for Queensland's electoral overhaul as embodied in the *Electoral Act 1992* (Qld). Regarding TIPA, the first report considered legislative controls on political advertising and recommended that controls be established to prevent misleading or false advertising affecting parties and candidates (Queensland Electoral and Administrative Review Commission, 1991).

This recommendation was disregarded in the initial drafting of the *Electoral Act 1992* (Qld). Section 163(1) (now s 185(1)) contained an offence relating to misleading voters; the language used related to matters intended to 'mislead an elector in relation to the way of voting at the election' and would obviously be interpreted in light of *Evans*. Section 163(2) (now s 185(2)) contained an offence akin to the UK provision which prohibited 'knowingly publish[ing] a false statement of fact regarding the personal character or conduct of the candidate'. Section 163(2) has not been litigated since its passage in 1992.

In 1995 the Deputy Leader of the Liberal Party, Denver Beanland, tabled the Electoral Amendment Bill 1995 (Qld) which sought to add an offence modelled on the 1983 Commonwealth provision prior to its repeal. The main difference was that the offence punished statements that were untrue *or* misleading or deceptive, a lower threshold than the 1983 provision which required that both elements be present. The bill applied a higher penalty than the Commonwealth, was uniform between individuals and body corporates, and provided no statutory defence, with only the common law defence of reasonable and honest mistake of fact being available. The bill lapsed upon the prorogation of parliament in 1996 (see Legal, Constitutional and Administrative Review Committee, 1996: 17–18).

The 1996 Report

The most serious consideration of the matter came in the Queensland Legal, Constitutional and Administrative Review Committee's ('LCARC') report into TIPA in 1996. After the *Cameron* decision affirmed the constitutionality of the South Australian provision in 1995, the 1996 Queensland report gave serious consideration to a 'transplant' of the South Australian law into Queensland's electoral act (LCARC, 1996).

The Committee saw TIPA legislation as both workable and desirable, arguing that candidates and parties 'should *not* be able to make untrue or misleading statements about matters of fact in order to falsely justify or bolster their opinions or predictions'; further, legislators cannot 'shirk their responsibility' by claiming the issue is 'too hard to administer' (LCARC, 1996: 28). In considering the parallel laws governing advertising in the then-*Trade Practices Act 1974* (Cth), the Committee posed the question: 'Parliament demands that the commercial community not mislead consumers. How then can Parliament not demand that candidates seeking election to Parliament not mislead electors?' (LCARC, 1996: 28). Their sole recommendation on TIPA laws read: 'The Committee recommends that [TIPA] legislation be introduced in Queensland' (LCARC, 1996: 29).

The Committee then deliberated on more peripheral TIPA concerns. At the time of its publication the implied right of political communication had been found, but no applicable test had been developed in the case law. The Committee considered George Williams submission that TIPA laws 'should only impede free speech to the minimum amount necessary to

meet a competing public policy interest' (LCARC, 1996: 29) as a possible test to guide the development of the provision. With this in mind, the Committee proposed that their model, like the South Australian provision per *Cameron*, would be a 'reasonable, proportionate interference with the right of free speech and thus acceptable in terms of the recent decisions of the High Court' (LCARC, 1996: 29).

The Committee was then tasked with articulating the form their TIPA provision was to take. The four options considered were along the lines of previous experiments: the former s 161(2) of the *Electoral Act 1918* (Cth); s 113 of the *Electoral Act 1985* (SA); s 52 of the *Trade Practices Act 1974* (Cth); and Denver Beanland's previously tabled 1995 bill in Queensland. The South Australian provision was chosen as the most suitable due to its constitutional validity and 'more objectively ascertainable standard' (LCARC, 1996: 30) as it did not boldly attempt to prohibit statements that were purportedly 'untrue', but only targeted statements that were inaccurate and misleading to a 'material extent'.

On penalties, the Committee recommended pecuniary penalties, with bodies corporate paying five times more than natural persons. Other remedies, such as injunctions, declarations of falsity and 'fresh elections' were also recommended to be applied at the court's discretion. On defences, the committee recommended the South Australian statutory defence and acknowledged that the common law defence of honest and reasonable mistake of fact would be available and desirable.

Finally, on the ever-contentious matter of the appropriate adjudicator, the Committee opted for the courts. Citing the Queensland Electoral Commission's hesitancy in their submission, the cost of an independent tribunal and the obvious unsuitability of industry self-regulation; the Committee saw the courts as the least inappropriate authority.

The proposed provision would therefore look almost identical to the South Australian provision in most respects. While both the South Australian and the proposed Queensland provision would contain pecuniary penalties in which a body corporate would pay five times more than a natural person, these penalties would differ in absolute value as Queensland's would be expressed in penalty units. As the South Australian Electoral Commissioner was only given power to request a retraction after the *Electoral Act 1985* (SA) was amended in 1997, the proposed model of arbitration suggested by the Queensland Committee in 1996 would have

been exactly the same as South Australia's at the time, with the courts having original jurisdiction over electoral complaints.

Upon receiving the Committee's report and subsequent endorsement of TIPA laws, Premier Robert Borbidge anticipated that the regime would 'improve political discourse in Queensland' (Queensland Government, 1998). Attorney-General Denver Beanland, who had initially tabled the 1995 bill, saw the recommendations as uncontroversial and envisaged bipartisan support (although in a later letter he warned of enforcement difficulties and the apparent risk of polarisation). Despite early enthusiasm and declarations of support from the National Party and Australian Democrats, the laws were never tabled or voted on.

Post-1996 Developments

Concomitant with the resurgence in interest in TIPA legislation around Australia, Queensland has begun to reconsider the possibility of TIPA laws. For example, in 2013 the Attorney-General's Department released its 'Electoral Reform Discussion Paper' in which it addressed the TIPA issue. In canvassing international, federal and state regimes (in particular South Australia's), the report distilled two fundamental questions for consultation in Queensland: should such laws be passed? And should such laws extend beyond advertisements to other inaccurate or misleading election statements? These questions were not addressed by the Newman Government in their term but prompted a response from Queensland Labor under then-opposition leader Anastasia Palaszczuk. Labor responded that the political impact of false statements is 'incontestable' and that they were therefore 'supporting of legislation … along similar lines to the successful model used in South Australia' (Queensland Labor, 2013: 13). Incumbent since 2015, the Palaszczuk government is yet to pass the laws they so enthusiastically supported when in opposition.

In June 2021, Labor rank-and-file members attending the Queensland Labor Conference urged the Queensland government to investigate laws regulating dishonest or inaccurate political advertising as a response to events like the 'death taxes' campaign promulgated by the Liberal Party at the 2019 Federal Election. Queensland Labor Attorney-General Shannon Fentiman agreed that the 'integrity of our electoral system is so important' and that '[e]nsuring voters are informed when they go to the

polling booth needs a national approach across all jurisdictions and elections'. However, she did not commit to pursuing the matter further. In December 2020 a spokesperson for the government reported that Labor had no plans to introduce any such new laws. Fiona Simpson, the LNP's spokesperson for integrity in government, said that the Opposition was keen for elections to be free of false campaign statements: 'Voters should be presented with the facts to make an informed decision when they cast their vote' (Caldwell, 2021).

Victoria

There are two Parliamentary Committee reports by the Electoral Matters Committee ('EMC') that are of interest in the Victorian TIPA debate: the 2010 'Inquiry into the Provisions of the *Electoral Act 2002* (Vic) Relating to Misleading or Deceptive Political Advertising' and the 2021 'Inquiry Into the Impact of Social Media on Elections and Electoral Administration'.

The 2010 Report

The 2010 report was commissioned following a complaint about a pamphlet authorised by the ALP during the 2008 Kororoit by-election. The advertisement targeted an opposing independent candidate, Les Twentyman, and claimed that: 'A vote for Les Twentyman is a vote for the Liberals' (EMC, 2010: 1). Les Twentyman's campaign lodged the complaint, asserting that the pamphlet was misleading and/or deceptive and therefore contravened section 84(1) of the *Electoral Act 2002* (Vic) (which we identify above as only a 'pseudo' TIPA provision). While accepting that it was misleading, the Victorian Electoral Commission ('VEC') deemed the claim insufficient to breach the provision which stipulated that:

> (2) A person must not during the relevant period—
> (a) print, publish or distribute; or
> (b) cause, permit or authorise to be printed, published or distributed any matter or thing that is likely to mislead or deceive an elector in relation to the casting of the vote of the elector.

As would be expected, this was interpreted by the Commission under the precedent established in *Evans*. As the advertisement did not mislead with respect to the physical casting of the vote, it did not violate the provision. Given this interpretation and its seemingly tacit endorsement of false campaign statements that did not advert to the physical casting of a vote, the Committee sought to inquire into the future operability of existing provisions, and the proper direction for future provisions relating to false and misleading political advertising in Victoria. The inquiry was recommended by the Victorian Electoral Commissioner upon receipt of the complaint, based on his view that misleading statements had contributed to 'an undesirable trend for candidates to take advantage or build on community misunderstandings of preferential voting with confusing statements' (EMC, 2010: 1).

As with other cognate inquiries, the report canvassed TIPA laws in Australia and elsewhere, and paid special attention to the South Australian provision. Unlike the Queensland inquiry in 1996, the Victorian inquiry generally disapproved of the South Australian provision. The Committee's attitude was based upon submissions and comments made by Steve Tully, who had served as South Australian Electoral Commissioner between 1997 and 2005 but was then-incumbent as Victorian Electoral Commissioner. Tully commented that, due to s 113 in South Australia, '[e]verybody wanted to complain about everything' (EMC, 2010: 53) and that the provision had proven an onerous burden during his tenure. Implying that s 113's complaints process had been co-opted by the political class as merely another campaign tool Tully answered in the affirmative to Robin Scott's question: 'Could it be that where there is a system of complaint that is available, that process itself becomes part of the political process?' (EMC, 2010: 54).

Professor Brian Costar, then coordinator of the Democratic Audit of Australia, provided a two-pronged criticism of the South Australian law which was cited in the report. Costar's first criticism was that South Australia's law 'involved the [E]lectoral [C]ommissioner making judgements about election material' and therefore purportedly impugned the impartiality of the office. Costar's second criticism centred on what he regarded as the legally blurry distinction between fact and opinion that any successful TIPA regime would have to navigate (EMC, 2010: 54).

The Committee also cited Kay Mousley, then-South Australian Electoral Commissioner, who had commented in 2009 that she was 'of the

strong opinion that if the onerous burden of determining whether electoral material was misleading to a material extent was removed from legislation, the office would be in a better position to monitor the content of electoral material' (Electoral Commission of South Australia, 2009: 22). The comment highlighted difficulties in the determination of 'material extent' as it relates to s 113 of the *Electoral Act 1985* (SA), which we discuss later in Chapter 9.

The Committee noted that although 'members of parliament have a duty and responsibility as elected representatives to uphold values of honesty and integrity', they feared that 'expanded measures to regulate misleading or deceptive political advertising would have implementation difficulties and increase the risk of a more litigious approach to elections' (EMC, 2010: 157–158). The Committee concluded that regulating political advertising would be 'potentially unworkable and could have unintended consequences'. It ended the matter by invoking a familiar, ingenuous trope: 'the highest authority to test [TIPA] is the electors' (EMC, 2010: 159). As of 2021, the contemplated section of the *Electoral Act 2002* (Vic) has not been changed.

The 2021 Report

In September 2021 the Victorian Electoral Matters Committee released its 'Inquiry Into the Impact of Social Media on Victorian Elections and Victoria's Electoral Administration'. The ambitious 300-page report tackled many pressing facets of electoral administration and considered TIPA laws as a possible remedy to slow the spread of inaccurate information. The inquiry again considered the South Australian model as the archetypical TIPA provision and then sought to discuss its efficacy as well as possible improvements for an ideal regime.

The inquiry received a submission from Associate Professor Luke Beck, which posited several changes to the South Australian model as the basis for a Victorian model. Beck suggested bringing political advertising regulation in line with commercial advertising regulation, and the use of the words 'misleading or deceptive' in the offence to harmonise the understanding of the provision with existing consumer law (JSCEM, 2020). To this end, Beck also recommended that civil rather than criminal penalties apply, a sentiment with which we strongly disagree (see below). The Committee rightly observed that TIPA provisions are, and ought

to be, quite limited in their scope, but saw them as a powerful tool in combatting authorised false statements of fact.

Based on submissions received, the Inquiry was ambivalent about the efficacy of the South Australian regime and, in turn, the suitability of a similar regime for Victoria. In some submissions, the South Australian model was hailed as a powerful catalyst for change in political culture and a vehicle for protecting truthful democratic discourse but was heavily criticised by the VEC . The VEC told the Committee that s 113 in South Australia had 'proved problematic in many respects' (VEC, 2020: 13). They cited concerns such as vexatious litigation, enforcement difficulties and the administrative and legal burden of demonstrating 'material extent'. But its dominating concern was being designated as the 'arbiter' of political 'truth': 'The VEC is not an authority on the myriad of issues that arise in an election, and it would be an overreach for the VEC to purport to determine the truth in such issues' (VEC, 2020: 14). On the other hand, Mick Sherry, current South Australian Electoral Commissioner, reassured the Committee that 'in a broad sense the legislation does prevent misleading advertising heavily influencing elections here in South Australia' (EMC, 2021: 2).

The Committee reflected on its previous conclusion that TIPA laws were inappropriate for Victoria, and in doing so, acknowledged that the media and electoral landscapes had changed significantly in the ten intervening years. The remedies suggested in the 2010 report were primarily focused on transparency requirements for advertisers, but the 2021 report commented that 'a lot has changed since 2010 in terms of electoral advertising and … transparency is not enough'. The Inquiry saw that traditional media institutions which had previously been tasked with safeguarding electoral truth were 'no longer as well resourced' and had 'less capacity to interrogate claims made at election time' (EMC, 2021: 120).

Much like George Williams' change of heart between 2016 and 2019, the Victorian inquiry conceded that the changing media landscape meant that 'legislation specifically targeting purported statements of fact in electoral advertising can play a helpful role as one part of a strategy to maintain and strengthen Victorian democracy' (EMC, 2021: 120). The Government's response is expected to be tabled some time in 2022.

Australian Capital Territory

Aside from South Australia, the Australian Capital Territory is the only other Australian setting with robust TIPA legislation. The law was passed unanimously in September 2020 as s 297A of the *Electoral Act 1992* (ACT) and came into force on 1 July 2021. Caroline Le Couteur MLA moved the amendment and explicitly based it on the South Australian provision. The offence and defence are found in sub-sections 1 and 2, respectively. The offence reads:

> (1) A person commits an offence if—
>
> (a) the person disseminates, or authorises the dissemination of, an advertisement containing electoral matters and
> (b) the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent
>
> Maximum penalty: 50 penalty units.
>
> (2) It is a defence to a prosecution for an offence against subsection (1) if it is proved by the defendant that the defendant—
>
> (a) took no part in deciding the content of the advertisement and
> (b) could not reasonably be expected to have known that the statement was inaccurate and misleading.

Substantively, the legislation is almost identical to the South Australian provision, however there are two critical ways in which it is different and, arguably, better. First, the maximum penalty that can be applied to a person is AUD8000 which is AUD3000 more than in South Australia. For bodies corporate, the maximum penalty in the ACT is AUD40,500 as opposed to AUD25,000 in South Australia. In terms of efficacy, the larger penalty is probably justified as sufficient to deter political *parties* because it is less easily absorbed as a campaign expense for the purposes of gaining an advantage.

The second difference—and possible advantage—of sub-s (1)(a) of the ACT legislation is that it is not *intended* to apply to publishers. Caroline Le Couteur MLA made a supplementary explanatory statement that the 'amendment only applies to electoral material of a kind that is already

required to be authorised … the offence is intended to apply only to people or political entities who post an advertisement, not the publisher' (ACT Legislative Assembly, 2020: 3). Although this supplementary statement has not been formally endorsed by the Assembly, it clarifies the intention of Ms. Le Couteur in moving this legislative provision, namely, that only the author, not the publisher, should be subject to prosecution. This sentiment is consistent with our own view that it is inappropriate and imprudent, given the constraints imposed by the implied freedom of political communication, to penalise *publishers* of inaccurate and misleading political advertisements.

However, there is still some ambiguity around the wording of the legislation because it does not reflect the meaning of the explanatory statement made by Ms Le Couteur. The ACT legislation targets a person who *disseminates or authorises the dissemination* of electoral material. 'Disseminate', as defined in the act, includes the printing, publishing, distribution and production of electoral matters (*Electoral Act 1992* (ACT) Dictionary: 305). Therefore, there is nothing in the wording of s 297A(1) that precludes the potential liability of publishers.

Both prior to and since the passage of the provision, the ACT Electoral Commission (Elections ACT) has voiced its concerns about being designated the arbiter and regulator of s 297A. With apparent prescience, the Commission made a submission to the 2016 ACT Election Inquiry recommending 'against the introduction of legislation in the ACT aimed at regulating truth in political advertising' (Elections ACT 2017: 2). The Commission opined that while 'truth should be at the heart of an election campaign', the administrative burden would be too great should it be made responsible and suggested that another independent body should administer the provision (Elections ACT, 2017: 8). The submission cited cynical injunctions, vexatious litigations, lack of legislative scope and current protections such as advertisement authorisations, as sufficient reasons to reject TIPA laws (Elections ACT, 2017: 8–11).

Despite the provision not being functional (although it had been passed) at the ACT election held between September and October 2020, TIPA was a prominent theme in the Inquiry into the 2020 ACT Election and the Electoral Act. Submissions were received both in support of and in opposition to the still dormant provision, with Elections ACT again recommending the empowerment of an independent body to determine the veracity of claims. Despite Elections ACT's request that their power of determination be transferred, they also rather unhelpfully observed

that truth determinations are 'the individuals' responsibilities, as individual electors and voters' (Elections ACT: 51). In light of the Elections ACT submission, the Committee requested that the commencement of the provision be delayed. Its request was denied. Section 297A similarly featured as a prominent topic in Elections ACT's 2020 election report, with the Commission again recommending that power be transferred to an independent body such as an 'Electoral Complaints Authority' (Elections ACT, 2021: 54–55). Despite its evident reluctance, at the time of writing (December 2021) Elections ACT remains the statutory arbiter of s 297(a).

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CHAPTER 8

South Australia's Experience

Introductory Comments

We now explore in detail how s 113 in South Australia has operated and the extent to which it has been successful in managing the problem of false election information. We pay particular attention to its constitutionality with respect to a series of test cases, thereby also providing a partial history of how the implied freedom of communication under the *Australian Constitution* has evolved. We then propose means by which s 113 could be enhanced to future-proof it against constitutional challenge.

Section 113 of the *Electoral Act 1985* (SA) states that:

> A person who authorises, causes or permits the publication of an electoral advertisement (*an advertiser*) is guilty of an offence if the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.
>
> Maximum penalty:
>
> (a) if the offender is a natural person—$5000;
> (b) if the offender is a body corporate—$25,000.

This provision applies to an 'electoral advertisement' defined in the Act as an advertisement containing electoral matter, meaning matter 'calculated to affect the result of the election' (*Electoral Act 1985* (SA) s 4). An electoral advertisement can be published by any means, but must not be distributed unless the name and address of the author of the

L. Hill et al., *How and Why to Regulate False Political Advertising in Australia*, https://doi.org/10.1007/978-981-19-2123-0_8

advertisement, or the person who authorised its publication, appears at the end (*Electoral Act 1985* (SA) s 112(1)). This definition enables s 113 to apply to a wide range of advertising mediums such as television, radio, corflute board and social media posts without applying to political communications in the form of informal discussion and debate.

Where a person or body corporate publishes a purported statement of fact that is inaccurate and misleading to a material extent, an elector can submit a complaint to the Electoral Commission of South Australia ('ECSA'). Under s 113(4), the Electoral Commissioner is empowered to act on these complaints (since s 113 was amended in 1997) by requesting the advertiser to do one or more of the following:

(a) withdraw the advertisement from further publication;
(b) publish a retraction in specified terms and a specified manner and form.

Requests for withdrawals of misleading political advertising made by the Electoral Commissioner are generally respected (Browne, 2019: 7). However, if a request is not acted upon by the advertiser, the Electoral Commissioner can make an application for enforcement in the Court of Disputed Returns which sits within the Supreme Court of South Australia. If the Court is satisfied beyond reasonable doubt that the advertisement is inaccurate and misleading to a material extent, the Court, under s 5, may order the advertiser to withdraw the advertisement from further publication and/or publish a retraction in the terms, manner and form specified by the Commissioner.

Section 113 in Historical Context

South Australian electoral law was overhauled by the passage of the *Electoral Act 1985* (SA) and associated repeal of the *Electoral Act 1929* (SA). Greg Crafter, then member for Norwood, clarified the motivation and inspiration for the overhaul in the Bill's second reading speech in May 1985. In it, he lambasted the existing electoral infrastructure of South Australia, describing it as an 'unsatisfactory pastiche of measures that lie scattered throughout Statute books and other sources'. Modern innovations in the 1929 Act were clouded by the 'vestigial remains of long

forgotten practices'; a view shared by others. The Electoral Commissioner was quoted in the speech as observing that 'the present system is extremely fragile and not well equipped to cope with late twentieth century pressures' (South Australian House of Assembly, 1985: 4252). By the time of passage of the 1985 Act, the 1929 Act had been amended 22 separate times and appeared to many to be no longer fit for purpose. It was from this overhaul that section 113 emerged.

Pursuant to the criticism, the overhaul was intended to 'affect a number of long overdue reforms'. The Bill further '[sought] to be simple and straightforward—simple to read and understand, simple to administer and simple to comply with'. The Government's self-proclaimed motivation for the overhaul was to put 'the future of the State exactly where it should be—in the hands of the people' (South Australian House of Assembly, 1985: 4252). The Government cited several sources calling for large scale revision including the report of the Electoral Commissioner on the conduct of the 1982 election and the electoral law policy platform of the ALP at the 1982 election. It also adverted positively to revisions to the *Electoral Act 1918* (Cth) following the reforms of the JSCER in 1983 and 1984—including revisions which affected political advertising.

The addition of the modern section 113 in 1985 would have been primarily motivated by the recent changes to the *Electoral Act 1918* (Cth) as well as the then-recent case of *Evans*. As we have outlined previously, the Commonwealth Parliament passed a short-lived and poorly drafted TIPA law in 1983, and hastily repealed it in 1984. In addition to this, existing statutory protections about misleading voters had been blunted by *Evans* to be confined to the mechanical act of 'casting one's vote'. The defunct Commonwealth TIPA law (*Electoral Act 1918* (Cth) s 161(2)) had existed *in addition* to the law that prohibited misleading voters in relation to the casting of their vote (*Electoral Act 1918* (Cth) s 161(1))—suggesting that the Parliament saw preference formation and expression as distinct, and that two distinct provisions were required to regulate them. South Australia followed this line of reasoning in devising the *Electoral Act 1985* (SA) and created two distinct offences targeted at protecting the integrity of processes around both preference expression *and* preference formation.

The South Australian legislature was clearly cognisant of the *Evans* decision in devising the modern section 113. Section 113 was and remains concerned with misleading advertising (material that impacts preference formation), whereas section 126 of the same Act prohibits 'advocacy of

forms of voting inconsistent with [the] Act' (material which affects preference expression). Prior to *Evans*, some legislators may have assumed that provisions prohibiting misleading electors in relation to the 'casting of their vote' were sufficiently broad to cover statements relating to both preference formation and preference expression whereas, as we have explained, the judgement in *Evans* meant that it only covered the latter. The splitting of South Australia's erstwhile pseudo-TIPA provision in the 1929 Act into the two distinct provisions in the 1985 Act (s 113 and s 126) suggests that the South Australian legislature wanted to avoid the narrow interpretation later found in *Evans* and to effectively encompass the all-important preference formation stage neglected under 'pseudo' provisions. Otherwise, any 'pseudo' TIPA law limited to the 'casting of one's vote' would be immediately interpreted as solely relating to the mechanical *act* of voting.

This arrangement is congruent with the short-lived Commonwealth provision in which false statements affecting expression were covered by s 161(1), and false statements affecting formation by s 161(2). The 'tightening' of the South Australian law therefore appears to be inspired by a rejection of the *Evans* interpretation and a careful study of the Commonwealth experience with TIPA throughout 1983/1984.

From a close reading of s 113, it is evident that it was designed to ameliorate concerns that emerged in the 1984 JSCER second report and which motivated the repeal of the Commonwealth provision. Section 113 is constructed in the spirit of the Commonwealth provision but makes notable and prudent changes. For example, s 113:

- Does not purport to capture 'untrue' statements, but rather those that are 'inaccurate and misleading'
- Is designed to capture 'advertisements' rather than all statements (which the Commonwealth provision seems to have sought to achieve)
- Captures only advertisements that are purported statements of fact, rather than those of comment or opinion
- And is qualified by the condition that the false information affected an election result to a 'material extent' in order to discourage trivial and vexatious litigation.

Each of the differences between s 113 of the *Electoral Act 1985* (SA) and the previous s 161(2) of the *Electoral Act 1918* (Cth) represents a response to criticisms of the latter made in the second JSCER Report in 1984 which resulted in the repeal of Australia's short-lived federal TIPA provision.

As a democratic innovation, South Australia's s 113 therefore seems to have emerged from the ashes of a much maligned and transient Commonwealth provision. Questions of s 113's constitutionality were not relevant during its original passage as the implied freedom of political communication would not be established until 1992. However, since 1992 such questions have been posed and litigated and they continue to shadow its operation. This is a major issue as proposals for TIPA-type provisions are routinely taken off the table due to the mistaken belief that they are incapable of passing constitutional muster.

Constitutionality of s 113

Section 113 of the *Electoral Act 1985* (SA) has survived constitutional challenge based on the implied freedom of political communication in the *Australian Constitution*. In 1995 the Supreme Court of South Australia unanimously held in *Cameron* that s 113 is constitutional. That case concerned an electoral advertisement aired on Channel 10 which contained the following statement: 'The fact is the Brown Liberals have stated that any school with less than three hundred students will be subject to closure. We have 363 schools with less than 300 students' (*Cameron*: 240). The advertisement paraphrased a statement made in a radio interview by Mr Lucas, a spokesman for the Liberal Party, who said:

> [W]e've indicated here in South Australia that we're certainly not going to be closing two hundred schools in South Australia. If there are a small number of schools that have got very small numbers of students, well then under both Governments I guess there will continue to be a small program of school closures, but we're not going to be looking at schools with three hundred students in them. (*Cameron*: 240)

Among other grounds, the defendant submitted that the offence created by s 113 breached the implied freedom of political communication in the *Australian Constitution*. Justice Olsson, with Bollen J concurring, found that the s 113 offence was constitutional. The Court held

that the limitation imposed by s 113 of the *Electoral Act 1985* (SA) on the implied freedom of political communication strikes the appropriate balance and is 'manifestly proportionate to the legitimate object of ensuring that what is represented as factual material published in electoral advertisements is accurate and not misleading' (*Cameron*: 248 (Ollson J)). Lander J reasoned that, while the provision 'does interfere with the right of freedom of speech, it does so for the purpose of protecting the electors from being misled and deceived. The Act, I think, attempts to balance the concept of freedom of speech and the right to be properly informed' (*Cameron*: 248). The Court evidently regarded well-designed TIPA legislation as compatible with the maintenance of the constitutionally prescribed system of representative government in Australia.

Nevertheless, there is still a lack of clarity in *Cameron* regarding the appropriate way to assess the compatibility of s 113 with the *Constitution*, per Lander J: 'Different members of the High Court have suggested tests to determine the validity of a provision that does interfere, by regulation, with the freedom of political discourse' (*Cameron*: 256). Despite this, Lander J affirmed s 113's constitutionality on all the then-possible tests: 'I think on any of the tests proposed, that this legislation would be valid. The legislation … goes no further than is necessary to protect the legitimate interest for which it is designed' (*Cameron*: 257).

While it has already been established that s 113 of the *Electoral Act 1985* (SA) has a legitimate object in ensuring that electors make a free and informed choice when voting, we would suggest that s 113, in its current form, is not as appropriate and adapted as it ideally could be because it places a burden on publishers. In s 113, '[a] person who authorises, causes or permits the publication of an electoral advertisement (an 'advertiser')' is potentially liable (*Electoral Act 1985* (SA) s 113(2)). This formulation creates the possibility of overlapping liability directed, on the one hand, at the political party authorising the advertisement and, on the other, at the media organisation that publishes the advertisement (Williams, 2016). If the liability on publishers has the effect of discouraging political advertising in general, then s 113 may not be appropriate and adapted to serving a legitimate object.

As *Cameron* was decided in 1995, there was no broadly accepted test to apply to determine its compatibility with the implied freedom and therefore its constitutionality. Few cases concerned with the then-fledgling implied freedom had been decided by 1995,[1] all of which

suggested that the right was not absolute and could be reasonably curtailed for motives such as the 'preservation or maintenance of an ordered society under a system of representative democracy and government' (*Cunliffe v Commonwealth* (1994) 182 CLR 272, 300 (Mason CJ)).

The High Court in *Lange v Australian Broadcasting Corporation* ('*Lange*') reaffirmed the implied freedom of political communication as an indispensable incident of representative and responsible government prescribed by the *Constitution* ((1997) 189 CLR 520, 559). That case developed the 'reasonably appropriate and adapted' test for determining whether a law infringes the implied freedom. Subsequently, the test advanced in *Lange* was reformulated in *Coleman v Power*. Structured proportionality was included in the test following the judgement of *McCloy v New South Wales* ('*McCloy*') and revised again in *Brown v Tasmania* ((2017) 261 CLR 328) to the current test which was confirmed in *Clubb v Edwards* ((2019) 267 CLR 171, 186 (Kiefel CJ, Bell and Keane JJ) as:

1. Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
2. If 'yes' to question 1, is the *purpose* of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

The test expressed above demonstrates that the relevant factors for considering the constitutional validity of a law with respect to the implied freedom are: the burden it places on political communication; whether the law has a legitimate purpose; and, whether the measures necessary to fulfil that purpose are proportionate to the burden they impose. While *Cameron* affirmed s 113's compatibility with the *Constitution* in 1995, it is prudent to apply the modified test in *Brown* to evaluate the provision's

compatibility with the implied freedom as it is currently understood by the High Court.

Burden

The first question is whether the 'law effectively burden[s] the freedom in its terms, operation or effect' (*McCloy*: 194 (French CJ, Kiefel, Bell and Keane JJ)). This asks nothing more than whether the law puts 'some limitation on, the making or the content of political communications' (*Monis v The Queen* (2013) 249 CLR 92, 142 (Hayne J)). Section 113 by its terms prohibits misleading and inaccurate political communications and operates to penalise persons who make them. In the case of *Cameron,* Lander J conceded that although s 113 'is directed to a very small class of persons in very narrow circumstances', it is 'a law that does interfere with the freedom of discourse in political matters' (*Cameron*: 254). There is no doubt that the provision burdens the implied freedom, but its effect appears to be modest because it applies to a very limited subset of political communications.

Purpose

The second question is whether the purpose of the law is legitimate in the sense that it is compatible with the maintenance of representative government (*McCloy*: 179). The purpose of s 113 is to protect the fundamental right in a representative democracy of electors to be well informed and not misled or deceived when deciding the direction of their vote. This purpose is of paramount importance to the maintenance of representative government. In *Smith v Oldham* ('*Smith*'), it was stated that '[t]he vote of every elector is a matter of concern to the whole Commonwealth … the voter shall not be led by misrepresentation or concealment of any material circumstance into forming and consequently registering a political judgment' ((1912) 15 CLR 355, 362 (Isaacs J)). Further, Isaacs J affirmed that 'Parliament can forbid and guard against fraudulent misrepresentation' (*Smith*: 362). More recently, Keane J affirmed that the 'protection of the integrity of the electoral process from secret or undue influence is a legitimate end the pursuit of which is compatible with the freedom of political communication' (*Unions NSW v New South Wales* ('*Unions*')

(2013) 252 CLR 530, 579). Consequently, there is no doubt that s 113 has a legitimate purpose.

Proportionality

The final consideration is whether s 113 is reasonably appropriate and adapted to advance its legitimate purpose. This involves a proportionality test to determine if the restriction that the law imposes on the freedom of political communication is justified (*McCloy* (2015) 257 CLR 178 at 179). There are three inquiries to be made: whether the law is (a) *suitable*; (b) *necessary*; and (c) *adequate in its balance*. Despite some dissent, following *McCloy*, a majority of the High Court has consistently reaffirmed that structured proportionality is the accepted approach[2] and it will be applied to s 113 in the analysis below.

A law is *suitable* if there is a rational connection between the purpose of the law and measures adopted to achieve that purpose in the sense that the means for which it provides are capable of realising that purpose (*Comcare v Banerji* (2019) 267 CLR 373). The purpose of s 113 is realised by providing the power to withdraw, retract and order penalties for misleading electoral advertising. These measures have the direct effect of disincentivising and removing information that has the potential to mislead electors.

The law must be *necessary* in that there is no obvious and compelling alternative or reasonably practicable means of achieving the same purpose with a less restrictive effect on the implied freedom. It could be argued that the *Electoral Act 1985* (SA) has an unnecessarily broad definition of 'electoral matter'. Misleading electoral advertising is likely to be most harmful in the weeks prior to an election, therefore the operation of s 113 could be confined to the election period. The problem with this option is that it would detract from the broad purpose of the legislation—to ensure that electors are as well informed as possible throughout the entirety of the election cycle. After all, preference formation happens over a prolonged period of time. A more compelling alternative would be to remove the burden on second-hand publishers of electoral advertisements. Publishers who do not determine the content of the advertisement should not be subject to a pecuniary penalty. Doing so would likely have the effect of discouraging political advertising because of the perceived risk and vetting costs (Renwick & Palese, 2019). The person or body

corporate who formulated and authorised the creation of the advertisement would remain liable. This alternative would be capable of achieving the same purpose if s 113 were amended to remove only the pecuniary penalty on second-hand publishers. This would still empower the Court to order the withdrawal of the advertisement (where possible) and a public retraction to be made.

There is a risk that the law could be invalidated on the third step (*adequate balance*) because s 113 seems to place a greater burden on political communication than previously asserted in *Cameron*. Section 113 is directed at a person who '*permits* the publication of an electoral advertisement' (*Electoral Act 1985* (SA) s 113(2)) (emphasis added) which means that both the candidate and/or political party authorising the advertisement and the media organisation that publishes it could be liable. If publishers bear the burden of determining whether an electoral advertisement breaches s 113 then, by potentially discouraging the publication of political advertising it could have a chilling effect on political communication and be invalidated (Williams, 2016). In other words, s 113 still has the potential to infringe the implied freedom of political communication because the preservation of representative government requires regular and candid media coverage. Consequently, there is a risk that s 113, in its current form, is incompatible with the constitutionally prescribed system of representative government.

Therefore, any ideal-type regime should minimise the liability of publishers to avoid chilling the free flow of information and ideas necessary to inform voters. As George Williams puts it, under '[TIPA] provisions, liability should be limited to the person or organization putting forward the point of view' (Williams 2016: 4).

Notes

1. See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Cunliffe and Another v Commonwealth* (1994) 182 CLR 272.
2. See for example: *Brown v Tasmania* (2017) 261 CLR 328 at 368–370, *Clubb v Edwards* (2019) 267 CLR 171; *Comcare v Banerji* (2016) 267 CLR 373; *LibertyWorks Inc v Commonwealth of Australia* (2021) 95 ALJR 490; *Monis v The Queen* (2013) 249 CLR 92; *Unions NSW v New South Wales* (2019) 264 CLR 595.

Cases

Comcare v Banerji (2019) 267 CLR 373.
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.
McCloy v New South Wales (2015) 257 CLR 178.
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Smith v Oldham (1912) 15 CLR 355.
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CHAPTER 9

Implementation of s 113: Lessons to Adopt, Pitfalls to Avoid and Refinements to Pursue

Introductory Comments

South Australia's s 113 has been in place for over two decades now, therefore it has much to teach us about how to design a viable regime for truth in election advertising. Nevertheless, in our ideal model we offer a number of enhancing modifications to SA's framework, some of which are inspired by practice involving TIPA laws—including their shortcomings—in other common law jurisdictions. In this chapter we focus on the implementation of s 113, in particular on issues associated with: whether the publication of misleading election information should be a civil or criminal matter; timeliness and resources including problems with the investigation process; the notion of 'material extent' and its complications in determining a breach of s 113; avoiding unwanted unintended consequences of TIPA-type legislation; determining the difference between purported statements of fact and opinion; legal defences; and appropriate penalties and regulators. We also offer a number of suggestions to streamline the processing of complaints under s 113.

Implementation of s 113

The implementation of s 113 in South Australian elections has met with widespread support while ECSA has successfully sought withdrawals and retractions of political advertisements that were demonstrably misleading or inaccurate.[1] During and between the six South Australian elections

L. Hill et al., *How and Why to Regulate False Political Advertising in Australia*, https://doi.org/10.1007/978-981-19-2123-0_9

since 1997, ECSA has made at least 27 requests for withdrawal or retraction (Renwick & Palese, 2019). The most recent retraction occurred on 6 July 2021, following a request from the Electoral Commissioner to the leader of the South ALP, Peter Malinauskas. On 17 May 2021 Mr. Malinauskas had shared a link to an InDaily article entitled '"Secret" plans to axe doctors, nurses from Adelaide hospitals', adding the words: 'It is incomprehensible that the Marshall Liberal Government are secretly planning to cut even more doctors and nurses at our hospitals' (ABC News, 2021a). The Electoral Commissioner sought a retraction from Mr. Malinauskas to the effect that the statement was incorrect and that his 'office did not have sufficient evidence to support' it. Mr. Malinauskas promptly complied with the request and posted the retraction to his Facebook page in the required form.

Similarly, in April 2021, the Liberal Party distributed flyers that read: 'Under Labor's plan to extend the O-Bahn dozens of properties will need to be demolished' (ABC News, 2021b). There was no evidence to suggest the Labor Party had any such plan to extend the O-Bahn to Golden Grove. Additionally, a Department of Infrastructure and Transport report had already found that extending the busway would destroy too many homes and trees, with the government instead promising to go ahead with an upgrade of Golden Grove Road. Consequently, the Electoral Commissioner, Mick Sherry, wrote a letter to the Liberal Party stating that 'I am satisfied that the material… is misleading and inaccurate to a material extent' with requests to issue corrections (ABC News, 2021b).

South Australia's TIPA law can be enforced, is generally respected and has withstood constitutional challenge. There is no indication that s 113 will be repealed any time soon and the recently retired Attorney-General of South Australia, Vickie Chapman, has said that there is no case for repealing it (Renwick & Palese, 2019).

Violation of s 113 as a Criminal Offence

As the law currently stands in South Australia, a person or body corporate found to have contravened s 113 of the *Electoral Act 1985* (SA) is liable to face criminal rather than civil penalties. We believe that this standard is appropriate. Nevertheless, it has been recently suggested that civil rather than criminal penalties should apply to the violation of TIPA provisions 'in the same way that current misleading or deceptive commercial advertising prohibitions are civil prohibitions' (Beck, 2020: 2). We disagree

because political advertising is in no way akin to commercial advertising and the way it is regulated should reflect this. The federal JSCER noted in 1984 that: 'Political advertising differs from other forms of advertising in that it promotes intangibles, ideas, policies and images' (JSCER, 1984: 26). Senator Michael Macklin agreed: '[I]t is not a private matter, therefore, but rather a matter of community concern that a voter may be misled into forming a political judgement by an advertisement which is untrue and misleading or deceptive' (JSCER, 1984: 45).

Misleading citizens in their decision-making in the key moment of representative democracy—elections—produces what we might call 'democratic externalities' that inflict significant harm on both individuals and the polity. False election statements affect negatively, not only the reputation and fortunes of election candidates, but democratic processes and their perceived and actual legitimacy; they erode public trust in elections and render electoral decision-making both difficult and inauthentic. As Isaacs J put it in one of the High Court's earliest dealings with federal electoral legislation:

> *The vote of every elector is… a matter of concern to the whole Commonwealth* and all are interested in endeavouring to secure not merely that the vote shall be formally recorded in accordance with the opinion which the voter actually holds, free from intimidation, coercion and bribery, but that the voter shall not be led by misrepresentation or concealment of any material circumstance into forming and consequently registering a political judgment different from that which he would have formed and registered had he known the real circumstances. (*Smith*: 362) (emphasis added)

Due to the significant social costs of false election campaigning, private civil penalties are an inappropriate response; they send the wrong message that the problem is of a private nature whereas it is a matter of profound public importance.

Issues in Administration of s 113

Timeliness and Resources

Even though ECSA has readily secured compliance with its requests for withdrawals and retractions in the past, South Australian State Election Reports have noted that there are significant challenges when resolving complaints under s 113. The first is that the onus is on complainants

to identify what is misleading in the impugned political advertisement; yet many fail to support their claims. This issue is compounded by the fact that ECSA is unable to materially investigate complaints as they arise and relies on the information obtained from the complainant (ECSA, 2019). During the South Australian state elections of 2018, the majority of complainants (across all the categories of complaint) did not follow the instructions on the complaints lodgement form provided on the ECSA website. They either failed to provide sufficient information or failed to articulate exactly what was at issue. In 2018, ECSA received 38 complaints in relation to misleading political advertising. Fourteen of these complaints were unable to be properly assessed because insufficient evidence was provided. This resulted in the closure of those cases without a resolution.

An adjacent issue in relation to the resolution of complaints under s 113 is that seeking further information from complainants invariably causes delays. When ECSA receives a complaint with insufficient evidence, it often results in back-and-forth communication with the complainant (ECSA, 2019). Once ECSA has received sufficient evidence, a referral is prepared and subsequently sent to the Crown Solicitor's Office. At this stage the Solicitor General and senior solicitors can provide advice on whether an offence has been committed. Upon receipt of advice, the Electoral Commissioner can request a retraction of the advertisement if they are satisfied that it is misleading and inaccurate to a material extent.

Another issue raised in the 2014 ECSA report is that it is difficult in some cases to enforce the publication of a correction prior to polling day. This is especially hard during the media blackout period that 'applies to radio and television advertising and commences at the end of the Wednesday before polling day until the close of the poll on polling day' (ECSA, 2014: 56). So, for example, if something false and misleading were posted on the Wednesday during the day, the ECSA could not request, in a lawful manner, that the perpetrator publish a retraction advertisement on the Thursday due to the blackout ban on election advertising. This problem is compounded by the 24-hour news cycle which means that, depending on which point in the news cycle the misleading material is released, the misleading information could be disseminated quickly and not readily corrected. Hence our recommendation to empower Electoral Commissioners (or the relevant regulator) to be able make its own public statement or notice correcting the advertisement if it infringes s 113 on the balance of probabilites. Such a provision

could be incorporated into any existing or newly devised regimes for comparable jurisdictions.

Determining a Breach of Section 113—The Notion of 'Material Extent' and Its Complications

Under s 113(2) a breach is dependent upon establishing several elements and the onus is on the party alleging the breach to prove it on the balance of probabilities. Obviously, the subject matter of the complaint must be an 'electoral matter' which is defined under s 4 of the *Electoral Act 1985* (SA) as 'a matter calculated to affect the result of the election'.

The first element is that the statement must be inaccurate which means that the purported statement of fact is demonstrably incorrect. In *Cameron*, citing *Holt v Cameron* ((1979) 22 SASR 321) the Court equated inaccurate with incorrect (*Cameron*: 240); it compared the statement in the electoral advertisement with the material on which it was based and found that the advertisement was 'patently inconsistent with Lucas's statement that the Liberals would be closing less than 200 schools' (*Cameron*: 241 (Olsson J)). Another example of a purported statement of fact that was incorrect can be found in the case of *King v Electoral Commission* ('*King*') ((1998) 72 SASR 172) which concerned a political advertisement that was published during the 1997 South Australian election. The advertisement appeared in *The Advertiser* newspaper and conveyed the message that a vote for a Labor candidate (or '[t]hanks to preferences'), an independent candidate or Democrat would give voters Mike Rann as their Premier. The Court of Disputed Returns found that the statement was incorrect: a vote for either an Independent or a Democrat did not, via preferences 'give you' Mike Rann as Premier (Fig. 9.1).

The second element of s 113 is that the political advertisement is 'misleading'; that is, likely to lead to an error of conduct, thought or judgement. In *King*, Prior J found that the political advertisement described above 'is also misleading because it gives the impression that preferences will automatically flow to Labor when, of course, they are dependent upon the will of a voter who may give preferences as he or she chooses' (*King*: 179).

The third element of the offence is qualified by the words 'material extent'. While reported cases involving s 113 of the *Electoral Act 1985* (SA) began with *Cameron* in 1995, the terms 'material extent' and

Fig. 9.1 The impugned advertisement in *King*

'false in material particular' are well understood in the common law. In *Minister for Immigration, Local Government and Ethnic Affairs v Dela Cruz* ('*Dela Cruz*') ((1992) 34 FCR 348), Black CJ, Davies and Neaves JJ state that '[t]he term "material" requires… [that] the false particular must be of moment or of significance, not merely trivial or inconsequential' (*Dela Cruz*: 352). Within the South Australian electoral context, the meaning of 'material extent' was ultimately clarified in 2002 in *Featherston v Tully (No 2)* ('*Featherstone*') ((2002) 83 SASR 347). Justice Bleby held that the phrase denoted that 'the statements were such that it can be said that the electors … did not in fact have a fair and free opportunity of electing the candidate which the majority might prefer' (*Featherston*: 373).

Note that s 113(2) does not require the petitioner to prove that the advertisement *actually* affected the result of the election. In *King*, Prior J held that the advertisements (above) breached s 113 but 'were neither likely to, nor did they affect the result of the election' which the petitioner sought to void under s 107(3) (*King*: 185). Therefore, a breach of s 113 can be established where an electoral advertisement is incorrect and

deceptive to a significant degree without the need to prove that it actually affected the result of the election. The judgment in *Cameron* is consistent with this interpretation because the judgment did not consider whether the political advertisement impacted the result of the election. Rather, Olsson J found the relevant advertisement to be inaccurate and misleading to a material extent because '[i]t was, on any view, a gross distortion of the content of the Lucas statement from which it derived' (*Cameron*: 244). The publication was, in the form in question, *prima facie* a breach of s 113.

Nevertheless, it has been suggested that the criterion of 'material extent' has imposed a considerable burden on ECSA. Following the 2009 Frome by-election, the South Australian Electoral Commissioner recommended that s 113 of the *Electoral Act 1985* (SA) be amended to remove the 'material extent' component (ECSA, 2009). The Commissioner was of the 'strong opinion' that the onerous burden of proving that a misleading political advertisement would affect the outcome of the election was a distraction. The recommendation concluded that 'the office would be in a better position to monitor the content of electoral material based on accuracy alone while maintaining the integrity of electoral comments' (ECSA, 2009: 22).

This is a valid point, however, in terms of its compatibility with the *Australian Constitution*, it strikes us as necessary that s 113 is qualified by the words 'material extent'. Were they removed, s 113 would impose a much greater burden on the implied freedom of political communication whereby relatively minor inaccuracies could attract scrutiny. The third limb of the *McCloy* test requires that any law which burdens the freedom of political communication must be *adequate in its balance*. This requires making a value judgement that, on balance, the purpose served by the restrictive measure is not outweighed by the extent of the restriction on the freedom of political communication.

Potential Unintended Consequences

The scope of s 113 of the *Electoral Act 1985* (SA) is narrow in its application to political advertising as it does not apply to 'statements of intention or opinion, or general statements of past success or failure in broad terms' (ECSA, 2010: 68). However, the risk associated with legislation that regulates political statements is that any such law could be used cynically and instrumentally to bring litigation against political adversaries to gain

an unfair advantage by casting doubt over their honesty even where no offence was committed. Yet, so far, there is no evidence to suggest that this risk has materialised.

The legislation reflects the inherent trade-off between safeguarding voters from manipulated information, on the one hand, and impeding political communication, on the other (the 'freedom-fairness' trade-off discussed in Chapter 4). While political parties may seek to 'weaponise' s 113 to disrupt an opponent's campaign, repealing the provision would enable inaccurate election smear campaigns to operate with impunity; arguably a greater evil and one that is likely to increase in magnitude over time. In addition, the risk that a person or political party uses the provision frivolously is significantly reduced by the qualifier of 'material extent'. The Electoral Commissioner can only request that serious instances of inaccurate and misleading political advertisements are withdrawn or retracted. It is also worth bearing in mind that unsuccessful complaints by political parties under s 113 could negatively affect their own campaigns because opponents can claim that they have been independently verified as 'honest' by the ECSA (Renwick & Palese, 2019).

Other unintended consequences that we seek to guard against in our ideal-type model include: the strategic use of false campaign statements with the intention of absorbing the pecuniary penalty as a 'routine campaign expense'; 'dragged-out' litigation; *ex-post* rulings by the Supreme Court; unjust prosecution; mischievous litigation for the sole purpose of distracting the Commission from its primary responsibility of conducting elections; and the perception that the regulator is too restrictive in its assessments. We seek to address all these issues in our ten recommendations in Chapter 10.

The Difference Between Purported Statement of Fact and Opinion

Another consideration in devising and administering legislation of this type relates to the often blurry line between statements of fact and statements of opinion. In the High Court case of *Channel Seven Adelaide v Manock* ('*Manock*') ((2007) 232 CLR 245), Gleeson CJ made observations about this distinction in relation to the law of defamation. Chief Justice Gleeson held that 'a statement is more likely to be recognisable as a statement of opinion if the facts on which it is based are identified or identifiable' (*Manock*: 253). In practical terms, if the reader or viewer

is 'able to identify a communication as a comment rather than a statement of fact, and is able sufficiently to identify the facts upon which the comment is based, then such a person is aware that all that he or she has read, viewed or heard is someone else's opinion (or inference, or evaluation, or judgment)' (*Manock*: 253 (Gleeson CJ)). By contrast, '[a] bald comment, made in circumstances where it is not possible to understand it as an inference, is likely to be treated as an assertion of fact which will only be susceptible to a defence of justification or privilege' (*Manock*: 273 (Gummow, Hayne and Heydon JJ)).

Justices Gummow, Hayne and Heydon also observed that:

> It is not the mere form of words used that determines whether it is comment or not; a most explicit allegation of fact may be treated as comment if it would be understood by the readers or hearers, not as an *independent imputation*, but as an inference from other facts stated. (*Manock*: 263 quoting *Cole v Operative Plasterers' Federation of Australia (NSW Branch)* (1927) 28 SR (NSW) 62, 67) (emphasis added)

Their Honors acknowledged that 'the distinction between fact and comment is commonly expressed as equivalent to that between fact and opinion' (*Manock*: 263).

The reasoning in *Manock* was applied in the case of *Hanna v Sibbons* ('*Hanna*') ((2010) 108 SASR 182) which was adjudicated in the Court of Disputed Returns following the 2010 South Australian election. Justice Vanstone considered the observation by Gleeson CJ in the context of s 113. In *Hanna*, the petitioner (Mr Hanna) asserted that a misleading electoral advertisement circulated by the South Australian branch of the ALP had affected the outcome of the election, specifically, that four sets of leaflets distributed within the electorate prior to the election asserted that Mr Hanna was 'soft on crime', hoons and drugs with attendant excerpts from parliamentary speeches made by Mr Hanna drawn from Hansard. For example, the respondent claimed that one of Mr Hanna's statements expressed opposition to laws increasing prison terms for violent offences, indicating that he was 'soft on crime'. The petitioner claimed that this advertisement was misleading because his speech, read in context, demonstrated that he objected to the law because it would not have any substantial impact on the crime rate. Justice Vanstone found that the petitioner was disputing the *conclusion* drawn in the leaflets (*Hanna*: 190). The distinguishing feature of statements of opinion is

that they are an inference from verifiable facts, in this case statements made in Hansard by the petitioner.

The Court found that the inference conveyed an opinion or comment. Crucially, nothing prevented the reader of the advertisement from evaluating whether the quote justified the label, or from determining whether the interpretation of Mr Hanna's statements lacked context because they were recorded in Hansard. Justice Vanstone found that none of the materials distributed by the Labor Party were misleading. Her Honor characterised the content within the advertisement as statements of opinion based upon statements of fact recorded in Hansard. Consequently, Mr Hanna's challenge to the validity of the election failed.[2]

Had the electoral advertisement stated that the petitioner was 'soft on crime' as a standalone statement in circumstances where it was not possible to draw an inference from other material, it would likely have been treated as an assertion of fact (*Manock*: 263). An adjacent consideration is whether an inference based on inaccurate or fabricated evidence would result in a breach of s 113. In the case of *Brent Walker Group Plc v Time Out Ltd* ([1991] 2 QB 33) Bingham LJ said, 'the law has developed the rule … that comment may only be defended as fair if it is comment on facts (meaning true facts) stated or sufficiently indicated' (*Brent Walker Group Plc v Time Out Ltd* [1991] 2 QB 33, 44)). Although this argument was advanced in the context of a defamation defence, as we have already mentioned, the High Court has said in passing that the distinction between fact and comment is equivalent to that of fact and opinion (*Manock* (2007) 232 CLR 245, 263). It follows that inferences drawn from inaccurate or fabricated evidence may not be able to be defended under s 113.

All of this suggests that Australian courts are capable of distinguishing statements of fact from statements of opinion akin to considerations in defamation law. Persons and bodies corporate who authorise political advertisements can rest assured that they will not be subject to penalties under s 113 so long as they are advancing an opinion based on identifiable and verifiable facts. This legislation sets a clear expectation that the contextual information necessary to properly inform voters is provided, as was done in *Hanna*.

Defences

Violation of s 113 is a strict liability offence and it is therefore unnecessary for the prosecution to prove the existence of *mens rea* (*Cameron*: 241). It is not relevant to assess whether the respondent intended to deceive, was reckless, or simply negligent in making the purported statement of fact; only whether the physical elements of the offence have been committed. In relation to recklessness, the *actus reus* (the guilty act) of the offence does not relate to a circumstance or result per se. To determine a breach of s 113, there is no requirement to show that the inaccurate and misleading electoral advertisement affected the result of the election, simply that it had the *potential* to do so (*King*: 182). It is appropriate that TIPA laws are structured as a strict liability offence because otherwise it would be exceedingly difficult to prosecute a fault element associated with the offence.[3] This is consistent with the principles articulated by the Australian Law Reform Commission in relation to justifying strict liability offences (Australian Law Reform Commission, 2016). In particular, the imposition of strict liability offences can be justified where it is difficult to prosecute fault provisions and where it ensures the integrity of a regulatory regime.

Section 113(3) of the *Electoral Act 1985* (SA) provides a statutory defence. The onus is on the defendant to prove that they:

> (a) took no part in determining the content of the advertisement; and
> (b) could not reasonably be expected to have known that the statement to which the charge relates was inaccurate and misleading.

The judgment in *Cameron* provides an instructive analysis of the operation of the statutory and common law defences available to a charge under s 113. In that case the defendant could not establish the statutory defence under s 113(3) because he admitted taking part in determining the content of the advertisement by approving the text. However, in *Cameron* the Supreme Court of South Australia held that s 113 does not preclude the common law defence articulated in *Proudman v Dayman* ('*Proudman*') ((1941) 67 CLR 536). Justice Olsson and Lander J stated in passing that the s 113 provision did not create an absolute liability offence because it does preclude the common law defence (*Cameron*: 245 (Olsson J), 253 (Lander J)). This means that the defendant can raise a defence to a charge under s 113 where the evidence shows the existence

of an honest and reasonable belief in the state of facts. The common law defence is similar to the second limb of the statutory defence: that the defendant 'could not reasonably be expected to have known that the statement to which the charge relates was inaccurate and misleading' (*Electoral Act 1985* (SA) s 113(2)).

However, the *Proudman* defence to a charge under s 113 requires that the mistake is also reasonable; it is insufficient to merely argue that the mistake was honest (*Bramble Holdings Ltd v Corey* (1976) 15 SASR 270). In *Cameron*, the defendant submitted that he genuinely believed that the Lucas statement conveyed the message that any school with less than 300 students might be closed. At this point of inquiry, the onus shifts from the defendant onto the prosecution to exclude the belief on the grounds it is unreasonable to hold such a belief. In that case the Court found that the evidence relied upon for the defence did not support the interpretation made of it by the defendant; it was not a reasonable interpretation but rather a gross distortion of the original statement.

Penalties

What penalties should apply to those who promulgate misleading and inaccurate election advertisements? In South Australia, financial penalties apply to a person who permits the publication of a misleading and inaccurate electoral advertisement. The fine is currently a maximum of AUD5000 for a natural person and AUD25,000 for a body corporate under s 113(2) of the *Electoral Act 1985* (SA). After the Electoral Commissioner applies for legal proceedings to commence, the Court of Disputed Returns will consider the advertiser's response to the request for retraction and withdrawal under s 113(2). If the defendant is unresponsive to the Commission's request, the Court will take this into account when determining the pecuniary penalty. Advertisers who have breached s 113 and ignored requests by the Electoral Commissioner are more likely to be penalised at a higher amount (up to the maximum).

Pecuniary penalties are advisable in TIPA legislation, and, according to a recent Australia Institute survey, their use has strong public support (Browne, 2019b). The survey also prompted attitudes to appropriate *types* of penalties including financial penalties, the withdrawal of public funding for offending parties and forced public retractions. While 60 per cent of respondents supported parties and candidates being forced to publish retractions at their own expense, it is unclear how effective this measure

would be in practice. The maximum financial penalty should be significant enough that political actors do not view it merely as a routine campaign expense incurred to gain a political advantage.

One issue with the penalties under s 113 of the *Electoral Act 1985* (SA) is that they are expressed in absolute dollar terms rather than penalty units. Consequently, the penalty has not been adjusted to inflation since 2011. The penalty amount has implications for the public interest. If the fine is too low, its deterrent effect is minimised and this will unnecessarily burden electoral commissions, a significant cost to the public. But this is a minor consideration compared to the second public interest concern, namely that a petitioner can argue for relief under s 113 with orders to have the election set aside under s 107(5) of the *Electoral Act 1985* (SA). In other words, the election of a candidate could be declared void and would have to be run again.[4] Therefore, apart from the obvious fact that the public has an interest in having accurate information on which to make voting decisions, there are also other public interest reasons for deterring breaches of s 113 including the cost and inconvenience of re-running an election.

Appropriate and Alternative Adjudicatory Bodies

At the time of writing (December 2021) the ECSA still adjudicates complaints under s 113 and can refer cases to the Court of Disputed Returns which sits in the Supreme Court. Although there has never been any suggestion that the Commission is incapable of performing this function, there is a risk that the perceived impartiality of the ECSA could be undermined by its current responsibilities under s 113. This has prompted proposals for alternative adjudicatory bodies, particularly if the volume of breaches and complaints escalates. Graeme Orr has suggested that a panel of respected former politicians convened for the election would be in a better position than judges to understand the realities of political debate and to make a judgement on complaints (Orr, 2016). Sole adjudication by judges and magistrates is another option and one that 27 per cent of survey respondents in the Australia Institute survey support. Of the total respondents 26 per cent preferred that electoral commissions handle political advertising complaints while 21 per cent supported adjudication by an industry body. The idea of a special panel of former politicians was preferred by only 7 per cent of respondents (Browne, 2019a).

A relevant adjudicatory consideration is whether the body remains independent and also whether it has an adequate understanding of the time constraints and challenges of managing an election. Former Attorney-General of South Australia, John Rau has stated that, while he acknowledges that the ECSA is 'an imperfect adjudicator', there is no other independent institution with the expertise in elections to administer s 113 (Renwick & Palese, 2019: 27). Further, Australian electoral commissions are trusted as impartial (Hill, 2010). By the same token, any perception that a commission may have influenced an election must be avoided as it would erode public trust in its vital role as an independent administrator of elections. It is also possible that mischievous litigants could impose a flood of vexatious litigation during the lead-up to elections for the sole purpose of distracting the Commission from its primary responsibility of managing the election or else to disrupt it more generally, thereby potentially placing the legitimacy of election processes and outcomes in doubt.

An alternative that would allow electoral commissions to concentrate on managing elections is to set up an independent Electoral Complaints Authority which is empowered to administer complaints, commence investigations, require/issue retractions and ultimately recommend prosecution of these matters (see JSCEM, 1997). Electoral commissions have often expressed their hesitation in acting as TIPA regulators. As the Victorian Election Commission recently opined in a submission to a government inquiry on the matter: '[T]he VEC does not consider its role to be an arbiter of "truth" … the VEC is expert in electoral matters and follows up attempts to mislead voters about how to vote correctly'. But it is 'not an authority on the myriad of issues that arise in an election, and it would be an overreach for the VEC to purport to determine the truth in such issues' (VEC, 2020: 14). A further and related consideration is that, in order to investigate and make determinations, electoral commissions are heavily reliant on the advice and assistance of Crown Solicitors. However, where an electoral commission has strong and consistent support from the Crown Solicitor's Office, as it does in South Australia, these concerns can be overcome. Throughout the election period the Electoral Commissioner is assisted by a team of complaints management staff led by ECSA's legal officer. To expedite the resolution of complaints, the Crown Solicitor's Office supports ECSA with a team of legal advisers that includes senior solicitors. These advisors are

'on call throughout the election to provide dedicated legal advice in the specialised field of electoral law' (ECSA, 2019: 78).

In light of the material presented in the preceding nine chapters we now make our final recommendations for a best practice, Australian TIPA regime suitable for both state and Commonwealth levels. We then offer some concluding remarks.

Notes

1. In 2018 the Electoral Commission made requests for 7 retractions of electoral advertisements, 9 requests for cessation of further publication and 3 warnings. See *Election Report: 2018 South Australian State Election* 2019, Electoral Commission South Australia, viewed 22 November 2021, https://www.ecsa.sa.gov.au/component/edocman/2018-state-election-report/download.
2. Legal challenges under s 113 of the *Electoral Act* have been run concurrently with s 107 to seek to void the election.
3. For example, s 199A *Electoral Act 1993* (NZ) would require the prosecution to successfully prove knowledge of the falsity of the statement.
4. That is to say, the election for that seat only would have to be run again.

Cases

Bramble Holdings Ltd v Corey (1976) 15 SASR 270.
Brent Walker Group Plc v Time Out Ltd [1991] 2 QB 33.
Channel Seven Adelaide v Manock (2007) 232 CLR 245.
Featherston v Tully (No 2) (2002) 83 SASR 347.
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CHAPTER 10

Ten Recommendations for an Effective Model for Regulating Truth in Political Advertising and Conclusion

Introductory Comments

In this final substantive chapter we offer 10 recommendations for our ideal-type TIPA regime. In devising them we seek to ensure that our ideal-type model is capable of fulfilling four general goals. First, it should be acceptable to the public as well as the political class in order to ensure that it can be passed into law; second, it should allow complaints to be handled in a timely fashion; third, it should be capable of withstanding constitutional scrutiny, not only so that it is not invalidated but also as a sign that it is not stifling good faith political speech; and fourth, it should be able to deal effectively with the problem of false campaign statements without producing too many unwanted and unintended consequences such as: the cynical use of injunctions against candidates for political purposes; vexatious litigation; the strategic use of false campaign statements with the intention of absorbing the pecuniary penalty as a routine campaign expense; prolonged litigation; *ex-post* rulings by the Supreme Court; unjust prosecution; mischievous flooding of trivial litigation for the sole purpose of distracting the Commission from its primary responsibility; and the public perception that the regulator is too restrictive in its actions.

L. Hill et al., *How and Why to Regulate False Political Advertising in Australia*, https://doi.org/10.1007/978-981-19-2123-0_10

Recommendation 1

There should be no pecuniary liability for mere publishers of false information to safeguard the constitutional validity of the laws by ensuring they are appropriate and adapted to their purposes; that is, so that they do not discourage the publication of political advertising altogether and stifle the speech condition they are intended to protect. Instead, liability should be limited to the person or body corporate putting forward the view expressed. This recommendation is a result of applying the *McCloy* test to the existing South Australian provision. It is possible that the law could be invalidated because of a constitutional challenge under the implied freedom of political communication as per our discussion above. In effect, the SA law, in its present form, may not be 'appropriate and adapted to serving a legitimate end' as required by the third limb of the test in *McCloy*.

Recommendation 2

The requirement that *cases will only be prosecuted when the false campaign statement in question affected an election outcome to a 'material extent'* should be retained or included in any future legal regime to discourage vexatious and trivial litigation.

Recommendation 3

Any aspirational or ideal-type law against false campaign statements should embody provisions and sanctions that cover the entirety of the election campaign, by which we mean, not only after the writs are issued and during any blackout periods, but during the entire period between elections when preference formation is taking place. This is how s 113 has been implemented and it has not proven to be too ambitious.

Recommendation 4

The penalty amount should be such that it cannot be easily absorbed as a routine campaign expense instrumentally or cynically incurred to gain a political advantage. As it stands now, the penalty specified in South Australia's s 113 is not expressed in penalty units; consequently, the penalty amount has remained the same since 2011 (inflation has

increased considerably since then). The fine should therefore be expressed in penalty units and reflect the fact that the stakes are higher than most observers appreciate, not only for the democratic legitimacy reasons already given, but also because a concerted campaign of false information can render the election void under s 107. It would therefore have to be run again at great expense and inconvenience to the public. The long-term erosion of trust in electoral processes is also a possible consequence were this to become a regular event. Note that penalties should only apply to those who refuse official requests to remove or retract offending material.

Recommendation 5

Promulgating false or misleading election information should be a criminal offence, rather than a civil matter. In both the ACT and South Australia, a person or body corporate found to have contravened ss 297A and 113 of the respective electoral acts is liable to face criminal rather than civil penalties. Although it has been suggested that civil rather than criminal penalties are more appropriate 'in the same way that current misleading or deceptive commercial advertising prohibitions are civil prohibitions' (Beck, 2020: 2), we have argued that false political advertising is in no way akin to commercial advertising due to its significant social costs ('democratic externalities'). False election statements inflict harm, not only on the reputation and fortunes of election candidates, but on democratic processes, legitimacy and trust. The way they are regulated should reflect this. At the same time, prosecutions should be handled carefully and conservatively in order to avoid the potential problems of public disapproval and 'free-speech martyrdom' that would bring the law into disrepute. For the same reasons, prison terms should be avoided.

Recommendation 6

To meet the objection that financial penalties may be insufficient to deter strategic and targeted false advertisements, an alternative with a potentially greater deterrent effect would be *to impose a reputational/disqualification penalty that bars the candidate from standing for perhaps one election cycle*, as per the penalty for breaching the TIPA provision in the *Representation of the People Act 1983* (UK) s 106: 'A breach

may bar the individual from standing for Parliament or holding elected office for up to 3 years'. Federally, this provision could be included in s 386 of the *Electoral Act 1918* (Cth) and similar sections in state and territory electoral acts. Section 386 already deems those found to have committed electoral offences such as bribery, undue influence, and interference with political liberty as incapable of standing for parliament for two years; the addition of the criminal offence pertaining to contravening the relevant political advertising provision would therefore be a reasonable addition to this list. Again, such penalties would only apply to those who refuse to take down offending material upon the request of the regulator.

Recommendation 7

The Electoral Commissioner/regulator should have the power to publish its own corrections (via a public notice) to false election material under certain conditions to ensure fairness where particularly damaging inaccurate and misleading advertisements are released a few days before election day. The *Electoral Act 1985* (SA) s 8(1)(d) could be suitably amended to vest the Electoral Commissioner with this power. The current problem with s 113 is that the infringing advertiser may not be able to publish a retracting statement in the same form and medium as the initial offending advertisement before the media blackout period. Empowering the Electoral Commissioner in this way would enable them to respond expeditiously to contain the damage and to potentially reach the same audience that received the original offending advertisement.

Recommendation 8

Given that the problem may escalate, it would be advisable to *provide extra resources to Electoral Commissions* (should they continue to act as the regulator) to manage misleading election information or else provide resources for them to set up special units within commissions dedicated to addressing this issue. Alternatively, consider a model in which *complaints could be handled by an independent Election Complaints Authority with both legal and electoral expertise*, which is empowered to administer complaints, commence investigations, require/issue retractions and ultimately recommend prosecution of these matters. This model was suggested in the AEC's submission to the JSCEM Inquiry into the 1996 Federal election. According to the report, the Election Complaints

Authority could be established at each relevant election for a specified period and dissolved in a similar fashion thereafter (although we are not convinced about its proposed temporary status as this would leave the periods between elections unregulated).

Although ECSA has been both capable and effective in its enforcement of s 113 of the *Electoral Act 1985* (SA), it reports that s 113 can often impose an onerous responsibility, particularly during election time (see ECSA). The establishment of an Election Complaints Authority would ease the relevant electoral commission's burden and allow it to concentrate on its primary task—conducting elections. It would also mitigate the risk of compromising the independence of the Commission in the enforcement of partisan complaints. Australian electoral commissions command unrivalled domestic trust at both the state and federal level, and the preservation of this trust and independence is of the utmost importance.

Recommendation 9

There is a practical onus of proof on the government to demonstrate that the law is justified. For interpretative clarity, *an explanatory statement endorsed by the relevant legislature should accompany any new legislation or amendments to existing TIPA provisions*. It should establish in clear terms who could be liable under the provision, its purpose, how the law is appropriate and adapted to achieve its purpose and that the purpose of the law is compatible with the maintenance of representative and responsible government. The government should also be able to demonstrate that it has considered whether there are reasonably practicable alternative means of achieving the purpose of the law with less restrictive effects on political communication.

To this end, the explanatory statement should provide an evidentiary basis to show that the law is compatible with the implied freedom of political communication. Indeed, in *Unions NSW v New South Wales*, Kiefel CJ, Bell and Keane JJ stated that although it is 'accepted that Parliament does not generally need to provide evidence to prove the basis of the legislation which it enacts … its position in respect of legislation which burdens the implied freedom is otherwise' (*Unions NSW v New South Wales* (2019) 264 CLR 595, 616 [45] (Kiefel CJ, Bell and Keane JJ)). Ultimately, the parliament must ensure that there is sufficient evidence to support a case where it is defending the law against a constitutional

challenge under the implied freedom. Additionally, extrinsic material (in the form of an explanatory memorandum or otherwise) is of assistance in the interpretation of a law (see, for example, *Acts Interpretation Act 1901* (Cth) s 15AB(2). It should set out who could be liable under the provision and its purpose. In general, 'modern common law rules of statutory interpretation have embraced the use of extrinsic material where such reference is capable of assisting a court to determine the intention of the Parliament' (Stubbs, 2006: 124). Obviously, the 'first-best' case is to produce law that is well drafted enough to ensure that it is interpreted as was intended. But in the case of laws around political speech, extra care is required and it is wise to ensure that laws are interpreted and implemented as intended by the parliaments that enacted them.

Recommendation 10

One difficulty with the use of TIPA-type legislation in comparable regimes like the UK and New Zealand is that their existence was not widely publicised; politicians and the public were not aware of them nor of the consequences of a breach (Renwick & Palese, 2019). As a result, such laws were rarely invoked, and they could not perform one of the vital functions of new laws: to change norms around undesirable behaviour. After all, most laws operate to *deter* the commission of wrongs rather than to prosecute them after they have been committed and it is preferable that false campaign statements are not made in the first place. Accordingly, *the legislation should be publicised widely*, and electoral candidates could be asked to sign a declaration that they have read and understood what it requires of them.

Conclusion

In this book we sought to show that Australia—and other democracies the world over—need to find remedies to the growing problem of false election information. Although we have dealt with only one small part of it here—authorised election advertising by identifiable political actors—it is a start. A larger and more ambitious project would be to address the problem of *un*authorised bad faith communication that is proving to be particularly destructive to democratic legitimacy and functioning. But starting with the false communication of those who seek to represent and

lead us makes sense in terms of feasibility and the modelling of better norms of communicative behaviour.

We began by establishing the harms of false election information, including its tendency to violate democratic values, which, in turn, harms democratic legitimacy. We then provided a detailed political and legal history of attempts, both in South Australia and elsewhere, to regulate false election information in order to see what lessons might be taken from them after which, we explored the psychological and market dynamics of false election information. We concluded that, due to the high stakes, and unavoidably competitive nature of modern elections, coupled with perverse financial incentives within the information market, the problem should not be left to market solutions alone. Neither are voluntary codes and civil action under defamation law adequate to the task. Defamation law is too narrow in its application, exclusively addressing reputational harm, while the efficacy of voluntary codes of conduct depends on the good faith of actors operating in a highly competitive environment with incentives to deceive. Instead, because of its significant social costs, false election information should be understood as a collective action problem in need of state action in the form of laws.

In justifying and devising a best practice TIPA regime for Australian jurisdictions, we were extremely mindful of the fact that regulating speech is fraught with danger because there is a good chance that, whatever we do, we might end up doing more harm than good, unwittingly impairing the free flow of good faith democratic speech that all democracies need in order to function properly. In practice, in Australia, this effectively amounts to violating the implied freedom of political communication under the *Australian Constitution*. We used tests associated with this implied freedom as a guide to how far one should go with regulating speech since the tests strike us as generally fair and reasonable and would be applied by the courts were a TIPA law challenged. At this point in time, any measure that fails to withstand constitutional scrutiny has, most likely, gone too far; therefore, it is probably fair to say that Australian courts have provided a reliable framework for balancing fairness and freedom where speech is concerned.

This constitutional and jurisprudential approach to political speech is a key reason why Australia is a great place to start in pioneering TIPA legislation. Australian courts have upheld the constitutionality of SA's TIPA laws based on their particular conception of how the implied freedom is

supposed to operate. This makes Australia a uniquely congenial setting for TIPA laws and the type of burden they place on political speech.

The other reason why Australia is a logical place to start with TIPA-type legislation is because it uses compulsory voting. Although all democratic states have an obligation to provide the right conditions for meaningful voting (including an information environment that is conducive to the casting of votes based on full-bodied choice) it is our view that the Australian state has an especially strong duty to create these conditions because it requires its citizens to vote. This requirement should not place an undue burden on individual citizens. Just as successive Australian governments have sought to remove all the known obstacles to inclusiveness in the casting of formal and authentic votes to ensure that the cost of voting is not too high, so too should it seek to remove any information pollution that raises the information costs of voting and obstructs our ability to choose the candidates who will represent us best.

Without TIPA laws, the ability of electors to make a 'real choice' can be frustrated by inaccurate statements that cannot be verified or readily identified as an opinion of the author. False campaign statements produce a multitude of effects that are extremely harmful to democratic functioning and culture. They can alter the course of elections; contribute to voter cynicism; depress voter turnout; erode democratic engagement more generally; lower standards of public discourse; silence minority voices; and polarise the electorate, thereby stoking political extremism. They are a form of 'voter manipulation' that can put authentic electoral outcomes in doubt and undermine the authority of elected representatives leading, in turn, to problems in governing. If the election outcome is not accepted, this is disastrous in the sense that the election has failed to fulfil its primary function: to permit the peaceful transference of power from one regime to the next. In sum, false election information inflicts substantial damage upon the free speech condition that enables democracies—and the elections that are their key moment—to function in a healthy manner and thereby fulfil their original purposes.

Without excluding other means to address the problem, we have argued here for a legal remedy to deter false election material in Australian jurisdictions. We also argued that such a remedy should evince certain characteristics. First, it should not operate in a manner that chills political speech but, rather, enhances its free flow. Further, its methods and procedures should be timely and enforceable where necessary. It should be timely in the sense that a complainant should be able to pursue

formalised means for seeking the withdrawal and retraction of misleading and demonstrably incorrect statements and secure swift injunctive relief in cases where a harmful and demonstrably incorrect statement has been made against them. The provision should also be enforceable by its application to a very narrow and well-defined category of statements, with relevant enforcement agencies understanding their responsibilities and political actors understanding their obligations. Finally, and perhaps most importantly, these laws should deter, over time, the use of false campaign advertisements. Therefore their existence should be widely publicised and understood by both the political class and the wider public. We remain agnostic on the question of who should act as regulator.

South Australia has shown that TIPA laws are viable and there is strong support for them among the public as well as political and legal elites. Our ideal regime, which builds on the South Australian, would be appropriate for other Australian jurisdictions, including the Commonwealth. If handled with good judgement and appropriate levels of respect for the importance of free speech in a democracy, this kind of legislation would be a useful addition to Australia's already long list of democracy-enhancing electoral innovations. It would also be a valuable tool in defending democracy from the more general crises of faith and trust it currently faces.

Case

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