

## SOUTH AUSTRALIA'S TRUTH IN POLITICAL ADVERTISING LAW: A MODEL FOR AUSTRALIA?

'I reached the conclusion that you can venerate a contest of ideas, if you will, and we all do and that's important, but it shouldn't be in a way that hides agendas. A contest of ideas shouldn't be used to legitimise disinformation. And I think it's often taken advantage of.'<sup>1</sup>

### I INTRODUCTION

Truth in political advertising legislation has been proposed, enacted, and often promptly repealed in Australian states and federally since 1983.<sup>2</sup> By contrast, South Australia has consistently regulated inaccurate and misleading electoral advertisements under s 113 of the *Electoral Act 1985* (SA) ('*SA Electoral Act*'). This law addresses both misinformation and disinformation<sup>3</sup> in election advertising

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\* LLB; BCom (Adel); Research Assistant, School of Social Sciences, The University of Adelaide; Student Editor, *Adelaide Law Review* (2021).

<sup>1</sup> James Murdoch on why he resigned from News Corporation: Maureen Dowd, 'James Murdoch, Rebellious Scion', *The New York Times* (online, 10 October 2020) <<https://www.nytimes.com/2020/10/10/style/james-murdoch-maureen-dowd.html>>.

<sup>2</sup> See, eg: *Commonwealth Electoral Act 1918* (Cth) s 329(2), as repealed by *Electoral and Referendum Amendment Act 1984* (Cth) s 5(a); *Commonwealth Electoral Amendment Bill 1987* (Cth); *Commonwealth Electoral and Referendum Amendment Bill 1989* (Cth); *Electoral and Referendum Amendment Bill 1995* (Cth); *Electoral Amendment (Political Honesty) Bill 2003* (Cth); *Electoral Amendment Bill 1995* (Qld). See also George Williams, 'Truth in Political Advertising Legislation in Australia' (Research Paper No 13, Parliamentary Library, Parliament of Australia, 24 March 1997) 1–3; Electoral Matters Committee, Parliament of Victoria, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) Relating to Misleading or Deceptive Political Advertising* (Parliamentary Paper No 282, February 2010) 50–1, 158.

<sup>3</sup> 'Disinformation is meant to deceive, while misinformation may be inadvertent or unintentional': Andrew M Guess and Benjamin A Lyons, 'Misinformation, Disinformation, and Online Propoganda' in Nathaniel Persily and Joshua A Tucker (eds), *Social Media and Democracy: The State of the Field and Prospects for Reform* (Cambridge University Press, 2020) 10, 11. Disinformation is understood as 'false, inaccurate, or misleading information designed, presented, and promoted to intentionally cause public harm or for profit': Joo-Cheong Tham and KD Ewing, 'Free Speech and Elections' in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford University Press, 2021) 312, 327, quoting European Commission, *A Multi-Dimensional Approach to Disinformation: Report of the Independent High Level Group on Fake News and Online Disinformation* (Report, 2018) 3.

and it has survived constitutional challenge.<sup>4</sup> It is timely to consider whether South Australia's law is suitable for adoption throughout Australia and how it could be strengthened. National polls indicate that approximately 90% of Australians want truth in political advertising laws<sup>5</sup> while the Australian Labor Party ('ALP') plans to introduce federal truth in political advertising laws as a current priority.<sup>6</sup> In Victoria, the Electoral Matters Committee has recommended that the Victorian Government introduce a truth in political advertising law and consider the South Australian legislation as a model.<sup>7</sup> And on 25 October 2021, Independent MP, Zali Steggall, has formally introduced a private members' bill into the House of Representatives<sup>8</sup> that seeks to introduce similar laws and whose explanatory memorandum refers to this South Australian law.<sup>9</sup>

Recent elections in Australia have demonstrated that disinformation threatens democracy. During the 2016 federal election, the ALP ran a 'Mediscare' campaign claiming that the Liberal–National Coalition (the 'Coalition') intended to privatise Medicare without evidence indicating such a plan.<sup>10</sup> In the 2019 federal election, the Coalition alleged that the ALP would introduce a 'death tax' if elected.<sup>11</sup>

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<sup>4</sup> *Cameron v Becker* (1995) 64 SASR 238 ('Cameron').

<sup>5</sup> Survey results from nationally representative samples: Australia Institute, *Polling: Truth in Political Advertising* (Report, June 2020). See also Paul Carp, 'Vast Majority of Australians Support Ban on Misleading Political Advertising', *The Guardian* (online, 18 August 2019) <<https://www.theguardian.com/media/2019/aug/18/vast-majority-of-australians-support-ban-on-misleading-political-advertising>>.

<sup>6</sup> Australian Labor Party, *ALP National Platform: As Adopted at the 2021 Special Platform Conference* (Report, 2021) 71 [25].

<sup>7</sup> Electoral Matters Committee, Parliament of Victoria, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria's Electoral Administration* (Report, September 2021) 124.

<sup>8</sup> Zali for Warringah, 'Zali Steggall OAM MP Introduces the Stop the Lies Bill' (YouTube, 25 October 2021) <[https://www.youtube.com/watch?v=PBORcu\\_GRow](https://www.youtube.com/watch?v=PBORcu_GRow)>; Colin Brinsden, 'Most Want Laws for Truth in Political Ads', *Canberra Times* (online, 25 October 2021) <<https://www.canberratimes.com.au/story/7482231/most-want-laws-for-truth-in-political-ads>>.

<sup>9</sup> 'Commonwealth Electoral Amendment (Stop the Lies) Bill 2021', *Zali Steggall* (Web Page) <[https://www.zalisteggall.com.au/commonwealth\\_electoral\\_amendment\\_stop\\_the\\_lying\\_bill](https://www.zalisteggall.com.au/commonwealth_electoral_amendment_stop_the_lying_bill)>; 'Electoral Legislation Amendment (Stop the Lies) Bill 2021: Explanatory Memorandum', *Zali Steggall* (Web Page) [21]–[23] <[https://www.zalisteggall.com.au/commonwealth\\_electoral\\_amendment\\_stop\\_the\\_lying\\_bill](https://www.zalisteggall.com.au/commonwealth_electoral_amendment_stop_the_lying_bill)> ('*Stop the Lies Memorandum*').

<sup>10</sup> Amanda Elliot and Rob Manwaring, "'Mediscare!': Social Issues' in Anika Gauja et al (eds), *Double Dissolution: The 2016 Federal Election* (Australian National University Press, 2018) 549, 551.

<sup>11</sup> Katharine Murphy, Christopher Knaus and Nick Evershed, "'It Felt Like a Big Tide': How the Death Tax Lie Infected Australia's Election Campaign", *The Guardian* (online, 8 June 2019) <<https://www.theguardian.com/australia-news/2019/jun/08/it-felt-like-a-big-tide-how-the-death-tax-lie-infected-australias-election-campaign>>.

Disinformation campaigns like these can have a profound effect on election outcomes,<sup>12</sup> which suggests that counter speech alone is not sufficient to address them. At least three factors lessen the efficacy of counter speech in Australian elections. One major factor, according to former Prime Minister of Australia, Kevin Rudd, is that the traditional Australian media landscape is monopolised, which undermines democratic expression and polarises national debate.<sup>13</sup> Another reason to doubt the efficacy of counter speech is the growing evidence in the fields of psychology and behavioural economics that ‘highlight[s] fundamental human tendencies that can lead to the acceptance of false information over accurate information’<sup>14</sup> — cognitive biases that can be exploited by political advertisers.<sup>15</sup> These factors are compounded by the rapid and broad dissemination of digital advertising, particularly close to the ‘blackout period’ before election day, that makes it difficult to correct falsehoods before they cause irreparable damage.<sup>16</sup>

All of this suggests that the marketplace of ideas is corruptible and therefore warrants regulation of misleading electoral advertising. This comment outlines South Australia’s current truth in political advertising law, how the courts have interpreted it, and the extent to which it is consistent with the implied freedom of political communication in the *Constitution*. This comment will also propose recommendations for reform while having regard to legislative constraints.

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<sup>12</sup> See Andrea Carson, Aaron J Martin and Shaun Ratcliff, ‘Negative Campaigning, Issue Salience and Vote Choice: Assessing the Effects of the Australian Labor Party’s 2016 “Mediscare” Campaign’ (2020) 30(1) *Journal of Elections, Public Opinion and Parties* 83, 96–101. See also Nicholas Reece, ‘Why Scare Campaigns Like “Mediscare” Work: Even if Voters Hate Them’, *The Conversation* (online, 14 July 2016) <<https://theconversation.com/why-scare-campaigns-like-mediscare-work-even-if-voters-hate-them-62279>>.

<sup>13</sup> Kevin Rudd, Submission No 52 to Senate Standing Committee on Environment and Communications, *Inquiry into Media Diversity in Australia* (January 2021) 2 [4], 3 [7]. See generally Bulent Kenes, ‘Rupert Murdoch: A Populist Emperor of the Fourth Estate’ (ECPS Leader Profile Series No 4, European Center for Populism Studies, December 2020).

<sup>14</sup> The literature illustrates how selective exposure, confirmation bias and heuristics for coping with information overload, and directionally motivated reasoning, undermine rationality: Philip M Napoli, ‘What if More Speech Is No Longer the Solution: First Amendment Theory Meets Fake News and the Filter Bubble’ (2018) 70(1) *Federal Communications Law Journal* 55, 66. See also Daniel Kahneman, *Thinking, Fast and Slow* (Penguin Books, 2012) 55–7, 61–4.

<sup>15</sup> Kelly Weidner, Frederik Beuk and Anjali Bal, ‘Fake News and the Willingness to Share: A Schemer Schema and Confirmatory Bias Perspective’ (2020) 29(2) *Journal of Product and Brand Management* 180, 183–5.

<sup>16</sup> Electoral Commission SA, *State Election 2014* (Report, 2015) [5.3.6].

## II SOUTH AUSTRALIAN LAW

South Australia regulates disinformation in electoral advertising to a greater extent than any other democratic polity;<sup>17</sup> the law that does so is widely accepted in the State.<sup>18</sup> Section 113 of the *SA Electoral Act* is a strict liability offence<sup>19</sup> where:

- (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 natural person — \$5 000;  
(b) if the offender is a body corporate — \$25 000.

This provision applies to an ‘electoral advertisement’ defined in the *SA Electoral Act* as an advertisement containing ‘electoral matter’,<sup>20</sup> which, in turn, means matter ‘calculated to affect the result of the election’.<sup>21</sup> Consequently, s 113 is applicable to electoral advertisements published on a wide range of mediums, such as television, radio, corflute boards and social media. Section 113, in principle, does not apply to political discussions, speeches, interviews, newspaper articles,<sup>22</sup> or any form of communication that cannot be defined as an ‘electoral advertisement’ and is therefore not required to be authorised under s 112 of the *SA Electoral Act*. However, this definition could be interpreted broadly. For example, a newspaper article tarnishing a political candidate or party might be seen as ‘calculated to affect the result of the election’. News coverage of political parties in Australia can degenerate into a ‘systemic campaign of smear and delegitimisation’.<sup>23</sup> Although the more cogent view is that an advertisement — defined as a notice or announcement<sup>24</sup> — can be readily distinguished from a full-length article.

Section 113 only applies to purported statements of fact, not statements of opinion. In *Channel Seven Adelaide Pty Ltd v Manock*, Gleeson CJ said that ‘a statement

<sup>17</sup> Alan Renwick and Michela Palese, *Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?* (Report, The Constitution Unit, University College London, March 2019) 22.

<sup>18</sup> *Ibid* 28–9.

<sup>19</sup> *Cameron* (n 4) 241 (Olsson J).

<sup>20</sup> *Electoral Act 1985* (SA) s 4(1) (definition of ‘electoral advertisement’) (*SA Electoral Act*).

<sup>21</sup> *Ibid* (definition of ‘electoral matter’).

<sup>22</sup> Renwick and Palese (n 17) 22.

<sup>23</sup> Rudd (n 13) 7 [27].

<sup>24</sup> *Macquarie Dictionary* (online at 10 July 2021) ‘advertisement’.

is more likely to be recognisable as statement of opinion if the facts on which it is based are identified or identifiable'.<sup>25</sup> This reasoning was applied by Vanstone J in *Hanna v Sibbons*,<sup>26</sup> a case arising from the South Australian state election in 2010. The South Australian Labor Party ('SA Labor') had circulated four leaflets during the election asserting that the petitioner was 'soft on' crime, hooners and drugs. These statements were printed above excerpts from Hansard of relevant speeches made by the petitioner. Justice Vanstone held that the petitioner was disputing an inference drawn from verifiable facts in the leaflets, and therefore SA Labor was not in breach of s 113.<sup>27</sup> 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'.<sup>28</sup>

The offence can only be established if the purported statement of fact is inaccurate and misleading to a *material extent*, meaning:

[T]he making of the statements was the type of event by which the court could be satisfied that there is reasonable ground to believe that a majority of electors may have been prevented from electing the candidate they preferred.<sup>29</sup>

The test does not involve a counterfactual inquiry into whether the election would have been decided differently.<sup>30</sup> Instead the focus is on whether it is likely that a substantial number of electors have been led astray by deceit. This concept is exemplified in the judgment of *King v Electoral Commissioner*.<sup>31</sup> That case concerned an advertisement published in the Adelaide Advertiser newspaper during the closely contested 1997 South Australian Parliamentary election. It conveyed the message that a vote for an SA Labor candidate, or '[t]hanks to preferences', an independent candidate or Democrat, would result in the election of Mike Rann.<sup>32</sup> Justice Prior held that the statement was in breach of s 113 because it gave a deceptive impression that preferences would automatically flow to SA Labor.<sup>33</sup>

Section 113 provides a defence where the onus is on the defendant to prove that they took no part in determining the content of the advertisement and could not reasonably be expected to have known that the statement was inaccurate and

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<sup>25</sup> (2007) 232 CLR 245, 252–3 [4] ('*Manock*').

<sup>26</sup> (2010) 108 SASR 182, 190 [29], quoting *ibid* ('*Hanna*').

<sup>27</sup> *Hanna* (n 26) 192 [36], 194 [45]–[46], 202–3 [96].

<sup>28</sup> *Manock* (n 25) 274–5 [54] (Gummow, Hayne and Heydon JJ), quoting *Lowe v Associated Newspapers Ltd* [2007] QB 580, 599 [55] (Eady J).

<sup>29</sup> *Featherston v Tully* [No 2] (2002) 83 SASR 347, 373 [125] (Bleby J) (citations omitted) ('*Featherston*').

<sup>30</sup> *Ibid* 395 [237]–[238].

<sup>31</sup> (1998) 72 SASR 172 ('*King*').

<sup>32</sup> *Ibid* 174.

<sup>33</sup> *Ibid* 179.

misleading.<sup>34</sup> Additionally, in *Cameron v Becker* ('Cameron'), the Supreme Court of South Australia held that 'there is nothing in the subject matter of s 113 which would indicate a preclusion of the common law defence' of honest and reasonable mistake,<sup>35</sup> the defence articulated in *Proudman v Dayman*.<sup>36</sup> Both the statutory and common law defences involve the court assessing whether a reasonable person in the circumstances could have known that the statement in the electoral advertisement was inaccurate and misleading. Determining whether the defendant held a belief that the statement was true is an objective test.<sup>37</sup>

In 1997, s 113 was amended to empower the Electoral Commissioner to act on complaints of misleading electoral advertisements,<sup>38</sup> which can be submitted by anyone to the Electoral Commission of South Australia ('ECSA'). If the Electoral Commissioner is satisfied that an electoral advertisement is misleading and inaccurate to a material extent, the Commissioner may request the advertiser to withdraw and retract the advertisement in specified terms and in a specified manner and form.<sup>39</sup> The Electoral Commissioner makes this assessment on the balance of probabilities.<sup>40</sup> In the six South Australian elections since 1997, ECSA has made at least 27 requests for withdrawal or retraction.<sup>41</sup>

On 23 September 2021, an electoral amendment bill was received by the Legislative Council which would have the effect of removing the power of the Electoral Commissioner by deleting sub-ss (4) and (5) of s 113.<sup>42</sup> If passed, the South Australian Civil and Administrative Tribunal ('SACAT') will replace the function of the Electoral Commissioner in seeking orders for withdrawals and retractions. The amendment proposes 'rights of appeal to either the Court of Appeal or a single judge of the Supreme Court under the *South Australian Civil and Administrative Tribunal Act*

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<sup>34</sup> *SA Electoral Act* (n 20) ss 113(3)(a)–(b).

<sup>35</sup> *Cameron* (n 4) 245 (Olsson J, Bollen J agreeing at 239), 252 (Lander J).

<sup>36</sup> (1941) 67 CLR 536.

<sup>37</sup> The court compares the evidence that was available to the defendant with the purported statement of fact subsequently expressed in the electoral advertisement: see *Cameron* (n 4) 241–3 (Olsson J, Bollen J agreeing at 239).

<sup>38</sup> *Electoral (Miscellaneous) Amendment Act 1997* (SA) s 19, amending *SA Electoral Act* (n 20) s 113.

<sup>39</sup> *SA Electoral Act* (n 20) s 113(4).

<sup>40</sup> Electoral Commission SA, *Election Report: 2018 South Australian State Election* (Report, 2019) 79 ('*SA State Election Report 2018*').

<sup>41</sup> Renwick and Palese (n 17) 23; 'SA Opposition Leader Peter Malinauskas Forced to Apologise for Facebook Post about Health Staff Numbers', *ABC News* (online, 7 July 2021) <<https://www.abc.net.au/news/2021-07-07/sa-opposition-leader-forced-to-apologise-for-facebook-post/100273028>> ('Malinauskas Incident'). See also 'SA Liberals Forced to Correct Misleading Golden Grove O-Bahn Extension Flyer', *ABC News* (online, 11 April 2021) <<https://www.abc.net.au/news/2021-04-11/sa-liberals-forced-to-correct-misleading-o-bahn-flyer/100061606>>.

<sup>42</sup> Electoral (Electronic Documents and Other Matters) Amendment Bill 2021 (SA) cl 36.

depending on the circumstances'.<sup>43</sup> This amendment is a response to the 2018 State Election Report which noted that ECSA spent significant time and resources in the investigation process 'to chase up the complainants for further information'.<sup>44</sup> Although ECSA also reported that once it 'receives all the necessary information, making a determination is relatively quick'.<sup>45</sup> The second reading speech states the central reason for vesting the power in SACAT: 'The amendments will mean that [the] Electoral Commissioner will be able to focus on administering the Act in the lead up to an election without having to become involved in potentially partisan disputes'.<sup>46</sup> In 2017, Alan Renwick and Michela Palese analysed hundreds of media articles on the operation of s 113 and found an isolated instance of a partisan actor attempting to undermine the authority of the Electoral Commission, which was later withdrawn.<sup>47</sup> Beyond that incident, Renwick and Palese state: 'we found no direct accusations of Electoral Commission bias at all, and no attempts undermine the Commission's legitimacy'.<sup>48</sup>

A case study of two contrasting examples illustrates that, currently, the Electoral Commissioner can only seek a withdrawal or retraction for electoral advertisements that contain a purported statement of *fact*. The Electoral Commissioner cannot ask parties to withdraw or retract advertisements containing an opinion, prediction or query about political policies or candidates. In 2014, SA Labor mailed out flyers asking, 'Can You Trust Habib?', shortly before the election campaign, which was authorised by SA Labor Secretary, Reggie Martin.<sup>49</sup> The flyer was widely and rightly condemned as a racist attack on Liberal candidate, Carolyn Habib, containing only her surname plastered on a crumbling brick wall littered with bullet holes.<sup>50</sup> The advertisement was also said to associate her falsely with Egyptian-Australian Mamdouh Habib, a former Guantánamo Bay detainee.<sup>51</sup> Subsequently, a complaint was made to the Electoral Commissioner, who did not find it in breach of s 113.<sup>52</sup> This example illustrates that s 113 only applies to a limited class of political communications that express a statement containing a truth value. Although it could be argued that the background suggests an answer to the question, it cannot be regarded as a decisive statement of fact and is therefore outside the scope of the provision.

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<sup>43</sup> South Australia, *Parliamentary Debates*, Legislative Council, 12 October 2021, 4443 (Rob Lucas, Treasurer) ('Second Reading Speech').

<sup>44</sup> *Ibid* 4442 (Rob Lucas, Treasurer); *SA State Election Report 2018* (n 40) 80.

<sup>45</sup> *SA State Election Report 2018* (n 40) 80.

<sup>46</sup> Second Reading Speech (n 43) 4443.

<sup>47</sup> Renwick and Palese (n 17) 28.

<sup>48</sup> *Ibid*.

<sup>49</sup> Stacey Lee, 'SA Labor Party Secretary Apologises For "Racist" Habib Flyer after Former MP Speaks Out', *ABC News* (online, 28 March 2021) <<https://www.abc.net.au/news/2021-03-27/sa-labor-secretary-apologises-for-habib-flyer/100033472>>.

<sup>50</sup> *Ibid*.

<sup>51</sup> Renwick and Palese (n 17) 24.

<sup>52</sup> *Ibid*.

The most recent retraction occurred on 6 July 2021, following a request from the Electoral Commissioner to the leader of SA Labor, Peter Malinauskas. On 17 May 2021, Malinauskas had shared a link to an *InDaily* article titled, ““Secret” Plans to Axe Doctors, Nurses from Adelaide Hospitals: Clinicians’,<sup>53</sup> and added the words: ‘[i]t is incomprehensible that the Marshall Liberal Government are secretly planning to cut even more doctors and nurses at our hospitals’.<sup>54</sup> *InDaily* had purportedly received confirmation from SA Health as to the existence of an ““internal working document” outlining “various opportunities” for savings’, although ‘no decisions ha[d] been made’.<sup>55</sup> Consequently, the Electoral Commissioner decided to seek a retraction from Malinauskas, stating: ‘the Auditor-General’s most recent annual report indicates ... there were no fewer doctors in public hospitals in 2020 than in the previous two years’. Further, ‘[a]t the time the post was written, my office did not have sufficient evidence to support the statement that the Liberal Government has a “secret plan to cut more doctors and nurses from our hospitals”’.<sup>56</sup> Malinauskas complied with the Commissioner’s request and posted the retraction to his Facebook page in the same form.<sup>57</sup>

Requests to remove electoral advertisements, like the example above, are generally respected.<sup>58</sup> In circumstances where the person or body corporate does not comply, the Electoral Commissioner can make an application to the Court of Disputed Returns.<sup>59</sup> A person can also dispute the validity of the election by petition addressed to the Court.<sup>60</sup> Subsequently, if the Court is satisfied beyond reasonable doubt that the offence has been committed, it can order the withdrawal of the advertisement and specify that a retraction be made.<sup>61</sup> The Court may also declare the results of the election void on the grounds of misleading advertising, if on the balance of probabilities, the result of the election was affected by that advertising.<sup>62</sup> Several cases have been brought under these provisions, two of which resulted in a finding that s 113 was breached.<sup>63</sup> However, none of these cases have overturned the result of the election.

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<sup>53</sup> Jemma Chapman, ““Secret” Plans to Axe Doctors, Nurses from Adelaide Hospitals: Clinicians’, *InDaily* (online, 17 May 2021) <<https://indaily.com.au/news/2021/05/17/secret-plans-to-axe-doctors-nurses-from-adelaide-hospitals-clinicians/>>.

<sup>54</sup> ‘Malinauskas Incident’ (n 41).

<sup>55</sup> Chapman (n 53).

<sup>56</sup> PMalinauskasMP (Facebook, 6 July 2021, 12:20am ACST) <<https://www.facebook.com/PMalinauskasMP/posts/347677390052666>>.

<sup>57</sup> *Ibid.*

<sup>58</sup> Bill Browne, ‘We Can Handle the Truth: Opportunities for Truth in Political Advertising’ (Discussion Paper, Australia Institute, August 2019) 7.

<sup>59</sup> The Supreme Court is the Court of Disputed Returns: *SA Electoral Act* (n 20) s 103(1).

<sup>60</sup> *Ibid* s 102.

<sup>61</sup> *Ibid* ss 113(5)(a)–(b).

<sup>62</sup> *Ibid* s 107(5).

<sup>63</sup> Section 113 was breached in the first two of these cases: *Cameron* (n 4) 239 (Olsson J, Bollen J agreeing at 239), 250 (Lander J); *King* (n 31) 178–9 (Prior J); *Featherston* (n 29); *Hanna* (n 26).



Given the significant orders that the Court can make under the *SA Electoral Act*, s 113 may be challenged on the ground that it inappropriately burdens the freedom of political communication implied in the *Constitution*.

### III THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

In 1995, the Full Court of the Supreme Court of South Australia ('Full Court') unanimously held in *Cameron* that s 113 of the *SA Electoral Act* is constitutionally valid.<sup>64</sup> That case concerned an appeal on the ground that s 113 of the *SA Electoral Act* contravenes the implied freedom of political communication found in the *Constitution*.<sup>65</sup> The Full Court held:

Whilst this legislation does interfere with the freedom to engage in political discourse, it does so for the protection of the fundamental right, which is that an elector is not only to be as widely informed as the elector and any candidate would wish, but also that the elector is not lead by deceit or misrepresentation into voting differently from that which the elector would have done if the elector had not been misinformed.<sup>66</sup>

This is consistent with the seminal case of *Australian Capital Television Pty Ltd v Commonwealth*, which established the implied freedom of political communication in the *Constitution*.<sup>67</sup> In that judgment, Gaudron J stated that the freedom of political communication is not absolute, rather it

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 law with respect to material answering that description.<sup>68</sup>

Subsequently, in *Lange v Australian Broadcasting Corporation*, the High Court of Australia grounded the implied freedom in ss 7 and 24 of the *Constitution*<sup>69</sup> and provided the initial test for determining when the implied freedom would invalidate a law. The test was later modified by *Coleman v Power* to include a proportionality analysis<sup>70</sup> and disaggregated into three distinct steps in *McCloy v New South Wales*.<sup>71</sup>

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<sup>64</sup> *Cameron* (n 4) 248 (Olsson J, Bollen J agreeing at 239), 257 (Lander J).

<sup>65</sup> *Ibid* 239.

<sup>66</sup> *Ibid* 255 (Lander J).

<sup>67</sup> (1992) 177 CLR 106 (*ACTV*).

<sup>68</sup> *Ibid* 217.

<sup>69</sup> (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>70</sup> (2004) 220 CLR 1, 50 [93] (McHugh J), 77 [196] (Gummow and Hayne JJ), 90 [235] (Kirby J). See generally Adrienne Stone and Simon Evans, 'Australia: Freedom of Speech and Insult in the High Court of Australia' (2006) 4(4) *International Journal of Constitutional Law* 677–88.

<sup>71</sup> (2015) 257 CLR 178, 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ) (*McCloy*).

### A *Applying the Test*

*Cameron*<sup>72</sup> was decided prior to *McCloy*;<sup>73</sup> therefore, it is prudent to apply the modified test to s 113, which considers the burden that a law places on political communication, its purpose and whether it is reasonably appropriate and adapted to advance that purpose.

#### 1 *Burden*

The first question is whether the law effectively burdens the freedom ‘in its terms, operation or effect’.<sup>74</sup> This asks nothing more than whether the law puts ‘some limitation on, the making or the content of political communications’.<sup>75</sup> 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’.<sup>76</sup> 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.

#### 2 *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.<sup>77</sup> The purpose of s 113 is to protect a fundamental right in a representative democracy — that an elector is to be widely informed as they wish and not led by deceit when voting.<sup>78</sup> This purpose is of paramount importance to the maintenance of representative government. In *Smith v Oldham*, 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’.<sup>79</sup> Further, Isaacs J observed that ‘Parliament can forbid and guard against fraudulent misrepresentation’.<sup>80</sup> 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’.<sup>81</sup> Consequently, there

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<sup>72</sup> *Cameron* (n 4).

<sup>73</sup> *McCloy* (n 71).

<sup>74</sup> *Ibid* 194 [2] (French CJ, Kiefel, Bell and Keane JJ), 280 [306] (Gordon J). See also at 230–1 [126] (Gageler J).

<sup>75</sup> *Monis v The Queen* (2013) 249 CLR 92, 142 [108] (Hayne J).

<sup>76</sup> *Cameron* (n 4) 254.

<sup>77</sup> *Brown v Tasmania* (2017) 261 CLR 328, 363–4 [104] (Kiefel CJ, Bell and Keane JJ) (*‘Brown’*).

<sup>78</sup> *Cameron* (n 4) 252, 255 (Lander J).

<sup>79</sup> (1912) 15 CLR 355, 362 (Isaacs J).

<sup>80</sup> *Ibid*.

<sup>81</sup> *Unions NSW v New South Wales* (2013) 252 CLR 530, 579 [138].

is no doubt that s 113 has a legitimate purpose which is essential to the maintenance of representative government. In the recent case of *LibertyWorks Inc v Commonwealth*<sup>82</sup> — which concerned foreign interference legislation — the High Court affirmed that the burden on political communication effected by a law is relevant to the proportionality analysis and ‘is considered in light of the importance of the purpose sought to be achieved’.<sup>83</sup>

### 3 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 whether the restriction that the law imposes on the freedom of political communication is justified.<sup>84</sup> This test consists of three inquiries — whether the law is suitable, necessary, and adequate in its balance. It is worth bearing in mind that this approach, referred to as ‘structured proportionality’ or ‘strict proportionality’, has been rejected by Gageler J<sup>85</sup> and Gordon J.<sup>86</sup> Justice Gordon has endorsed the established ‘reasonably appropriate and adapted’ test.<sup>87</sup> With potentially greater consequence, Gageler J has advanced a categorical approach whereby ‘the standard of justification ... is calibrated to the degree of risk to the system of representative and responsible government’.<sup>88</sup> Of particular relevance to truth in political advertising laws, Gageler J has indicated that for a ‘restriction on political communication in the conduct of an election for political office’,<sup>89</sup> the standard should be close scrutiny of the reasonable necessity of the compelling purpose.<sup>90</sup> However, following *McCloy*, a majority of the High Court has consistently reaffirmed that structured proportionality is the accepted approach.<sup>91</sup> It will be applied to s 113 in the analysis below.

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<sup>82</sup> (2021) 391 ALR 188 (*LibertyWorks*’).

<sup>83</sup> *Ibid* 204 [63] (Kiefel CJ, Keane and Gleeson JJ), citing *McCloy* (n 71) 218 [84] (French CJ, Kiefel, Bell and Keane JJ).

<sup>84</sup> *McCloy* (n 71) 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>85</sup> *Ibid* 235–7 [141]–[146]; *Brown* (n 77) 376–9 [160]–[165] (*Brown*’); *Clubb v Edwards* (2019) 267 CLR 171, 225 [161] (*Clubb*’).

<sup>86</sup> *Clubb* (n 85) 305–8 [390]–[399].

<sup>87</sup> *Ibid*, citing *McCloy* (n 71) 281 [306] (Gordon J).

<sup>88</sup> Murray Wesson, ‘The Reception of Structured Proportionality in Australian Constitutional Law’ (2021) 49(3) *Federal Law Review* 352, 357, quoting *McCloy* (n 71) 238 [150] (Gageler J).

<sup>89</sup> *Unions NSW v New South Wales* (2019) 264 CLR 595, 621–2 [65] (Gageler J) (*Unions NSW*’), citing *ACTV* (n 67) 143–4 (Mason CJ).

<sup>90</sup> *Unions NSW* (n 89) 621–2 [65] (Gageler J), discussing *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 200 [40] (Gleeson CJ).

<sup>91</sup> See, eg: *Brown* (n 77) 368–70 [123]–[131] (Kiefel CJ, Bell and Keane JJ); *Clubb* (n 85) 202 [74] (Kiefel CJ, Bell and Keane JJ); *Comcare v Banerji* (2019) 267 CLR 373, 400 [32] (Kiefel CJ, Bell, Keane and Nettle JJ), 451 [188] (Edelman J) (*Banerji*’); *Unions NSW* (n 89) 615 [42] (Kiefel CJ, Bell and Keane JJ); *LibertyWorks* (n 82) 200 [48] (Kiefel CJ, Keane and Gleeson JJ), 240 [194] (Edelman J).

A law is suitable if there is a rational connection between the purpose of the law and the measures adopted to achieve that purpose, in the sense that the means for which it provides can realise that purpose.<sup>92</sup> 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 which has a less restrictive effect on the freedom.<sup>93</sup> While the *SA Electoral Act* may have 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. However, this is unlikely to be a compelling alternative because it would detract from the broad purpose of the legislation, to ensure that electors are as widely informed as they wish. 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 would not be subject to a pecuniary penalty. The current formulation of the law may have an unduly restrictive effect on political advertising if second-hand publishers perceive that there is a risk that they may be liable and are unwilling to undertake extensive vetting.<sup>94</sup> The person or body corporate who formulated and authorised the creation of the advertisement would remain liable under the current penalty provisions, whilst the court could order a second-hand publisher to withdraw (where possible) and retract the misleading advertisement. This alternative would be capable of achieving the same purpose with a less restrictive effect.

Finally, the law must be adequate in its balance between the importance of the purpose it serves and the extent to which it restricts the freedom of political communication.<sup>95</sup> This inquiry is problematic because it necessarily involves a value judgement. The majority in *McCloy* agreed that this does not entitle the courts to substitute their own assessment for that of the legislative decision-maker,<sup>96</sup> however, the courts have a duty to determine the limit of legislative power affecting constitutionally guaranteed freedoms.<sup>97</sup> Consequently, it is uncertain as to exactly how the courts will make this value judgement. Although it should be noted that the joint judgment in *McCloy* has 'built a substantial measure of deference [to the judgements of elected branches] into the balancing stage'.<sup>98</sup> In *Palmer v Western Australia*, Edelman J reiterated that

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<sup>92</sup> *Banerji* (n 91) 400 [33] (Kiefel CJ, Bell, Keane and Nettle JJ).

<sup>93</sup> *McCloy* (n 71) 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>94</sup> Renwick and Palese (n 17) 26.

<sup>95</sup> *McCloy* (n 71) 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>96</sup> *Ibid* 219 [89]. See also *R v Secretary of State for the Home Department* [2015] AC 945, 964 [20] (Lord Sumption).

<sup>97</sup> *McCloy* (n 71) 219–20 [89].

<sup>98</sup> Wesson (n 88) 376.

‘this third basis for invalidating laws must be highly exceptional’.<sup>99</sup> In fact, a proportionality analysis has not changed the outcome in any case before the High Court.<sup>100</sup>

It should not be assumed that a law will never be invalidated on this third step. It appears that s 113 places a greater burden on political communication than previously asserted in *Cameron*.<sup>101</sup> Section 113 is directed at a person who ‘permits the publication of an electoral advertisement’.<sup>102</sup> This means that both the candidate 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 it may generally discourage the publication of political advertising and be invalidated.<sup>103</sup>

#### IV AVENUES FOR REFORM

In light of the above, there are several ways South Australia’s truth in political advertising law could be made more robust. Recent developments in the Australian Capital Territory are instructive. On 1 July 2021, s 297A of the *Electoral Amendment Act 2020* (ACT) came into effect — a truth in political advertising law that is a near transplant of the South Australian provision. The supplementary explanatory statement sets out that ‘the offence is intended to apply only to people or political entities who post an advertisement, not the publisher’.<sup>104</sup> South Australia could consider amending s 113 of the *SA Electoral Act* to limit liability to the person or body corporate who formulates the content of the inaccurate and misleading advertisement and puts forward that view. This will reduce the risk that s 113 will be invalidated while remaining effective, albeit to a narrower range of political communications.

Financial penalties may be insufficient to deter wealthy candidates and political parties who can absorb the specified amount as a routine campaign expense to gain political advantage. One alternative, with a stronger deterrent effect, would be to impose a disqualification penalty that bars the candidate from standing for election.

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<sup>99</sup> (2021) 388 ALR 180, 248 [267].

<sup>100</sup> Adrienne Stone, ‘Proportionality and Its Alternatives’ (2020) 48(1) *Federal Law Review* 123, 148.

<sup>101</sup> *Cameron* (n 4) 248 (Olsson J, Bollen J agreeing at 239), 257 (Lander J).

<sup>102</sup> *SA Electoral Act* (n 20) s 113(2) (emphasis added).

<sup>103</sup> George Williams, Submission No 19 to Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into and Report on All Aspects of the Conduct of the 2016 Federal Election and Matter Related Thereto* (23 October 2016) 4.

<sup>104</sup> Supplementary Explanatory Statement, Electoral Amendment Bill 2018 (ACT) 3. This statement was authored by Caroline Le Couteur MLA, who moved the amendments, but it was not formally endorsed by the House of Assembly. Notably, *Electoral Amendment Act 2020* (ACT) s 13, inserting *Electoral Act 1992* (ACT) s 297A(1)(a) (*‘Electoral Act ACT’*) includes the word ‘disseminates’ which means to ‘publish’: *Electoral Act ACT* (n 104) s 3 (definition of ‘disseminate’).

This type of penalty applies in the United Kingdom to any person or body corporate who publishes any false statement of fact in relation to a candidate's character before or during an election.<sup>105</sup> A breach of this provision may bar the individual from standing for Parliament or holding elected office for up to three years.<sup>106</sup> Similar penalties already exist for other electoral offences in Australian federal elections. Under s 386 of the *Commonwealth Electoral Act 1918* (Cth) any person who is convicted of bribery or undue influence can be disqualified from sitting as a Member of either House of the Parliament for a period of two years. A penalty provision of this kind would make the law more robust.

Another consideration is the need to adapt the legislation to technological developments. In particular, the rise of 'deepfakes' will pose significant challenges for regulating political advertising that can undermine the integrity of elections.<sup>107</sup> Deepfakes involve a manipulated photograph or image that impersonates an individual and can be 'animated to portray [them] speaking or acting in a certain way'.<sup>108</sup> The World Economic Forum has cited that deep fakes have been used in election campaigns in Belgium, Malaysia and Gabon to destabilise governments and political processes.<sup>109</sup> Deep fakes have already been employed in Australia during the 2020 Queensland election campaign to impersonate the Premier, although fortunately the advertisement was clearly labelled as doing so and was not a compelling impersonation.<sup>110</sup> Steggall's draft bill for truth in political advertising 'prohibits parties, candidates and campaigners from impersonating or passing off material as being from another candidate'.<sup>111</sup> South Australia should consider explicitly regulating the use of 'deep fakes' in electoral advertising.

Any amendments to the law should be accompanied with an explanation, at least in the second reading speech,<sup>112</sup> that sets out who could be liable, its purpose and how the law is appropriate and adapted to achieve that purpose. This is important because in *Unions NSW v New South Wales* it was stated by Gordon J that 'once it has been demonstrated that a legislative provision burdens the implied freedom, it is for

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<sup>105</sup> *Representation of the People Act 1983* (UK) s 106(1).

<sup>106</sup> *Ibid* ss 160(4)(b)–(c).

<sup>107</sup> Emma Perot and Frederick Mostert, 'Fake It Till You Make It: An Examination of the US and English Approaches to Persona Protection as Applied to Deepfakes on Social Media' (2020) 15(1) *Journal of Intellectual Property Law and Practice* 32, 33.

<sup>108</sup> *Ibid* 32.

<sup>109</sup> Alexander Puutio and David Alexandru Timis, 'Deepfake Democracy: Here's How Modern Elections Could Be Decided by Fake News', *World Economic Forum* (Web Page, 5 October 2020) <<https://www.weforum.org/agenda/2020/10/deepfake-democracy-could-modern-elections-fall-prey-to-fiction/>>.

<sup>110</sup> *Stop the Lies Memorandum* (n 9) [18]; Cam Wilson, 'Australia's First Deepfake Political Ad Is Here and It's Extremely Cursed', *Gizmodo* (online, 2 November 2020) <[https://www.gizmodo.com.au/2020/11/australias-first-deepfake-political-ad-is-here-and-its-extremely-cursed](https://www.gizmodo.com.au/2020/11/australias-first-deepfake-political-ad-is-here-and-its-extremely-cursed/)>.

<sup>111</sup> *Stop the Lies Memorandum* (n 9) [1].

<sup>112</sup> Explanatory memoranda are generally not published for South Australian legislation.

the supporter of the legislation to persuade the Court that the burden is justified'.<sup>113</sup> Chief Justice Kiefel, Bell and Keane JJ stated that

[i]t must be of course be accepted that Parliament does not generally need to provide evidence to prove the basis for legislation which it enacts. However, its position in respect of legislation which burdens the implied freedom is otherwise.<sup>114</sup>

## V CONCLUSION

Despite its limited scope, South Australia's truth in political advertising law has been invoked on numerous occasions to remove inaccurate and misleading electoral advertisements. This law is essential to protect the integrity of the electoral process from undue influence exacerbated by the spread of disinformation through digital media. The current law could be refined in light of recent developments to the test for the implied freedom of political communication. In particular, the law should not apply to second-hand publishers because doing so may generally discourage political advertising — an argument that could be made to invalidate the law. Another consideration is that the law could be strengthened by disqualifying candidates who authorise misleading political advertisements from standing for election. Furthermore, there is now a risk that deepfakes can be spread online to distort the electoral process. This new technology should be taken seriously given that it has already been used to destabilise foreign governments. Structuring the law with these considerations in mind may decrease the likelihood that it will be invalidated, while enhancing its deterrent effect. South Australia's law has already been adapted by the Australian Capital Territory to enhance the fairness of its electoral process. Its operation and structure are also being considered for a Commonwealth bill. Perhaps this is because it has provided an effective mechanism for removing misleading political advertising since 1997. All of this suggests that South Australia's law is not an aberration, but a workable model to address inaccurate and misleading advertising in elections. It is certainly capable of being adapted for implementation in all states and federally.

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<sup>113</sup> *Unions NSW* (n 89) 650 [151] (Gordon J).

<sup>114</sup> *Ibid* 616 [45].