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

Unions NSW v New South Wales (2019) 264 CLR 595.

References

Beck, L. (2020). *Inquiry into the impact of social media on elections and electoral administration*. Submission No. 1 to Electoral Matters Committee, Parliament of Victoria.

Electoral Act 1918 (Cth).

Electoral Act 1985 (SA).

ECSA. (2014). *Election report: State election 2014*. Electoral Commission South Australia, viewed 22 November 2021, https://www.ecsa.sa.gov.au/component/edocman/2014-state-election-report-including-fisher-and-davenport-by-elections/download

ECSA. (2019). *Election report: 2018 South Australian state election*. Electoral Commission South Australia, viewed 22 November 2021, https://www.ecsa.sa.gov.au/component/edocman/2018-state-election-report/download

Renwick, A., & Palese, M. (2019). *Doing democracy better: How can information and discourse in election and referendum campaigns in the UK be improved*? The Constitution Unit, University College London, viewed 16 November 2021, https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/184_-_doing_democracy_better.pdf

Representation of the People Act 1983 (UK).

Stubbs, M. (2006). From foreign circumstances to first instance considerations: Extrinsic material and the law of statutory interpretation. *Federal Law Review, 34*(1), 103–125.