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

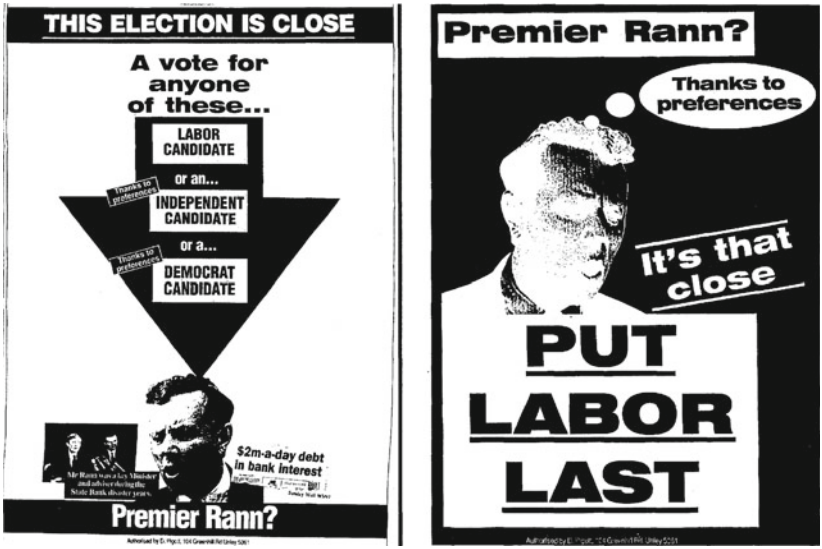

Fig. 9.1 The impugned advertisement in *King*

'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

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