

# Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations

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## Abstract

Contemporary politics is increasingly described as ‘post-truth’. In Australia and elsewhere, misleading or false statements are being deployed in electoral campaigning, with troubling democratic consequences. Presently, two Australian jurisdictions have laws that require truth in political advertising. There have been proposals for such regulation in several more, including at the federal level. This article considers whether these laws are consistent with the implied freedom of political communication in the *Australian Constitution*. It suggests that the existing provisions, in South Australia and the Australian Capital Territory, would likely satisfy the proportionality test currently favoured by the High Court of Australia. However, the article identifies several implied freedom concerns that could prevent more onerous limitations on misleading political campaigning. Legislatures therefore find themselves between a rock and a hard place: minimalistic regulation may be insufficient to curtail the rise of electoral misinformation, while more robust laws risk invalidity under the *Constitution*.

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## I Introduction

[T]he deliberate falsehood and the outright lie used as legitimate means to achieve political ends, have been with us since the beginning of recorded history. Truthfulness has never been counted among the political virtues ...<sup>1</sup>

— Hannah Arendt

There is no human right to disseminate information that is not true.<sup>2</sup>

— Lord Hobhouse

Navigating the streets of Canberra in 2020, an observant driver might have spotted on the side of a parked van an advertisement from The Australia Institute (‘TAI’), a progressive think-tank. In bold font, it observed: ‘It’s perfectly legal to lie in a political ad and it shouldn’t be. Enough is enough.’ The advertisement ended with a call for action: ‘It’s time for truth in political advertising laws.’<sup>3</sup> TAI is not alone in making this demand; polling undertaken by the think-tank found that 84% of Australians supported the introduction of such laws.<sup>4</sup> In its report on the 2019 Federal Election, published in December 2020, the Joint Standing Committee on Electoral Matters canvassed the possibility of a federal law regulating truth in political advertising. While the Liberal–National Coalition-majority Committee did not support new regulation, dissenting reports from the Australian Labor Party (‘ALP’) and the Australian Greens members expressed appetite for reform.<sup>5</sup> ‘[W]ithout some legislative response,’ wrote Greens Senator Larissa Waters, ‘the integrity of election campaigns and public faith in political parties will continue to be eroded.’<sup>6</sup> In late 2021, Independent Member of Parliament Zali Steggall released a draft private member’s bill, Commonwealth Electoral Amendment (Stop the Lies) Bill 2021 (Cth).<sup>7</sup>

Truth-in-political-advertising laws (‘TPALs’) have existed in Australia in various forms since 1983.<sup>8</sup> Presently, South Australia (‘SA’) and the Australian Capital Territory (‘ACT’) have laws that make it an offence to publish inaccurate

<sup>1</sup> Hannah Arendt, ‘Lying in Politics: Reflections on the Pentagon Papers’, *New York Review of Books* (online, 18 November 1971) <[https://www.nybooks.com/articles/1971/11/18/lying-in-politics-reflections-on-the-pentagon-pape/?lp\\_txn\\_id=1020352](https://www.nybooks.com/articles/1971/11/18/lying-in-politics-reflections-on-the-pentagon-pape/?lp_txn_id=1020352)>.

<sup>2</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 238.

<sup>3</sup> ‘We Need Truth in Political Advertising Laws’, *The Australia Institute* (Web Page) <[https://nb.tai.org.au/truth\\_in\\_political\\_ads](https://nb.tai.org.au/truth_in_political_ads)>.

<sup>4</sup> Bill Browne, ‘We Can Handle the Truth: Opportunities for Truth in Political Advertising’ (Discussion Paper, The Australia Institute, August 2019) 38.

<sup>5</sup> Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (Report, December 2020) 194–5, 202–3.

<sup>6</sup> *Ibid* 195 [8.39].

<sup>7</sup> Zali Steggall, ‘Zali Steggall MP to Introduce Bill to Stop the Lies in Political Advertising’, *Zali Steggall MP* (Media Release, 30 August 2021) <[https://www.zalisteggall.com.au/media\\_release\\_zali\\_steggall\\_mp\\_to\\_introduce\\_bill\\_to\\_stop\\_the\\_lies\\_in\\_political\\_advertising](https://www.zalisteggall.com.au/media_release_zali_steggall_mp_to_introduce_bill_to_stop_the_lies_in_political_advertising)>.

<sup>8</sup> For a history of parliamentary consideration of such laws, see 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) 32–45.

and misleading communications in the course of electoral campaigns.<sup>9</sup> The perceived need for such regulation at the federal level, and in other states, has been heightened by the social media age<sup>10</sup> and high-profile instances of misleading campaigning. During the 2016 Federal Election, for example, the ALP ran a ‘Mediscare’ campaign claiming the Liberal–National Coalition intended to privatise Medicare;<sup>11</sup> it had indicated no such plan. In the 2019 Federal Election, the Liberal Party alleged that the ALP would introduce a ‘death tax’ if elected; again, it had no such plan.<sup>12</sup> These examples are the tip of the iceberg: on Twitter, Facebook and Instagram, as well as in more traditional media outlets, misleading, deceptive or plainly false political communication has flourished, in Australia and elsewhere.<sup>13</sup>

Attempts to regulate truth and falsehood in electoral campaigning enliven thorny free speech issues,<sup>14</sup> and, in Australia, raise the spectre of a constitutional obstacle: the implied freedom of political communication. The constitutionality of such laws has been tested once before, when the Full Court of the Supreme Court of South Australia upheld the validity of the *Electoral Act 1985* (SA) (‘SA Act’) in the 1995 case of *Cameron v Becker*.<sup>15</sup> However, that case’s contemporary salience is limited. *Cameron* was decided at the dawn of the implied freedom: in the subsequent quarter-century, the jurisprudence has become more complex. The test for determining constitutional validity was reformulated in *Lange v Australian Broadcasting Corporation*,<sup>16</sup> and underwent substantial modification in *McCloy v New South Wales*.<sup>17</sup> Australia’s apex court, meanwhile, has yet to confront squarely TPALs. In *Evans v Crichton-Browne*,<sup>18</sup> a case that preceded the development of the implied freedom of political communication, the High Court of Australia read down

<sup>9</sup> *Electoral Act 1985* (SA) s 113 (‘SA Act’); *Electoral Act 1992* (ACT) s 297A (‘ACT Act’). The Northern Territory is sometimes cited as having a TPAL, although the Northern Territory Electoral Commission has adopted a narrow interpretation of the relevant provision, stating ‘[t]he provision is not a truth in political advertising clause’: Northern Territory Electoral Commission, ‘Campaign Advertising and Authorisation: Local Government Elections’, (Information Sheet) <[https://ntec.nt.gov.au/\\_data/assets/pdf\\_file/0009/571446/Campaign-advertising-and-authorisation-LG.pdf](https://ntec.nt.gov.au/_data/assets/pdf_file/0009/571446/Campaign-advertising-and-authorisation-LG.pdf)> (emphasis in original).

<sup>10</sup> In the American context, one scholar has suggested that the internet and social media distinguish false speech in the contemporary era: ‘the internet has made the issue different from times past and will raise difficult issues of First Amendment law’: Erwin Chemerinsky, ‘False Speech and the First Amendment’ (2018) 71(1) *Oklahoma Law Review* 1, 2.

<sup>11</sup> Mazoe Ford, ‘Election 2016: “Mediscare” and Other Tactics from the Labor Campaign Handbook’, *ABC* (online, 4 July 2016) <<https://www.abc.net.au/news/2016-07-04/election-2016-how-did-they-do-it-inside-the-labor-campaign/7568456?nw=0>>.

<sup>12</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>>.

<sup>13</sup> See Browne (n 4) 5–6; McKay Coppins, ‘The Billion-Dollar Disinformation Campaign to Reelect the President’, *The Atlantic* (online, 10 February 2020) <<https://www.theatlantic.com/magazine/archive/2020/03/the-2020-disinformation-war/605530/>>. In the United States (‘US’), voting-related misinformation has taken on a troubling racial dimension. See Gilda Daniels, ‘Voter Deception’ (2010) 43(2) *Indiana Law Review* 343.

<sup>14</sup> Joo-Cheong Tham and KD Ewing, ‘Free Speech and Elections’ in Adrienne Stone and Frederick Schauer (eds), *Oxford Handbook of Free Speech* (Oxford University Press, 2021) 312, 327–8.

<sup>15</sup> *Cameron v Becker* (1995) 64 SASR 238 (‘Cameron’).

<sup>16</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (‘Lange’).

<sup>17</sup> *McCloy v New South Wales* (2015) 257 CLR 178 (‘McCloy’).

<sup>18</sup> *Evans v Crichton-Browne* (1981) 147 CLR 169 (‘Evans’).

a prohibition on false communication relating to vote-casting. The Court observed that ‘the framers of a law designed to prevent misrepresentation or concealment which may affect the political judgment of electors must consider also the importance of ensuring that freedom of speech is not unduly restricted’.<sup>19</sup>

It is probable that, should TPALs be introduced federally, or proliferate at the state and territory level, challenges will be made to their constitutional validity.<sup>20</sup> Given *Cameron* was decided before *Lange* or *McCloy*, there is no authoritative guidance on how that litigation might be resolved. Accordingly, in light of the ongoing political debate, a focused analysis on the interplay between such laws and the implied freedom of political communication is timely. This is particularly so because these issues have not previously benefited from sustained scholarly engagement. Most studies have focused on the desirability of such laws,<sup>21</sup> rather than constitutional concerns. In a 1997 research paper, Williams merely noted that ‘Australia also faces constitutional problems with seeking to regulate truth in political advertising’.<sup>22</sup> It is hoped this article might therefore have practical utility. It is possible to conceive of a spectrum of regulation: at one end, highly burdensome TPALs that are effective in addressing the problem, but contravene the implied freedom; and at the other end, a minimalistic regime that is ineffective, but does not offend the *Australian Constitution*. Considering where the line might be drawn, and how to maximise efficacy without overstepping constitutional boundaries, may aid legislative drafters.<sup>23</sup>

This article seeks to address two related questions: (1) Are existing TPALs consistent with the implied freedom of political communication in the *Constitution*?; and (2) What lessons can policymakers draw from implied freedom jurisprudence in designing efforts to address falsehoods in campaigning? The article will deploy a predominantly doctrinal approach, applying the current implied freedom test to TPALs. It will supplement this with insight from comparative law and scholarship, particularly from the United States (‘US’) and Britain.

The article begins by describing the evolution of relevant electoral regulation in Australia, from Federation to the passage, and swift repeal, of a federal TPAL in the 1980s. It then outlines the contours of TPALs in SA and the ACT, before assessing the validity of these schemes against the requirements of the implied

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<sup>19</sup> Ibid 206–7 [12] (Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ).

<sup>20</sup> In the ACT, Victoria and Queensland, a challenge could also be made under human rights law: *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).

<sup>21</sup> See, eg, Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 1<sup>st</sup> ed, 2010) 142–8.

<sup>22</sup> George Williams, ‘Truth in Political Advertising Legislation in Australia’ (Research Paper No 13, Parliamentary Library, Parliament of Australia, 1997) ii. See also George Williams and Natalie Gray, ‘A New Chapter in the Regulation of Truth in Political Advertising in Australia’ (1997) 8(2) *Public Law Review* 110; George Williams, ‘Freedom of Political Discussion and Australian Electoral Laws’ (1998) 5 *Canberra Law Review* 151.

<sup>23</sup> In doing so, I echo the comments of an American scholar who undertook a similar exercise: ‘My suggestions are modest. My suggestions are unlikely to transform the state of our politics. But there is value in delineating what is permissible within the boundaries of the First Amendment as we work towards enhancing our democratic discourse’: Joshua Sellers, ‘Legislating against Lying in Campaigns and Elections’ (2018) 71(1) *Oklahoma Law Review* 141, 165.

freedom. The article finds that a constitutional challenge to these laws would likely fail on the structured proportionality methodology currently employed by a majority of the High Court, although it may have greater prospects under the alternative calibrated scrutiny approach. The article then considers other issues arising at the intersection of the implied freedom and TPALs, which may well constrain the development of broader regulation. In traversing this ground, it highlights several uncertainties in implied freedom jurisprudence that are squarely raised by TPALs. These uncertainties suggest that future litigation over the validity of TPALs will cause headaches for legislatures and the High Court alike.

## II Context

### A History

Concern with the propriety of political campaigning is not novel.<sup>24</sup> The first electoral law in Britain to regulate certain categories of false statements was enacted in 1895.<sup>25</sup> Several years later, Grantham J expressed his ‘great pity that in elections at the present time so many false statements are made, and that votes are obtained in this way’.<sup>26</sup> In Australia, the very first federal electoral law, the *Commonwealth Electoral Act 1902* (Cth), prohibited the publication of electoral advertisement handbills or pamphlets that did not identify the name and address of the person who authorised it.<sup>27</sup> This requirement was expanded by the *Commonwealth Electoral Act 1911* (Cth), which provided that, following the issuance of electoral writs, any published political comment must identify the author’s name and address.<sup>28</sup> In 1912, the High Court was asked whether such a law was within the Commonwealth’s legislative authority. Isaacs J emphatically upheld the law’s validity: ‘Parliament can forbid and guard against fraudulent misrepresentation. It would shock the conscience to deny it.’<sup>29</sup> In addition to these procedural requirements, the 1911 law also provided content-based regulation. Section 180(e) prohibited advertising that contained ‘any untrue or incorrect statement intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his vote.’ These provisions were retained, with minor additions, following amendments in 1918 and 1928.

Electoral reform elicited minimal political interest in subsequent decades. However, ahead of the 1983 Federal Election, the ALP pledged a review of electoral law if elected. The Hawke Government subsequently established a Joint Select Committee on Electoral Reform, which delivered its first report in September

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<sup>24</sup> See generally Catherine J Ross, ‘Ministry of Truth: Why Law Can’t Stop Prevarications, Bullshit, and Straight-out Lies in Political Campaigns’ (2017) 16 *First Amendment Law Review* 367, 367–9.

<sup>25</sup> *Corrupt and Illegal Practices Prevention Act 1895* See Jacob Rowbottom, ‘Lies, Manipulation and Elections — Controlling False Campaign Statements’ (2012) 32(3) *Oxford Journal of Legal Studies* 507, 508.

<sup>26</sup> *Attercliffe Division of the City of Sheffield* (1906) 5 O’Malley & Hardcastle Election Cases 218, 221.

<sup>27</sup> *Commonwealth Electoral Act 1902* (Cth) s 180(a).

<sup>28</sup> *Ibid* s 181AA(1).

<sup>29</sup> *Smith v Oldham* (1912) 15 CLR 355, 362 (Isaacs J) (‘*Smith*’).

1983.<sup>30</sup> The Committee noted that it had received a submission from Geoffrey Lindell, a law lecturer, raising concerns about the proper regulation of ‘misleading electoral advertising’.<sup>31</sup> The Committee tentatively recommended that the Australian Electoral Office be empowered to seek injunctive relief against misleading advertising.<sup>32</sup> The Committee also suggested that the Committee itself could consider ‘standards governing political advertising vis a vis trades practices legislation, among other things ... at greater length’.<sup>33</sup>

Although the case was not explicitly referenced in the Committee’s report, Lindell’s concerns may have been animated by the High Court’s 1981 decision in *Evans* (sitting as the Court of Disputed Returns). That case concerned the ‘mislead or improperly interfere’ offence in the *Commonwealth Electoral Act 1918* (Cth) (‘1918 Act’).<sup>34</sup> The petitioners challenged the election of three Senators on the basis that advertisements containing untrue or incorrect statements were published in newspapers and broadcast on television in contravention of that provision.<sup>35</sup> The case turned on the provision’s construction: did the offence cover conduct influencing voter deliberation, or ‘does it refer only to statements intended or likely to mislead or improperly interfere with an elector in such a way that his choice when made is not properly expressed or given effect by the physical act of voting?’<sup>36</sup> The Court favoured the latter interpretation, informed by free speech concerns and practical factors. However, the Court stressed that its judgment did not foreclose the possibility of a wider provision: ‘This Court is not concerned with what it would be desirable for Parliament to provide, but with the meaning of what Parliament has in fact provided’.<sup>37</sup>

In late 1983, Parliament passed amendments to the *1918 Act*. It included, following the Committee’s rather cursory consideration, Australia’s first TPAL. Section 329(2), as amended, provided:

A person shall not, during the relevant period in relation to an election under this Act, print, publish, or distribute, or cause, permit or authorise to be printed, published or distributed, any electoral advertisement containing a statement —

- (a) that is untrue; and
- (b) that is, or is likely to be, misleading or deceptive

The offence was punishable by a fine or six months’ imprisonment. ‘Electoral advertisement’ and ‘publish’ were broadly defined, albeit a defence was provided for defendants who could prove they did not know, and could not reasonably be

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<sup>30</sup> Joint Select Committee on Electoral Reform, Parliament of Australia, *First Report* (Parliamentary Paper No 227, 13 September 1983).

<sup>31</sup> *Ibid* 180.

<sup>32</sup> *Ibid* 181.

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

<sup>34</sup> *Commonwealth Electoral Act 1918* (Cth) (‘1918 Act’) s 161(e), as at 17 February 1981.

<sup>35</sup> One petition concerned advertising to the effect that votes for Australian Democrats candidates were effectively votes for the ALP; two others concerned allegations that the ALP would introduce a wealth tax.

<sup>36</sup> *Evans* (n 18) 201 (Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ).

<sup>37</sup> *Ibid* 206.

expected to have known, that the advertisement was of the nature prohibited. An electoral candidate, or the Australian Electoral Office, could seek injunctive relief.

The provision was short-lived. The Committee's second report, published in August 1984, noted that the new provision 'could seriously disrupt the orderly process of political campaigning'.<sup>38</sup> The Committee observed that 'even though fair advertising is desirable it is not possible to control political advertising by legislation'.<sup>39</sup> Accordingly, it recommended the repeal of s 329(2). Senator Michael Macklin filed a dissenting report, strongly rejecting the majority's position: 'It is surely a small price to pay for a better informed democracy that politicians are required to tell the truth'.<sup>40</sup> The provision was subsequently repealed.<sup>41</sup> There remains no TPAL in force at federal level today, despite the Gillard Government committing to such legislation,<sup>42</sup> and frequent parliamentary consideration (most recently in the 2020 Joint Standing Committee on Electoral Matters report).<sup>43</sup> Attempts to deploy consumer law in this context have also been unsuccessful. In *Durant v Greiner* it was held that prohibitions on misleading and deceptive conduct do not apply to campaigning, because it is not 'trade or commerce'.<sup>44</sup>

## B South Australia

In 1985, SA enacted the *SA Act*. It contained a TPAL. Section 113(2), as currently in force after superficial amendment since enactment, provides:

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.

Section 113 also provides for financial penalties and a *1918 Act*-style defence. Further, it empowers the Electoral Commissioner to request the advertiser withdraw the advertisement and publish a retraction, and apply to the Supreme Court for an order to that effect.

The introduction of s 113 is somewhat curious.<sup>45</sup> It was not explicitly referenced in the second reading speech. To the contrary, that speech had indicated that the 1984 Joint Select Committee on Electoral Reform report influenced the legislative design — a report that stridently criticised such laws. During legislative

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<sup>38</sup> Joint Select Committee on Electoral Reform, Parliament of Australia, *Second Report* (Parliamentary Paper No 198, 24 August 1984) i.

<sup>39</sup> *Ibid* 27.

<sup>40</sup> *Ibid* 47. For a discussion of the policy merits and shortcomings of TPALs, see William Marshall, 'False Campaign Speech and the First Amendment' (2004) 153(1) *University of Pennsylvania Law Review* 285, 293–300.

<sup>41</sup> By the *Electoral and Referendum Amendment Act 1984* (Cth) s 5.

<sup>42</sup> Agreement between the Australian Greens and the Australian Labor Party (1 September 2010) cl 3(b).

<sup>43</sup> See, eg, Joint Standing Committee on Electoral Matters (n 5) 75–84; Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report of Inquiry into the Conduct of the 1993 Federal Election and Matters related thereto* (Report, November 1994) [8.1.5].

<sup>44</sup> *Durant v Greiner* (1990) 21 NSWLR 119.

<sup>45</sup> This legislative history is largely drawn from Legal, Constitutional and Administrative Review Committee, Legislative Assembly of Queensland, *Truth in Political Advertising* (Report No 4, December 1996) 11–13.

debate, the proposed provision was attacked — particularly a clause permitting candidates to seek an injunction (this was removed from the Bill). Nonetheless, the *SA Act* was enacted and is today hailed as a world leader.<sup>46</sup> It has had some practical effect, with several cases successfully brought under it.<sup>47</sup> In the six SA elections since 1997, the SA Electoral Commission has received 313 complaints relating to misleading electoral advertising, and made 25 retraction requests.<sup>48</sup> Despite its longevity, the provision is not uncontroversial. In 2014, the Commission recommended s 113's repeal, suggesting it raised an 'ethical question' about the Commission's role determining truth in politicised contexts, which 'can offend against [its] independence'.<sup>49</sup> However, in 2017, researchers Renwick and Palese interviewed representatives from both major parties and found unanimous support for the provision. The then SA Attorney General, John Rau, observed that 'whilst I acknowledge that the Electoral Commission is an imperfect adjudicator ... compared to all of the other options, it appears to be the best of the set of choices'.<sup>50</sup> Renwick and Palese concluded that s 113 was relatively 'benign', but had constrained 'politicians from making claims that are demonstrably false'.<sup>51</sup>

### C *Recent Developments*

The *SA Act* has provoked much consideration in other Australian states. In Queensland, a 1996 report by the Legal, Constitutional and Administrative Review Committee recommended a TPAL, although it did not come to fruition.<sup>52</sup> In Victoria, meanwhile, a detailed report of the Legislative Council's Electoral Matters Committee in 2010 determined not to recommend a TPAL. It observed that such regulation 'would have implementation difficulties and increase the risk of a more litigious approach to elections'.<sup>53</sup> In 2020, the ACT Legislative Assembly amended the *Electoral Act 1992* (ACT) ('*ACT Act*'), to provide a TPAL that took effect in July 2021. Notably, the law was introduced despite resistance from the ACT Electoral Commission, which deemed the idea 'unworkable'.<sup>54</sup> The amendment provides (in part):

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<sup>46</sup> Alan Renwick and Michela Palese, 'Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?' (Research Paper, The Constitution Unit, University College London, March 2019) 22.

<sup>47</sup> These cases have been a mix of prosecutions and matters before the Court of Disputed Returns: see, eg, *Cameron* (n 15); *King v Electoral Commissioner* [1998] SASC 6557; *Featherston v Tully (No 2)* (2002) 83 SASR 347; *Hanna v Sibbons* (2010) 108 SASR 182.

<sup>48</sup> Renwick and Palese (n 46) 23 Table 2.1.

<sup>49</sup> Electoral Commission of South Australia, *Election Report: State Election 2014* (Report, 2014) 79.

<sup>50</sup> Quoted in Renwick and Palese (n 46) 27.

<sup>51</sup> Renwick and Palese (n 46) 29–30.

<sup>52</sup> Legal, Constitutional and Administrative Review Committee (n 45) ii.

<sup>53</sup> Electoral Matters Committee (n 8) 158.

<sup>54</sup> Katie Burgess, 'Truth in Political Advertising Laws "Unworkable", ACT Electoral Commission says', *The Canberra Times* (online, 25 July 2017) <<https://www.canberratimes.com.au/story/6030153/truth-in-political-advertising-laws-unworkable-act-electoral-commission-says/#gsc.tab=0>>.



297A Misleading electoral advertising

- (1) A person commits an offence if—
  - (a) the person disseminates, or authorises the dissemination of, an advertisement containing electoral matter; and
  - (b) the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.

Maximum penalty: 50 penalty units.

The remainder of the provision provides a *1918 Act*-style defence and empowers the Commission to seek a retraction and, if necessary, apply to the Supreme Court.

### III Truth-in-Political-Advertising Laws and the Implied Freedom of Political Communication

#### A *The Implied Freedom*

The *Australian Constitution* contains no explicit protection for freedom of expression. However, in 1992 the High Court of Australia held that, by implication, the *Constitution* protects freedom of political communication.<sup>55</sup> The Court subsequently grounded this freedom in the text and structure of the *Constitution* concerning representative and responsible government, in a landmark judgment in *Lange*.<sup>56</sup> *Lange* also provided the test for determining validity that remains applicable today, albeit with modification arising from cases including *Coleman v Power*,<sup>57</sup> *McCloy*,<sup>58</sup> and *Brown v Tasmania*.<sup>59</sup> As currently stated, that test is:

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

This question involves ‘proportionality testing’ to determine whether the restriction that the provision imposes on the freedom is justified. The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test: the enquiries as to

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<sup>55</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (‘ACTV’); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

<sup>56</sup> *Lange* (n 16) 557–67 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>57</sup> *Coleman v Power* (2004) 220 CLR 1 (‘*Coleman*’).

<sup>58</sup> *McCloy* (n 17).

<sup>59</sup> *Brown v Tasmania* (2017) 261 CLR 328 (‘*Brown*’).

whether the law is justified as suitable, necessary and adequate in its balance (the *Lange/McCloy* test).<sup>60</sup>

## B *Application to Truth-in-Political-Advertising Laws*

To begin considering the interplay between the implied freedom and TPALs, it is instructive to apply the *Lange/McCloy* proportionality test to existing TPALs. Given the similarities between the *SA Act* and *ACT Act*, they can be analysed together.

### 1 *Burden*

Do the *SA Act* and *ACT Act* ‘effectively burden freedom of [political] communication ... either in its terms, operation or effect?’<sup>61</sup> This first question asks ‘nothing more complicated’ than whether the law in some way limits ‘the making or the content of political communications’.<sup>62</sup> It seems uncontroversial to suggest that this question would be answered affirmatively. By definition, TPALs impinge on the freedom: they serve to directly penalise certain types of communication. Because *Cameron* was decided before *Lange*, it did not explicitly consider the granular *Lange/McCloy* framework. Nonetheless, Lander J conceded that, although the *SA Act* ‘is directed to a very small class of persons in very narrow circumstances’, it was a ‘law that does interfere with the freedom of discourse in political matters’.<sup>63</sup> Olsson J’s comments in *Cameron* focused on the *SA Act*’s proportionality, indicating that his Honour accepted the freedom was burdened.<sup>64</sup>

There is one potential caveat. In a matter recently heard by the High Court, *Zhang v Commissioner of the Australian Federal Police*,<sup>65</sup> the Commonwealth raised the possibility that certain political communication might not be protected by the implied freedom. In written submissions defending a challenge to foreign influence laws, the Solicitor-General argued:

the implied freedom does not protect communications that are inimical to the free and informed choice of electors. For example, a communication which seeks to subvert the choice of an elector by threatening the elector with violence unless they exercise that choice in a particular way receives no protection. Nor does a communication which seeks to foment the violent overthrow of a democratic system of government. No doubt at one level the communications in both of these examples concern ‘political or government matters’. But they are nevertheless outside the range communications necessary to give effect to the constitutional provisions upon which the implied freedom is based.<sup>66</sup>

<sup>60</sup> This extract merges relevant passages from *Brown* ibid 364 (Kiefel CJ, Bell and Keane JJ) and *McCloy* (n 17) 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>61</sup> *Lange* (n 16) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>62</sup> *Monis v The Queen* (2013) 249 CLR 92, 142 (Hayne J).

<sup>63</sup> *Cameron* (n 15) 254.

<sup>64</sup> Ibid 248.

<sup>65</sup> *Zhang v Commissioner of the Australian Federal Police* (2021) 95 ALJR 432 (‘Zhang’).

<sup>66</sup> First Defendant and Attorney-General (Cth), ‘Joint Annotated Submissions of the First Defendant and the Attorney-General of the Commonwealth (Intervening)’, Submission in *Zhang*, Case No S129/2020, 9 December 2020, 12 [29] (citations omitted) (‘Submission in *Zhang*’).

Similar ideas were ventilated by Heerey J in a 1998 case before the Federal Court of Australia involving a challenge to the censorship of a student newspaper that contained a guide to shoplifting as part of a critique of capitalism.<sup>67</sup> His Honour said, in considering the noted history of anarchist literature,

[a]ll this may be in one sense politics, but the [c]onstitutional freedom of political communication assumes — indeed exists to support, foster and protect — representative democracy and the rule of law. The advocacy of law breaking falls outside this protection and is antithetical to it.<sup>68</sup>

A party defending a TPAL might therefore seek to argue that there is no burden on political communication because the freedom does not protect ‘a statement of fact that is inaccurate and misleading to a material extent’. It could plausibly be suggested that lies play no constructive role in political discourse and thereby do not give effect to the constitutional provisions from which the implied freedom derives.<sup>69</sup> This argument might draw support from the distinction proposed by noted free speech scholar Frederick Schauer, between coverage and protection, to argue that TPALs do not give rise to a free speech question.<sup>70</sup>

Yet, while the Commonwealth’s argument in *Zhang* is superficially attractive, it lacks any basis in existing High Court authority. As *Zhang* was decided on non-constitutional grounds, the issue was not ultimately addressed by the Court.<sup>71</sup> The submissions sought to distinguish the position in *Coleman*, where the High Court found that offensive communication was still protected.<sup>72</sup> In the context of applying the *Lange/McCloy* test to existing TPALs, *Coleman* will pose a barrier to such a finding, perhaps more so than it would have in *Zhang* (a case relating to foreign interference laws), had that case been determined on constitutional grounds. It may be possible to distinguish inaccurate and misleading statements of fact from the ‘insult and emotion, calumny and invective’ that Kirby J suggested in *Coleman* had long been ‘part and parcel of the struggle of ideas’ in Australia.<sup>73</sup> Yet the boundary is not clearly demarcated and a court will be hesitant to draw such a distinction at the initial stage of the *Lange/McCloy* test. This is particularly so given a TPAL might not only restrain the making of materially-false statements, but could also have a chilling effect on a wider category of communication.

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<sup>67</sup> *Brown v Members of the Classification Review Board of the Office of Film and Literature Classification* (1998) 82 FCR 225. With thanks to a referee for bringing this case to my attention.

<sup>68</sup> *Ibid* 246.

<sup>69</sup> It is notable that, even in the absolutist jurisprudence of the American First Amendment, there is support for this position. Brennan J has held that ‘the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection’: *Garrison v Louisiana*, 379 US 64, 75 (1964).

<sup>70</sup> See, eg, Frederick Schauer, ‘What Is Speech? The Question of Coverage’ in Adrienne Stone and Frederick Schauer (eds), *Oxford Handbook of Free Speech* (Oxford University Press, 2021) 159. With thanks to a referee for bringing this to my attention.

<sup>71</sup> *Zhang* (n 65) 437–8 (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).

<sup>72</sup> Submission in *Zhang* (n 66) 13 [31] n 38.

<sup>73</sup> *Coleman* (n 57) 91 [239]. Although, analogously with *Coleman*, it might be suggested that falsehoods also have a long history in Australian political debate. One author has noted that ‘[e]xaggeration, distortion and lying is part and parcel of an Australian election’: Scott Bennett, *Winning and Losing: Australian National Elections* (Melbourne University Press, 1996) 77. See also Bryan Mercurio and George Williams, ‘Australian Electoral Law: “Free and Fair?”’ (2004) 32(3) *Federal Law Review* 365, 391.

On balance, it is likely a court would accept that TPALs burden the implied freedom. However, there is a strong argument that this burden is modest. An evaluation of the nature of the burden is an often-overlooked element of the *Lange/McCloy* test. However, recent judgments have reiterated its importance. As Gageler J noted in *McCloy*: ‘The simplicity of the inquiry should not detract from its importance ... The first step is critical.’<sup>74</sup> It can be compellingly argued that the *SA Act* and *ACT Act* impose a modest burden on the implied freedom, because they apply only to an extremely limited subset of political communication (materially inaccurate and misleading statements of fact), in a limited context (electoral advertising) and impact only a small cohort (those responsible for making or authorising such advertising). In another case recently decided by the High Court, *LibertyWorks Inc v Commonwealth*, the Commonwealth advanced an analogous position.<sup>75</sup> The (limited) nature of the burden, the Commonwealth submitted, was squarely relevant to the subsequent proportionality exercise, such that a finding of modest burden supported an overall holding of validity.<sup>76</sup> This was accepted by a majority of the Court. The same plurality, Kiefel CJ, Keane and Gleeson JJ, held that the ‘[t]he burden effected is likely to be modest’.<sup>77</sup> This fact was then relevant to their Honours’ ultimate finding that the law satisfied the proportionality test, because the modest burden was adequate in balance to the legitimate purpose sought to be achieved.<sup>78</sup>

## 2 Purpose

The second phase of the *Lange/McCloy* test requires an assessment of the legislative purpose: are the aims of the *SA Act* and *ACT Act* compatible with Australia’s system of representative and responsible government? The burden must be ‘explained’ by the pursuit of a compatible end: ‘[e]xplanation precedes justification.’<sup>79</sup> Both laws seek to minimise the prevalence of false electoral advertising, which helps ensure that the electorate is properly informed and not unduly influenced by falsehoods (although the rationale for SA’s TPAL was not explicitly outlined during legislative debate).<sup>80</sup> In the ACT, the relevant provisions were introduced by Member of the Legislative Assembly Caroline Le Couteur. In her comments moving the amendment, Le Couteur said:

Unfortunately, in Australia there is no shortage of examples of false or misleading electoral advertising. While not perfect, the South Australian system has worked well there for decades ... This amendment is not designed to stamp out political debate.<sup>81</sup>

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<sup>74</sup> *McCloy* (n 17) 231 [127].

<sup>75</sup> Commonwealth, ‘Defendant’s Submissions’, Submission in *LibertyWorks v Commonwealth*, Case no S10/2020, 21 October 2020.

<sup>76</sup> *Ibid* 5.

<sup>77</sup> *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 509 [74] (*‘LibertyWorks’*).

<sup>78</sup> *Ibid* 510 [85].

<sup>79</sup> *McCloy* (n 17) 231 [130] (Gageler J).

<sup>80</sup> South Australia, *Parliamentary Debates*, Legislative Council, 19 March 1985, 3308–12 (Chris Sumner, Attorney-General).

<sup>81</sup> Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 27 August 2020, 2285.

It seems highly likely that the High Court would find this to be a legitimate purpose, not only compatible with Australia's system of government, but serving to enhance it.<sup>82</sup> In *Cameron*, Lander J observed that the *SA Act* burdened the freedom

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 [sic] by deceit or misrepresentation ... That it seems to me is as important as any other legitimate interest ...<sup>83</sup>

The High Court's comments in *Smith* are also salient: 'The vote of every elector is a matter of concern to the whole Commonwealth, and all are interested in endeavouring to secure ... that the voter shall not be led by misrepresentation'.<sup>84</sup> More recently, the Court has accepted legislative motives relating to election integrity as legitimate in implied freedom cases.<sup>85</sup> Accordingly, there is no reason to doubt that these TPALs' purpose would be accepted as legitimate.

### 3 *Proportionality*

The final phase of analysis asks whether the *SA Act* and *ACT Act* are reasonably appropriate and adapted to advance this legitimate purpose. Since *McCloy*, that question has had three elements through a process labelled structured proportionality: are the laws suitable, necessary and adequate in balance?

#### (a) *Suitability*

In *Comcare v Banerji*, a recent implied freedom case, Kiefel CJ, Bell, Keane and Nettle JJ observed that: 'A law is suitable ... if it exhibits a rational connection to its purpose, and a law exhibits such a connection if the means for which it provides are capable of realising that purpose'.<sup>86</sup> The TPALs exhibit a rational connection to a purpose of reducing the prevalence of falsehoods in political campaigning; by prohibiting the use of inaccurate and misleading statements of facts in electoral advertising, the provisions discourage such behaviour and provide penalties for those who engage in it. This readily constitutes means that are capable of realising the provisions' purpose. Just as the safe access zone laws in *Clubb v Edwards* were a 'rational response to a serious public health issue',<sup>87</sup> so too are the *SA Act* and *ACT Act* rational responses to serious political integrity concerns.<sup>88</sup> In *Clubb*, the plurality also noted that the impugned provision had a rational connection to a broader purpose of protecting privacy and dignity, which they held to accord with the 'constitutional values that underpin the implied freedom'.<sup>89</sup> Equally, the broader purpose of these TPALs is to ensure informed electoral participation by the political

<sup>82</sup> See *Comcare v Banerji* (2019) 267 CLR 373, 423–4 [100]–[102] (Gageler J) ('*Banerji*').

<sup>83</sup> *Cameron* (n 15) 255.

<sup>84</sup> *Smith* (n 29) 362 (Isaacs J).

<sup>85</sup> See, eg, *Unions NSW v New South Wales* (2013) 252 CLR 530, 578 (Keane J) ('*Unions NSW (No 1)*'); *McCloy* (n 17) 209 [53] (French CJ, Kiefel, Bell and Keane JJ). For a thoughtful discussion of the comparison between campaign finance-related restrictions and TPALs, see Marshall (n 40) 306–14.

<sup>86</sup> *Banerji* (n 82) 400 [33].

<sup>87</sup> *Clubb v Edwards* (2019) 267 CLR 171, 205 [84] (Kiefel CJ, Bell and Keane JJ) ('*Clubb*').

<sup>88</sup> See also *Unions NSW v New South Wales* (2019) 264 CLR 595, 638 (Nettle J) ('*Unions NSW (No 2)*').

<sup>89</sup> *Clubb* (n 87) 205 [85] (Kiefel CJ, Bell and Keane JJ).

community, which, as in *Clubb*, can be described as adhering to the underlying values animating the implied freedom. Accordingly, it is probable a court would find that the suitability requirement is satisfied.

(b) *Necessity*

A law with a legitimate purpose that burdens the implied freedom will be considered necessary ‘unless there is an obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden’.<sup>90</sup> A court will ordinarily approach this inquiry with caution due to the risk of usurping legislative authority in the field of policymaking: ‘the question of necessity does not deny that it is the role of the legislature to select the means by which a legitimate statutory purpose may be achieved.’<sup>91</sup> Locating an equally compelling alternative is therefore difficult; for a court to divine a less burdensome alternative that solution ‘must be as capable of fulfilling that purpose as the means employed by the impugned provision, ‘quantitatively, qualitatively, and probability-wise’.<sup>92</sup>

A plaintiff might contest the necessity of the *SA Act* or *ACT Act* on at least three distinct bases. First, they could argue that a prohibition on statements of fact that are ‘inaccurate and misleading to a material extent’ is overly broad. It might be contended, for example, that a narrower prohibition on only ‘materially false statements of fact’ would achieve the same purpose without casting a chill over political communication. The short-lived federal TPAL, for example, applied to ‘untrue’ communications that misled or deceived (or were likely to).<sup>93</sup> It is arguable that this is a narrower approach, on the basis that ‘inaccurate’ could encompass communications that are only inexact or partially erroneous, whereas ‘untrue’ requires more fundamental falsity.

Second, it could be argued that the scope of the prohibition, in the case of the *ACT Act* ‘advertisement containing electoral matter’,<sup>94</sup> could be more narrowly targeted. Section 4 of the *ACT Act* defines ‘electoral matter’ as printed or electronic communications ‘intended or likely to affect voting at an election’, including material with an express or implied reference to the election or the performance of a government, politician or political party. The *SA Act* contains similar, although less prescriptive, definitions. It might be submitted that these definitions could be drafted narrowly, and with a greater temporal focus — the federal TPAL, for example, only applied during a ‘relevant period’.<sup>95</sup> Given misleading and deceptive electoral campaigning arguably has the greatest electoral impact in the weeks immediately prior to an election day, when there is less time to rebut falsehoods,<sup>96</sup> a TPAL restricted to those timeframes might achieve the same policy impact without burdening speech at other times.

<sup>90</sup> *Banerji* (n 82) 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

<sup>91</sup> *McCloy* (n 17) 217 [82] (French CJ, Kiefel, Bell and Keane JJ).

<sup>92</sup> *Tajjour v New South Wales* (2014) 254 CLR 508, 571 [114] (Crennan, Kiefel and Bell JJ), quoting Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 324.

<sup>93</sup> See above Part II(A).

<sup>94</sup> *ACT Act* (n 9) s 297A(1)(a).

<sup>95</sup> *1918 Act* (n 34) s 329(2), as repealed by *Electoral and Referendum Amendment Act 1984* (Cth).

<sup>96</sup> See Ross (n 24) 387.

Finally, it seems possible that inaccurate electoral advertising is most likely to influence voter choice when undertaken by political parties or candidates. As such, it might be argued the TPALs are over-broad by applying to anyone authorising an ‘electoral advertisement’.<sup>97</sup> This includes those engaging in advertising-based advocacy on electoral matters, such as third-party campaigners.<sup>98</sup> This arguably has a broader chilling effect on political debate, beyond what would be caused if the TPALs only applied to political parties and candidates.

While these arguments are plausible, they are unlikely to meet the high threshold required by the necessity test. The first objection would likely not produce a ‘significantly lesser burden’<sup>99</sup> — while the exact wording of the test may make some difference to the extent of the burden, it is unlikely to be of sufficient magnitude as to meet this requirement. A law of the nature proposed by the second objection, meanwhile, may not be as capable as the existing laws to achieve the purpose — any narrowing of definition or temporal period necessarily reduces the coverage of the TPALs, and, potentially, their efficacy. The third objection similarly risks reducing efficacy: some existing third parties are already closely aligned to political parties;<sup>100</sup> related third-party campaign organisations could be established to evade TPALs;<sup>101</sup> and the proposition that misinformation from candidates is more corrosive than that from third parties is unproven. Accordingly, in the absence of any compelling alternative, it is likely a court would find the *SA Act* and *ACT Act* necessary in the sense required by the *Lange/McCloy* test.

(c) *Adequate in Balance?*

Finally, a court will undertake the third element of proportionality testing. This is effectively a balancing exercise between the importance of the purpose and the extent of the burden.<sup>102</sup> As the plurality explained in *Banerji*: ‘If a law presents as suitable and necessary in the senses described, it is regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom.’<sup>103</sup> The *SA Act* and *ACT Act* impose only a modest burden on the freedom. This burden is imposed in the pursuit of a legislative purpose aimed at protecting Australia’s system of informed electoral democracy (which, in turn, ensures representative government). Of course, a court should remain wary of legislative attempts to burden the implied freedom. As Mason CJ observed in *Australian Capital Television Pty Ltd v Commonwealth*, ‘[t]he Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about

<sup>97</sup> *SA Act* (n 9) s 4(1); *ACT Act* (n 9) ss 4, 297A.

<sup>98</sup> On the broader regulatory issues raised by third-party campaigners, see Anika Gauja and Graeme Orr, ‘Regulating “Third Parties” as Electoral Actors: Comparative Insights and Questions for Democracy’ (2015) 4(3) *Interest Groups & Advocacy* 249.

<sup>99</sup> *Banerji* (n 82) 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

<sup>100</sup> See, eg, *Unions NSW (No 1)* (n 85).

<sup>101</sup> But see Joo-Cheong Tham and David Grove, ‘Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections’ (2004) 32(3) *Federal Law Review* 397, 420.

<sup>102</sup> *McCloy* (n 17) 195 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>103</sup> *Banerji* (n 82) 402 [38] (Kiefel CJ, Bell, Keane and Nettle JJ).

corruption and distortion of the political process.<sup>104</sup> Nonetheless, there is evidence, in Australia and abroad, that misleading electoral advertising is having a corrosive impact on democratic norms.<sup>105</sup> Accordingly, the modest burden, compelling purpose and the suitability and necessity of the *SA Act* and *ACT Act* cumulatively favour the conclusion that these TPALs are adequate in balance. Certainly, it cannot be said that the benefit sought to be achieved by the TPALs is ‘manifestly outweighed’ by the modest burden they impose on the implied freedom. Those words require a high threshold for a finding of invalidity; in the circumstances of the *SA Act* and *ACT Act*, it is very unlikely the threshold would be reached. This finding is consistent with the holding in *Cameron*, notwithstanding the considerable subsequent evolution of the implied freedom. Lander J held that the *SA Act* ‘goes no further than is necessary to protect the legitimate interest for which it is designed’,<sup>106</sup> and Olsson J found that it was ‘manifestly proportionate’.<sup>107</sup> A contemporary consideration of either TPAL may be less emphatic, as both laws raise genuine implied freedom concerns. Yet on the ultimate analysis, it is likely the outcome would be the same.

#### 4 *Calibrated Scrutiny*

The *Lange/McCloy* test’s structured proportionality is not universally endorsed by the High Court. Gageler J has been a strident critic, insisting that it is ‘at best, a tool ... I have never considered it to be a particularly useful tool’.<sup>108</sup> Gordon J has declined to adopt the plurality’s approach,<sup>109</sup> while Edelman J did not initially adopt the *Lange/McCloy* test, but has done so in more recent judgments.<sup>110</sup> Given the retirement of two proportionality proponents, Nettle and Bell JJ, it was momentarily unclear which approach would gain ascendancy. However, in *LibertyWorks*, Gleeson J joined with Kiefel CJ and Keane J in the plurality judgment adopting structured proportionality.<sup>111</sup> Steward J, writing alone, accepted that ‘the three parts of structured proportionality can, in a given case, be used as analytical tools to test whether a given law is reasonably appropriate and adapted in the advancement of its purpose’<sup>112</sup> (albeit his Honour also cast doubt on the implied freedom’s existence).<sup>113</sup>

Nonetheless, given Gageler J and Gordon J remain outspoken critics of the majority’s approach, and have continued to apply their own approach (and attack structured proportionality in strong terms),<sup>114</sup> it is useful to consider their Honours’

<sup>104</sup> *ACTV* (n 55) 145 (Mason CJ).

<sup>105</sup> See, eg, Joint Standing Committee on Electoral Matters (n 5) 71–84.

<sup>106</sup> *Cameron* (n 15) 257.

<sup>107</sup> *Ibid* 248.

<sup>108</sup> *Brown* (n 59) 376 [159].

<sup>109</sup> See, eg, *Clubb* (n 87) 305 [390]–[391].

<sup>110</sup> *Ibid* 330–49 [462]–[508]. See also Arisha Arif and Emily Azar, ‘*Clubb v Edwards; Preston v Avery: Structured Proportionality — Has Anything Changed?*’, *AusPubLaw* (online, 3 May 2019) <<https://auspublaw.org/2019/05/clubb-v-edwards-preston-v-avery-structured-proportionality/>>.

<sup>111</sup> *LibertyWorks* (n 77).

<sup>112</sup> *Ibid* 545 [247].

<sup>113</sup> *Ibid* 546 [249].

<sup>114</sup> Including in non-implied freedom contexts: see *Palmer v Western Australia* (2021) 95 ALJR 229 (‘*Palmer*’).



alternative approach.<sup>115</sup> This is so for three reasons. First, both justices have significant tenure remaining on the bench, while two of the main adherents of structured proportionality, Kiefel CJ and Keane J, will retire in the coming years. It is not impossible, therefore, that calibrated scrutiny could become the majority approach in 2024 or thereafter. Second, even if it does not, that two members of the Court persist with an alternative approach means it may well be influential, even decisive, in determining the validity or otherwise of a TPAL in the event of a challenge. Third, the present context offers interesting insight as to the differences between the approaches when applied.

In *Clubb*, Gageler J described four steps in undertaking the calibrated scrutiny analysis:

first, to examine the nature and intensity of the burden which the protest prohibition places on political communication; second, to calibrate the appropriate level of scrutiny to the risk which a burden of that nature and intensity poses to maintenance of the constitutionally prescribed system of representative and responsible government; third, to isolate and assess the importance of the constitutionally permissible purpose of the prohibition; and finally, to apply the appropriate level of scrutiny so as to determine whether the protest prohibition is justified ...<sup>116</sup>

In *McCloy*, and *Unions NSW v New South Wales (No 2)*, Gageler J indicated that the appropriate calibration in cases involving ‘a restriction on political communication in the conduct of elections for political office’ to be ‘close scrutiny’ of the reasonable necessity of a ‘compelling’ purpose.<sup>117</sup> On first glance, the *SA Act* and *ACT Act* fall within this category — they restrict communication in the electoral context. However, it is notable that in *Cameron*, Lander J considered the emerging distinction in early implied freedom cases between content-based and content-neutral regulation. Observing that the former required stricter scrutiny, his Honour held that the *SA Act* was of the latter kind: ‘This is a law that regulates the conduct of persons in making a communication.’<sup>118</sup> The correctness of that characterisation has not been subsequently considered, yet it is at odds with the holdings of American courts, where the content-based/content-neutral distinction is central to First Amendment jurisprudence.<sup>119</sup> In *Rickert v Washington State*, the Washington Supreme Court held that a TPAL was content-based regulation, and ultimately invalidated the law.<sup>120</sup> While American cases are of limited utility in the implied freedom context,<sup>121</sup> *Rickert*

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<sup>115</sup> Stone has suggested that Gageler J’s approach ‘need not be seen as an alternative to the proportionality method. On the contrary, the two could be reconciled and proportionality used as a manner for better development of the law.’: Adrienne Stone, ‘Proportionality and Its Alternatives’ (2020) 48(1) *Federal Law Review* 123, 153.

<sup>116</sup> *Clubb* (n 87) 225 [162].

<sup>117</sup> *McCloy* (n 17) 239 [153], citing *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 200 [40] (*‘Mulholland’*) quoting *ACTV* (n 55) 143; *Unions NSW (No 2)* (n 88) 621–2 [65] (Gageler J), quoting *ACTV* (n 55) 143–4 and *Mulholland* at 200–1 [40]–[41].

<sup>118</sup> *Cameron* (n 15) 256.

<sup>119</sup> Geoffrey Stone, ‘Content-Neutral Restrictions’ (1987) 54(1) *University of Chicago Law Review* 46, 46. See also Susan Williams, ‘Content Discrimination and the First Amendment’ (1991) 139(3) *University of Pennsylvania Law Review* 615; Leslie Gielow Jacobs, ‘Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations’ (2003) 34(3) *McGeorge Law Review* 595.

<sup>120</sup> *Rickert v Washington State*, 795 NW 2d 236, 6 (Wash Sup Ct, 2007) (*‘Rickert’*).

<sup>121</sup> See, eg, *Unions NSW (No 1)* (n 85) 570 [99]–[102] (Keane J).

supports the conclusion that Lander J erred in his characterisation of the *SA Act*. This, in turn, supports the adoption of a close scrutiny test.

Accordingly, a calibrated scrutiny approach would first require an identification of the nature and intensity of the burden: modest, although significant in the cases where it is engaged (given the risk of civil penalties). Second, calibration to the appropriate level of scrutiny: close scrutiny. In *Clubb*, Gageler J observed that, in such circumstances, the purpose must be ‘more than just constitutionally permissible; it needs to be compelling’.<sup>122</sup> Given that the *SA Act* and *ACT Act* are aimed at protecting electoral discourse from false and misleading communication, which distorts the political process, it is likely this purpose satisfies the ‘compelling’ threshold. Gageler J also added that, in undertaking a close scrutiny analysis, the burden ‘needs to be closely tailored to the achievement of that purpose’.<sup>123</sup> Thus, the final stage of analysis would require consideration of whether the *SA Act* and *ACT Act* go further than necessary; the burden ‘needs to be no greater than is reasonably necessary to achieve that purpose’.<sup>124</sup>

The extent of the difference between calibrated scrutiny and structured proportionality remains a source of disagreement among scholars.<sup>125</sup> Until recently, a significant outcome-based divide had not emerged, with Gageler J and Gordon J largely reaching the same position as the majority — albeit via a different route.<sup>126</sup> That changed in *LibertyWorks*, where Gageler J and Gordon J dissented, finding the law at issue invalid, whereas the majority, applying structured proportionality, rejected the challenge. However, neither justice dwelled on the significance of their contrasting approach to the divergent outcome. Indeed, Gageler J even repeated his findings in *McCloy*-style language: ‘Doing my best to express that incompatibility in the language of structured proportionality ...’.<sup>127</sup>

Despite this absence of judicial introspection, it appears that it would be at the final stage of the calibrated scrutiny approach that the distinction might matter, because it suggests a tighter scrutiny on the means employed by the legislature. The necessity phase of the *Lange/McCloy* test seeks an alternative that would impose a ‘significantly lesser burden’,<sup>128</sup> while the adequacy phase asks whether the benefit of the law is ‘manifestly outweighed’ by the burden’s adverse effect.<sup>129</sup> In contrast, calibrated scrutiny approaches the inquiry from a different direction, with attention directed to the burden–purpose nexus. This distinction can be illustrated with an example: Gageler J (and possibly Gordon J) could find that a law is insufficiently tailored because it goes further than necessary to achieve its purpose. Such a law may nonetheless survive a structured proportionality analysis: an alternative might

<sup>122</sup> *Clubb* (n 87) 232 [184].

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid* 232 [185].

<sup>125</sup> See, eg, Evelyn Douek, ‘All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia’ (2019) 47(4) *Federal Law Review* 551, 568; Rosalind Dixon, ‘Calibrated Proportionality’ (2020) 48(1) *Federal Law Review* 92, 121; Anne Carter, ‘Bridging the Divide? Proportionality and Calibrated Scrutiny’ (2020) 48(2) *Federal Law Review* 282, 283.

<sup>126</sup> See, eg, *Brown* (n 59); *Clubb* (n 87); *Unions NSW (No 2)* (n 88); *Banerji* (n 82).

<sup>127</sup> *LibertyWorks* (n 77) 517 [119].

<sup>128</sup> *Banerji* (n 82) 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ) (emphasis added).

<sup>129</sup> *Ibid* 402 [38] (emphasis added).

have a lesser burden (but not significantly so), while the law's purpose might be outweighed by the burden's impact (but not manifestly so). In such circumstances, a majority of the current High Court might uphold a law, while those undertaking a calibrated scrutiny approach might find it invalid.

This is significant in the present context because of the variety of ways in which a TPAL might be designed. As highlighted earlier in this Part, there are available criticisms of the *SA Act* and *ACT Act* that suggest a narrower approach is possible; equally, broader TPALs can be readily contemplated. The calibrated scrutiny approach suggests greater focus on legislative choices and heightened risk of invalidity where those choices stray beyond what is reasonably necessary to achieve the law's purpose. That may not be consequential if it remains the minority view, however, if it becomes ascendant, the scrutiny to be applied in any constitutional challenge of a TPAL would be stricter.

Returning to the present: are the *SA Act* and *ACT Act* closely tailored to achieving their purpose? Is the burden they impose greater than what is reasonably necessary? Despite the stricter scrutiny, it is likely these questions would be answered 'yes' and 'no' respectively. Notwithstanding the concerns around the TPALs' breadth and coverage, they are nonetheless relatively narrow. Both laws cover only (a) electoral advertising; (b) that purports to be a statement of fact; (c) that is inaccurate to a material extent; and (c) that is misleading to a material extent. Neither TPAL covers political communication beyond electoral advertising. Unlike the short-lived federal TPAL, which covered any 'statement', the *SA Act* and *ACT Act* are limited to statements purporting to be statements of fact. Under both laws, the statements must be materially inaccurate *and* misleading. Unlike the federal TPAL, neither law provides for imprisonment — only civil penalties.<sup>130</sup> Unlike the federal TPAL, neither law empowers third parties to enforce the TPAL — the respective electoral regulators are the only bodies with standing to apply for a court order under both the *SA Act* and *ACT Act* (and only the respective Director of Public Prosecutions can prosecute the offence provisions). Cumulatively, these factors suggest that both laws are closely tailored to achieving their purpose and would withstand scrutiny, even on the stricter calibrated approach.

#### IV Lessons for Regulatory Design

That the TPALs currently enacted in Australia may well survive challenge is not the end of the inquiry. The *SA Act* and *ACT Act* are limited in scope. If their validity is contested, this will aid them in the likelihood of a finding that they are constitutional. However, the extent to which they will adequately address the increasing challenge posed to Australia's electoral system by misinformation is uncertain. As has been observed in the British context, '[t]he more that the law is tailored, the less frequently it is likely to be used and it will do little to improve the quality of political debate.'<sup>131</sup> In the years ahead, other Australian jurisdictions — including the Commonwealth

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<sup>130</sup> This significantly reduces each TPAL's chilling effect: James Weinstein, 'Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns' (2018) 71(1) *Oklahoma Law Review* 167, 230–1.

<sup>131</sup> Rowbottom (n 25) 534.

— may consider implementing TPALs. If the existing laws are deemed insufficient, policymakers will consider more expansive approaches. Consideration of implied freedom jurisprudence therefore provides useful guidance as to circumstances in which expanded TPALs might and might not be constitutionally permissible. Exploring this intersection also underscores ongoing uncertainties around the implied freedom.

## A *Scope*

The most obvious method of bolstering the efficacy of TPALs is to expand their scope. Such expansion could proceed in two dimensions: (i) increasing the substance covered; and/or, (ii) increasing the form covered. Australia's existing TPALs are: (i) limited to statements of facts; and (ii) limited to advertising. At the maximum extent, such expansion could expand to: (i) encompass any statement that is inaccurate, misleading or deceptive; and/or (ii) cover any election-related communication. Alternatively, a middle ground could be arrived at between the existing position and these outer boundaries. However, any expansion would heighten implied freedom concerns.

### 1 *Substance*

There are two ways of categorising the substance covered by TPALs: the content of the statement, or the nature of the inaccuracy. As to content, various jurisdictions have experimented with different methods of defining coverage. In Britain, a longstanding TPAL limits its application to 'any false statement of fact in relation to the candidate's personal character or conduct'.<sup>132</sup> In 2010, the High Court of England and Wales rejected an expansive construction that would have extended the TPAL to political conduct. The Court held: 'It would be difficult to see how the ordinary cut and thrust of political debate could properly be carried on if such were the width of the prohibition.'<sup>133</sup> In the US, meanwhile, it has been argued that laws equivalent to the offence read down in *Evans* have the surest constitutional footing: 'The strongest case for constitutionality is a narrow law targeted at false election speech aimed at disenfranchising voters'.<sup>134</sup> It has also been suggested that attempts to regulate false speech by foreign actors might be accommodated within US First Amendment jurisprudence.<sup>135</sup> As to nature, meanwhile, Ross proposes a helpful taxonomy of misleading statements in the electoral context: 'straight-out lies' ('self-referential' or 'oppositional'), 'intentional distortions', 'hyperbole' and 'indirect prevarication'.<sup>136</sup>

The closer the nexus between the content or nature of the prohibited statement and the TPAL's purpose, the more likely it will be to survive constitutional scrutiny.

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<sup>132</sup> *Representation of the People Act 1983* (UK) s 106.

<sup>133</sup> *R (on the application of Woolas) v Speaker of the House of Commons* [2010] EWHC 3169 (Admin), [113] (Lord Thomas for the Court).

<sup>134</sup> Richard Hasen, 'A Constitutional Right to Lie in Campaigns and Elections?' (2013) 74(1) *Montana Law Review* 53, 71.

<sup>135</sup> Sellers (n 23) 154–8.

<sup>136</sup> Ross (n 24) 370–9.

It seems uncontroversial that a prohibition aimed squarely at speech intended to disenfranchise voters will be valid (laws of that nature already exist in most Australian jurisdictions).<sup>137</sup> Similarly, regulation of foreign misinformation might receive less implied freedom scrutiny (a related issue was raised, although not decided, in *Zhang*).<sup>138</sup> Directing a TPAL at false commentary on a politician's personal life or conduct would minimise the burden on political communication, although not remove it entirely — the line between personal and political is blurry and personal conduct might have relevant implications for political choice. However, a TPAL of that nature might give rise to concerns at the necessity stage of the *Lange/McCloy* test, given defamation law already provides remedies for political candidates maligned in electoral campaigning.<sup>139</sup> Moving in the other direction, more expansive coverage of substance will heighten implied freedom concerns. 'Straight-out lies' are no doubt the safest sphere of coverage from a constitutional perspective. 'Intentional distortions' might also be uncontroversial. Yet moving towards coverage of 'hyperbole' and 'indirect prevarication' will engender greater risk, by increasing the burden and providing greater scope for alternatives at the necessity phase. Similarly, purported statements of facts are at the safer end of the spectrum, but seeking to regulate statements more generally (as did the short-lived federal TPAL), and particularly statements of opinion, would risk constitutional jeopardy.

## 2 Form

Neither the *SA Act* nor *ACT Act* provide a comprehensive definition of 'advertisement'. However, it is clear — from a mix of express and implied direction — that they are intended to cover (at least) print, radio, television and online advertising. Additionally, the *ACT Act* provides that 'electoral advertisement means an advertisement containing electoral matter, *whether or not consideration was given for its publication or broadcast*.'<sup>140</sup> While the combined effect is reasonably broad, TPALs are restricted to advertising. Contemporary electoral campaigning is multifaceted and extends beyond advertising. If a politician made false claims in a newspaper column, or during a talkback radio interview, they would not be covered by the existing TPALs. If a politician made false claims on social media, they would likely not be covered (although coverage may arise if the post was 'sponsored'). Indeed, one of the more notorious recent examples of inaccurate political campaigning, 'Mediscare',<sup>141</sup> was undertaken via text message — such that it is unlikely to fall within the existing coverage.

Expanding TPALs to cover some or all of these fora would raise implied freedom concerns. Broader coverage would significantly increase the burden on political communication, particularly if, as presently, the laws extend beyond political parties and candidates. It would also change the balance of the necessity

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<sup>137</sup> *Evans* (n 18).

<sup>138</sup> Submission in *Zhang* (n 66) 13 [30].

<sup>139</sup> Indeed, early implied freedom jurisprudence largely developed in the defamation context: see generally Adrienne Stone and George Williams, 'Freedom of Speech and Defamation: Developments in the Common Law World' (2000) 26(2) *Monash University Law Review* 362.

<sup>140</sup> *ACT Act* (n 9) s 198 (emphasis added).

<sup>141</sup> See above n 11 and accompanying text.

exercise, particularly given existing TPALs offer a much narrower alternative. Whether considered under the *Lange/McCloy* test or Gageler J’s approach, it is likely that a TPAL covering all political communication during an election period would be invalid — the burden would manifestly outweigh the law’s legitimate purpose. Focusing on official speech, such as a political party’s social media account, rather than the personal account of a candidate, may assist validity, as might the introduction of temporal limits: the burden of broader scope could be mitigated by narrower application. Ultimately, it seems likely that TPAL designers have only limited room to move: the broader the scope, the higher the burden, the more evident alternatives become and the less adequate in balance a TPAL appears — cumulatively making it harder to pass constitutional scrutiny.

## B *The Chilling Effect*

One of the most challenging issues that might arise in TPAL-related constitutional litigation is the potential chilling effect of such laws.<sup>142</sup> Any attempt to expand the scope of TPALs increases the likelihood the law would act as a deterrent to speech that is not, in fact, covered by its terms: individuals will self-censor.<sup>143</sup> This would significantly increase the burden placed upon political communication by the TPAL, which could in turn tilt the balance of the *Lange/McCloy* test towards invalidity. Concern for the chilling effect of speech regulation is an important part of American law; Schauer describes it as ‘a major substantive component of first amendment adjudication’.<sup>144</sup> However, in Australia, implied freedom jurisprudence has not fully grappled with how to address effectively the risk of a chilling effect on speech without straying beyond the (limited) bounds of the freedom.<sup>145</sup> In *Brown*, Nettle J noted that Australian law ‘knows nothing of the United States constitutional doctrine of “chilling effects” on free speech’.<sup>146</sup>

A cognate issue concerns the vagueness of a TPAL as drafted. In the US, the void-for-vagueness doctrine and its ‘closely related ... constitutional cousin’ — the overbreadth doctrine,<sup>147</sup> invalidate vaguely drafted laws that make it difficult to determine whether constitutionally-protected speech is covered by statutory prohibitions.<sup>148</sup> In *Brown*, Gordon J stridently rejected the applicability of these American doctrines in Australian law, describing the jurisprudential differences as

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<sup>142</sup> See Rowbottom (n 25) 525.

<sup>143</sup> Brandice Canes-Wrone and Michael C Dorf, ‘Measuring the Chilling Effect’ (2015) 90(4) *New York University Law Review* 1095, 1096.

<sup>144</sup> Frederick Schauer, ‘Fear, Risk and the First Amendment: Unraveling the “Chilling Effect”’ (1978) 58(5) *Boston University Law Review* 685, 685. But see Leslie Kendrick, ‘Speech, Intent, and the Chilling Effect’ (2013) 54(5) *William & Mary Law Review* 1633.

<sup>145</sup> But see Joshua Forrester, Lorraine Finlay and Augusto Zimmerman, ‘Finding the Streams’ True Sources: The Implied Freedom of Political Communication and Executive Power’ (2018) 43(2) *University of Western Australia Law Review* 188, 241 n 208.

<sup>146</sup> *Brown* (n 59) 410 [262].

<sup>147</sup> Richard Parker, ‘Overbreadth’, *First Amendment Encyclopedia* (Web Page, September 2017) <<https://www.mtsu.edu/first-amendment/article/1005/overbreadth>>.

<sup>148</sup> See Note, ‘The First Amendment and the Overbreadth Doctrine’ (1970) 83(4) *Harvard Law Review* 844; Note, ‘The Void-for-Vagueness Doctrine in the Supreme Court: A Means to an End’ (1960) 109(1) *University of Pennsylvania Law Review* 67.

‘too great’ for them to ‘be adopted directly or indirectly’.<sup>149</sup> Nonetheless, the plurality in *Brown*, and several other judges including Gordon J, were critical of the impugned statute’s vagueness. The plurality noted that the consideration of a law’s ‘effect on the freedom generally is necessarily one about its operation and *practical* effect’,<sup>150</sup> and that a vague law could exacerbate that effect.<sup>151</sup> Even though Nettle J had been dismissive of American chilling effect doctrine, his Honour accepted that ‘the terms of the [challenged law] are of such breadth that the likelihood of them so operating in practice as to burden the implied freedom to a significant extent cannot be discounted’.<sup>152</sup>

The relevance for present purposes is twofold. First, legislatures would be well advised to draft TPALs with extreme care to minimise vagueness. Vaguely worded prohibitions on speech will considerably increase the practical burden on political communication, which — as a majority of the High Court accepted in *Brown* — can aid a finding of invalidity. Second, TPAL litigation may well require a court to confront the chilling effect of such laws, particularly if the impugned TPAL was broader than the current examples. It may be, per Nettle J, that the chilling effect *doctrine* is foreign to implied freedom jurisprudence. But the *fact* that broad speech restrictions chill speech is true, whether it occurs in the US or Australia. The High Court is yet to fully account for that effect in its case law, in either the burden or adequacy phase of implied freedom adjudication. That may be because recent litigation has occurred in contexts where the chilling effect was not the primary vice (albeit in *Banerji*, Edelman J accepted that the relevant provision ‘casts a powerful chill’).<sup>153</sup> But it will arise centrally in TPAL litigation.

### C Evidence

The enactment of TPALs, whether modelled after existing laws or in a more expansive form, should be accompanied by supporting research indicating the problems caused by electoral misinformation and the limited impact of TPALs on political communication. Such research, of the nature typically undertaken by parliamentary committees, will become necessary to justify the TPAL’s scope if challenged on implied freedom grounds.<sup>154</sup> A failure to consider fully the appropriate contours of such regulation can be fatal to validity. As much was clear in *Unions NSW (No 2)*, after the New South Wales Government halved the campaign expenditure cap for third parties at state elections. This reduction was done without any proper consideration of whether the revised cap still enabled third-party campaigners to communicate reasonably their electoral messages. The High Court

<sup>149</sup> *Brown* (n 59) 475 [466].

<sup>150</sup> *Ibid* 374 [150] (Kiefel CJ, Bell and Keane JJ) (emphasis in original).

<sup>151</sup> *Ibid* 373–4 [149]–[150].

<sup>152</sup> *Ibid* 413 [269]. With thanks to a referee for bringing this to my attention.

<sup>153</sup> *Banerji* (n 82) 441 [164].

<sup>154</sup> In the American context, Ross (n 24) 399 has noted that

[a] reasonable inference is not a sufficient substitute for empirical evidence showing a close link between the harm to be prevented and the impact of suppressing protected speech. ... None of the reported cases contain evidence of the alleged harm and, failing that, the state cannot show how regulating campaign speech would ameliorate the purported (though common-sensical) harms.

invalidated the revised provision, finding that, despite a legitimate purpose, '[t]he defendant has not justified the burden ... as necessary'.<sup>155</sup> The absence of evidence supporting the legislative choice was criticised by the Court. Gageler J, for example, held that 'it is not possible to be satisfied that the cap is sufficient to allow a third-party campaigner to be reasonably able to present its case to voters ... [the cap] stands unjustified'.<sup>156</sup> Legislatures considering TPALs should therefore carefully consider the need for, and impact of, such laws *prior* to enacting them to ensure maximum prospects of validity.

## D *Appropriate Arbiter*

One dilemma in contemplating a TPAL scheme is who should be the arbiter of truth at various stages of the process. Both the *SA Act* and *ACT Act* offer a three-part solution. First, the relevant electoral regulator is empowered to request that the advertiser ceases disseminating a false statement and publish a retraction. Second, the regulator can apply to the relevant Supreme Court. The Court, if satisfied (under the *ACT Act*) or if satisfied beyond reasonable doubt (under the *SA Act*), may order that the advertisement be withdrawn (*SA Act*), not disseminated again (*ACT Act*) and/or that a retraction, of a specific manner and form, be published (both TPALs).<sup>157</sup> Third, as the prohibition on misleading advertisement is an offence, a prosecution can be brought by the appropriate authorities.

Accordingly, under both schemes the electoral regulator makes preliminary judgments about whether advertising complies with the TPALs, but only the Supreme Court in each jurisdiction can make a binding determination (either on application by the regulator, or in prosecution proceedings). While the regulator's request power is discretionary and not coercive ('may ask' or 'may request'), under both laws the response to any such request can be considered in assessing penalties in a subsequent prosecution.<sup>158</sup> Additionally, although the Court ultimately remains the final arbiter of truth, the time-limited nature of an election period means that, in practice, the electoral regulator's role is likely to be more influential than it appears at face-value. It may not always be possible, or politically desirable, to face judicial intervention — particularly in the frantic final days of an election.

The appropriateness of this model is contested. In testimony to the Joint Standing Committee on Electoral Matters, Australian Electoral Commissioner Tom Rogers expressed caution about involving the Australian Electoral Commission in such a model at federal level: 'Truth, particularly at election time, is sometimes in the eye of the beholder. If we're set as a tribunal deciding, "We like that one, we don't like this one," it's going to lead us, I think, into a dark place.'<sup>159</sup> In the ACT, the local Electoral Commissioner sought to have the adoption of the new TPAL postponed amid concerns about its role in the scheme. 'It will be a difficult task,' the Commissioner, Damian Cantwell, said in May 2021. 'It's an area I would rather not

<sup>155</sup> *Unions NSW (No 2)* (n 88) 618 [53] (Kiefel CJ, Bell and Keane JJ).

<sup>156</sup> *Ibid* 634 [102].

<sup>157</sup> *ACT Act* (n 9) s 297A(5); *SA Act* (n 9) s 113(5).

<sup>158</sup> *ACT Act* (n 9) s 297A(3)–(5); *SA Act* (n 9) s 113(4).

<sup>159</sup> Quoted in Joint Standing Committee on Electoral Matters (n 5) 84 [4.124].



be involved in. The sense of impartiality and independence here is very important to maintain.<sup>160</sup> Similar concerns have been raised in Canada, which presently only has a very narrow TPAL,<sup>161</sup> about the possibility of a more expansive scheme.<sup>162</sup> As these concerns appear to relate mainly to the concurrent holding of TPAL powers and core operational responsibility for the conduct of elections, it has been suggested that a standalone body could be established,<sup>163</sup> or the Australian Competition and Consumer Commission could be vested with the powers.<sup>164</sup>

These issues have constitutional salience because the scheme's arbiter may influence the implied freedom analysis. Giving a non-judicial body the ability to make conclusive determinations about accuracy may imperil validity, because limiting appeal and review options would increase the burden on communication.<sup>165</sup> On the other hand, subject to sufficiently clear criteria (as in the *SA Act* and *ACT Act*), there is nothing novel about the role exercised by the courts in a TPAL. In defamation proceedings, courts are frequently asked to determine the truth, or otherwise, of written or spoken statements.<sup>166</sup> That judicial exercise has a 400-year history in the common law.<sup>167</sup> The misleading and deceptive standard, meanwhile, has been a core feature of trade practices law for decades,<sup>168</sup> and has relevance in securities law.<sup>169</sup> Firmly incorporating the judiciary in any TPAL scheme is therefore a safeguard against invalidity. While it is unlikely to be feasible for the judiciary to be the sole body with oversight of a TPAL, providing for preliminary assessments made by executive officials (or even judges in a *persona designata* role) — but not the electoral regulator — before escalation to a court, might be an appropriate design.

Placing the judiciary at the centre of any TPAL also minimises the broader policy risks, by shifting controversial decisions away from electoral regulators. Yet it does not negate these concerns entirely. Rowbottom has urged 'caution before regulating false election statements' because '[e]ven with the independence of the judiciary, there are still dangers that court rulings in such an area will lead to the perception of judicial bias.'<sup>170</sup> Indeed, the Federal Court of Australia recently reconsidered the provision read down in *Evans* in a case arising out of the 2019

<sup>160</sup> Quoted in Lucy Bladen, 'Truth in Political Advertising Laws Should Be Delayed: ACT Electoral Commissioner', *Canberra Times* (19 May 2021, online) <<https://www.canberratimes.com.au/story/7259414/electoral-commissioner-calls-to-delay-truth-in-advertising-laws/>>.

<sup>161</sup> *Canada Elections Act*, SC 2000, c 9, s 91.

<sup>162</sup> Elections Canada, *Political Communications in the Digital Age: The Regulation of Political Communications under the Canada Elections Act* (Discussion Paper No 1, May 2020) 19.

<sup>163</sup> Bladen (n 160).

<sup>164</sup> Luke Beck, Submission No 65 to Joint Standing Committee on Electoral Matters, *Inquiry into an all Aspects of the Conduct of the 2019 Federal Election and Matters related thereto* (19 September 2019) 2.

<sup>165</sup> Such an approach might also raise issues under ch III of the *Australian Constitution*.

<sup>166</sup> Cf Meiring de Villiers, 'Substantial Truth in Defamation Law' (2008) 32(1) *American Journal of Trial Advocacy* 91; Andrew Kenyon, 'Perfecting Polly Peck: Defences of Truth and Opinion in Australian Defamation Law and Practice' (2007) 29(4) *Sydney Law Review* 651.

<sup>167</sup> Marc Franklin, 'The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law' (1964) 16(4) *Stanford Law Review* 789, 790.

<sup>168</sup> Justice R S French, 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63(4) *Australian Law Journal* 250.

<sup>169</sup> See, eg, Michael Duffy, 'Investor Loss from Securities Non-Disclosure: A Statutory Presumption of Causation on the Canadian Model?' (2009) 32(3) *University of New South Wales Law Journal* 965.

<sup>170</sup> Rowbottom (n 25) 525.

Federal Elections. In *Garbett v Liu*, which involved misleading corflute signs, the Court observed:

It is a large step (although it was briefly taken in 1983 ...) to constrain political discourse and argumentation by prohibiting misleading statements or conduct in that discourse. That step was taken in trade and commerce. But the field of contest in politics is broader and more apt to a width of debate where differences of views as to what is misleading or deceptive, in particular among political partisans or between opponents, may move into questions that are scarcely justiciable ...<sup>171</sup>

Respectfully, this concern seems more appropriately directed to the need for precise statutory criteria than indicating the inappropriateness of a judicial forum for resolution of TPAL proceedings. It can hardly be said that the *SA Act* and *ACT Act* could give rise to questions that are ‘scarcely justiciable’.<sup>172</sup> Because both schemes are limited to statements of fact, the adjudication required by TPALs is firmly within the scope of ordinary judicial activity.

The active involvement of third parties in TPAL schemes may heighten the risk of invalidity.<sup>173</sup> Empowering third parties to enforce TPALs is therefore somewhat of a double-edged sword: while it could increase efficacy, by relieving enforcement responsibility from the shoulders of an electoral regulator, it might significantly increase the burden on communication. This is so due to the risk of politically-motivated TPAL enforcement,<sup>174</sup> which would chill speech by raising the costs of electoral advertising (due to the need to defend frivolous cases).<sup>175</sup> These concerns were central to an American court invalidating Ohio’s TPAL on First Amendment grounds.<sup>176</sup> The law lacked an adequate filtering mechanism for frivolous claims, which meant third-party complainants could ‘use the law’s process “to gain a campaign advantage without ever having to prove the falsity of a statement”’.<sup>177</sup> Notwithstanding the divergence between implied freedom and First Amendment jurisprudence, these factors would bear on the extent of the burden imposed and may well jeopardise the necessity analysis under the *Lange/McCloy* test.

## E *Inconsistent Application*

Vexing implied freedom issues could arise if TPALs are applied inconsistently by a regulatory body empowered to enforce the law. Whichever arbiter is chosen by a TPAL, concerns may arise about the body’s impartiality. In *Rickert*, for example, one factor relied on by the Washington Supreme Court in invalidating a TPAL was that the relevant regulator’s composition was determined by the Governor: ‘When this same governor seeks reelection, the governor’s own appointees will decide

<sup>171</sup> *Garbett v Liu* (2019) 273 FCR 1, 10–11 [37] (Allsop CJ, Greenwood and Besanko JJ) (*‘Garbett’*). See generally Christina Devetzidis, ‘After the “Hurly-Burly Has Dimmed Outside”: Misleading and Deceptive Corflutes in *Garbett v Liu* (2019) 375 ALR 117’ (2020) 41(2) *Adelaide Law Review* 671.

<sup>172</sup> But see Tham and Ewing (n 14) 327.

<sup>173</sup> In the American context, see Sellers (n 23) 152–3.

<sup>174</sup> See Marshall (n 40) 300.

<sup>175</sup> Rowbottom (n 25) 525.

<sup>176</sup> *Susan B Anthony List v Driehaus*, 814 F 3d 466 (D Ohio, 2016).

<sup>177</sup> *Ibid* 475, quoting *Susan B Anthony List v Driehaus*, 573 US 149 (2014). See also Weinstein (n 130) 200–3.

whether to sanction the speech of campaign opponents.<sup>178</sup> These concerns would be heightened if a regulatory body frequently commenced proceedings against candidates or parties from one political viewpoint but not another.<sup>179</sup> However, current implied freedom jurisprudence contains no clear mechanisms for addressing such inconsistent application. If the improper motives of the regulator were blatant, administrative law remedies may be available.<sup>180</sup> Yet it is possible to envisage more subtle inconsistent application, or inadvertent inconsistency arising from different communication approaches adopted by political parties.

The issues, from an implied freedom perspective, are twofold. First, how would such practical selectivity be addressed in a constitutional challenge? It is High Court dogma that the implied freedom is not a personal right.<sup>181</sup> It follows that the constitutional analysis eschews focus on individual circumstances and directs attention to the statutory scheme.<sup>182</sup> In the present context, such an approach risks failing to see the wood for the trees: a TPAL might, on its face, be even-handed, but have disproportionate practical impact on a particular viewpoint. While the High Court recognised the discriminatory effect of the impugned law in *Brown*,<sup>183</sup> and invalidated it, the jurisprudence concerning discriminatory practical operation is underdeveloped. That is particularly the case if the inconsistency is only evident at a macro level. In *Banerji*, Gageler J recognised that an obligation of impartiality on public servants limited their ability to engage in ‘praise for or criticism of’ government policy.<sup>184</sup> Nonetheless, the Court did not raise concerns about guidelines that prohibited criticism yet encouraged praise, or the litigious record that indicated all recent cases in the field had involved sanctions for criticism, not praise (thereby suggesting content-based discrimination).<sup>185</sup>

The second issue is practical. In *Wotton v Queensland*, the High Court held that an implied freedom challenge to the exercise of a statutory discretion is assessed at the level of the authorising statute.<sup>186</sup> This approach, which minimises the relevance of the particular circumstances of the case,<sup>187</sup> was confirmed in *Banerji*.<sup>188</sup> However, the Court in *Banerji* did not rule out the possibility that the implied freedom could be relevant if the challenge was brought via administrative law. For

<sup>178</sup> *Rickert* (n 120) 17.

<sup>179</sup> See Hasen (n 134) 56; Weinstein (n 130) 227–8; Marshall (n 40) 299.

<sup>180</sup> HP Lee, ‘Improper Purpose’ in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 198, 198–211.

<sup>181</sup> See, eg, *Unions NSW (No 1)* (n 85) 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>182</sup> See, eg, *Banerji* (n 82); *Chief of the Defence Force v Gaynor* (2017) 246 FCR 298.

<sup>183</sup> *Brown* (n 59) 361–2 [92]–[95] (Kiefel CJ, Bell and Keane JJ), 389 [198]–[199] (Gageler J).

<sup>184</sup> *Banerji* (n 82) 424 [105].

<sup>185</sup> See Kieran Pender, ‘“A Powerful Chill”? *Comcare v Banerji* [2019] HCA 23 and the Political Expression of Public Servants’, *AusPubLaw* (online, 28 August 2019) <<https://auspublaw.org/2019/08/a-powerful-chill-comcare-v-banerji-2019-hca-23/>>; Kieran Pender, ‘Punishing Critics while Courting Praise is Censorship’, *Canberra Times* (online, 5 March 2019) <<https://www.canberratimes.com.au/story/5993418/punishing-critics-while-courting-praise-is-censorship/>>.

<sup>186</sup> *Wotton v Queensland* (2012) 246 CLR 1, 14 (French CJ, Gummow, Hayne, Crennan and Bell JJ) (*‘Wotton’*). See also *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 614 (Brennan J).

<sup>187</sup> See Kieran Pender, ‘“Silent Members of Society”? Public Servants and the Freedom of Political Communication in Australia’ (2018) 29(4) *Public Law Review* 327, 347.

<sup>188</sup> *Banerji* (n 82) 395, 406 (Kiefel CJ, Bell, Keane and Nettle JJ). The *Wotton* approach was also endorsed, although with little additional clarity, in a non-implied freedom context in *Palmer* (n 114).

example, rather than filing a constitutional challenge to the TPAL, an aggrieved political party who had received a retraction request from a regulator pursuant to a TPAL, might instead seek judicial review of the decision to make the retraction request.<sup>189</sup> How that would work in practice remains distinctly unclear. As one judge said in extra-curial remarks in 2018, ‘general propositions to the effect that the implied freedom is a restraint on executive as well as legislative power are not enough. There is scope for further principled development.’<sup>190</sup> In *Banerji*, the plurality suggested the implied freedom might be a relevant consideration,<sup>191</sup> whereas Gageler J described such an approach as containing ‘an element of conceptual confusion’.<sup>192</sup> These issues remain unsettled, and could be raised squarely by TPAL litigation.

## F Penalties

Finally, the nature and extent of the penalty imposed by the TPAL will likely have a bearing on validity in the event of an implied freedom challenge, influencing the extent of the burden, the necessity of the approach adopted and its adequacy in balance. The *SA Act* provides for a maximum penalty of \$5,000, if the offender is a natural person, or \$25,000 if the offender is a body corporate; the *ACT Act* provides for a maximum penalty of 50 penalty units, which at the time of writing was \$8,000 for an individual and \$40,500 for a corporation.<sup>193</sup> The federal provision, at s 329 of the *1918 Act*, that was read down in *Evans* to apply narrowly only in relation to the act of vote-casting, and was more recently considered in *Garbett*, provides a maximum penalty of imprisonment for a period not exceeding six months (or an equivalent fine). In *Evans*, the punitive nature of the provision, including the potential for imprisonment, was held to justify its reading down.<sup>194</sup>

The dilemma for legislative drafters is that, the more severe the penalty, the greater the risk of invalidity. However, modest financial penalties may not be a sufficient deterrent, particularly for larger political parties. Given the multi-million dollar budget of major parties in a Federal Election, for example, a five-figure fine would likely be seen simply as a campaigning cost. While larger financial penalties might have a disproportionate burden on smaller political parties or independents (and hence increase the risk of invalidity), penalties expressed as a percentage of turnover, as is sometime the case for corporate offences,<sup>195</sup> might be an appropriate solution. This could serve as a sufficient deterrent for larger parties without unduly

<sup>189</sup> Although the availability of judicial review might depend on the coercive nature of the request, which would be dependent on the exact nature of the power set out in the TPAL.

<sup>190</sup> Justice Pamela Tate, ‘The Federal and State Courts on Constitutional Law: The 2017 Term’ (Speech, 2018 Constitutional Law Conference, Gilbert and Tobin Centre of Public Law, 23 February 2018) 9.

<sup>191</sup> *Banerji* (n 82) 406 [45] (Kiefel CJ, Bell, Keane and Nettle JJ).

<sup>192</sup> *Ibid* 408 [52], quoting *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240, 256–7 [56] (Basten JA).

<sup>193</sup> *SA Act* (n 9) s 113(2); *ACT Act* s (n 9) 297A(1).

<sup>194</sup> *Evans* (n 18) 206.

<sup>195</sup> See, eg, the offence provisions in the *Competition and Consumer Act 2010* (Cth), which provide, for example at s 45AF(3)(c): ‘if the court cannot determine the total value of those benefits—10% of the corporation’s annual turnover during the 12-month period ending at the end of the month in which the corporation committed, or began committing, the offence’.

burdening campaigners without such deep pockets. TPALs providing for potential imprisonment would likely face heightened implied freedom scrutiny, given the severity of the penalty would increase the burden on communication. Such an approach, if challenged, would likely also be required to demonstrate the ineffectiveness of financial penalties at the necessity stage of proportionality analysis. It is notable that Steggall's proposed federal TPAL provides only for financial penalties,<sup>196</sup> despite the presence of imprisonment penalties elsewhere in the *1918 Act*, including the related s 329 provision.

## V Conclusion

Research for this article commenced in late 2020. In January 2021, the US provided a stunning demonstration of the urgency of the issues it addresses. On 6 January 2021, supporters of then-President Donald Trump stormed the US Capitol Building. Their actions were motivated, in large part, by an online campaign of misinformation from President Trump and his associates, who had falsely claimed that the 2020 Presidential Election had been 'stolen'.<sup>197</sup> It was a vivid indication of the real world, violent consequences of factually-baseless communication. Australian political discourse may not yet be experiencing American-style polarisation. But Australia is not immune from these trends. Absent a significant socio-political shift, it seems almost inevitable that deceptive electoral campaigning — which spreads like wildfire on social media — will gain greater political salience here. The forthcoming Federal Election is anticipated to offer a troubling case study.

Regulation cannot single-handedly fix democracy's truth problem. Yet it may well be an important part of the arsenal deployed to reverse the tide of misinformation infecting Australia's elections. As and when that time comes, Australia's legislators — and courts — will have to grapple with the compatibility of laws that limit political communication with the implied freedom in the *Australian Constitution*. This article has explored that intersection. It argued that Australia's existing TPALs likely withstand constitutional challenge, on either the *Lange/McCloy* test or the alternative calibrated scrutiny approach (although this scrutiny may be more exacting). However, the article suggested more expansive TPALs may face constitutional barriers, relating to scope, potential chilling effects, the need for justifying evidence, difficulties around the appropriate arbiter and the risk of inconsistent application. In considering these obstacles, the article highlighted lingering jurisprudential uncertainties that may be raised by a TPAL case. Litigation relating to electoral regulation has been central to the implied freedom's development in the past three decades; that trend looks set to continue.

As has been underscored by comparative references throughout this article, Australia is not alone in confronting the challenge of reconciling a commitment to

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<sup>196</sup> Steggall (n 7).

<sup>197</sup> Dan Barry and Sheera Frenkel, "'Be There. Will Be Wild!': Trump All but Circled the Date", *New York Times* (online, 6 January 2021) <<https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html>>. Several Australian politicians have echoed Trump's misinformation: see Paul Karp, 'Australian Liberal MP Craig Kelly Stands by US Capitol "Antifa" Claim, Despite Discredited Evidence', *The Guardian* (online, 8 January 2021) <<https://www.theguardian.com/australia-news/2021/jan/08/australian-liberal-mp-craig-kelly-us-capitol-antifa-claim>>.

free speech with laws seeking to regulate misleading electoral campaigning. As with other areas of implied freedom jurisprudence, Australia's unique constitutional *terroir* will have significant bearing on the ultimate resolution reached by the High Court.<sup>198</sup> In the US, the Supreme Court has insisted that even lies have First Amendment protection. 'The remedy for speech that is false is speech that is true,' held Kennedy J for the majority in *United States v Alvarez*. 'The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.'<sup>199</sup> Kennedy J could not, in 2011, have foreseen that a decade later, straight-out lies would incite thousands of Americans to storm the Capitol.<sup>200</sup> How *Alvarez's* First Amendment absolutism fares in America's current political atmosphere remains to be seen.<sup>201</sup> So, too, must we await a determination from the High Court on the constitutionality of regulating truth and lies in Australian politics.

During legislative debate over Australia's newest TPAL, the *ACT Act*, the spectre of that determination reared its head. Le Couteur, who was moving the amendment, noted that 'there is potential concern about constitutional issues for such a scheme'.<sup>202</sup> Yet ultimately, the ACT Legislative Assembly forged on with its TPAL. Le Couteur quipped: 'if it turns out that one of the few rights that our *Constitution* enshrines or at least implies means that politicians can actually lie about matters of fact without any consequences then we have bigger problems than my amendment.'<sup>203</sup> As this article has demonstrated, the *ACT Act* is probably on safe ground. While the implied freedom does provide some barriers to more stringent TPALs, the High Court is unlikely to invalidate laws that merely seek to prevent politicians from lying without consequence. In that respect, at least, Australia may be better prepared to address the post-truth political era than our American peers.<sup>204</sup>

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<sup>198</sup> *Terroir* is a French word denoting the influence of local conditions (climate, soil etc) on the taste of wine. American scholar Roger Alford has commented that 'the free speech norm is given its distinctive personality in different cultures based on the local conditions of that country. The results are greatly influenced, if you will, by a country's constitutional *terroir*': Roger Alford, 'Free Speech and the Case for Constitutional Exceptionalism' (2008) 106(6) *Michigan Law Review* 1071, 1086.

<sup>199</sup> *United States v Alvarez*, 567 US 709, 15–16 (2012) ('*Alvarez*'). Kennedy J (at 11) even raised the spectre of Orwell:

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth.

<sup>200</sup> For a prescient critique of the idea that false speech deserves free speech protection, with reference to the manipulation and confusion of constituents, see Rowbottom (n 25) 523.

<sup>201</sup> Despite the First Amendment obstacles, as of 2018 at least 16 American states had laws regulating or criminalising false campaign speech: Ross (n 24) 383. The US Supreme Court is yet to directly confront the constitutionality of TPALs (*Alvarez* was a 'stolen valour' case), and intermediate-level jurisprudence is split: Hasen (n 134) 57–64; Weinstein (n 130) 171–202.

<sup>202</sup> Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 2 July 2020, 1540.

<sup>203</sup> *Ibid.*

<sup>204</sup> One of the most eminent free speech scholars in the US has sounded a troubling note of concern: 'I do not have a solution. I still believe in the premise of the First Amendment — that more speech is better. But evermore, I realize that it is a matter of faith, and the internet may challenge that faith for all of us': Chemerinsky (n 10) 15.