

**Submission
No 14**

**ADMINISTRATION OF THE 2023 NSW STATE ELECTION AND OTHER
MATTERS**

Organisation: NSW Independent Commission Against Corruption

Date Received: 15 February 2024

Committee Manager
Joint Standing Committee on Electoral Matters
NSW Parliament House
6 Macquarie Street
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By email: electoralmatters@parliament.nsw.gov.au

Our Ref: AD24/0018

Dear Committee Manager

Inquiry into 'Administration of the 2023 NSW state election and other matters'

The NSW Independent Commission Against Corruption (the Commission) welcomes the opportunity to make a submission to the Inquiry into 'Administration of the 2023 NSW state election and other matters'.

The Commission's attached submission focuses on part (3) of the Inquiry's terms of reference. It draws on findings and recommendations made in previous Commission investigations that relate to political donations, property development, and/or where undisclosed conflicts of interest have seriously compromised the integrity of elected officials when exercising public powers.

If you require further information or assistance on any of the matters raised in the submission, please contact my office or [REDACTED]

Yours sincerely


The Hon John Hatzistergos AM
Chief Commissioner

14 February 2024



INDEPENDENT COMMISSION
AGAINST CORRUPTION
NEW SOUTH WALES

**Submission by the NSW Independent Commission
Against Corruption to the Inquiry into
'Administration of the 2023 NSW state election and
other matters'**

February 2024

About the Commission

The Commission was established as an independent body in 1988 to investigate and prevent corruption in and affecting the NSW public sector.

The Commission's principal functions are set out in s 13 of the *Independent Commission Against Corruption Act 1988* (the "ICAC Act"). In summary, s 13 provides that the Commission:

- as part of an investigation process, consider whether laws, methods of work, practices or procedures should be changed to reduce the likelihood of the occurrence of corrupt conduct
- examine laws, practices and procedures of public authorities to facilitate the discovery of corrupt conduct
- instruct, advise and assist public authorities on ways in which corrupt conduct may be eliminated or reduced, and the integrity and good repute of public administration promoted
- enlist and foster public support in combating corrupt conduct and in promoting the integrity and good repute of public administration.

Consistent with the above functions, the Commission's submission focuses on (3) (i), (ii) and (iii) of the terms of reference.

The Commission's involvement with political donations

The observation that political donations can be a corruption risk is not new. In one of the Commission's first inquiries, Operation Barracuda,¹ over 34 years ago Assistant Commissioner Roden observed:

But if there is a form of payment that can be made, and accepted, without fear from the law, or from public opinion, then there is an obvious threat to fair and honest government.²

Since 1990, the making and receiving of donations from property interests has featured in numerous Commission investigations. The Commission's Operation Cyrus report, released in 2014, provides a notable example. In this matter, corrupt conduct findings were made against an influential parliamentarian and power broker in relation to a \$50,000 donation and representations he made to government interests in favour of leaseholders at Circular Quay. The report observed that the parliamentarian regarded himself as being under an obligation or an inducement, following the payment of the money to his political party, to participate in and, if possible, affect the outcome of the decision-making process at Circular Quay.³

¹ NSW ICAC, *Report on investigation into North Coast land development*, Sydney, July 1990

² NSW ICAC, *Report on investigation into North Coast land development*, Sydney, July 1990, p.653

³ NSW ICAC, *Investigation into the conduct of the Hon Edward Obeid MLC and others concerning circular quay retail leasing policy*, Sydney, June 2014, p.54

Later in 2016, the Commission's Operation Spicer report detailed conduct indicative of significant failures to comply with election funding laws concerning the disclosure of political donations, the prohibition on property developers making political donations and the caps placed on political donations.

Most recently, the Commission's Operation Aero report, released in 2022, dealt with an unlawful scheme to secure a \$100,000 cash donation received in connection with a fundraising dinner held in the lead up to the 2015 New South Wales (NSW) State election.⁴

Political donations in the local government sector have also featured in investigations, including Operations Cal,⁵ Trophy,⁶ Atlas,⁷ and Tolosa.^{8 9}

In Operation Cyrus, the Commission observed that there is a clear dividing line between general party donations and money paid to affect a particular outcome.¹⁰ Despite this, the claim that a payment, or requested payment, was a legitimate political donation was made, albeit not often successfully, in many of the Commission's investigations.

3 (i) Whether other entities and individuals whose business relates to property development should be prohibited from making political donations

The statutory definition of "property developer"

The *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* introduced a prohibition on political donations from property developers. This addressed a significant area of corruption risk that has been ruled as lawful by the High Court in *McCloy v NSW*.¹¹ In this case, a High Court majority held that the level of dependence of property developers on decisions of government about land development matters distinguishes them from actors in other sectors of the economy.¹² The High Court also noted the reality of the corruption risk associated with property developers with

⁴ NSW ICAC, *Investigation into political donations facilitated by Chinese Friends of Labor in 2015*, Sydney, February 2022

⁵ NSW ICAC, *Report on the Conduct of George Bertoncello of Lane Cove Council, Nazem Bechara in relation to certain Councillors of Holroyd City Council and Vittorio Fasan and Antonio Cavallaro and their dealings with Fairfield City Council*, Sydney, November 1997

⁶ NSW ICAC, *Report into corrupt conduct associated with development proposals at Rockdale City Council*, Sydney, July 2002

⁷ NSW ICAC, *Report on an investigation into corruption allegations affecting Wollongong City Council*, Sydney, October 2008

⁸ NSW ICAC, *Investigation into the conduct of the City of Canada Bay Council mayor and others*, Sydney, November 2023

⁹ No findings of serious corrupt conduct were made in relation to the political donations that featured in Operation Tolosa.

¹⁰ NSW ICAC, *Investigation into the conduct of the Hon Edward Obeid MLC and others concerning circular quay retail leasing policy*, Sydney, June 2014, p.54

¹¹ *McCloy v New South Wales* [2015] 257 CLR 178

¹² *McCloy v New South Wales* [2015] 257 CLR 178, [49]-[50]

reference to previous Commission investigation reports involving this industry and adverse findings made in other jurisdictions.¹³

Section 53 of the *Electoral Funding Act 2018* provides a statutory definition of property developer. This definition does not:

- extend to other industries that are engaged by property developers, including subcontractors and consultants
- extend to corporations that make development applications but are not designated 'property developers'. This may include supermarkets and other retail businesses, and businesses that make planning applications from time to time in relation to properties from which they conduct their usual business
- include all family members of property developers.

Moreover, while property developers often establish holding companies or special purpose subsidiaries for legitimate business reasons, such as liability and risk prevention, not all entities incorporated for a particular development come within the meaning of s 53 in situations where the activity test provided for in s 53(1)(a)(ii) has not been met.

Consequences of extending prohibitions on donors

While supporting the prohibition on donations from individuals and entities that come within the statutory definition of property developer, the Commission does not, however, support extending this prohibition to other entities and individuals whose businesses relates to property development. Extending any ban to include these groups could potentially ensnare a wide range of ancillary actors including tradespeople, architects, banks/financiers/mortgage brokers, real estate agents, surveyors, planning consultants, engineers, lawyers and conveyancers. This raises the real possibility that an extension of the ban may unduly restrict the constitutional implied freedom of political communication.

The Commission also cautions against an over reliance on prohibitions as providing an integrity safeguard. Operations Aero and Spicer provide examples of how the effectiveness of prohibitions can be undermined. In Operation Aero, most of the named 'donors' worked in a restaurant (where the fundraising event was held) and assisted an unlawful scheme by falsely declaring they had donated cash totalling \$100,000. The putative donors eventually admitted that they had not been the source of the donations. While Operation Spicer exposed donations from prohibited donors being made to an entity that channelled the funds to the NSW branch of a major political party.

Improving governance frameworks for elected officials

For the reasons outlined above, the Commission supports strengthening the focus of elected officials on their ethical obligations, as opposed to extending prohibitions. In particular, the Commission favours improving the governance framework for managing parliamentarians' conflicts of interest, which should capture political donations giving rise to conflicts of interest. It is appropriate such obligations should rest with the public officials who receive

¹³ *McCloy v New South Wales* [2015] 257 CLR 178, [51]

political donations given their duty to “act with fidelity and with a single-mindedness for the welfare of the community”.¹⁴

An example of this approach can be found at the local government level where conflicts of interests arising from political donations have been explicitly recognised since 2012 as having the potential to adversely affect the impartial exercise of official functions. This issue is currently dealt with under the prescribed *Model Code of Conduct for Local Councils in NSW 2020* (the “Model Code”) which requires councillors to disclose political donations from individuals with matters before a council as conflicts of interest and recuse themselves from voting and discussing matters involving donors in certain circumstances.¹⁵

It is important to note that the Model Code advises councillors that political donations that are not “reportable political donations” may still give rise to a non-pecuniary conflict of interest. It also provides that councillors should determine whether or not such conflicts are significant and take the appropriate action to manage them.

The most recent *Code of Conduct for the Legislative Assembly* and the *Code of Conduct for the Legislative Council* (the Members’ Codes) each contain expanded provisions requiring parliamentarians to avoid, resolve or disclose conflicts of interest.¹⁶

The Commission has sought to highlight and extend obligations on parliamentarians with respect to conflicts of interest by making recommendations in its Operation Witney report that the Members’ Codes be amended to include a clear, consistent and comprehensive conflict of interest definition and that the Constitution (Disclosure by Members) Regulation 1983 be amended to provide for a mandatory registration of conflicts of interest for parliamentarians.¹⁷

In February 2024, the NSW Government tabled a draft regulation in the NSW Parliament requiring parliamentarians to disclose new matters including conflicts of interest. It is also noted that the Government intends to introduce the proposed changes on 1 July 2024 after consultation with the Legislative Assembly’s Standing Committee on Parliamentary Privilege and Ethics and the Legislative Council’s Privileges Committee (the Parliamentary Committees).¹⁸

Additionally, in Operation Keppel, the Commission recommended that the mechanisms to disclose and manage conflicts of interest for parliamentarians be further improved in line with the Commission’s better practice conflicts of interest framework by providing for greater:

¹⁴ *R v Boston* [1923] 33 CLR 386, [400]

¹⁵ cll 5.15-5.19, NSW Government, *Model Code of Conduct for Local Councils in NSW*, Sydney, 2020

¹⁶ See cl 7

¹⁷ NSW ICAC, *Investigation into the conduct of the local member for Drummoyne*, Sydney, July 2022, p.179. See recommendations 3 and 4

¹⁸ <https://www.nsw.gov.au/media-releases/nsw-government-introduces-integrity-reforms> (Accessed 13 February 2024)

- consistency and clarity regarding what constitutes a conflict of interest and the level of detail that is required in a disclosure
- consistency and clarity on how to make a disclosure
- consistency and clarity on how disclosures should be managed
- emphasis on avoiding conflicts of interest
- transparency and accountability by requiring continuous updating of registered interests
- enforcement mechanisms
- ongoing professional education to raise awareness and promote an ethical culture.¹⁹

The Commission, in this report, also noted that the existing conflict of interest regime for parliamentarians could be further improved by providing additional guidance and practical examples of how to avoid, resolve, disclose and manage a conflict of interest and observed that it would welcome consultation with the NSW Parliament to adapt its conflicts of interest control framework to the workings of the legislature. Accordingly, the Commission recommended:

*That the NSW Parliament, in consultation with the Commission, develops a comprehensive framework applicable to members that addresses the avoidance, disclosure and management of conflicts of interest. The framework should provide members with practical guidance about how to avoid, disclose and manage common conflicts of interest.*²⁰

The Parliamentary Committees have established Inquiries to report on the recommendations arising from Operation Keppel.²¹

Donations made in other jurisdictions

The Commission has previously raised concerns about the lack of harmonisation of election finance laws across Australia.²² There is a real risk that donors could take advantage of discrepancies between the laws of the different state and federal jurisdictions. This is particularly concerning in the NSW jurisdiction which has lower caps on donations and disclosure thresholds, and banned donors. In Operation Aero, the Commission heard evidence that accepting funds into the federal account of a major political party, which would otherwise be prohibited at the state level, is a known practice.²³

Most recently in Operation Tolosa, the Commission considered the issue of whether political donations made during a mayor's federal election campaign by donors connected to

¹⁹ NSW ICAC, *Investigation into the conduct of the then member of parliament for Wagga Wagga and then Premier and others*, Sydney, June 2023, vol 2, p.331

²⁰ NSW ICAC, *Investigation into the conduct of the then member of parliament for Wagga Wagga and then Premier and others*, Sydney, June 2023, vol 2, p.332. See recommendation 2

²¹ The Standing Committee on Parliamentary Privilege and Ethics will also inquire and report on the recommendations made in the Commission's Operation Witney report

²² NSW ICAC, *Election funding, expenditure and disclosure in NSW: Strengthening accountability and transparency*, Sydney, December 2014, p.28

²³ NSW ICAC, *Investigation into political donations facilitated by Chinese Friends of Labor in 2015*, Sydney, February 2022, p.270

developers ought to have been disclosed as a conflict of interest under the Model Code when the mayor dealt with the relevant development matters. The Commission recommended in the investigation report that councillors be explicitly required to disclose political donations made in other jurisdictions as conflicts of interest.²⁴ Any measures to strengthen the focus on parliamentarians' management of conflicts of interest may need to incorporate similar advice.

Strengthen political parties' governance arrangements

In addition to the ethical obligations placed on individual elected officials, the governance of political parties must also be addressed. Operation Aero highlighted the governance shortcomings of a political party and the inability to conduct adequate due diligence to comply with NSW donation laws. This contributed to the failure of the party to detect the scheme to conceal the true source of a donation.

The need to strengthen parties' governance arrangements has featured in many reviews and investigations. In 2014, the NSW Government's Expert Panel report into political donations supported the linking of public funding for party administration expenditure to good governance and compliance practices.²⁵ The Expert Panel agreed with an earlier Commission recommendation to amend the relevant legislation to convert administration funding from a reimbursement scheme to a grant, contingent on the internal governance capability of political parties.²⁶

The Expert Panel also recommended there should be a requirement for parties to regularly lodge governance standards and methods of accountability with the NSW Electoral Commission for approval. Additionally, the Expert Panel recommended that political parties be required to identify where a political donation has been solicited by, or made for the direct benefit of, an endorsed candidate of the party.²⁷

The Commission's Operation Aero report restated the need for legislative reform to make payments from the administration fund contingent on the achievement of acceptable standards of party governance and control standards. These standards could relate to:

- accounting for, receipting and banking donations
- the organisation of fundraising events
- identifying prohibited donors and donations that exceed statutory caps
- the roles and responsibilities of staff, including volunteers
- risk management and internal audit
- whistleblowing and complaint-handling

²⁴ NSW ICAC, *Investigation into the conduct of the City of Canada Bay Council mayor and others* Sydney, November 2023, pp.124-125. See recommendation 2

²⁵ K Schott, A Tink AM, The Hon J Watkins, *Political Donations: Final Report*, NSW Department of Premier & Cabinet, Sydney, December 2014, p.7

²⁶ NSW ICAC, *Election funding, expenditure and disclosure in NSW: Strengthening accountability and transparency*, Sydney, December 2014, p.5. See Recommendation 1

²⁷ K Schott, A Tink AM, The Hon J Watkins, *Political Donations: Final Report*, NSW Department of Premier & Cabinet, Sydney, December 2014, pp.13-14. See recommendations 26 and 33

- management of gifts and conflicts of interest
- compliance and ethical obligations of senior party officials.²⁸

Following the change of Government in 2023, the Operation Aero recommendations have been referred to the Joint Standing Committee on Electoral Matters (the Committee) for further consideration. If implemented as intended, the governance reforms will go a long way to prevent corruption and strengthen integrity and public trust in electoral matters.

3 (ii) Whether it is necessary to address the risk of property developers making political donations through shell companies

Circumventing political donation laws

A feature in some Commission investigations has been the use of intermediaries to make donations.

Since Operation Barracuda in 1990, the Commission has been aware that donations have been made via separate entities to avoid the obligation to disclose the donor. The Operation Barracuda report noted that the adoption of such arrangements was a standard practice of all major parties at the time, despite the lawfulness of such schemes being questioned.²⁹ It also identified the use of intermediaries or what it referred to as “dummy companies” between donors and parties as a particular problem and made recommendations to address this issue.³⁰

As noted above, the Commission’s Operation Spicer also exposed attempts to evade the requirement for the accurate disclosure of political donations, and the prohibition on property developer donations, by channelling donations through other entities.

The *Election Funding, Expenditure and Disclosures Amendment Act 2014 (NSW)* addressed the concerns raised in Operations Barracuda and Spicer by providing for a separate indictable offence in relation to entering into or carry out a scheme for the purpose of circumventing political donations or electoral expenditure prohibitions or requirements.³¹ Consequently, the use of an entity that does not serve an active business purpose other than to circumvent disclosure obligations would most likely contravene this provision, which suggests that further legislative amendment in this regard is not required.

It is also noted that in NSW at the State and local government level numerous reforms have been introduced in recent years concerning caps on political donations and electoral expenditure, increased penalties for offences and the timely disclosure of donations. Additionally, in 2020 a \$100 cash donation limit was introduced in response to the Commission’s Operation Aero investigation. The purpose of this change was to “make it

²⁸ NSW ICAC, *Investigation into political donations facilitated by Chinese Friends of Labor in 2015*, Sydney, February 2022, pp.272-274. See recommendation 2

²⁹ NSW ICAC, *Report on investigation into North Coast land development*, Sydney July 1990, p 532

³⁰ NSW ICAC, *Report on investigation into North Coast land development*, Sydney July 1990, p.532

³¹ s 144, *Electoral Funding Act 2018*

easier to trace and account for significant political donations, removing potential opportunities to disguise their true source".³²

Addressing intermediaries more broadly

There is merit, however, in addressing the issue of intermediaries who continue to feature in Commission investigations more broadly. Both Operations Cyrus and Aero demonstrated a notable interplay between donations, lobbying and political powerbrokers. The intermediaries at the centre of these case studies were also involved in fundraising. These intermediaries were not professional 'third party' lobbyists, and consequently they are not covered by many of the measures introduced in recent years to discourage improper conduct by this group.

Nor are intermediaries necessarily 'government officials' in their own right, and so contact made with them by individuals seeking to harness their influence would not be covered by these measures. Other recent Commission investigations, including Operations Tolosa³³ and Galley³⁴, have highlighted the role of intermediaries who are not public officials in providing inducements to public officials to favour developers' interests, albeit not via political donations.

The Commission's Operation Eclipse report³⁵ provides a range of recommendations that include enhancing obligations of public officials that arise or operate in the conduct and disposition of lobbying proposals.³⁶ As discussed earlier in this submission, the Commission believes there is merit in directing attention to the duties of public officials given the conferral of public power on them and their obligation to exercise it for a legitimate public purpose.

3 (iii) Whether truth in political advertising laws for New South Wales state elections would enhance the integrity and transparency of the electoral system, taking into account any implications of the Commonwealth's Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2023

Misinformation, disinformation and corrupt conduct

The debate for and against further regulation of truth in political advertising, and misinformation and disinformation in political ads, has been ongoing for years, but it has gained more attention recently due to the rise of social media, and the recent past referendum and elections. In principle, it would be ideal if all participants in election campaigns were truthful, however, different stakeholders will continue to have contrasting

³² New South Wales, *Parliamentary Debates*, Legislative Council, 16 October 2019, (Don Harwin, Special Minister of State), p.98

³³ NSW ICAC, *Investigation into the conduct of the City of Canada Bay Council mayor and others*, Sydney, November 2023

³⁴ NSW ICAC, *Investigation into the conduct of three former councillors of former Hurstville City Council, now part of Georges River Council, and others*, Sydney, August 2023

³⁵ NSW ICAC, *Investigation into the regulation of lobbying, access and influence in NSW*, Sydney, June 2021

³⁶ NSW ICAC, *Investigation into the regulation of lobbying, access and influence in NSW*, Sydney, June 2021, p.11. See recommendations 1, 2 and 3

views and interests as to where the tensions and balances lie between public values of freedom of political expression and the integrity and transparency of the electoral system.

The Commission's interest in this topic derives from its principal function to promote the integrity and good repute of public administration. This involves ensuring public institutions remain trustworthy, and that trust in public institutions is not undermined. Misinformation and disinformation pose significant threats to the integrity of electoral processes, potentially swaying public opinion through the dissemination of false or misleading information.

While not typically classified as corrupt conduct under ss 7, 8, and 9 of the ICAC Act, scenarios exist where such activities could be considered corrupt. For instance, depending on the circumstances, a public official's actions in misusing official resources to spread misinformation or disinformation could constitute corrupt conduct.

Additional powers

In NSW, the *Electoral Act 2017* contains transparency measures which require:

- electoral material to bear the name and address of the individual on whose instructions it was printed, published or distributed³⁷
- the prevention of material that is incorrect or misleading or improperly interferes with an elector in relation to the casting of his or her vote.³⁸

In addition to these requirements, a strategy used by electoral commissions in NSW, Victoria, Queensland and the Commonwealth to combat misinformation and disinformation has been to maintain registers of material having the potential to mislead the public about electoral processes. Myths and untruths spread about electoral processes are published online by the electoral commissions where it is 'de-bunked' and along with details of the agency's action. The Australian Electoral Commission (AEC) informs the public:

*The AEC is not responsible for fact-checking claims about the Yes or No case for a referendum, and we do not seek to censor debate in any way. However, when it comes to the referendum process we conduct, we're the experts and we're active in defending Australia's democracy.*³⁹

There are other measures taken by electoral commissions, as well as other bodies, to combat misinformation and disinformation such as awareness and education campaigns, for

³⁷ s 186, *Electoral Act 2017*

³⁸ ss 180-184, *Electoral Act 2017*

³⁹ <https://www.aec.gov.au/media/disinformation-register-ref.htm#:~:text=The%20AEC%20is%20not%20responsible,censor%20debate%20in%20any%20way>. (Accessed: 13 February 2024)

example, the NSW Electoral Commission’s ‘Stop and Consider’ campaigns, as well as an electoral commissions’ own social media presence.^{40 41 42 43}

Electoral commissions in South Australia (SA) and the Australian Capital Territory (ACT) are the only two states that may request materially inaccurate and misleading electoral advertising be withdrawn and retracted, or seek financial penalties. The SA and ACT electoral laws are substantially similar. The powers do not apply to political discussions, speeches, interviews, newspaper articles or any form of communication that cannot be defined as an ‘electoral advertisement’. Instead, the powers only apply to purported ‘statements of fact’ and are only established if the purported statement of fact is inaccurate and misleading to a material extent.^{44 45 46 47}

Recent legal analysis has considered the constitutionality of the SA model as well as a possible extended scope of powers generally in the States and Commonwealth to regulate political advertising. This has occurred in the context of increased concerns about challenges in detecting, preventing, and mitigating harms to fair and open elections caused by the spread of misinformation and disinformation via digital platform services.^{48 49 50 51}

Where the Committee considers additional measures to regulate political advertising should be pursued, the Commission believes care needs to be taken as to where those powers are housed to avoid any perceptions of partiality or any conflicting duties, roles, functions or responsibilities.⁵² Failure to carefully address and mitigate these issues may increase an agency’s susceptibility to concerns about whether it independently administers its

⁴⁰ <https://elections.nsw.gov.au/integrity/disinformation-register/stop-and-consider#:~:text=The%20NSW%20Electoral%20Commission%20is,and%20print%20media%20in%20NSW> (Accessed: 13 February 2024)

⁴¹ <https://www.aec.gov.au/referendums/learn/stop-and-consider.html> (Accessed: 13 February 2024)

⁴² https://www.ecq.qld.gov.au/_data/assets/pdf_file/0015/18024/fact-sheet-stop-and-consider-v1.2.pdf (Accessed: 13 February 2024 @ 9.07)

⁴³ <https://www.vec.vic.gov.au/voting/learn-to-vote/sorting-fact-from-fiction> (Accessed: 13 February 2024)

⁴⁴ s 113 *Electoral Act 1985 (SA)*

⁴⁵ s 297A *Electoral Act 1992 (ACT)*

⁴⁶ *Cameron v Becker* [1995] SASC 5149

⁴⁷ *Cameron v Becker* [1995] 64 SASR 238 Olsson J at [24], Lander J at [3]

⁴⁸ B Browne, *We can handle the truth Opportunities for truth in political advertising Discussion paper*, The Australian Institute, Canberra, 2019

⁴⁹ R Baltutis, “South Australia’s Truth in Political Advertising Law: A Model for Australia?”, *Adelaide Law Review*, vol.42, no.2, pp.597-611

⁵⁰ K Pender, “Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations”, *The Sydney Law Review*, vol. 44, no.1 pp.1-30

⁵¹ L Hill, M Douglass & R Baltutis, *How and Why to Regulate False Political Advertising in Australia*, Palgrave MacMillan 2022, https://doi.org/10.1007/978-981-19-2123-0_1 (Accessed: 13 February 2024)

⁵² NSW ICAC, *Managing conflicts of duties in the NSW public sector*, Sydney, January 2024

obligations. For instance, a member of the public might perceive that an electoral commission has unduly focused on monitoring electoral statements or that the agency is favouring the interests of one political party over another in an election, at the expense of its duty to administer the electoral process impartially. This is a particular risk given that views about where the 'truth' lies can be the subject of considerable public debate.

Electoral commissions in different jurisdictions have raised concerns about undermining the principle of neutrality. For example, in 2014 the SA Electoral Commission recommended removing the power to request withdrawing and retraction of electoral advertising material for reasons including that it threatened its perceived independence. More recently, amendment is being considered by the SA Parliament to the *Electoral Act 1985 (SA)* by transferring some powers of the SA Electoral Commission to the SA Civil and Administrative Tribunal.⁵³

To provide an example of another model, in New Zealand, misinformation and disinformation are regulated by the Advertising Standards Authority (which includes social media), the Broadcasting Standards Authority Electoral Commission and the New Zealand Media Council that apply codes in response to complaints about advertising on social media.^{54 55}

Advanced technologies, deepfakes and digital platform services

There is a complex interplay between political advertising, misinformation and disinformation, freedom of political communication and the evolving digital landscape.

Artificial Intelligence (AI) can accelerate the spread of rumour, conjecture, inadvertent misinformation and deliberate disinformation, which undermine public confidence in policy making and pose significant challenges in relation to regulations where platforms are simple to use and free.

Digital platform services have adopted a voluntary code, the Australian Code of Practice on Disinformation and Misinformation (the Code), which is aimed at mitigating the risk of the spread of misinformation and the emergence of deepfakes. The Australian Communication and Media Authority (ACMA) was tasked with overseeing the development of the Code, reporting on the adequacy of its measures and the broader impacts of disinformation in Australia.⁵⁶

The efficacy of the Code is the subject of review through the public consultation of the Commonwealth's Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (the Bill). Although not within the Commission's jurisdiction, there is

⁵³ Electoral (Electronic Documents and Other Matters) Amendment Bill 2021 (SA), [https://www.legislation.sa.gov.au/lz/path=/b/archive/electoral%20\(electronic%20documents%20and%20other%20matters\)%20amendment%20bill%202021](https://www.legislation.sa.gov.au/lz/path=/b/archive/electoral%20(electronic%20documents%20and%20other%20matters)%20amendment%20bill%202021) (Accessed: 13 February 2024)

⁵⁴ <https://www.asa.co.nz/2023/08/09/spotlight-on-general-election-advertising/> (Accessed: 13 February 2024)

⁵⁵ <https://cdn.asa.co.nz/wp-content/uploads/2023/05/ASA-Guide-on-Election-Advertising-2023-.pdf> (Accessed: 13 February 2024)

⁵⁶ ACMA, *A report to government on the adequacy of digital platforms' disinformation and news quality measures*, Canberra, June 2021, p.1

obvious merit in updating the Code to address the evolving nature of digital technologies and the increasing sophistication of disinformation tactics, such as AI-generated content.

While the Commission has an interest in online content that may involve corrupt conduct it is suitable that the Commonwealth continue to provide relevant oversight of digital platform service activities through its constitutional powers, ability to provide consistency in approach, and dedicated institutions.