Submission on new ACMA Misinformation Powers

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The authors of this submission write in their own capacity, and not on behalf of their employers or any other organisation.

Introduction

The proposed bill "ACMA powers to combat misinformation and disinformation" (henceforth 'the Bill') is a needless assault on free speech in Australia which will entrench

the censorious power of big tech over Australians and give it the force of law. This assault comes with scant rationale. The Bill's associated fact sheet, asserts without evidence, that:

> *Misinformation and disinformation pose a threat to the safety and wellbeing Australians, as well as our democracy, society and economy*

But Australia's democracy has long developed very well under conditions of free speech, where the public has defended itself from misinformation without a higher authority to curate what citizens can see, hear and say. The more likely threat to Australia is the introduction of such an authority.

Far from holding digital platforms to account, this Bill creates a framework for them to coordinate censorship above the heads of Australians.This Bill:

- Unconstitutionally betrays Parliament's responsibility by placing censorship above free speech, to which it pays only lip service.
- Creates broad and vague definitions of misinformation and disinformation that allows digital platforms and ACMA to proscribe almost any controversial idea.
- Reinforces foreign influence on Australia's information space.
- Incentivises platforms to censor controversial speech without providing recourse for persons wrongfully censored.
- Largely ignores the public, and instead creates a framework for industry and government to coordinate censorship above the heads of Australians.
- Establishes a class of privileged persons who are above the law that binds ordinary Australians.
- Compromises the sanctity of private messages.

In the following section we will explain these objections to the Bill and more in detail. After that we will outline changes that could mitigate the Bill's harms. Those suggestions are offered in the spirit of constructive dialogue; the easiest and best mitigation for this Bill is to simply set it aside entirely.

Objections to the Bill

Parliament has a responsibility to protect civil liberties

If it is to be a liberal democracy, Australia must legally protect ordinary citizens' basic civic rights, including freedom of speech. Australia has largely avoided codifying such rights in the Constitution, not because the nation has eschewed those rights, but because it has entrusted Parliament with the responsibility to define the appropriate legal guarantees. This Bill is a betrayal of that trust. Far from protecting free speech, it pays only lip service to it and instead requires industry to engage in broad and large-scale censorship.

In Australia, citizens are expected to enjoy the freedom of expression except where Parliament has expressly curtailed it. This Bill is inverting that principle: Australians are to enjoy the freedom of expression only as far as an administrative agency (ACMA) allows it to (e.g. Clause 37(1d)).

The Bill Infringes on the Implied Freedom of Political Communication

The power granted to the ACMA to give legislative effect to Misinformation Codes and to enact Misinformation Standards and Digital Platform Rules (clause 64) violate the implied constitutional freedom of political communication. Clause 60 states that the Codes, Standards, Rules and Schedules have no effect if they infringe the constitutional doctrine of implied freedom of political communication. This provision is redundant as it adds nothing to the already existing constitutional prohibition. It cannot save the Bill as drafted.

The test of misinformation is that ‘the content contains information that is false, misleading or deceptive [and] the provision of the content on the digital service is reasonably likely to cause or contribute to serious harm.’ cl 7(1) ‘Harm’ is defined in cl 2 to include ‘(d) harm to the health of Australians; (e) harm to the Australian environment; (f) economic or financial harm to Australians, the Australian economy or a sector of the Australian economy’. These raise matters of public policy that are highly contested among political parties, and interest groups. They are also matters of scientific investigation and debate. Any limitation of legitimate discussion on these matters would unavoidably and unreasonably curtail the implied constitutional freedom of political communication.

Lawmaking over fundamental rights should not be delegated

The Misinformation Codes become law when they are registered without any parliamentary scrutiny. Misinformation Standards and Digital Platform Rules are set by legislative instruments (delegated legislation) that must be tabled in Parliament where they may be disapproved. However, in practice, delegated legislation receives minimal review, if at all. The High Court, in the past, has allowed virtually limitless delegations of legislative power to the executive branch. This does not make the law making authority granted to the ACMA justifiable within a constitutional democracy where laws affecting the fundamental rights and liberties of citizens should be made by Parliament itself after full public deliberation.

Delegation of Lawmaking Power to Private Entities is Unconstitutional

Although the High Court has permitted the delegation of wide lawmaking power to the executive, the Court will not permit lawmaking authority to be delegated to private entities that are not directly responsible to Parliament. A principle rationale used by the Court in the leading authority to justify delegation was that the ministers to whom power is delegated are responsible to Parliament. (Victorian Stevedoring and General Contracting Co v Dignan (1931) 46 CLR 43 at 120, 101-2) Under the proposed Bill, Parliament will be delegating legislative power to the companies that allows them to create Misinformation Codes which,

when registered becomes law. The Codes can be superseded by Miinformations Standards made by the ACMA which is a statutory authority not directly responsible to Parliament. The Standards are not required to be approved by Parliament to become law. This arrangement, we submit, amounts to an unconstitutional abdication of the legislative power of Parliament.

The Bill favours censorship over free expression

Australians should not be misled into believing this Bill is about anything other than censorship. While it purports merely to "combat online misinformation and disinformation", it is in fact a framework for online censorship in general. A system to combat only misinformation and disinformation would need to

1. Suppress information that is both deceptive and harmful, but also
2. Permit truthful and harmless information.

The Bill fails on both counts because it leaves it to industry and ACMA to decide on behalf of Australians what is truthful, untruthful, harmful or harmless prior to it being discussed by the public. The fundamental insight behind the freedom of expression is that no human institution has privileged knowledge of the truth – the most that either industry or ACMA could do is enforce *approved narratives* which might or might not be true. This is the task of a censor.

Existing Law deals with misinformation, without pre-censorship.

The Bill enables the ACMA to pre-censor political content that the ACMA considers is harmful. Violations of ACMA's Codes and Standards carry civil penalties. The general law of contract, tort and consumer protection already offer remedies for harm caused by misinformation. (In the United States, conspiracy theorist Alex Jones was judicially ordered to pay almost one billion US dollars to the victim families of the Sandy Hook School massacre. Fox News paid more than 700 million dollars to Dominion Voting Machines for false allegations concerning the 2016 elections.) Criminal law has many provisions penalising harmful speech. Elections law penalises electoral fraud. Hence, we may ask, what is the purpose of the proposed Bill except to restrict speech generally on matters that concern the public? How does this not impinge on political speech?

The Bill pays only lip service to free speech

The Bill is purported to balance combating misinformation and disinformation against the freedom of expression. But this balancing is in name only. Indeed the Government's fact sheet shows this in the hollowness of the protections it points to.

The Government notes that the Bill doesn't empower ACMA to censor particular messages.

- *the Bill is directed at encouraging digital platform providers to have robust systems and measures in place to address misinformation and disinformation on their services, rather than the ACMA directly regulating individual pieces of content*

- *the ACMA will not have the power to request specific content or posts be removed from digital platform services*

But it matters nothing to the Australian public whether they are censored by ACMA or by digital platforms required by law to all sing from the same song-sheet.

The Government tries to claim the threshold for censorship is high, because the text mentions "serious harm"

- *rules made under the Bill may require digital platform services to have systems and processes in place to address misinformation or disinformation that meets a threshold of being likely to cause or contribute to serious harm*

Even on its face, this text is replete with weasel-words. The censors need only determine that message is *"likely"* ot *"contribute to"* serious harm. Worse, this threshold is vague and very much open to interpretation by industry and ACMA, especially since the Bill gives users no procedure to hold the censors to this threshold. Clause 2, creates plenty of room for capricious judgements about what amounts to harm. For example, advocacy of particular policy positions may be judged to be harmful to health, environment or the economy of Australia although these are matters of legitimate public debate.

The Government also points to particular exemptions

- *the code and standard-making powers will not apply to authorised electoral and referendum content and other types of content such as professional news and satire*

We welcome the exemptions for satire and authorised electoral and referendum content. But these are very narrow exemptions. All other exemptions in the Bill, including that for professional news, are not extended to ordinary Australians.

Despite assurances, the Bill does not require that misinformation codes make any specific or effective effort to protect free speech. It only nods in this direction in clauses such as 37(d) which merely require ACMA to consider whether a code or standard would burden the freedom of expression and whether that burden is reasonable.

The Bill reinforces foreign influence on Australia's information space.

It is possible that an Australian government might use its supervisory powers to control approved narrative. But it's just as likely to be a follower as a leader in this process. The beliefs of the well-meaning regulators who enforce law are themselves affected by the intellectual consensus formed overseas under the influence of the very companies they regulate.

We must admit that the status quo in 2023 is already an information space shaped under the censorship of foreign platforms. However the Bill will entrench and worsen this situation by giving that regime legal force and setting up ACMA as cartel-enforcer, making sure no digital platform defects from the narrative accepted by its peers.

The vague definition of misinformation is a licence to censor

Apart from some exemptions and jurisdictional limitations the Bill defines "misinformation" as content that "contains information that is false, misleading or deceptive;" and "is reasonably likely to cause or contribute to serious harm." (Clause 7.1). “Misinformation” (as opposed to “disinformation”) does not have to be intentionally deceptive.

This definition amounts to a blanket licence to censor because, in the real world, both elements, truth and harmfulness are hotly contested for all manner of claims. The Bill requires platforms to adjudicate these matters before they are debated in public. If there exist matters where truth and harmfulness are not reasonably debatable, then the Bill makes no effort to limit the censors to such matters.

If Parliament decides to proscribe false-advertising, scams, or any other particular type of falsehood, the law should provide clear and narrowly defined proscriptions. Instead, the Bill provides (in clause 1.7) sweepingly general definitions of misinformation and disinformation which industry bodies and ACMA must inevitably interpret for themselves.

The Bill punishes only the failure to censor

The Bill demands that misinformation codes "require participants in ... the digital platform industry to implement measures to prevent or respond to misinformation and disinformation on digital platform services."

Digital platforms under such a code (or under an ACMA-authored standard) will risk penalties whenever misinformation is deemed to exist on their platform. However there is no counterbalancing penalty for improperly removing content that is merely controversial.

This creates an incentive to over-censor relative to the legal requirements. Any limitation or exemption in the Bill will also be undermined, as platforms will be allowed and indeed incentivized to ignore those limits.

The Bill already sets no clear legal standard for what constitutes misinformation, but its actual censorious effects will far exceed whatever standard is made explicit.

The Bill provides no recourse for affected users

Even today, if an Australian internet user's ability to either send or receive information is harmed by undue censorship by a digital platform, there is scant recourse available, and no legally guaranteed procedure for making a complaint. This is a significant *de facto* impingement on Australians' civil liberties.

Parliaments' real responsibility is therefore to safeguard those liberties by obliging digital platforms to establish reasonable recourse. But far from holding the platforms to account, the Bill actually cements existing misbehaviour with the force of law.

Exempting privileged speakers is backward-looking and elitist

The Bill exempts "excluded content for misinformation purposes"; but four out of the five exempt categories actually privilege particular types of speaker rather than content. The speech of governments, approved educational & journalistic institutions are defined as "not misinformation" regardless of their truth or harmfulness.

There is something obviously self-serving and elitist about these privileges. But it is also an admission of failure. It suggests that these institutions could not function properly or inform the public if subject to the kind controls envisaged under this Bill.

The Bill looks backwards by grandfathering in exemptions for Australia's incumbent sense-making institutions, but fails to look forward and protect the speech of whatever new voices might emerge in the digital age.

The Bill privileges foreign schools over the Australian public

The excluded content exemptions extend to the speech of *foreign* educational institutions "accredited … to substantially equivalent standards as a comparable Australian educational institution;" There is no reason why institutions in Russia or China or any other autocracy could not meet this requirement. The Bill does not require the institution to be independent of its government.

Any pronouncement sent through such a channel will therefore be excluded from the definition of misinformation. This provides an easy way for autocratic governments to evade this law and spread disinformation causing harm to Australia's democracy and national security. The Bill deems such speech less of a threat to Australians and our democracy than the speech of Australians themselves.

The private message exemption is too narrow

In a nod to privacy, the Bill prevents misinformation codes and ACMAs information gathering powers from retaining or revealing the contents of private messages. However, protecting only *content* of messages leaves rich sources of private information unprotected, including:

- The identities of the messages' senders and receivers.
- The locations of the senders and receivers.
- Other digital identifiers such as IP and MAC addresses.
- The timing of messages.
- Results of automated analysis of the message content.

For example, a misinformation code could, without violating the Bill, require platforms to

- Log the activity of particular persons.
- Trace a person's physical movements.

- Report the sentiment of private messages as measured by AI algorithms.
- Block private messages deemed by AI to contain certain ideas.

ACMA's broad information gathering power is oppressive.

The bill grants ACMA a subpoena-like power to demand information not only from digital platforms, but from all persons. The Bill even explicitly removes the traditional safeguards of excuses for self-incrimination and self-exposure.

Any person could be asked, without a court order, to provide evidence to ACMA on pain of imprisonment. Nothing in the Bill safeguards against this power being used for fishing expeditions, intimidation or other abuses of power.

Recommendations to mitigate the Bill's harms

The simplest and most effective mitigation of this Bill is to simply reject it entirely. Liberal democracies have developed for centuries with a regime of free speech by default; it is the illiberal and autocratic regimes which have felt the need to arbitrate "truth" from above the heads of the public.

However in the spirit of positive engagement, we have several recommendations for reducing the Bill's excesses and keeping it focused on its purported aims.

Clear, narrow definitions for misinformation and disinformation

- Misinformation codes and standards should be limited to subject matter (such as false-advertising or scams) explicitly enumerated in the statute.
- Content should only be counted as misinformation if it is *clearly demonstrable* that it meets the other elements of the definition such as deceptiveness and harmfulness.

Content moderation should be fair and contestable

The Bill should ensure that whenever a platform blocks content, they must:

- Apply the rules consistently. For example they cannot apply the rules more for one viewpoint compared to another.
- Provide evidence that any actions taken against misinformation or disinformation accurately stick to the statutory definitions.
- Provide a procedure for the user to contest this finding, with appropriate remedies available.
- Remedies should include monetary damages sufficient to deter improper blocking.

End users should have recourse to the courts should platforms or ACMA prove intransigent.

Remove Exemptions for privileged persons

All Australians should be able to use the internet on a level playing field.

The definition of "*excluded content for misinformation purposes"* should pick out only *content,* not privileged speakers. If the safeguards are not sufficient to protect the Government, the media and educational institutions, then they are not sufficient for ordinary speakers either.

ACMA'S information gathering powers should be limited

The Bill should be modified to ensure that:

- Compelling information from platforms should require the involvement of a court.
- The power to compel information from other persons should be removed entirely.

Protect private messaging, not just message content.

The Bill should be modified to ensure that:

- ACMA may neither require, nor register a code that requires, the automated analysis of message contents, the retention or exposure of the data thus obtained.
- Personal metadata (including user names, IP addresses, locations etc.) has the same protection as message contents.