16 August 2023

PO Box [redacted]
[redacted]

Director
Department of Infrastructure, Transport, Regional Development, Communications and Arts
information.integrity@infrastructure.gov.au

Dear Director

Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023

I would like to take the opportunity to make a personal submission regarding the above-mentioned bill, additional to the submission I made on 27 July on behalf of EMR Australia PL.

This bill is an anathema that must not become legislation.

Neither the ACMA, nor any government department, has the skill, the knowledge, the integrity or the resources to adequately investigate issues and pass judgment on whether they can be considered 'information' or 'misinformation'.

Nor should Australians be expected to trust 'information' that has been approved by a politically biased source.

To put a government department in charge of what is 'information' and what is not is to take a huge leap towards fascism.

I reaffirm my comments in my 27 July submission and support the comments made by the Victorian Bar in a submission opposing the bill (attached).

I urge you to withdraw this bill to protect Australian democracy and the public's right to freedom of speech.

Yours faithfully

[redacted]

Lyn McLean

THE VICTORIAN BAR INCORPORATED

SUBMISSION TO THE LAW COUNCIL OF AUSTRALIA

EXPOSURE DRAFT OF THE COMMUNICATIONS LEGISLATION AMENDMENT (COMBATTING MISINFORMATION AND DISINFORMATION) BILL 2023

A. INTRODUCTION

1. The Victorian Bar (**the Bar**) welcomes the opportunity to provide input to the Law Council of Australia in relation to the Exposure Draft of the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (Cth) (**Bill**). The Bar acknowledges the potential harm posed by the rapid and wide dissemination of false or otherwise harmful information online. However the Bar is concerned that the Bill's response to that danger is insufficiently sensitive to, and protective of, freedom of expression and related privacy interests.

2. This submission outlines the Bar's concerns about the Bill, commencing with a general concern that the Bill's proposed derogations of free expression are unwarranted or, at the least, premature given the availability of alternative means of protecting against false or otherwise harmful online information.

3. The submission then makes a number of comments about specific textual features of the Bill, including:

   (a) the power of the Australian Communications and Media Authority (**ACMA**) to compel the production of information;

   (b) the definitions of 'misinformation' and 'disinformation'; and

   (c) the record-keeping requirements.

ACKNOWLEDGEMENT

4. The Bar acknowledges the contributions of its Communications Legislation Amendment Working Group, Georgina L Schoff KC, Mark A Robins KC, Romauld Andrew KC, James McComish and Dr Julian R Murphy, in the preparation of this submission.

B. GENERAL CONCERNS

5. Freedom of expression is sometimes called 'the freedom *par excellence*; for without it, no other freedom could survive'.[1] It has also been said that the freedom of expression is 'closely linked to other fundamental freedoms which reflect … what it is to be human: freedoms of religion, thought, and conscience'.[2]

6. So important is the freedom of expression to Australian society that in 1992 the High Court identified an implied freedom of expression within the Constitution, albeit limited to *political* communication.[3] Indeed, freedom of expression has been said to be 'the ultimate constitutional foundation in Australia'.[4]

7. The Bar is concerned about the Bill's interference with the identified benefits of free expression, namely:

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1 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.

2 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 13.

3 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.

4 *Wik Peoples v Queensland* (1996) 187 CLR 1, 182 (Gummow J).

> First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'. Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.[5]

8. Taking those matters in turn, the Bill's interference with the self-fulfilment of free expression will occur primarily by the chilling self-censorship it will inevitably bring about in the individual users of the relevant services (who may rationally wish to avoid any risk of being labelled a purveyor of misinformation or disinformation).

9. Even leaving aside this effect, it is not at all clear that the Bill is required. It is to be recalled that the problem of the dissemination of false information online has only relatively recently risen to prominence and has so far been relatively effectively responded to by *voluntary* actions taken by the most important actors in this space. In this regard, freedom of expression on the internet has been exercised since the 1990s.

10. The Bill's response to false information thus does not seem warranted. It may even be counter-productive when one recalls that the purveyors of so-called misinformation and disinformation are often part of relatively small online communities who are brought together by feelings of isolation and distrust of the State. The perceived silencing or targeting of these groups is unlikely to address the underlying social problems animating the dissemination of false information. It is widely accepted in liberal democratic societies that it is better to fight information with information and to attempt to persuade rather than coerce persons to positions grounded in evidence and fact.

11. Perhaps most importantly, the Bar is concerned that the Bill creates an unlevel playing field between governments and other speakers. Any view authorised by the government is, by statutory definition, not 'misinformation', however false or misleading it might be. Only information that is *not* authorised by government is capable of being 'misinformation' as defined. That double standard is illiberal, and disadvantages critics of government in comparison with a government's supporters.

12. Relatedly, the Bill incentivises digital platform services to introduce illiberal 'misinformation codes' for fear of a heavier-handed 'misinformation standard' being imposed at ACMA's behest. The simplest ways for a digital platform to avoid 'misinformation' being found on its service is to permit only the expression of views authorised by government (which, by statutory definition, is not 'misinformation'), or otherwise to forbid the expression of any controversial, debatable, factually uncertain or politically sensitive views.

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[5] *R v Secretary of State for the Home Department; Ex Parte Simms* [2000] 2 AC 115, 126 (Lord Steyn).

C. SPECIFIC TEXTUAL COMMENTS

13. In addition to those fundamental concerns about the general tenor of the Bill, the Bar has the following concerns about specific features of it.

C.1 POWER TO COMPEL PRODUCTION

14. The Bill arms ACMA with extraordinary coercive powers that can be exercised against *any* person who might have information or documents 'relevant' to the existence of, among other things, 'misinformation or disinformation on a digital platform service'. Suspected authors or disseminators of alleged 'misinformation' are obvious targets for the exercise of such powers. That make this part of the Bill somewhat unique within its overall scheme – here the Bill is concerned with the responsibilities of individuals, rather than services providers.

15. The Bill's abrogation of the privilege against self-incrimination is purportedly counterbalanced[6] by the protections offered against direct and derivative use of any compelled disclosures (clause 21(1) and (2)).

16. What is especially concerning, however, is that there is no such protection offered in consideration of an individual's privilege against civil penalty (clause 21(3)). There is no attempt to justify this complete and unqualified abrogation of penalty privilege, which itself is rooted in the important idea 'of ensuring that those who allege criminality or other illegal conduct should prove it.'[7]

17. The failure to offer any protections consequent upon the abrogation of penalty privilege could lead to a position where a person is compelled to produce documents that later expose them to civil penalties such as disciplinary proceedings or workplace censure. That ought not to be done lightly, and no reason is apparent for not offering direct and derivative protections against the use of information that might expose an individual to civil penalty.

C.2 DEFINITIONS OF 'MISINFORMATION' AND 'DISINFORMATION'

18. At the heart of the difficulties presented by the Bill — not least the intrusion into freedom of expression — are the definitions of 'misinformation' and 'disinformation'. These raise at least three conceptual problems. The first is the substantive breadth of the definitions, including the concept of 'harm'. The second is the limited nature of the exemptions that take content outside the definition of 'misinformation'. The third is the statutory supposition that misinformation (however defined) is identifiable as such; and is capable of being so identified by ACMA (or indeed the service providers whom the Bill effectively requires to monitor the content published via their services).

19. Before proceeding to discuss those problems it is necessary to emphasise how important the definitions of 'misinformation' and 'disinformation' are to the Bill, particularly in the face of the suggestion in the Fact Sheet

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[6] It should be recognised that even an express prohibition on the use of material obtained by compulsory processes will be insufficient to alleviate all potential prejudice to a person charged with criminal offences: *X7 v Australian Crime Commission* (2013) 248 CLR 92, [124]–[125] (Hayne and Bell JJ).

[7] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [31] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

accompanying the Bill that industry 'does not need to adopt definitions in the Bill'.[8] In a specific sense, the scope of almost all obligations under the Bill and the concomitant scope of ACMA's powers are hinged upon the concepts of 'misinformation' and 'disinformation' (see, e.g., clause 14(1)(c), 18(2)(a) and 25(1)). In a more general sense, those concepts define the scope of the 'mischief' which the statute purportedly aims to remedy,[9] and thus will inform the interpretation of every provision of the Bill. It is for these reasons that the problems with concepts of 'misinformation' and 'disinformation' are fundamental to the Bill's justifiability.

C.2.1 THE DEFINITION OF 'MISINFORMATION' IS OVER-BROAD AND UNWORKABLE

20. There are at least five principal respects in which the statutory definition of 'misinformation' is over-broad and unworkable.

21. First, the statutory definition requires a distinction to be drawn between 'information' and other forms of online content. What 'information' means in this context is unclear, but it is unlikely to be limited to 'positive claims about the truth of identified facts'. Much online content involves combinations of fact, opinion, commentary or invective. Speech about political, philosophical, artistic or religious topics often involves statements that are not straightforwardly 'factual', but which are not mere statements of subjective belief. Much scientific discourse involves the testing and rejection of hypotheses, in which even 'true' information is provisional or falsifiable. The prospect that ACMA will be required to sift 'information' from 'opinion' or 'claims' is itself likely to have a chilling effect on freedom of speech; especially in sensitive or controversial areas. The effect may be particularly pernicious if a regulator is tempted to be over-inclusive about what counts as 'information' rather than 'opinion'. The risk is that disfavoured opinions might come to be labelled and regulated as 'misinformation' (i.e., as misleading facts, and not as opinions).

22. Second, the statutory concept of 'misinformation' in the Bill involves information that *is* false, misleading or deceptive; not merely information that is alleged or suspected to be so, or that is so in the opinion of a decision-maker. The internet contains a vast amount of information, and the Bill is not confined to information authored by Australians. The burden of identifying which of that worldwide information is, in truth, 'misinformation' is likely to be intolerable. The risk of 'false positives' is real. An inaccurate allegation (especially by a regulator) that a true fact is 'misinformation' may be very damaging; and a wrongful accusation that a person is the author or purveyor of 'misinformation' could be seriously defamatory.

23. Third, the definition of 'misinformation' is over-broad, in that it is not confined to straightforward positively false statements of fact. The existing law of misleading or deceptive conduct in trade or commerce makes clear that conduct will infringe the statutory norm in a very wide range of circumstances; particularly because the concept of 'misleading' information is much broader than 'false' information. Here, it is immaterial that the Bill uses the language of 'information' rather than 'conduct'. The heartland of misleading or deceptive conduct under existing

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[8] Fact sheet, p 9.

[9] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

law is conduct that conveys inaccurate information to a recipient. Accordingly, the drafting of the Bill is likely to encompass not merely positive false statements, but also:

(a) information that is partial or incomplete;[10]

(b) information that is silent about some relevant contextual matter;[11]

(c) information that is capable of two or more reasonable readings, only one of which is misleading;[12]

(d) information that is literally true but that may be said to be rendered misleading by its context;[13]

(e) information that is later rendered inaccurate by subsequent events, where the author fails to correct the initial impression;[14]

(f) information that causes harm to a person *other* than the person who is misled.[15]

24. Given those principles, the statutory definition requires ACMA to gather evidence of the entire extrinsic universe of facts in order to determine whether any given information is or is not misleading (and hence 'misinformation') by reason of, for example, unexpressed contextual matters. It is not clear how ACMA can be expected to undertake that burden within its available resources; or in a manner that is consistent with freedom of expression in a liberal society.

25. Fourth, there is no content-based limit on the definition of 'misinformation'. It is not, for example, confined to information *about* health, finances, the environment, the democratic process etc. Whether any given information is 'reasonably likely' to 'contribute' to 'serious harm' of the kinds specified in the Bill is a complex interpretative question which might not readily be determined by the apparent character of the information standing alone.

26. Fifth, the statutory definition labels content as 'misinformation' if it *contains* information that is false, misleading or deceptive: the 'misinformation' is not merely the false, misleading or deceptive information itself. There is no statutory requirement that the content *substantially* consist of false, misleading or deceptive information. This raises the prospect that the statutory category of 'misinformation' is radically over-inclusive. For example, the entirety of a long-form article may amount to 'misinformation' if it contains a single unwittingly misleading sentence; even if the author is blameless, and even if the vast bulk of the article is otherwise unimpeachable.

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[10] *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, [23] (French CJ and Kiefel J).

[11] *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357; *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.

[12] *Tobacco Institute of Australia Ltd v Australasian Federation of Consumer Organizations Inc* (1992) 38 FCR 1, 5, 27.

[13] *Porter v Audio Visual Promotions Pty Ltd* (1985) ATPR 40-547.

[14] *Winterton Construction Pty Ltd v Hambros Australia Ltd* (1992) 39 FCR 97, 114; *Thong Guan Plastic and Paper Industries SDN BHD v Vicpac Industries Australia Pty Ltd* [2010] VSC 11, [123]–[125].

[15] *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526.

C.2.2 THE CONCEPT OF 'EXCLUDED CONTENT' IS INSUFFICIENTLY PROTECTIVE OF FREE SPEECH, AND PLACES EXCESSIVE INTERPRETATIVE POWER IN AN EXECUTIVE AGENCY

27. The definition of 'excluded content for misinformation purposes' in clause 2 does not sufficiently protect freedom of expression. The proposed categories of 'excluded content' are unhelpful, conceptually incoherent, and require ACMA to make contestable interpretative judgements that it is not well-placed to make.

28. It is disturbing that there is no general exclusion of content that involves reasonable scientific, academic, political, artistic or religious discussion, including factual disagreements in respect of those topics. It is also disturbing that there is no general recognition in the Bill that many topics of public interest involve genuine and legitimate factual disagreement, uncertainty or debate.

29. The exclusion in subclause (a) ('entertainment, parody or satire') is unsatisfactory and under-inclusive. Significantly, this is the only exclusion that identifies content by its substance or character, rather than its provenance. Many socially valuable forms of expression are not readily identified as 'entertainment, parody or satire', including serious artistic expression, criticism and review, or religious speech. Equally, the line between 'entertainment' and 'information' falling within the concept of 'misinformation' is not at all clear. The prevalence of 'infotainment' is well-known.

30. The exclusion in subclause (b) ('professional news content') creates an artificial distinction that is difficult to justify. There are many recent notorious examples of professional news outlets propagating (wittingly or unwittingly) information that is false, misleading or deceptive. Equally, the reliance of professional news organisations on stories sourced from social media, or on audiovisual content generated by non-professionals, is well known. Since the focus of the Bill is the presence of misinformation on 'digital platform services' (and not the regulation of the mainstream news media), it is not clear why professional news content should be excluded from the concept of 'misinformation'. The existence of rules about editorial standards is irrelevant to the question of whether any given information is in fact false, misleading or deceptive (and hence 'misinformation' as defined).

31. The exclusion in subclause (c) ('content produced by or for an [accredited] educational institution') is inadequate. The Bill in this respect makes significant inroads into academic freedom. First, even where an individual academic speaks or writes for a professional purpose and within their field of expertise, it is not self-evident that such 'content' is produced 'by or for an *educational institution*'. The requirement for institutional imprimatur is inconsistent with academic freedom. Universities generally insist on the distinction between the views — perhaps diverse, conflicting or controversial — expressed by individual academics on the one hand, which are not taken to be the view of the university as an institution, and the (more limited) views or policies expressed by the institution itself on the other.

32. Second, the concept of 'educational institution' is itself unsatisfactory. Is it intended to exclude views expressed by or for respectable research institutes or think-tanks which are not 'accredited' as 'educational institutions'? Equally, is it intended to exclude communication about the research or study undertaken by private individuals? It is unsatisfactory that communications by, say, the Australian Strategic Policy Institute or the Walter and Eliza

Hall Institute would depend on their accreditation status, especially given that the fields in which they work (international relations, medical research) are likely to involve many politically salient but perhaps factually contestable claims.

33. The exclusion in subclause (d) (foreign institutions accredited 'to substantially equivalent standards as a comparable Australian educational institution') is troublesome in two interrelated respects. Educational institutions exist in many societies which do not share Australia's understandings of the rule of law and academic freedom. Moscow State University and the University of Tehran, for example, are long-established public research universities that are notoriously subject to ideological pressure from authoritarian regimes. If ACMA takes a broad-brush view of what 'substantially equivalent standards' means, would the views of Iranian theocracy or Russian authoritarianism automatically be excluded from the definition of 'misinformation', so long as they are filtered through a regime-friendly educational institution? Conversely, if ACMA considers that it is required to exercise real scrutiny about what 'substantially equivalent standards' involve, what expertise does it have in forming such a judgement? On what basis would the judgement be made? Even in a country that broadly shares Australia's values, such as the USA, educational institutions exist in a variety of different forms, some of which are unfamiliar in this country.

34. The exclusion in subclause (e) (content that is authorised by a government) highlights the Bill's significant inroads into freedom of expression. The views of government — any government — are automatically protected from designation as 'misinformation', however inaccurate, controversial or contestable they may be; yet the views of critics of government (whether the political opposition, NGOs or private individuals) are at risk of precisely such a designation. The prospect of politically charged accusations of 'misinformation' against opponents and critics readily presents itself. The later history of the Star Chamber was replete with exactly such politically-motivated claims of misinformation.

C.2.3 THE DEFINITION OF 'HARM' IS OVER-BROAD, AND DOES NOT SUFFICIENTLY LIMIT THE CONCEPT OF 'MISINFORMATION'

35. The definition of 'harm' in cl 2 is over-broad, especially when read in light of the definition of 'misinformation', under which material is caught not merely when it *in fact* causes serious harm (however defined) but also when it is only 'reasonably likely' to do so; or when it might only 'contribute to' such harm. [16] The width of that definition is significant, given that the concept of 'harm' and 'serious harm' each involve value judgments that are likely to be contestable and politically sensitive. Given that the existence of 'harm' is the only substantive differentiation between 'misinformation' (as defined) and any other false, misleading or deceptive information that exists in the world, it is important that the definition be clear, sufficient, and easy to apply.

36. Subclause (a) ('hatred against a group in Australian society') identifies a matter which is already captured by anti-discrimination and anti-vilification laws, but without the calibrated exemptions to protect (for example) artistic, academic and religious freedom that those laws typically contain. Conversely, given the apparent

[16] Clause 7(1)(d).

purpose of the Bill, it is unclear why stirring up hatred against groups *outside* Australian society ought not amount to 'harm'.

37. Subclause (b) ('disruption of public order or society in Australia') is overbroad. Lawful exercise of the right of public assembly and peaceful protest is often met with opponents (or government authorities) who allege or perceive a risk to public order. Further, many valuable social movements have been met with accusations that they involve a 'disruption of society', even in respect of peaceful and non-violent conduct that involves no public disorder. Such allegations were often made against the movements for women's rights, LGBTIQ+ rights, or the protection of the environment. Almost any social change — including peaceful change that the majority supports — could be said to 'disrupt' society; but the risk of misuse of this definition is particularly acute in the case of unpopular or politically disfavoured minorities.

38. Subclause (c) ('harm to the integrity of Australian democratic processes') is vague and overbroad, and is best met by specific legislation if existing electoral law is somehow shown to be inadequate (e.g. about campaign financing, or electoral publications).

39. Subclause (d) ('harm to the health of Australians') is overbroad and insufficiently calibrated. It involves matters of potentially controversial medical or scientific judgement on which ACMA has no expertise. Even where scientific opinion is clear, there is a wide continuum of conduct that involves harm to health. Consuming fatal poison and consuming chocolate are each potentially harmful to health. Given the prevalence of obesity in Australia — and given that the definition of 'misinformation' requires only a *contribution* to serious harm — can one be sure that encouraging people to eat chocolate would *not* involve the reasonable likelihood of at least a contribution to a serious harm to health? It is unclear what expertise ACMA has to form such judgements about what does or does not amount to a harm to health. Such matters should, if necessary, be left to a body such as AHPRA or the Chief Health Officer to respond to.

40. Subclause (e) ('harm to the Australian environment') is overbroad and insufficiently calibrated. The complexity of current environmental protection legislation, and the frequent length and complexity of the proceedings in which that legislation is applied, suggests that it may not be easy to identify what is, in fact, a harm to the environment. There may also be competing environmental goods: whether information about a wind farm causes 'harm to the Australian environment' might depend on whether one's focus is on reducing carbon emissions, or on protecting local bird life and visual amenity.

41. Subclause (f) ('economic or financial harm to Australians, the Australian economy or a sector of the Australian economy') is overbroad and insufficiently calibrated. 'Economic or financial harm to Australians' may arise from any number of causes. The subclause is not, for example, confined to fraudulent conduct, or conduct causing material financial loss to a significant number of people. An individual Australian might experience 'economic or financial harm' by being encouraged to spend money needlessly on expensive brand-name clothes, or by being encouraged to make legitimate but unnecessarily conservative investment choices; just as much as by being encouraged to invest in a Ponzi scheme. A significant amount of substantively unobjectionable commercial (and non-commercial) communication is likely to be caught by this aspect of the definition of harm.

42. The definition of 'harm' is not improved by the contextual factors set out in clause 7(3). They repose significant discretion in an executive decision-maker, including by making judgements in respect of favoured and disfavoured 'authors' or 'purposes', without any express obligation to have regard to freedom of expression, privacy, economic liberty or any other countervailing policy concerns.

C.2.4 THE DEFINITION OF 'DISINFORMATION' REPLICATES AND EXTENDS THE DIFFICULTIES INHERENT IN THE CONCEPT OF 'MISINFORMATION'

43. The concept of 'disinformation' embeds the same difficulties that are inherent in the definition of 'misinformation', with the additional problems caused by the requirement that 'the person disseminating, or causing the dissemination of, the content intends that the content deceive another person'. Two difficulties are of particular importance.

44. First, by what means will it be determined that the disseminator 'intend[ed] that the content deceive another person'? The mere intentional act of dissemination will not suffice: proof of intention to deceive will be needed. That will not often be apparent or inferable from the face of the allegedly misleading content. In the absence of coercive powers and the safeguards of the judicial process, people are not ordinarily compelled to disclose their unexpressed intentions, especially when what is alleged against them is actual deceit.

45. Second, the disseminator of content need not be its author. An author's innocent error may be misleading, and their content may amount to 'misinformation' (as defined) by reason of that innocent mistake. The content might then be disseminated by other innocent people who are ignorant of the error. If the content is thereafter disseminated by a malicious person who intends to deceive others, there is a risk that the pejorative label of 'author and disseminators of disinformation' will be applied to innocent people. Given that the observable conduct involved in innocent authorship, innocent dissemination and deceitful dissemination is the same (namely, transmission of particular information), there is a real risk of over-inclusion in any regulatory investigation into those people's intentions, and hence the existence of 'disinformation'.

C.2.5 THE BILL WRONGLY ASSUMES THAT 'MISINFORMATION' AND 'DISINFORMATION' CAN READILY BE IDENTIFIED, AND THAT ACMA IS CAPABLE OF DOING SO WITHIN THE LIMITS OF ITS RESOURCES AND EXPERTISE

46. The statutory scheme of the Bill presupposes that misinformation is an identifiable category of online material. This is inherent in the definitions of 'misinformation' and 'disinformation', which do not depend on the mere existence of allegation, suspicion, or executive opinion that information meets the statutory definition. Equally, it is inherent:

    (a) in clauses 14(1)(c), 18(2)(a), 19(2)(a) and 25(1)(a), about regulating or reporting the existence of 'misinformation or disinformation on digital platform services';

    (b) in clauses 14(1)(d), 18(2)(b), 19(2)(b) and 25(1)(b), about the 'effectiveness' of measures 'to prevent or respond to misinformation or disinformation on digital platform services'; and

(c) in clauses 14(1)(e), 18(2)(c), 19(2)(c) and 25(1)(c), which suppose that it is possible to form a meaningful judgement about the 'the prevalence of content containing false, misleading or deceptive information'.

Each of these, by definition, involve an objective assessment that such content *exists*.

47. The statutory scheme means that ACMA is the ultimate decision-maker about what is, or is not, misinformation; subject only to the (unexpressed) possibility of judicial review in the federal courts. There are three fundamental problems with these statutory presuppositions. First, the broad definition of 'misinformation' requires the decision-maker to distinguish 'information' (whether misinformation or not) from all other online content, such as opinion, criticism, political commentary, creative writing, religious expression or invective. It also requires the decision-maker within ACMA to identify the 'true' position against which the alleged misinformation is shown to be false, misleading or deceptive. That is because the statutory definitions do not concern material that is merely alleged, suspected or believed in the opinion of the decision-maker to be misinformation. Given the vast amount of material available online on digital platform services, each of these aspects of the task of identifying 'misinformation' assumes heroic proportions. Especially is that so in light of the High Court's recognition of the 'considerable difficulty' of discerning what is, and what is not, misleading and deceptive.[17]

48. Second, it is not clear what justifies the statutory presupposition that ACMA will have the expertise and intellectual resources to identify and distinguish 'misinformation' from other forms of online content. Taking only recent examples of contestable online claims, is ACMA well-placed to identify the economic cost-benefit analysis of major sporting events; the biological origin of novel viruses; the efficacy of newly-developed medical techniques; the extent of corruption on the part of foreign politicians; or the strategic motivations of the protagonists in major geopolitical events?

49. Third, the everyday experience of the courts or commissions of inquiry shows that discerning truth from falsehood in a procedurally fair manner may be an elaborate, costly and time-consuming process. The statutory supposition that this can be done readily, uncontroversially, and with little effort by ACMA or by digital platform operators seems unrealistic in light of real-life experience in relation to, for example:

(a) the truth (or otherwise) of allegations of war crimes committed in Afghanistan;[18]

(b) the truth (or otherwise) of allegations of financial exploitation of Aboriginal people in remote communities;[19]

(c) the truth (or otherwise) of allegations of inadequate medical care in psychiatric hospitals;[20]

(d) the truth (or otherwise) of allegations that widely-used medical devices were unsafe.[21]

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17 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 197 (Gibbs CJ).

18 *Roberts-Smith v Fairfax Media Publications Pty Limited (No 41)* [2023] FCA 555. Cf *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report* (2020).

19 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1.

20 *Herron v HarperCollins Publishers Australia Pty Ltd* (2022) 292 FCR 336.

21 *Ethicon Sàrl v Gill* (2021) 288 FCR 338.

C.3 THE IMPOSITION OF REGULATORY BURDENS AND OTHER CONCERNS

50. The Bill creates substantial regulatory burdens for the operators of 'digital platform services' (clauses 14–17), not least elaborate record-keeping obligations that may be inconsistent with users' privacy. The width of the statutory definition of 'digital platform services' means that platform operators cannot all be assumed to be large international for-profit corporations. The marketplace of ideas is at risk of being impoverished both by dissuading new digital platform services to enter the market, *and* by dissuading users from expressing themselves freely on such services as exist.

51. In the time allowed, the Bar has addressed its most fundamental objections to the proposed Bill. This submission is not comprehensive. There are many other issues of concern that call for close attention. They are:

    (a) Clause 12 – the extraterritorial operation of the Bill;

    (b) Clause 14 – whether the provisions with respect to record-keeping obligations are sufficient to protect the privacy of end-users of services;

    (c) Clauses 15–21 – the extent of the coercive powers conferred on ACMA;

    (d) Clauses 25–27 – ACMA's publication powers – the exclusion of 'personal information' within the meaning of the *Privacy Act* might not deal with the problem of people being labelled (perhaps not by ACMA itself) as 'purveyors of misinformation' because (say) they can be seen to have shared content that ACMA has labelled as 'misinformation';

    (e) Clauses 37, 40, 45, 51 – reference to the burden on political communication – the narrowness of these clauses (referring only to misinformation codes or misinformation standards) seems to highlight the broader inadequacy of the Bill's consideration of constitutional freedoms and wider norms of free speech;

    (f) Clause 46 – the concerning breadth of ACMA's power to impose a standard when it is merely 'convenient' to provide 'adequate protection' from misinformation; and

    (g) Clause 60 – a 'historic shipwrecks' clause for political communication – whether this in fact prevents the Bill from being unconstitutional is not the point: the real issue is the very great number of points in the Bill (and its administration by ACMA) at which the constitutional freedom could arise for consideration.

D. CONCLUSION

52. For the reasons identified above, the Bar considers that the Bill as it is presently drafted should not be enacted. While the Bar acknowledges the importance of responding to false and otherwise harmful information online, such responses ought only make justifiable incursions into socially valuable freedom of expression. The present Bill is not justifiable in this respect and will have a chilling effect. It is also likely to be ineffective and unworkable in responding to the harms to which it is purportedly directed.