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Department of Infrastructure, Transport, Regional Development, Communications and the Arts

Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023: Exposure Draft Feedback

Thank you for the opportunity to provide feedback on the exposure draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023, which was requested of the public on 24th June 2023.

I'd first like to say I'm writing this as a concerned citizen, and the views outlined in my submission are entirely my own and not that of my employer.

I was born in Newcastle, Australia in the mid-80's, and lived there throughout the 90's and 00's. It was there where my passion for technology was formed, and in particular what inspired me was the Internet and how it allowed anyone in the world with a connection and a computer to build communities no matter where in the world they are. It was due to its free and open nature. Anyone can start and run a website. This passion for tech helped me to start, manage, & participate in many online communities & websites over the last 25 years.

One example of this is in the early 2000's, when I was a member of a forum run out of the USA called Prelude Online. This forum was about Honda Preludes – my first car, and it had a sub-forum for the Australian community where we kept in touch and organised meetups. Unfortunately this forum closed down, and our community was left without a home.

I got together with a friend from the community and co-started a dedicated Australian website called Prelude Australia (PreludeAustralia.com.au). Prelude Australia was essentially a web forum where registered users could post messages about any topic they found interesting, organise meetups, and list and buy items for sale. From memory, we had thousands of members, and we used the open source software phpBB running on our own web host. Although I relinquished control of it in the mid-2000's, until recently it was still online and running. It seems to have been taken over for another purpose in 2020.

This early experience with the Internet as a teenager; the fact that anyone can start and run a website and have their voice heard, instilled in me a strongly held belief that the Internet is the most powerful democratic invention humanity has ever created.

My passion for the Internet and technology in general has led me to a career in the technology industry. I have worked for law firms, recruitment agencies in their IT teams, and in 2015 I joined an American cloud software company based in Silicon Valley, California. In 2021 I departed Australia and became a resident of Japan, living in [redacted]. I still work for the same company here in Japan.

I could not be more opposed to a bill. It is naive, reckless, and incredibly damaging to the global free and open Internet. I urge the government to halt plans for introduction until the concerns outlined in the rest of this submission are fully addressed.

Concern 1) Its scope is way too broad in the extreme

Only Large Digital Service Considered, but Applies Widely

This bill has clearly given consideration only to the largest platforms like Facebook, Reddit, and Twitter, and yet has brought in-scope (intentionally, or unintentionally) thousands and thousands of community websites that are part of the “social web” due to its broad definitions. Prelude Australia would have certainly been one of the websites in-scope, as it was a “web forum”.

I can say without question that were this law to have been in place at the time, I would not have started Prelude Australia. The law is way too broad, and is not encumbered in any way to give regard to the size of platforms that it applies to.

Not being able to start Prelude Australia due to this law and the legal risk it would impose on me I strongly feel would be an unreasonable restriction on my freedom and liberty, and my right to freedom of speech and enterprise.

The law is so ignorantly broad that it feels akin to the Australian government setting a speed limit on every road around the globe, which is already a ludicrous concept, but then to make it even more ludicrous not even telling people what that speed limit is.

Unreasonable to Expect Small Digital Services Comply

Under this bill, any website owner around the globe that currently has social features (such as the ability for users to post comments on blog articles, or a forum such as Prelude Australia) will potentially be at risk of fines of up to AU$500,000, and that’s if they are an individual; if they are a company (as a lot of smaller websites are, so that they can earn advertising income to pay for hosting bills), they are liable for fines of AU$2,500,000!

It is non-compliance with industry-created codes which causes an offence. If a website owner doesn’t even know that a code exists, let alone that they need to comply with it, how are they expected to do so? Will random small foreign website owners that don’t comply with these industry-codes be stopped at the border and issued fines due to a law they didn’t even know about?

Hundreds of Thousands of Digital Services In-Scope

Since Twitter was purchased by Elon Musk, an exodus from that platform has been occurring to various social media networks, one of which is Mastodon. There are apparently 7,500 Mastodon servers[1], all run by a varied assortment of people and organisations, and this count is growing.

Is the government proposing that each of these individual server owners must comply with these Australian industry codes, even if they are run from overseas and left open to the Internet-at-large? Should every Mastodon server block any Australian user from visiting due

[1] https://www.cmswire.com/digital-experience/how-to-pick-a-mastodon-server/

to the legal risk of allowing access to them, and thus having to comply with and enforce these industry-codes?

Required Modifications

I am not in a position to offer advice on how this concern could be addressed – it is a lawmakers responsibility to ensure that a law they are proposing has sufficiently limited scope. However, I would like to note that the European Union's Digital Services Act (DSA) limits its application using the concepts of:

1. VLOPs – Very Large Online Platforms[2]
2. VLOSEs– Very Large Online Search Engines[3]

These concepts to me seem much more reasonable as they only burden the largest platforms with compliance requirements.

[2] https://digital-strategy.ec.europa.eu/en/policies/dsa-vlops
[3] https://digital-strategy.ec.europa.eu/en/policies/dsa-vlops

Concern 2) Extraterritoriality must be limited

The proposed bill applies extraterritorially, and a digital service is captured under it and must consider its implications if it has a single visitor from Australia. This is a ridiculous overreach by Australia on what is a global Internet.

Given how many websites and services this law applies to (see Concern 1), it is a completely ignorant expectation that large and small foreign digital services with no knowledge of Australian law, no knowledge of the industry codes created by Australian industry bodies, and no membership or representation on those industry bodies, be expected to comply with it.

For example, an American may set up and host a web forum similar to the Prelude Australia one that I created. This is a perfectly legal thing to do in America, however unbeknownst to them one of their visitors is an Australian. This means that an industry code set by an industry body representing “web-forums” in Australia would need to be complied with by this website.

The concept of extraterritoriality, along with the scope of the digital services that this law applies to, is a completely unworkable concept and only introduces uncertainty to the global Internet that could very well see Australia become an outcast from the global Internet with web servers created with a default “block Australia” option turned on.

How would Australians feel to have China saying that it’s the responsibility of Australian websites to not publish misinformation (as defined in this law) about the Tiananmen massacre? Remember, this is not just false things, but true things that are “misleading”.

Would this really be OK if it was agreed to be not published by an industry body in China? And is it OK that Australian digital services would now need to comply with these Chinese industry body codes?

What about if Australians were in legal jeopardy unbeknownst to them for running a website in Australia, and they visited China and had issues at the border requiring payment of fines, or imprisonment? Would the Australian government be happy with that arrangement? Of course not!

China is free to set the rules for their Internet, just like Australia is. However, for China to say that a digital service overseas, open to the public internet, has some form of responsibility to comply with every single law in that country is ridiculous. China should just block that website.

In fact, the Government recently admonished the Hong Kong government for doing a very similar thing to what they propose happens under this draft bill. Two Hong Kong activists based in Australia were charged extraterritorially under Hong Kong National Security Laws[4].

Senator Penny Wong made the following statement publicly:

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[4] https://www.afr.com/world/asia/hong-kong-puts-bounty-on-two-australian-residents-20230703-p5dlhc

> *“Australia is deeply concerned by reports of Hong Kong authorities issuing arrest warrants for democracy advocates, including those in Australia.*
>
> *Freedom of expression and assembly are essential to our democracy and we support those in Australia who exercise those rights.”*

It’s a frankly insulting thing to say when on the other hand her own government is proposing a law which applies extraterritoriality like this.

To use another example, Saudi Arabia could say that it is the responsibility of Australian websites not to publish “misinformation” (as defined by this code) discussing the Saudi King’s involvement in the murder of Jamal Kashoggi, because a court in Saudi Arabia proved that he was not involved. Would the Australian government be happy with leaving Australians, on Australian soil, at legal risk due to that arrangement? Of course not!

In its current state, the proposed bill is a dramatic overextension of Australian law onto foreign entities in an extremely self-entitled and ignorant manner. The Australian government has already made it clear very recently that we do not like it when laws like this apply to Australians, so we shouldn’t be creating laws ourselves that apply to foreigners.

Required Modifications

If a website has no intention of providing service to Australia, and is simply “open to the free Internet”, they should not be covered by the bill and should simply be blocked.

Only if the digital service shows intent to provide service to Australia, such as establishing a domestic office, local bank accounts, local business deals (e.g. advertising) should a digital service be required to comply with these industry codes.

If the Australian Government does not like the content that appears on a foreign website, the only correct response to that is for the Australian government to pass laws, or take action, that restricts Australians access to those foreign websites.

The bill must be amended to offer blocking powers to ACMA for situations like this, and the extraterritorial provisions must be limited to only those foreign digital services with intention to provide services to users in Australia.

Precedent has already been set for this in regards to ACMA's powers to block gambling websites. With those powers, ACMA can ask internet service providers to help them disrupt illegal online content by blocking access to websites. This authority is given to ACMA under the Telecommunications Act 1997 (section 313).

To propose otherwise shows either a lack of confidence that the misinfo/disinfo the Australian government is intending to address is of sufficient impact. Or alternatively, that the legislative path that the Australian government has chosen to take does not have the full backing of Australian citizens.

Concern 3) It will have highly anti-competitive effects

Industry Bodies Become “Anti-Competitive Wedges”

Industry bodies are often stacked with and funded by – and thus most influenced by – the biggest players in that particular industry. Often, new entrants to an industry do not have the money or time to contribute to an industry body, as they are too busy getting their business or product established.

With this influence by big the biggest players, it is extremely likely that the industry codes proposed by the industry bodies that represent them will become “anti-competitive wedges” that large digital services will use to “gatekeep” their industry from new competitors by establishing onerous codes that are impossible to comply with for anything but the largest digital services.

Furthermore, the incentive of ACMA established in this code is to be as maximalist as possible. If an industry body comes to ACMA and says that they can do more than ACMA originally thought was reasonable, then ACMA will likely accept that industry code.

Calls to regulate Facebook by executives of the company that owns that digital service, Meta (e.g. Mark Zuckerberg), have been widely recognised as likely cynical attempts to ensure Facebook never faces significant competition[5]. Facebook is the largest digital service in their industry and potentially the only ones that can comply with regulations.

This proposed bill gives the biggest digital services in an industry the ability to not only write their own regulations, but damage their smaller competitors by setting them up with guaranteed infringement and onerous regulatory requirements.

Free-Market Principles

Furthermore, the free-market competition between platforms when it comes to misinfo/disinfo has recently shown evidence of working. Platforms with lax misinfo/disinfo policies and enforcement will naturally have their users migrate to platforms that fulfil community expectations in regards to these topics.

For example, many people currently have strong objections to the misinfo/disinfo policies and enforcement on Twitter since Elon Musk bought it. This has led to a surge of sign ups for competitive services such as Mastodon, and the release and uptake of new Twitter competitors such as BlueSky, Post.news, and the “Twitter clone” that Meta is shortly releasing called Instagram Threads[6].

At-Odds with Competition Regulators

Lastly, the proposed code is utterly reliant on the current state of affairs of one or two dominant digital services who set the policies, and the wipeout of small platforms and websites for which the policies set by these industry bodies are too hard to comply with. This

[5] https://www.eff.org/deeplinks/2021/03/facebooks-pitch-congress-section-230-me-not-thee
[6] https://www.bbc.com/news/business-66094072

makes the proposed bill at-odds with competition regulators around the globe who are doing their best to lower barriers of entry for competitors to these platforms in the interest of consumers.

Required Modifications

Similar to the recommendations in Concern 1, I am not in a position to offer advice on how this concern could be addressed.

It is a lawmakers responsibility to ensure that a law they are proposing can meet its stated objectives and not be in conflict with other government objectives.

However, I would like to note again that the European Union's Digital Services Act (DSA) limits its application using the concepts of:

3. VLOPs – Very Large Online Platforms[7]
4. VLOSEs– Very Large Online Search Engines[8]

These concepts to me seem much more reasonable as they only burden the largest platforms with compliance requirements, and the codes created by the industry bodies would only apply to digital services meeting these definitions.

[7] https://digital-strategy.ec.europa.eu/en/policies/dsa-vlops
[8] https://digital-strategy.ec.europa.eu/en/policies/dsa-vlops

Concern 4) Other laws are not fit-for-purpose in addressing challenges of misinfo/disinfo

The News Media Bargaining Code

Under the previous Liberal government, and with the support of the Labor party, the News Media Bargaining Code (NMBC) became law in 2021. This law allowed designation by the Treasurer of defined digital services as “designated platforms”, which are required to bargain with and enter agreements with eligible news media organisations.

The law defined “covered news content” essentially as the follows:

- *Content that reports, investigates or explains:*
    - *Issues or events that are relevant in engaging Australians in public debate and in informing democratic decision making*
    - *Current issues or events of public significance for Australians at a local, regional, or national level*
    - *current issues or events of interest to Australians.*

The law made it a discriminatory offence to show content meeting the definition above anywhere on a designated platform[9] (even from non-eligible news organisations, fact checkers, non-governmental organisations, or citizens), if that designated platform decided not to participate in the local Australian news industry and thus did not show “covered news content” from eligible news media businesses.

Impacts on Misinfo/Disinfo

The Australian government must recognise their own culpability for limiting digital services ability to address mis/disinfo through the enactment of the NMBC in its current form.

The NMBC forces a digital service that decides to not be part of the local Australian news industry to remove all global content meeting the above definition in its entirety. They cannot show any of this content or risk discriminatory offence under the law

The NMBC essentially uses content from non-eligible news organisations, fact checkers, non-governmental organisations, or citizens that could be used to counter mis/disinfo as a hostage to require digital services to pay money to eligible news organisations.

However this proposed bill is at odds with the NMBC as it hints at fact-checkers potentially other methods involving news content as being beneficial to counter mis/disinfo.

Required Modifications

The NMBC must be amended prior to introduction of this bill to exempt digital services from discriminatory offences if the purpose of showing “covered news content” is to counter misinfo/disinfo.

[9] https://www.dylanlindgren.com/2021/02/21/explainer-why-fb-news-ban-had-to-be-broad/

Concern 5) Freedom of speech

I expect a lot of other submissions will cover the harmful restriction of freedom of speech in Australia that this bill mandates be introduced. However, I would like to echo and add to those concerns here as well.

That this bill exists makes it clear that the Government does not respect the freedom of speech of Australian citizens.

Two Classes of Citizens

The bill creates two classes of citizens:

- **Class 1 (The" Truthy"/Free Class):** Made up of politicians, journalists, members of educational institutions, all who will have the power to spread what is (correctly or incorrectly) judged as false/misleading information online.

- **Class 2 (The "Fake News"/Oppressed Class):** The second group is everyone else; regular citizens in our democracy who often have more knowledge about topics than anyone in the previous category, such as industry insiders.

As mentioned in my introduction, it is my strongly held belief that the Internet is the most powerful democratic invention humanity has ever created. It has given a voice to regular people, and this law risks harming the "Class 2" group of citizens disproportionately.

Due to the excessive fines, digital services will be much more restrictive of speech than even the most restrictive digital services currently. The harm will be compounded by the fact that the code applies across the entire industry and there are no "pressure escape valves" on the system.

Minorities Harmed

For a bill that's intended to protect minorities it very well may result in them being persecuted. Often minorities are the ones oppressed by the current political realities, and the way progress is achieved is through convincing people that what once was believed to be fact is now untrue.

This bill mandates a single code be applied upon every digital platform in an industry, giving minorities no shelter when the system pushes back on them.

Judging Truth

It is an impossible task to accurately judge what is true or untrue. There is always new information being discovered which contradicts what was once widely accepted fact.

For example, here is a list of things that at one point were stated as fact by authorities and expert consensus ("Class 1" citizens), but were later found out to be false:

- Masks don't protect from COVID-19

- There is no evidence of human-to-human transmission of COVID-19
- The COVID-19 vaccine stops you from catching the disease
- The COVID-19 vaccine stops transmission
- The COVID-19 vaccine is a 2-dose vaccine
- The COVID-19 vaccine is a 3-dose vaccine

All of the above could very much be considered under this legislation to be public health harm-causing misinformation. An industry-code, or a mandatory-code created by ACMA would be very likely to require content similar to the above to be removed.

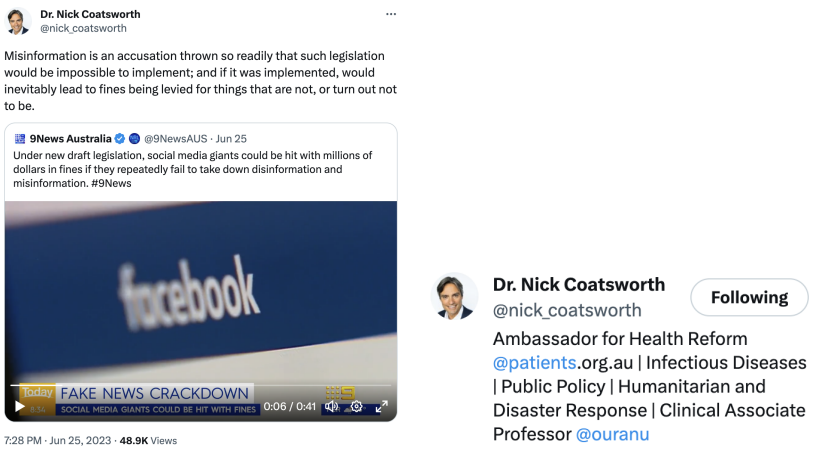
And to make matters worse, it's not even provably false information that will be in scope for removal. It is also true information which is "misleading" or "deceptive".

Freedom of speech is so valuable as it allows open and honest discussions to take place with no limits. It allows people to be wrong, and for truth to be debated for common ground can be found.

Governments and people proposing bills like this like to pretend they are on the side of truth, and not the side of censorship. However, even Dr. Nick Coatsworth, who was once a Deputy Chief Medical Officer of Australia has raised serious concerns about the scope and application of this bill via his personal Twitter account.

On 25th of June 2023, following the announcement of this bill, he posted the following tweet:

> *"Misinformation is an accusation thrown so readily that such legislation would be impossible to implement; and if it was implemented, would inevitably lead to fines being levied on things that are not, or turn out not to be."*



If expert consensus is so trustworthy then what does that say about the bill when one of those very experts it appointed to be a steward of truth when it comes to health information comes out with this scathing rebuke to it.

Required Modifications

At the very least, if the Government is insistent on passing some form of this law, the least dumb thing to do would be to modify the definition of misinformation and disinformation, reducing them both in scope to only include provably false information.

True information (e.g. that which can be considered to be misleading) must not be in scope for this bill due to the large impact on free speech doing so would have. It must also not be in scope due to the fact that there are large fines involved if mistakes are made – and at the scale of almost all digital services it is inevitable a lot of mistakes will be made in judging what kind of content could be considered “misleading”.

Conclusion

Thank you again for the opportunity to provide feedback in regards to this proposed bill.

I trust that my feedback, along with other submitters, will be given the time and consideration required to address all concerns raised.

Dylan Lindgren
[redacted]