An overbroad risk to free speech and intellectual inquiry: Submission on the “Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill”

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Summary

Governments must exercise care and restraint when restricting speech. The restrictions must go no further than is necessary and must be precisely and narrowly defined. However, the proposed bill casts a wide net. Its definition of “misinformation” is broad, ill defined, and arbitrary. It risks partisan, value laden and ideological restrictions on speech. The Bill incentivizes content platforms to overly suppress speech lest they be named and shamed but has no such incentivize for allowing ‘innocent’ speech. It exempts the media and government from the “misinformation” provisions. These is even though Australians rely on such institutions for correct information, such institutions are well resourced, and they are precisely the institutions that should not spread “misinformation”. The Bill also fails to grapple with the changing state of knowledge and the fact that what was once “misinformation” or “controversial” might emerge to be true: this is inherent in the scientific method and this is not in the exclusive domain of educational institutions. The proposed Bill presents an unacceptable risk to free speech and to ordinary intellectual inquiry. The Bill requires heavy revisions if not abandonment.

1 Introduction

It was once commonly believed that the Earth was the center of the universe. However, in the 1600s, Galileo changed this, defending and evidencing ‘heliocentrism’: the belief that the Earth revolves around the Sun. So controversial was this, that it was deemed heretical. In 1622, Galileo was deemed “vehemently suspect of heresy”. It was once ‘misinformation’ or ‘disinformation’ to claim that the Earth orbits the Sun. But, today we take that knowledge for granted. Unfortunately, the proposed approach to ‘misinformation’ risks repeating the same mistakes of old.

Free speech is essential in a democracy and to human knowledge. However, free speech has limits. These include existing prohibitions on defamation. However, any restriction on speech must be precise, limited, and must not be open to political interference. Restrictions must be nuanced and carefully balanced. Unfortunately, The Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (hereafter, "Misinformation Bill") does not strike this balance. The Misinformation Bill is overly broad, open to politically motivated abuse, and would undermine free speech. Such curbs on free speech risk making Australia an international pariah.

The Misinformation Bill empowers the regulator to force content platforms to monitor, report on, and suppress alleged "misinformation". The Bill defines misinformation broadly to include content that is merely "misleading" and that "contributes to" "harm", which is broadly defined. The Bill's ambit is both vague and broad. The regulator could name and shame platforms for having Misinformation. In so doing, it incentivizes platforms to take an aggressive stance on content, potentially suppressing swathes of content even if they are not "misinformation" as defined by the Bill. The Misinformation Bill also prioritizes media and the government by exempting them from monitoring or suppression provisions. In so doing, it enables organizations that are supposed to be trusted, and that are well resourced, to be the most lax with their content.

This Submission outlines several areas in which the Misinformation Bill falls short. The thesis is that the Misinformation Bill should be halted. This is because it covers such a broad range of speech, would suppress even accurate speech, fails to acknowledge that human knowledge changes over time, and inappropriately exempts already powerful and well-resourced entities from its 'misinformation' provisions. In so doing, it imposes an unnecessary risk to free speech.

2 The Misinformation Bill in brief

The Misinformation Bill empowers to regulator (ACMA) to impose rules onto 'digital platform providers' in relation to 'misinformation' and 'disinformation'. Digital platform providers are those who provide a "digital platform service". A digital platform service is any online service with content aggregation or media sharing.[1] It would include YouTube, Twitter, Facebook, Instagram, TikTok, and Substack. Presumably, it could also include certain blogs.

The Misinformation Bill proposes to collect and publish information on misinformation and steps taken against it. ACMA may impose rules requiring the service provider to keep and provide records in relation

[1] Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 Section 4.

to “misinformation”, its prevalence, and what the provider is doing to combat misinformation.[2] ACMA may also force service providers to prepare reports on misinformation at a periodicity that it specifies and in a manner that it specifies.[3] ACMA may then publish this information, including specifics of the nature and type of misinformation on each service provider and steps the service provider takes to combat misinformation.[4]

The Misinformation Bill loosely defines what “misinformation” is. However, it does so loosely and in broad terms, as explained below. The Misinformation Bill also exempts some content from consideration: for example, “professional news content” and content from educational institutions and the government need not be considered. That is, content from those groups is deemed to *not* be misinformation by default and there is no evaluation into its accuracy or lack thereof.

The Misinformation Bill does not *explicitly* outlaw deemed “misinformation” but it does so *implicitly* and indirectly. This is because service providers can be ‘named and shamed’ if their platform has misinformation and/or if their content moderation is deemed lax. This encourages platforms to suppress misinformation and disinformation.

The Misinformation Bill is framed as attempting to remove ‘harmful’ or ‘false’ information. However, this is question begging. Major questions include what is misinformation. It also raises the question of whose conduct is excluded from the bill; and thus, whose speech is implicitly assumed not to be misinformation.

3 What is Misinformation?

The definition of “misinformation” is overly broad and chills not only political speech but also ordinary investigative inquiries. This is because the definition of “misinformation” is itself question begging and is vague. In turn, this could encompass good faith communications that turn out to be wrong, potentially at a later time. It could also encompass communication that merely challenges the status quo.

The Bill defines “misinformation” as content “that is false, misleading or deceptive” and that “is reasonably likely to cause or contribute to serious harm” (Section 7(1)). There are several issues.

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[2] Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 Section 14.
[3] Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 Section 14(5).
[4] Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 Section 25.

To be clear, there is no inquiry into the person's state of mind when disseminating content. The definition contains no *mens rea* or state of mind. This is a strict liability. It is unnecessary to prove that the purveyor acted intentionally, recklessly, or even negligently. The bill effectively charges platforms with policing speech. Thus, platforms would render individuals liable for making a factually false statement even if they genuinely believe the statement to be true. Strict liability is generally to be avoided unless there is a strong policy reason for doing so and that strong policy reason outweighs the potential unfairness of the strict liability.

3.1 What is "false" under the Bill?

The definition of what is "false" is a problem area. The bill does not define what is "false". Rather, the administrator will determine this.

This *includes* in ordinary investigative work. And, such investigative work can be done by private businesses and individuals. Consider the example of data driven empirical research. Empirical techniques are complex. Analyzing data requires significant skills, time, and resources. However, if a researcher uses incorrect techniques, they can produce incorrect results that lead to incorrect policy conclusions. This is the case *even if* the researcher acted in good faith.

A concrete example illustrates the point: Consider the technical area of "difference in difference" (DiD) tests. This is an empirical technique used to identify whether variable A causes a change in variable B. Researchers have DiD tests frequently. However, recent research suggests that standard DiD tests have econometric problems. [5] Previous research undertaken in good faith might yield misleading conclusions. Much of that research has significant policy implications. And, thus, if it is false, it could cause serious harm. Under this bill, the concern is whether the prior research is now "false"; and thus, is misinformation. Further, it appears that disseminating the potentially "false" findings now "misinformation". This is the case even if discerning whether prior research is accurate is a technical and complex area. This creates a chilling effect disseminating such findings.

The Bill has no apparent remedy for this situation. The only purported remedy is that The Bill does exclude Educational Institutions from its 'misinformation' prohibitions. However, this would not solve the issue. Educational Institutions do not have a monopoly on research. Indeed, The Australian Government has emphasized industry-university linkages. Myriad PhD graduates work at standard

[5] Andrew C Baker, David F Larcker and Charles CY Wang, 'How Much Should We Trust Staggered Difference-in-Differences Estimates?' (2022) 144 Journal of Financial Economics 370.

businesses. Myriad businesses produce research and analyze data. However, the Misinformation Bill could chill research activity in the private sector as inadvertently producing or disseminating false information could enliven liability.

Let us take a concreate example. Disseminating false information about corporate governance could cause companies to hire bad quality CEOs; thereby seriously harming shareholders. However, it is not always easy to know what is false. Researchers conflict over what is 'good' governance. And, knowledge evolves over time. Thus, factors that people perceived as bad might emerge to have a more nuanced effect. But, these provisions penalize information that is disseminated in good faith merely because it subsequently emerges that the information is incorrect. This creates an overly broad chilling effect on communication.

3.2 What is "misleading"?

The Bill's reference to "misleading" content raises issues. Misleading *could* be deemed to be 'misinformation' under the Misinformation Bill. The term "misleading" is undefined. In some cases, this will be clear cut: It would be misleading to say that a dog is really a cat or that a cat is really a dog. In other situations it might involve a value judgment.

The clear danger is that people deem content to be 'misleading' merely because they disagree with it. This is a concern surrounding political speech. For example, it is not uncommon for political opponents to accuse each-other of being 'misleading'. There are ongoing examples of this in Australia that are occurring simultaneously with the Misinformation Bill.

The Misinformation Bill is contemporaneous with a referendum in Australia. Both supporters and opponents of the referendum assert the other side is being misleading. The referendum has presented several controversial examples of arguably 'misleading' statements. The referendum would create a body ("The Voice") that would make representations on behalf of indigenous Australians to parliament and the executive. However, there are arguments over misleading conduct on both sides of the referendum.

One example is in the Second Reading speech to the enabling legislation for Australia's indigenous voice referendum. Mark Dreyfus stated that the proposed referendum would create an Indigenous body that would make representations on matters that impact "Aboriginal and Torres Strait Islander peoples

differently to other members of the Australian community" (emphasis added).[6] This is false. The proposed body could make representations on all matters "relating" to Indigenous Australians. This has been interpreted broadly to include almost all matters and it is not restricted to matters that differently impact indigenous Australians.[7] Were that to be outside of parliament, that would be 'misleading' under the Misinformation Bill.

Another example is in relation to the argued powers of the Indigenous Voice. Some assert that The Voice body would only be advisory because it can only 'make representations' to the parliament and executive government. Others argue that unless contrary arguments are given the same level of access, funding, and political clout, empowering The Voice is akin to empowering one side of a case in a litigation: the empowered side might 'only' be making representations, but because the other is disempowered, it can drive decision-making and outcomes. Both sides believe the other is misleading. And, this creates a conundrum under legislation such as the Misinformation Bill.

The problem is then that the Misinformation Bill could be used to suppress 'unpopular' speech. By deeming such speech to be 'misleading' on the basis of a value judgment, regulators, or platforms, could suppress undesirable speech. This could be the case regardless of whether the speech is 'harmful' given that platforms are incentivized to over-police speech rather than under-police it. This is because the Misinformation Bill does not require platforms to report when they have suppressed speech erroneously.

3.3 What is "harmful"?

The 'harm' component in Section 7(1)(d) is broad. It requires only that the content be "reasonably likely to cause or contribute to serious harm". This induces several problems.

The Bill states that content need only be "reasonably likely" to have the relevant effect. It is not necessary to prove this with any degree of certainty. The standard of proof is unclear and vaguely defined. It is unclear whether this would merely be a matter of supposition or it must be based on empirical evidence: It is not clear whether the service provider (or regulator) would base this on whether such speech *has* caused harm in other contexts or whether it is merely asserted to do such.

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[6] Second Reading Speech: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F26436%2F0005%22 .

[7] For the full amendment text, see: https://www.niaa.gov.au/indigenous-affairs/referendum-aboriginal-and-torres-strait-islander-voice

The definition of “harm” is over-broad. The Misinformation Bill does not define what the difference is between “serious harm” and ordinary “harm”. The Misinformation Bill defines harm as:

> *harm means any of the following:*
> *(a) hatred against a group in Australian society on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion or physical or mental disability;*
> *(b) disruption of public order or society in Australia;*
> *(c) harm to the integrity of Australian democratic processes or of Commonwealth, State, Territory or local government institutions;*
> *(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.*

The broadness of this definition is troubling. The Misinformation Bill deems content to be harmful if it disrupts “public order” or “society” in Australia. In so doing, Bill seeks to protest Australians’ ability to protest. The Bill could suppress content that harms the “integrity” of the democratic process. But, this would suppress content that validly questions election integrity even if the concerns are genuine and fact based (cf. mere supposition). This is because fact-base critiques are a precursor to genuine inquiries and The Bill would suppress those first step critiques. These are just several of many possible examples.

The definition of “harm” is also question begging and fails to reflect that knowledge changes over time. For example, the Bill would suppress content that harms the “health” of Australians. But, our knowledge about what harms “health” changes over time. For example, our knowledge about the efficacy of vaccines has changed over time (i.e., in relation to the extent to which vaccines might prevent covid and its spread). Similarly, in the financial sphere, our knowledge about corporate governance evolves over time. This includes in relation to matters such as board independence, executive compensation, and board composition. The Bill would suppress content that questions the status quo even if the status quo emerges subsequently to have been ill-informed. This change in knowledge is manifest in how peer reviewed journals investigate and re-investigate topics over time.

The Bill does not indicate whether this is physical, emotion, or financial harm. Given the broadness, it presumably includes all types of ‘harm’. The bill does not specify whether the harm must be direct (i.e., emotional distress to the viewer) or indirect (i.e., encouraging bad behavior). The Bill does not indicate how it would determine what is ‘harmful’. The Bill does not indicate how it would assess arguments that weigh pros and cons.

The Misinformation Bill requires only that the content "contribute to" the specified harm. It does not require that the content "cause" the harm. This is over broad. Presumably, content can "contribute to" harm even if it is not causally linked. It appears that repeating controversial comments as part of a genuine critique could "contribute to" harm merely because the comments are reported or reiterated. Similarly, defending a person's right to have or state controversial beliefs might relevantly "contribute to" harm even if the defender disagrees with those underlying beliefs. Further, unrelated content that generates revenue of an organization that is deemed to produce misinformation would presumably "contribute to" harm. If the bill is to indirectly suppress speech, that speech should at least be causally linked to a specified harm.

Let us take a concrete example: Suppose several pieces of content promote the use of fossil fuels in the short term because the author believes there is little immediate source of energy. Some might argue that this could 'contribute to serious harm' to the environment; and thus, to people. Some of the content providers might be nuanced. Some might lack a solid grasp of how quickly climate change is progressing or of precisely how damaging coal fired power plants are. Then, in this case, the speech could be misinformation. But, in such a large and complex set of content, platforms would lack the tools to parse nuance. Thus, given the perceived reputational risk of being 'named and shamed' platforms would suppress any content on this topic, nuanced or otherwise. In turn, platforms would be tempted to suppress speech even if it is nuanced in order to risk providing speech that lacks that nuance.

4 Who is excluded from the Misinformation Bill?

There are significant concerns about who is excluded from the Misinformation Bill. The bill states that excluded content is

> *excluded content for misinformation purposes means any of the following*
> *(a) content produced in good faith for the purposes of 13 entertainment, parody or satire;*
> *(b) professional news content;*
> *(c) content produced by or for an educational institution accredited by any of the following:*
> *(i) the Commonwealth;*
> *(ii) State;*
> *(iii) a Territory;*
> *(iv) a body recognised by the Commonwealth, a State or a Territory as an accreditor of educational institutions;*
> *(d) content produced by or for an educational institution accredited:*
> *(i) by a foreign government or a body recognised by a foreign government as an accreditor of educational institutions; and*
> *(ii) to substantially equivalent standards as a comparable Australian educational institution;*

> *(e) content that is authorised by:*
> > *(i) the Commonwealth; or*
> > *(ii) a State; or*
> > *(iii) a Territory; or*
> > *(iv) a local government*

The core problem is who the bill covers and who is exempted. The bill does not justify why some bodies are excluded from the bill. For example, why is 'professional news' content exempt and why is 'professional news' content allowed to spread misinformation? Why is the government allowed to spread misinformation? Why are educational institutions allowed to spread misinformation? Second, the bill does not justify why other bodies are *not* excluded: increasingly many Australians obtain their news and information from YouTube, blogs, and the professional trade press. Why are ordinary small business subject to the 'misinformation' probation but news organizations are not? Why are YouTubers – who have fewer resources – subject to the prohibitions, but newscasters are not?

Excluding professional news organizations is curious. The bill defines those organizations as ones with "rules or internal editorial standards" either covered within, or analogous to, those in professional bodies. However, it is not clear why those editorial standards should allow news organizations to spread 'misinformation' more than ordinary individuals. Indeed, professional news organizations should arguably be held to a *higher* standard given that they purport to follow editorial standards and can use such standards as a symbol of authority. In this case, prohibiting misinformation from journalistic organizations would be more paramount than prohibiting it from ordinary citizens.

Excluding government is curious. The misinformation prohibitions explicitly do *not* apply to information stemming from the government. This appears to give the government license to spread misinformation. This sends the wrong signal to the Australian public and the international community. It implies that government communications are *less* trustworthy than are independent communications as independent communications are prohibited from spreading misinformation whereas the government is not. This exclusion also evinces a legislative intent to allow the government to communicate false or misleading information. This is odd given that the government is better resourced than are ordinary citizens; and thus, should be more able to ensure that it is accurate. In turn, enables an unscrupulous government to spread misinformation while – as is discussed elsewhere – defining truthful rebuttals as such.

The overall effect of the 'exclusions' is to exempt supposedly trusted authorities from misinformation prohibitions. These institutions are better funded, purport to be trusted and accurate, and have significantly greater institutional power. Thus, the exclusions are badly calibrated. Indeed, given that institutional power, funding, and cache, it would be more appropriate to exclude ordinary citizens and business from the bill and *include* media and government.

5 What about overreach? Is it not reported?

When seeking to identify misinformation there are two types of error: There is the risk of wrongly flagging information as misinformation when it is not. And, there is the risk of failing to identify misinformation when it exists. The Misinformation Bill specifically targets attempts to address the second issue by requiring reports on misinformation and measures taken against it. However, as indicated above, it is broad and could result in ordinary speech being flagged as misinformation.

The foregoing sections highlight how the legislation could cause ‘overreach’. This is due to the definition of ‘misinformation’ being over-broad. This in turn is because it defines misinformation as being content that is ‘false’ or ‘misleading’ and that ‘reasonably likely’ to cause ‘harm’. All aspects are vague. And, given that the regulator is empowered to ‘shame’ platforms if it deems them to be inadequately strict, there is an incentive to err on too much suppression rather than too little.

The Misinformation Bill does not have steps to address the overreach that it incentivizes. The Misinformation Bill enables the regulator to request reports into ‘the prevalence of’ misinformation (other than that by exempted bodies) and the measures taken to ‘prevent’ or ‘respond to’ misinformation and the ‘effectiveness’ thereof. However, this is targeted at the effectiveness of suppressing ‘misinformation’, which is broadly defined. It does not explicitly pertain to whether the measures – while effective – have the unintended consequence of suppressing ‘innocent’ content that is not misinformation. It also does not require any reporting into misinformation by the ‘exempt’ bodies, thereby allowing the ‘exempt’ bodies to spread misinformation unchecked.

6 Conclusions: What should the government do with The Bill?

The Misinformation Bill in its current form is unworkable, overly broad, and presents an unacceptable risk to free speech. The Bill indirectly suppresses speech merely because it “contributes to” “serious harm” if that speech is deemed “misleading” or “false” or “deceptive”. In so doing, The Bill casts a wide net. The Bill does not adequately define what makes speech “misleading”. It fails to acknowledge that knowledge changes over time and what was believed false at one time might emerge to be true. And, that questioning the status quo a natural part of discourse.

The Misinformation Bill further presents an unacceptable risk to ordinary discourse. The Bill would suppress speech even if it is not misinformation. This is because it incentivizes platforms to show that they have suppressed misinformation. But, it does not incentivize platforms to do so accurately. Given that the regulator would name and shame platforms for airing alleged ‘misinformation’, it encourages a broad brush approach to suppression. There is no audit or scrutiny of whether those measures inappropriately suppress ‘ordinary’ speech.

The Misinformation Bill is also flawed in who it excludes. The Bill specifically indicates that content from the government, media, and education providers cannot be misinformation under the law. It excludes their content from Misinformation data gathering, reporting, and suppression. Ironically, these institutions are the best resourced to ensure their content is accurate. Thus, the Bill appears to enable certain organizations to espouse false and misleading information without restriction while excessively suppressing the speech of ordinary citizens.

The concerns about this Bill are so deep and significant that it should be shelved and should not be revived. If the Bill were to be refined, it must cover all Australians and there should be no exclusions for media, government, or education providers. It must also focus on a significantly narrower and more specific set of content. It further must incentivize platforms to avoid suppressing ‘innocent’ content. However, even with these fixes, it is not clear that the Bill is desirable as a matter of policy or is workable.