

This submission is to oppose the Exposure Draft Communications Legislation Amendment (Combatting Misinformation and Disinformation Bill) 2023 (the Bill).

The Bill is opposed on the following grounds.

1. The problem to be solved by the legislation is not clear, in contravention of the *Australian Government Guide to Policy Impact Analysis*

The examples of “serious harm” provided are either yet to occur in Australia, could be addressed by existing legislation or are legitimate debate.

<i>Type of harm</i>	<i>Example of serious harm</i>	<i>Comment</i>
Hatred against a group in Australian society on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion or physical or mental disability	Misinformation about a group of Australians inciting other persons to commit hate crimes against that group	The Guidance Note does not demonstrate inadequacy in existing protection provided by the Australian Human Rights Commission and its legislation.
Disruption of public order or society in Australia	Misinformation that encouraged or caused people to vandalise critical communications infrastructure	Vandalising of such infrastructure is already illegal. Further, it is not clear that this is happening in Australia.
Harm to the integrity of Australian democratic processes or of Commonwealth, State, Territory or local government institutions	Misinformation undermining the impartiality of an Australian electoral management body ahead of an election or a referendum	It is not clear how the “impartiality” of the electoral body could be undermined by misinformation. Further, it is not clear that this is happening.
Harm to the health of Australians	Misinformation that caused people to ingest or inject bleach products to treat a viral infection	It is not clear this is happening. While there was discussion recently on controversial treatments to address COVID, such as ivermectin, this was legitimate debate rather than an unambiguous threat to health.
Harm to the Australian environment	Misinformation about water saving measures during a prolonged drought period in a major town or city	While there have been several droughts since social media became prevalent, it is not clear that this is happening.
Economic or financial harm to Australians, the Australian economy or a sector of the Australian economy	Disinformation by a foreign actor targeting local producers in favour of imported goods	This is a protectionist position and if action were taken on this ground, Australia may be the subject of a complaint to the World Trade Organization. It is legitimate debate to propose that cheaper foreign goods may be preferable to more expensive local products.

- That is: the Guidance Note suggests the bill seeks to prevent serious harm which may occur rather than which is happening, is already illegal under current legislation or which is legitimate debate rather than serious harm.
- The Guidance Note advises that the European Union (EU) Digital Services Act was approved in October 2022 and covers a wider range of harmful conduct than ACMA powers.

— Even if the instances of “serious harm” above are accepted, unless there is evidence that social media is publishing content in Australia which is suppressed within the EU, Australian regulation is unnecessary.

- In summary: the proponents have not identified a public policy problem necessitating Australian Government intervention.

2. The Guidance Note and bill lack clarity around both:

- **the justification for regulating to stop serious harm to groups of people, instead of individuals, and;**
- **how serious harm to groups, rather than people, might be measured.**
- It is not clear why legislation is needed to address harm to groups of people rather than individuals.
- While individual being assaulted or killed is a clear instance of serious harm, it is not clear how serious harm to a group of people might be inflicted or measured.
- To the extent that “serious harm” to a group of people might be inflicted, the Guidance Note does not explain where or why it is not being prevented by the *Australian Human Rights Commission Act 1986* and *Racial Discrimination Act 1975*.

3. The Bill does not strike a balance between allowing free speech and suppressing misinformation or disinformation.

- The Australian Government Guide to Policy Impact Analysis suggests that any policy proposal should consider the net benefit (i.e. benefits minus costs) of the proposal.
 - This is very important re such a significant issue as intrusions on freedom of speech.
 - It is not clear from the Guidance Note that the draft Bill’s net benefit was considered.
- The Bill would encourage a connected media services to develop their own code of practice to prevent publishing misinformation/disinformation
- With no clear definition of what is true or false, and therefore what is misinformation/disinformation, there is an overwhelming incentive for connected media service operators to develop a code which suppresses too much rather than too little discussion.
- This will almost inevitably lead to substantial litigation since clause 61 of the Bill provides that codes of practice have no effect to the extent (if any) that their operation would infringe any constitutional doctrine of implied freedom of political communication.
 - That is: a code of practice or finding as to misinformation/disinformation will almost certainly be challenged on the basis that it is inconsistent with the implied constitutional freedom identified in *Nationwide News Pty Ltd v Wills (1992) 177 CLR 1* and *Australian Capital Television v Commonwealth (ACTV) (1992) 177 CLR 106*.
- The inevitable litigation will ensure uncertainty within industry and the public as to what is misinformation/disinformation.
- The uncertainty will defeat the aim of the Bill i.e. it will not prevent misinformation/disinformation being amplified within the community without impinging on free speech.

4. If the Bill is to proceed, its provisions would be more properly inserted into the *Competition and Consumer Act 2010 (CCA)* with oversight by Australian Consumer and Competition Commission (ACCC).

- The Bill would give the *Broadcasting Services Act 1992* (BSA) and Australian Communications and Media Authority (ACMA) control over entities which do not hold a licence under legislation oversighted by ACMA.
- Regulation and oversight of corporations both Australian and overseas-based is more typically undertaken by ACCC under the CCA and *Corporations Act 2001*.
- The ACCC is well experienced in these areas and would be better placed to assess a balance between serious harm and legitimate debate.
- For example: one type of harm identified by the Guidance Note is “Disinformation by a foreign actor targeting local producers in favour of imported goods”.
 - It is legitimate debate to consider the merits of Australian-produced goods which may be of a higher price, compared to overseas-produced goods which may be available at a lower price to Australian consumers.
 - An attempt to suppress discussion on a connected media service, may lead to if a complaint against Australia being made to the World Trade Organization.
 - The wording of the Guidance Note suggests the ACCC may provide a more nuanced approach to assessment of serious harm versus legitimate debate.
 - This is especially so since ACMA holds no role in licensing many connective media services.
- Concerns as to serious harm caused by connective media services, which do not hold licences issued by ACMA, would be more appropriately investigated by the ACCC under the CCA and Corporations Act.

5. If the Bill is to proceed, anything which is misinformation or disinformation, should be defined by the Minister by Regulation, rather than being inferred by ACMA or ACCC.

- While clauses 7(1) and 7(2) define misinformation and disinformation to include content which false, misleading or deceptive, these three words are not defined.
- In practice, these terms will apply to different assertions, depending on the opinions of each person.
 - For example, “fact checks” by Royal Melbourne Institute of Technology (RMIT)/Australian Broadcasting Corporation (ABC), Australian Associated Press (AAP) and Agence France-Presse (AFP) often purport to check the integrity of assertions about what may happen in the future.
 - Whatever their validity these cannot be “fact checks” since, by definition, an assertion about the future can be neither true nor false.
 - RMIT/ABC, AAP and AFP also purport to assess the accuracy of statements about the causes of world events when the relative weighting of contributing factors is impossible to measure objectively.
 - Given the Guidance Note’s reference to “harm to the environment”, a connected service provider would likely not be able to assess what commentary should be suppressed regarding perceived changes in climate being anthropogenic.
- Accordingly it is not reasonable to expect any connected media service operator to know what ACMA or ACCC may deem to be misinformation or disinformation.
- To avoid confusion, any statement which is considered to be false, misleading or deceptive should be defined by the Minister through a regulation.
- This would allow connected media services to have clarity as to what discussion topics should be suppressed, when they prepare their codes of practice.