[redacted]
15 August 2023

To:
The Department of Infrastructure,
Transport, Regional Development,
Communications and the Arts,
GPO Box 594
Canberra ACT 2601

Dear Sir/Madam,

SUBMISSION

New ACMA powers to combat misinformation and disinformation (the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023)

I hereby make this submission in response to the exposure draft of the "Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023".

This is the essential part of my submission: in a free and democratic country like Australia, every person has the right to form their own opinion about an issue. That opinion may be correct or it may be erroneous. But they are entitled to their opinion, and to express that opinion in public including on digital platform services on the internet.

It is clear that the government seeks to use this bill to prevent free speech in Australia. I do not accept the government's claim that much of the information by so-called "conspiracy theorists" about the COVID-19 situation since 2020 has been misinformation and disinformation. Let us be clear: those you accuse of being conspiracy theorists are simply people who disagree with you. These are people who care deeply about their inalienable rights to privacy and bodily autonomy.

Of course, there has been some misinformation and disinformation from some of these sources. But by and large, it has been "information", something that this bill has failed to define.

Despite the efforts of the Australian Governments to vilify, ridicule, cancel, and censor anyone who dared to question their interpretation of the COVID-19 situation, many Australians have not been convinced. We did our own research. We found the people who were qualified, whom you also vilified, and we have come to our own conclusions.

The best way to encourage people to change their opinion is to give them the opportunity to hear an intelligent debate, in which each side of an argument is given a chance to present their facts and have their voice heard. It is not up to me or to the government to be the arbiter of what opinions are acceptable and what opinions are not.

The Australian Constitution created a parliament the encourages robust debate. Whenever a piece of legislation is proposed, it is debated. In Australia, we have a history of being sceptical about governments, and for good reason. The government of the day is elected to serve the people. If they are not serving the people, but are, in fact, harming or ignoring the people, then that government does not deserve to endure.

I have a number of concerns about this bill, which I will expand upon below. I have also made a number of recommendations:

1) It will severely restrict freedom of speech on the internet in Australia.
2) Its definitions for misinformation and disinformation are woefully

inadequate.
3) It claims to be motivated by a desire to reduce the incidence of “harm”, yet it does not define that term clearly either.
4) It is missing a definition for “factual information”.
5) The Bill sets up ACMA (i.e. a branch of the Australian government) as an arbiter of truth for content on digital platform services.
6) The bill puts too much emphasis on forcing digital platform services to censor the users on their platform.
7) ACMA does not have to accept the industry codes.
8) The bill gives ACMA quasi-judicial powers to “gather information” and impose penalties for non-compliance.
9) It exempts certain parties from the requirements of the bill.

It will severely restrict freedom of speech on the internet in Australia.
The vague and all-encompassing language used to frame the bill casts a wide net that will catch many ordinary people who are simply trying to express their views and share information.

Australia is a signatory to the International Covenant on Civil and Political Rights. Article 19 of that covenant says:
"Article 19
1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals."

Note that it says “and are necessary”. Not to be tampered with because someone took offence. Not to be curbed because the government or a politician didn’t like what you said. “Necessary”, meaning that if it is essential, and that with a clear and present danger, temporary changes may be made. And then these rights must be restored in full when the danger has passed.

Recommendation: Use this bill to enshrine in Australian law clear rights and safeguards to freedom of speech, freedom of expression, freedom of association, and freedom of religion. With these in place, the bill is set to clarify the extremely rare and unusual instances in which it would be necessary to curtail these rights for the protection of national security or of public order (ordre public), or of public health or morals.

Its definitions for misinformation and disinformation are woefully inadequate.
The bill defines these words in Subclause 7:
“Subclause 7 Misinformation and disinformation
(1) For the purposes of this Schedule, dissemination of content using a digital service is misinformation on the digital service if:
(a) the content contains information that is false, misleading or deceptive; and
(b) the content is not excluded content for misinformation
purposes; and
(c) the content is provided on the digital service to one or more end-users in Australia; and
(d) the provision of the content on the digital service is reasonably likely to cause or contribute to serious harm.

(2) For the purposes of this Schedule, dissemination of content using a digital service is disinformation on the digital service if:

(a) the content contains information that is false, misleading or deceptive; and
(b) the content is not excluded content for misinformation
purposes; and
(c) the content is provided on the digital service to one or more end-users in Australia; and
(d) the provision of the content on the digital service is reasonably likely”

I deal with some of my other concerns later, but the main problem here is that there is nothing to compare mis- and disinformation with. So I will suggest a way to do that.

It needs a definition for “factual information”
I will include another definition, as I consider it critical to this debate: "factual information". This is data that has been obtained from reputable sources. It may be from a peer-reviewed study from a scientific or professional journal. It may be statistics from publicly available sources such as the Australian Bureau of Statistics, or the Queensland Department of Health. It may be an analysis of a situation by a highly-respected and qualified person in their field, such as a PhD cardiologist, an embalmer of 20+ years' experience, or a welder who specialises in pressure vessels.

This is information that can be checked and verified for authenticity. However, in certain highly specialised fields, such as, perhaps, quantum mechanics, only a person with similar qualifications can verify some types of information. This is why professional associations have journals with peer-reviewed articles. It is not good enough for just any old "fact-checker" to check some of these facts. The checker must be qualified to do so, and must be free from accusations of improper pecuniary interest.

Even one of the Fact Sheets about this bill puts the term “evidence” in quotation marks as an attempt to derogate persons who have supposedly posted misinformation, whom they might also call “conspiracy theorists”. Who can we trust to determine what is “truth”? Even in science, no science is settled. At best, science can propose theories that are more or less reliable. Professional journals exist as forums for scientists to share their findings and allow others to check their findings. Sometimes there are very important advances in our knowledge, but rarely, if ever, could it be said that the scientist has discovered “the truth”.

In the realm of philosophy, there are numerous points of view. To suggest that one’s world view is the epitome of truth is a high call indeed. Short of opinions that encourage criminal behaviour, or incite others to directly hurt others, a plurality of opinions are to be expected. Discussion, debate, argument or sharing of information. These things help us to sharpen our own opinions and cast aside those that we have considered and found wanting. And by and large, this is a good thing for our democracy.

Recommendation: Include in the bill a definition for “factual information” (or similar term). This would clarify what type of information would be considered acceptable and would clarify the boundaries of when the information becomes misinformation.

It claims to be motivated by a desire to reduce the incidence of “harm”, yet it does not define that term clearly either.

It speaks of “harm” that a person’s views may have on our people, our democratic institutions and even our economy. Yet it does not clarify how a person or the economy may be harmed by those views. The meaning of “harm” has been diluted in recent years to include “causing offence”. For some people, to simply have someone express an opinion that is opposed to theirs is enough of an affront to constitute “causing offence”. The rise of cancel culture attests to this.
If we are to acknowledge that Australians have a right to freedom of speech, then it follows that we must acknowledge that they have a right to express views

that we do not agree with.

There is a difference between being offended, and being harmed. I have certain beliefs that many others do not agree with. However, just because someone states their disagreement with me, I do not consider that a case of causing me harm. In fact, I welcome robust discussion and healthy debate about important issues. It is essential to our parliamentary democracy that, in proposing a bill, that different points of view are brought to bear on the details of the bill.

As per this very submission, Australians must be given the opportunity to hear different opinions for any issue. It helps others to crystallise their own opinions, identify fallacies or mistruths in a given argument, and clarify details and ammendments for a proposed law. I don't hear about our politicians crying "harm!" every time someone expresses a view at odds with their own. We must not constrain the definition of harm so tightly that it loses its meaning and is used to justify stifling legitimate discussion and debate over important issues.

Recommendation: Define the term "harm", and do it in such a way that it would only include such things as criminal behaviour or incitement to cause immediate physical or emotional harm to a person. It must be so clearly defined that the minister or bureaucrat responsible for taking action can easily determine if the language used constitutes something that is harmful.

The Bill sets up ACMA (i.e. a branch of the Australian government) as an arbiter of truth for content on digital platform services.
It gives too much power to politicians as well as unelected bureaucrats to determine what constitutes misinformation and disinformation. Let us not think that a government or a subsidiary body of it, is capable of being an arbiter of all that is good and true. The government can make laws, but it cannot be considered the final word on "truth".

The bill puts too much emphasis on forcing digital platform services to censor the users on their platform.
This will lead these digital platform services to self-censor,lowering the bar even further for freedom of speech. Given the potential penalties for failing to censor posters on their service in accord with ACMA's vague and loosely framed codes and standards, I expect that these digital platform services will self-censor so that they err on the side of caution. This will lower the bar even further for freedom of speech. Opinions that would be considered valid by ACMA standards will be removed to avoid even possible breaches of the codes.

Recommendation: Any codes or standards for mis- and disinformation must so clearly define misinformation and disinformation that it is easy for a provider to determine if a user has breached the code. Typically, the type of misinformation would involve criminal activity. It would also allow members of the public to make complaints, knowing that their complaint was valid given the parameters of the code. Service providers would find it easy to determine if a complaint was justified, as it would be clear whether or not the code had been breached.

ACMA does not have to accept the industry codes.
The bill proposes that ACMA requires digital platform service providers to develop their own codes to deal with misinformation and disinformation. Yet it does not have to accept those industry codes. The way it stands, ACMA could reject the voluntary industry codes as inadequate, and then force its own codes or standards on the service providers require that they implement them.

Recommendation: If ACMA considers it necessary to reject industry codes, it must clearly explain, immediately, the nature of the concern and how the industry codes are inadequate. It must give suitable notice (e.g. 90 days) for the service providers to self-remedy the breaches.

The bill gives ACMA quasi-judicial powers to “gather information” and impose penalties for non-compliance. As I am not a lawyer, I will quote the human rights lawyers at Maats Method. About Division 3 of the bill, they said "...even the protections available to defendants in the criminal charge and hearing process are not afforded to digital platform providers (which again, can be individuals) under this Bill. The provision of this unbounded quasi-judicial authority subverts the rule of law and common law rights, while granting to ACMA a star chamber-like authority not afforded under the Constitution." (ACMA Submission (Maat's Method and ASF),23 July 2023)

Recommendation: Clearly set limits on the powers that ACMA has to gather information, call evidence and impose penalties. It must be in accord with other similar non-judicial bodies and must be subject to the rule of law and common law rights.

It exempts certain parties from the requirements of the bill.
“Professional” media, and governments of all levels do not have to be concerned with the information that they publish online, because they will not be subject to the bill’s penalties. Yet who is to say that these organisations can be trusted to always post “factual information” statements, if they are not subjected to the conditions of the bill. As per my statements above, no one person or party has the final say as to what is truth.

Recommendation: No parties shall be exempt from the bill. If it is to be enforced, it must apply to all persons and parties. No one gets favourable treatment under the law.

Thank you for the opportunity to make this submission. As it stands, this bill is unworkable. It is dangerous to the rights and freedoms of ordinary Australians. Ideally, it needs to be scrapped altogether or almost completely rewritten. If it does go into law, it will be a dark day for Australia and especially for ordinary citizens. I urge you to reject this bill as unsuitable for a free and democratic society.

Yours sincerely,
Paul Kennedy