

**COMMUNICATIONS LEGISLATION AMENDMENT  
(COMBATTING MISINFORMATION AND  
DISINFORMATION) BILL 2023**

***LIBERTARIAN***  
**PARTY**

**Submission to the Draft Exposure Bill**

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## **TABLE OF CONTENT**

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<b><i>Summary</i></b>	<b>1</b>
<b><i>Curtailing Freedom of Speech</i></b>	<b>2</b>
<b><i>What is False, Misleading, or Deceptive?</i></b>	<b>4</b>
<b><i>Excluded Content and Services</i></b>	<b>6</b>
<b><i>Serious Harm Threshold</i></b>	<b>7</b>
<b><i>Conclusion</i></b>	<b>9</b>



# SUMMARY

The Libertarian Party opposes and condemns this Bill in the strongest possible terms. While the mechanisms and language of the draft exposure Bill hide behind indirect requirements for digital platforms, the final (and intended) result of this legislation is to cause digital platforms to self-censor and remove communications deemed a threat by ACMA.

This legislation will have the effect of significantly limiting what speech and content will be able to be hosted on digital platforms, and therefore significantly limiting what Australians can see and consider.

The report by ACMA recommending it be given significant additional powers freely admits that its objective is to change what “conspiracy minded” groups and individuals think.

We reject this as a proper goal of a government regulatory authority, who are no better placed to say what views are true and what dissenting views might eventually be proven to be accurate in future.

Even if such a goal were accepted, this legislation will only have the effect of further marginalising, isolating, and fuelling positions that should be freely debated or ignored to die a natural death in the marketplace of ideas.

# CURTAILING FREEDOM OF SPEECH

The guidance note accompanying the Exposure Draft Bill claims that “the Bill does not seek to curtail freedom of speech, nor it is intended that powers will be used to remove individual pieces of content on a platform”.

This claim is, itself, misinformation of exactly the sort that the Bill would restrict, if government sources were not excluded from the definition of misinformation.

Indeed, this statement is more likely to be disinformation because it is intentionally trying to mislead and deceive readers of the guidance note. What the drafters of the Bill purportedly seek or intend to do – even if these claims are accepted, which they should not be – has nothing to do with what the effect of the Bill will be in reality.

The ACMA Report which informs the draft bill states that “an important trend in the propagation of misinformation” has been the rise of “smaller, free-speech oriented platforms with less rigorous content moderation policies”.

It is absolutely clear that the primary purpose of this legislation is to achieve greater restrictions on what individuals and groups can say or express on platforms that currently allow them to do so. This is the very definition of curtailing freedom of speech.

With the powers that would be granted by the draft exposure bill, ACMA would first hope that “voluntary efforts” would lead to a reduction in freedom of speech on digital platforms covered by the legislation. This means that the first preference of the government is self-censorship.

In a self-censorship model, digital platforms targeted by this Bill would impose a content moderation process that was rigorous enough to satisfy ACMA, in an attempt to avoid further government intervention or external regulation.

# CURTAILING FREEDOM OF SPEECH (CONTINUED)

In practice, the self-censorship that is likely to occur in this stage will tend to take a more restrictive approach than the definitions provided in the Bill.

Digital platforms and service providers will “over correct” and actively remove existing content that is deemed to be at risk of attracting ACMA attention or concern, as well as rapidly respond to new content posted that is deemed to be at risk of attracting the definitions of misinformation or disinformation.

If the self-censorship stage is not sufficient, then the Bill will give ACMA the ability to impose an industry code, or an industry standard, in an escalating level of significance and compliance.

At each stage the second and third order self-censorship effects will intensify. The fact that ACMA will be able to achieve the removal of individual posts and content through third parties without directly utilising its own powers or resources to do so, does not change the fact that ACMA is responsible for the removal of content. This is an intended, and primary purpose of this legislation.

***"In practice, the self-censorship that is likely to occur in this stage will tend to take a more restrictive approach than the definitions provided in the Bill."***

# 4 WHAT IS FALSE, MISLEADING, OR DECEPTIVE?

The guidance note to the draft bill says that “nor will the ACMA have a role in determining what is considered truthful”. This raises the important question of who will be responsible for determining what constitutes false, misleading or deceptive conduct.

This term, arguably the most important term in the draft exposure bill, does not have any internal definition. Neither the Bill, nor the Guide accompanying it, acknowledge in any way what the Bill intends a Court of law should have regard to on this question.

If it is the intention of the Bill to apply the same framework of “false, misleading or deceptive” as is seen in ASIC or the Consumer Law, then this needs to be stated clearly.

It is also a completely inappropriate framework for assessing whether particular content on a digital platform is misinformation or disinformation.

More importantly, it is not a Court that will be making the first decision on what constitutes false, misleading or deceptive conduct.

If ACMA insists that it will not be making these determinations, then it will be left to digital platforms, with only abstract case law guidance, to determine what falls within this definition.

In a complex commercial environment, attempting to avoid regulatory penalties, the only logical, reasonable conclusion is that platforms will define false, misleading or deceptive content as content that is controversial or dissenting opinion.

This is a serious problem, for the reasons explained below.

# WHAT IS FALSE, MISLEADING, OR DECEPTIVE? (CONTINUED)

The extent to which an opinion or communication is controversial or broadly accepted has very little bearing on whether it is substantially true, or reasonable. In many situations, and on many topics, reasonable minds can and do disagree.

Western civilization has a long and proud tradition of scientific method characterised by exposing hypotheses and theories to debate, scrutiny, and criticism. Doubtless many other submissions to this draft exposure will reference examples of dissenting opinions, theories, and ideas that later rose to prominence and general acceptance.

In the report on the adequacy of digital platforms, disinformation and news quality measures, ACMA chose an interesting example in its illustration of misinformation – the efficacy of mask wearing in preventing the spread of COVID-19, based on a comparison between responses and “the official advice at the time”.

Those who agreed with the official advice were considered to be informed, but this leaves the very significant risk that assessing whether something is misinformation against this criteria relies on official advice being accurate.

The circular logic inherent in assessing what disinformation is, against a criteria of predetermined approved information, means that until something is sufficiently widely accepted to reflect ‘official’ advice it will be classified as disinformation.

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# EXCLUDED CONTENT AND SERVICES

The exclusion of certain bodies from the misinformation and disinformation provisions places a further arbitrary value judgement on the accuracy and truthfulness of content from these sources.

Government departments, government funded media such as the ABC and SBS, and legacy news media with internal codes of conduct and editorial guidelines, do not have any special quality or perception of true or accurate information.

Particular information shared on a digital platform such as telegram or Rumble might be classified as misinformation under the draft Bill, while the same information shared by an excluded service would not be. This wrongly gives greater weight and a presumption of trust and accuracy to the government, government funded media, and legacy media.

The exclusion of these three key groups from this legislation also has the effect of creating a barrier to entry or uneven playing field, where rules and restrictions are imposed on some competitors in a market and not others.

Such regulatory costs and barriers to entry are a form of protectionism and should be rejected in a modern, global free market economy. This legislation is the latest in a series of legislative interventions designed to prop up the failing business model of legacy media at the expense of smaller, more agile competitors.

***"The exclusion of certain bodies from the misinformation and disinformation provisions places a further arbitrary value judgement on the accuracy and truthfulness of content from these sources."***



# 7 SERIOUS HARM THRESHOLD

The definition of serious harm in the bill is poorly drafted. The provisions read:

“(3) For the purposes of this Schedule, in determining whether the provision of content on a digital service is reasonably likely to cause or contribute to serious harm, have regard to the following matters:”

This leaves the question of who is to have regard to these factors unacceptably vague. Neither the types of harm that may be considered nor the examples of serious harm appear anywhere in the Bill. The factors provided in the draft exposure bill are so broad, and so all-encompassing, that it is impossible for a digital service provider to anticipate:

- a) Which of the factors will be considered in a particular circumstance
- b) What weight should be assigned to any of these factors
- c) What might be captured by the term ‘any other relevant matter’

The logical (and, we submit, intended) consequence of the way the draft exposure bill is framed is that all of these factors will form the basis for pre-emptive exclusion of content.

Weighting and meaning aside, these factors taken together should be rejected when considering the value of information and whether or not the communication would be reasonably likely to cause or contribute to serious harm.

The examples provided in the guidance note are not drawn from any legislative provisions in the bill, and likely represent a far higher threshold than what would actually be applied. Even if we accept that this would be the actual threshold, the examples provided should be a cause for serious concern.

# 8

## SERIOUS HARM THRESHOLD (CONTINUED)

As just one example, the guidance not lists "Misinformation undermining the impartiality of an Australian electoral management body ahead of an election or a referendum" as an example of serious harm.

This example is embarrassing to say the least, given the recent findings of the Federal Court in *Australian Electoral Commission v Kelly* that the AEC adopted an "intentional and unreasonable" position that was "difficult to understand".

The AEC is a political body, that is not immune from making mistakes, behaving in a way that violates community expectations of it, or receiving justified criticism when it falls short of these standards. Serious harm as a threshold is clearly focused on so-called "social harms" rather than actual harm in terms of incitement or damage to infrastructure.

All of these kinds of actual harm are already more than adequately covered by existing legislation.

***"The AEC is a political body, that is not immune from making mistakes, behaving in a way that violates community expectations of it, or receiving justified criticism when it falls short of these standards."***

# CONCLUSION

Even if it were accepted that preventing social harm of this kind was a proper goal of government, this legislation will have unintended consequences that will increase, rather than decrease harm.

Censoring ideas that the State disagrees with will only feed into narratives of suppression, social isolation and mistrust.

Attempting to influence thought, by restricting the digital spaces and town squares in which people can gather and share ideas is both misguided and doomed to fail.

The Libertarian Party will fight to oppose this bill; and if it is passed, will not rest until it is repealed.

***"The Libertarian Party opposes and condemns this Bill in the strongest possible terms."***