

Submission on the draft Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2023 ('the Bill')

There are 2 dimensions to the management of commentary on digital platforms. The first is the protection of the right to free and fair comment (that is non-harmful). The second is the prevention of harm caused by misinformation and disinformation. The Bill addresses only one of these dimensions: the prevention of harm caused by misinformation and disinformation. It does not offer any protections for legitimate fair comment.

While it is necessary and appropriate to restrict the spreading of misinformation and disinformation it is equally necessary to prevent the misuse or misapplication of these terms to remove fair comment or to de-platform commentators who post fair comment. The Bill should seek to not only prevent the spread of misinformation and disinformation but also seek to prevent the misuse, misinterpretation or misapplication of these terms to limit free and fair comment that is non-harmful.

The opportunity afforded by the Bill is not only to manage the risk of harm caused the spread of misinformation and disinformation but also to demonstrate to the Australian population a commitment to the protection of free speech and fair comment.¹

It noted that ACMA plays no role in determining the provisions within voluntary industry codes and the industry is not required by the Bill to adopt the definitions in the Bill. This position is not considered conducive to the consistent and fair interpretation or application of the terms misinformation and disinformation.²

This submission proposes changes to the Bill that seek to address these concerns.

¹ *The Fact Sheet notes the disruption of health responses as an example of the concerns that the Bill seeks to address. However, the COVID19 pandemic experience provides an example of the harm that can be caused by inappropriate interpretation of the terms "false, misleading and deceptive". Content was removed from digital platforms, and a number of highly qualified commentators were de-platformed (some at the request of government departments), for challenging the assertion by medical authorities that COVID vaccines were effective in stopping or significantly reducing the transmission of the COVID19 virus. The contrarian views of the de-platformed commentators, a number of whom were eminently qualified medical practitioners, were deemed to be misinformation (variously asserted to be false, misleading and/or deceptive) and considered harmful to the community. As is now known and proven, the vaccines were not effective in reducing the transmission of the virus. The restriction of fair comment by experienced practitioners arguably resulted in harm to the population of healthy, young Australians who were not at material risk from the virus but were exposed to the risk of complications from the vaccines such as myocarditis and pericarditis.*

This example highlights the fact that there is also a risk of harm posed by the inappropriate, erroneous or deliberate classification of information as misinformation. While authorities may have been acting in good faith in asserting that the COVID vaccines were effective in stopping transmission, the 'shutting down' of contrarian viewpoints from learned experts was clearly wrong and harmful to those young Australians who developed complications from the vaccines. While the Bill may not have prevented these events from occurring due to the government sponsorship of the inaccurate assertion regarding vaccines, the Bill should seek to prevent similar outcomes by facilitating free and fair comment that is non-harmful, however controversial that comment may be.

² *The proposed regime appears to leave considerable scope for individual service providers to adopt their own interpretation of misinformation or disinformation, a risk which is exacerbated by an industry standard that does not adopt the Bill's definitions. Some industry participants have, in the past, demonstrated a propensity to define content that is inconsistent with their views as misinformation or to remove content for other corporate reasons (such as the removal of news content by Facebook in February 2021)*

1. The Bill should combat not only misinformation and disinformation, it should also combat the restriction of free speech by misuse, misinterpretation or misapplication of these terms

The Bill provides an opportunity to instil or restore confidence in the consistent application of the principles of free speech in this country by not only combatting misinformation and disinformation but also by addressing the misuse of these terms by individual service providers to limit, restrict or preclude free speech.

As such the Bill should:

- require that any code of conduct must include provisions that preclude the removal of content or de-platforming of a contributor unless the information posted is demonstrated to be misinformation or disinformation, and likely to cause serious harm; and
- enable content providers to appeal against the decision of a service provider to remove content or de-platform them where they believe the information that has been removed is not misinformation or disinformation (item 3 below provides further comments on the right of appeal and the appeal process); and
- require service providers to provide ACMA with a monthly/ quarterly report detailing measures implemented by the provider to respond to misinformation or disinformation including the identity of the contributor, the nature of the content of the information, the action taken by the service provider and the reasons for the actions taken by the service provider (including the reasons why the information is considered to be misinformation or disinformation. This will enable ACMA to monitor unilateral actions by service providers and to determine if the actions being taken are reasonable and consistent with the intent of the legislation.³

If it is reasonable to assert that misinformation and disinformation should be controlled by the legislation to avoid serious harm it is equally reasonable to assert that the misuse or misapplication of these terms to limit fair comment and free speech (that is not harmful) should also be controlled by the legislation.⁴

³ I note clause 14 of the draft legislation but this only says that digital platform rules may require certain actions relating to record keeping and reporting. I believe the legislation should require regular reporting as described above to aid in prevention of abuse of free speech by individual service providers

⁴ In the US there have been numerous reports of digital service providers de-platforming political figures and others expressing legitimate views considered to be contrary to the views of the service provider. These actions have often been taken under the auspices of removing misinformation or disinformation when, in reality, they reflected only the inconsistency of the content with the views of the management of the service provider.

2. The Bill should provide definitions and interpretive guidance with respect to the terms “false”, “misleading” and “deceptive”

The proposed legislation is intended to control the dissemination of misinformation and disinformation that may result in substantial harm. The definitions of “misinformation” and “disinformation” are founded on 3 critical terms:

1. False
2. Misleading
3. Deceptive

The interpretation of these 3 terms is critical to the outcomes that will result from the Bill. However, the Bill, as drafted, does not define these terms and provides no guidance on the interpretation of these terms. In the absence of a clear definition of each, and guidance as to how they are to be interpreted and applied, there is:

- The likelihood that social, cultural, political or religious bias within the management of individual digital service providers or ACMA⁴ will influence the interpretation of these terms; *and*
- a high probability that there will be differing standards applied by platforms; *and, as a consequence of the above*
- a high risk that these terms may not be properly, fairly and consistently interpreted.

The absence of a clear definition and interpretive guidance with respect to these terms potentially facilitates highly subjective interpretation. In particular, the words “misleading” and “deceptive” are open to a range of subjective interpretations, leading to the risk of bias based on the social, cultural, political, or religious views of the decision makers of the platform, or alternatively, ACMA⁵. Additionally, the absence of guidance on the meaning and interpretation of these terms allows for inconsistencies in their interpretation as between individual platforms.

The lack of attention to these critical terms can be contrasted with the treatment of the term “harm”, which is a defined term in the legislation and one for which additional interpretive guidance is provided in section 7(3).

While it might be argued that these terms can be defined in the code of conduct, these terms are so integral to the application of the legislation that confidence and trust in the legislation can only be achieved if they are defined in the legislation and guidance is provided in the interpretation of these terms. Further, if the term “harm” warrants defining and guidance in the legislation, the same should be true for the terms “false”, “misleading” and “deceptive”.

⁵ While the fact sheet advises that the ACMA will not have the power to request specific content or posts be removed from digital platform services, the Bill allows ACMA (in certain circumstances) to direct service providers to comply with a code of conduct approved by ACMA. As such ACMA will have the power to request the removal of specific content where the content is considered by ACMA to be in breach of the code of conduct. In these circumstances ACMA will have the power to unilaterally decide if content is misinformation or disinformation and to require removal of content so determined

3. The Bill should contain a right of appeal or require any code of conduct to include a right of appeal

The Bill facilitates ACMA's investigation of complaints regarding non-compliance with codes or standards by service providers but does not contemplate complaints relating to inappropriate removal of information or de-platforming of individuals.

To minimise the risk of service providers removing content or de-platforming commentators without due process and/ or due to subjective and possibly biased views of the service provider, the Bill should require that any code of conduct:

- enable content providers who have their content removed, or who are de-platformed, to appeal to the service provider (in the first instance) where they believe that:
 - the information that has been removed is not misinformation or disinformation, or
 - their de-platforming has been based on misinterpretation, misuse or misapplication of the terms misinformation or disinformation
- require service providers to provide a written response to any appeal within a strict timeframe including reasons for the decision
- provide that content providers who are unhappy with the advice of the service provider to appeal to ACMA⁶
- give ACMA the power to require a service provider to restore content that is not demonstrably misinformation or disinformation⁵

⁶ Alternatively, the Bill should require that any code of conduct contain a right of appeal to an independent arbiter against decisions made by service providers and provide the arbiter to require:

- the reinstatement of information that is consistent with the legislation, or
- re-platforming of the individual, or
- payment of compensation