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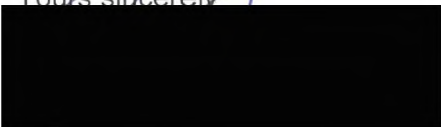
Dear Mr Windeyer

Submission in relation to the exposure draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023

Thank you for the opportunity to make a submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (Department) in relation to the exposure draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023.

On behalf of the Victorian Electoral Commission, I am pleased to provide the enclosed submission. The submission outlines the current regulatory environment for misinformation and disinformation in the electoral space in Victoria, and the potential impacts of the Bill. The VEC provides 3 recommendations in relation to the Bill for the Department's consideration.

Yours sincerely,



Sven Bluemmel
Electoral Commissioner

Submission regarding the Exposure
Draft of the Communications
Legislation Amendment (Combating
Misinformation and Disinformation) Bill
2023

Victorian Electoral Commission

August 2023



Acknowledgement of Country

The VEC pays respect to Victoria's traditional owners and their elders past and present who have been custodians of this country for many thousands of years. Their living culture and their role in the life of Victoria is acknowledged by the VEC.

Version history

This document was prepared in August 2023 for submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts in response to the exposure draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023.

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About the VEC

The Victorian Electoral Commission (VEC) is a Victorian statutory authority established by the *Electoral Act 2002* (Vic) (Electoral Act). The VEC is responsible for:

- maintaining a register of electors
- conducting State elections, local government elections, statutory elections and polls, and fee-for-service elections
- conducting electoral boundary reviews
- administering political funding and donation disclosure laws in relation to State elections
- conducting electoral research
- informing and engaging Victorians in the democratic process
- regulating electoral material on non-broadcasting media platforms in Victoria.

Introduction

VEC welcomes the opportunity to provide feedback to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA) in relation to the exposure draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Bill).

In January 2023, the Minister for Communications announced that the Australian Government would introduce new laws to provide the independent regulator, the Australian Communications and Media Authority (ACMA), with new powers to combat online misinformation and disinformation. The Bill would give the ACMA reserve powers to act, if industry efforts in regard to misinformation and disinformation are inadequate.

The VEC notes that DITRDCA is seeking views on the Bill and whether it strikes an appropriate balance on a range of issues, including:

- freedom of expression
- the complexity of content exemptions
- the scope of the private message exemption
- the size of the penalties and any other issues.

While the Bill deals with misinformation and disinformation on digital platform services in general, the VEC is interested in the operation of the proposed reforms in the electoral space, as well as the content exemption in relation to authorised electoral content.

This submission outlines the current regulatory environment in Victoria and the potential impacts of the Bill in the electoral space. The VEC provides 3 recommendations in relation to the Bill for DITRDCA's consideration.

Regulatory environment in Victoria

Victorian State elections are governed by the Electoral Act. While the Electoral Act acknowledges the internet as a means of publication, most provisions within the Electoral Act pre-date the widespread use of social media and online digital platforms.

Today, digital platform services are an integral aspect of how Victorians discuss, debate, communicate and inform each other of electoral matters. According to the Australian Election Study, voters are increasingly accessing their political and electoral information online rather than through traditional media.¹ Over the past 10 to 15 years, social media has overtaken traditional news media as the primary source of information sharing and news consumption for some age groups, but some research suggests that there has been a decrease in the use of social media for news by young people very recently.²

The VEC notes the risk of the increase in misinformation and disinformation published to social media and that the original intent of the Electoral Act does not contemplate operating elections in an online environment. With the development of sophisticated misinformation and disinformation, such as AI-generated disinformation, the VEC notes that there are significant challenges in relation to regulating misinformation and disinformation that can undermine the integrity of elections.³

Use of social media by the VEC

In addition to the VEC's responsibilities for conducting State and local government elections in Victoria, the Electoral Act also requires the VEC to promote public awareness of electoral matters through education and information programs, conduct and promote research, and provide advice and report on electoral matters.⁴

In the *Inquiry into the Impact of Social Media on Victorian Elections and Victoria's Electoral Administration* in 2020, the Victorian Parliament's Electoral Matters Committee's (EMC's) analysis found that tweets and Facebook posts with image-based memes or other humorous images received considerably higher levels of engagement than other types of content produced by the VEC and encouraged the VEC to continue with this strategy to increase engagement levels.⁵

To that end, the VEC notes that social media provides more accessible channels through which it educates, engages and informs Victorians about their democracy, often at lower cost than traditional media, and with fewer logistical barriers than face-to-face outreach activities.

¹ S. Cameron, & I. McAllister, Trends in Australian Political Opinion: Results from the Australian Election Study 1987–2019. The Australian National University, Canberra, ACT, 2019. See also: Alexander Puutio and David Alexandru Timis, 'Deepfake Democracy: Here's How Modern Elections Could Be Decided by Fake News', World Economic Forum (Web Page, 5 October 2020).

² S. Park, C. Fisher, G. Fuller, G. & J.Y. Lee, Digital News Report: Australia 2022, News and Media Research Centre, University of Canberra, 2022.

³ Emma Perot and Frederick Mostert, 'Fake It Till You Make It: An Examination of the US and English Approaches to Persona Protection as Applied to Deepfakes on Social Media' (2020) 15(1) Journal of Intellectual Property Law and Practice 32, 33.

⁴ *Electoral Act 2002* (Vic) s 8(2).

⁵ Electoral Matters Committee, Parliament of Victoria, *Inquiry into the Impact of Social Media on Victorian Elections and Victoria's Electoral Administration* (Parliamentary Paper No 279, September 2020) 40–41.

The VEC is also responsible for the enforcement, investigation and prosecution of offences against the Electoral Act. The emergence of social media has necessitated greater agility in the application of a regulatory regime originally intended to monitor political campaign material like billboards, corflutes and how-to-vote cards. While ‘publish’ in the Electoral Act includes publication on the internet, the breadth and depth of social media has, in some form or another, created a new frontier for political communication.

Similarly, Victoria’s political funding and donation disclosure requirements are among the most recent additions to the Electoral Act. In this field too, the VEC employs social media to both obtain and disseminate information in its role as a regulator. Social media provides greater visibility of grassroots campaigning, which assists to identify aspiring political actors and alert them to their potential donation disclosure and reporting obligations.

Regulation of electoral campaign material in Victoria

The Electoral Act regulates electoral campaign material, including electoral handbills, advertisements and signage. Section 83 of the Electoral Act makes it an offence, at any point in time, to print, publish or distribute or cause, permit or authorise to be printed, published or distributed, an electoral advertisement, handbill, pamphlet or notice unless it is appropriately authorised. Section 3 of the Electoral Act outlines that the material subject to authorisation requirements is any advertisement, handbill, pamphlet or notice that contains ‘electoral matter’.

‘Authorising’ material means including a person’s name and address on electoral campaign material. The name and address form an ‘authorisation statement’. This ensures that members of the public are aware of the origins of electoral campaign material and allows the audience to decide for themselves how much they value or trust the electoral campaign material. In the case of electoral campaign material that is published or distributed online, the material must contain an authorisation statement,⁶ or link to a website that contains an authorisation statement.

Section 4 of the Electoral Act defines ‘electoral matter’ very broadly. It includes any matter that is intended or likely to affect voting in an election, as well as matter that contains an express or implicit reference to:

- the election
- a current or historical government, opposition or member of Parliament of any jurisdiction within Australia
- a political party or branch, division of a political party
- a candidate in an election
- any issue before the electors in connection with the election.

The VEC notes that the Electoral Act does not provide clear guidance on how the offence under section 83 should be interpreted in the environment of modern electoral advertising practices, including the use of social media and online materials that were non-existent or in their infancy when the Electoral Act was introduced. The VEC observes that the regulation of

⁶ This can be done by, for example, an authorisation statement on a user’s bio or a pinned post that includes an authorisation statement.

online electoral campaign material is a matter of confusion and concern among electoral participants.

Further to the authorisation requirement, the Electoral Act also prohibits, from the issue of the writ to 6pm on election day, to print, publish or distribute or cause, permit or authorise to be printed, published or distributed misleading or deceptive matter.⁷ However, this prohibition applies narrowly to matter that is likely to mislead or deceive an elector *in relation to the casting of the vote* or a misrepresentation of the ballot paper that is likely to induce an elector to mark the vote otherwise than in accordance with the directions on the ballot paper.

Electoral matter may be authorised but still be misinformation or disinformation, as the act of authorisation does not, in and of itself, qualify the material as necessarily true or factual. Authorisation statements can also be applied to any type of content. For instance, an individual might incorporate an authorisation statement into a piece of disinformation, lending a perceived legitimacy to the content without incurring any consequences. At present, the content of authorised material is not subject to review by the VEC or any other body unless it is for the purpose of assessing its compliance with misleading or deceptive provisions, typically only on a complaint being received which prompts the same.

Self-regulation of digital platform services

Digital platforms are largely controlled by a small number of foreign multinationals, including Facebook, Google, Snapchat, Twitter and TikTok. Stricter content moderation on the larger platforms has resulted in the proliferation of small alternative platforms such as Telegram, Parler, Rumble and Gab. These platforms are generally free and easy to use, enable and encourage a proliferation of commentary on political matters, collect a vast amount of data about their users, and utilise that data to enable paid advertisers to target to highly specific demographics. Another common feature is a general resistance to regulation, as has been seen in Australia.

At present, digital platform services largely rely on self-regulation to address misinformation and disinformation. These strategies include regular updates to their operations and Terms of Service. The VEC also engages with digital platform services to combat misinformation and disinformation during elections.

Statement of Intent

In recognition of the potential for disinformation to affect the integrity of elections, the VEC worked with 5 major digital platform services to establish a Statement of Intent for its 2022 State election (Meta, Twitter, Microsoft, Google and TikTok). The Statement of Intent set out how the VEC and platforms would work together during the election period to reduce the risk of harm arising from disinformation and misinformation, and breaches of electoral law.

Furthermore, the VEC made arrangements with 3 additional platforms (Reddit, Tencent and Snapchat) to organise escalation channels for content potentially in breach of electoral law. This showed a general willingness on the part of the platforms to support and uphold electoral integrity.

⁷ *Electoral Act 2002* (Vic) s 84.

The effectiveness of the Statement of Intent and voluntary arrangements varies. During the Victorian State election in November 2022, a number of common misinformation themes were identified, including:

- voters who are not vaccinated will not be able to vote
- the VEC uses Scyt/Dominion voting software and it will result in 'rigged' elections
- postal voting is not secure or safe
- the election will be void if less than half the people vote
- the election is not legitimate because the writs have not been signed.

'Take down' requests will not be actioned if the material does not contravene the platform's own 'terms and conditions', or if the material is misinformation but does not breach electoral law. Of the 6 takedown requests that the VEC made to platforms during the 2022 State election, the response time was generally within one business day. However, only 3 of those requests were successful in having the content restricted, removed, or labelled as misleading. Of these successful takedowns, 2 were actioned because of a breach of the Electoral Act. The remaining request was initially refused by the platform because it did not breach the Electoral Act or the platform's Terms and Conditions. After strong representations from the VEC, the platform agreed to attach a misleading information label to the content.

Example – take down request for disinformation

On 30 October 2022, the VEC was alerted to a Facebook post through its social media monitoring process, which alleges that the World Economic Forum, a not-for-profit foundation in Switzerland, is running the 2022 Victorian State election. The Facebook post includes a screenshot on a tweet on 25 October 2022 published by a Twitter account 'EZFKA'.⁸ The original content from the Twitter account states that the VEC has announced that it will partner with World Economic Forum to oversee and count votes in the 2022 State Election.⁹

Although the original content was produced for the purposes of parody or satire, the VEC was concerned that responses to the content and the subsequent Facebook post indicated that some members of the public were led to believe that the content was factually correct, and that the election process was compromised. The VEC was also concerned that the content was being shared out of context, where the audience may not be aware of the satirical nature of the original content.

The VEC reported the post to Twitter via its Partner Support Portal and requested it to take down the post for the reason of breaching Twitter's Civic Integrity Policy. Twitter initially refused to take action after it assessed the content and found that it was not a breach of Twitter's policy. After strong representation from the VEC, Twitter included a misleading information label, but the content remains available online.

To reduce the impact of the content, the VEC updated its misinformation register to clarify that the VEC does not partner with other organisation to count votes for the State election.¹⁰

Current challenges

The VEC notes that there are clear indications that the public wishes to see action taken in the area of disinformation, particularly as it relates to elections.¹¹ National polls indicate that approximately 90% of Australians desire regulations on misleading advertising.¹² Research on electoral-related dis/misinformation conducted by the VEC in 2022 found that:

- 99% of respondents agreed that it was important to have a trusted and official source of information in a democracy
- 89% agreed that disinformation and misinformation should not be accepted

⁸ Australian Associated Press, 'Victorian election 'fix' claim is one big joke', *AAP Factcheck* (Web page) <<https://www.aap.com.au/factcheck/victorian-election-fix-claim-is-one-big-joke/>>.

⁹ @auseconomicunit (EZFKA) (Twitter, 25 October 2022, 7:11 pm AEST) <<https://twitter.com/auseconomicunit/status/1584819803193110528>>.

¹⁰ Victorian Electoral Commission, 'Sorting Fact From Fiction', *Misinformation Register* (web page) <<https://www.vec.vic.gov.au/voting/learn-to-vote/sorting-fact-from-fiction#MisinfoRegister>>.

¹¹ Ravi Baltutus, 'South Australia's Truth in Political Advertising Law: A Model for Australia?' (2021) 42(2) *Adelaide Law Review* 422, 08.

¹² Survey results from nationally representative samples: Australia Institute, *Polling: Truth in Political Advertising* (Report, June 2020); See also Paul Crap, 'Vast Majority of Australians Support Ban on Misleading Political Advertising', *The Guardian* (Online, 18 August 2019).

- 55% of respondents believe there should be penalties for the spread of either misinformation or disinformation.¹³

Despite strong desire from the public, the current electoral regulatory framework does not effectively regulate misinformation and disinformation that can cause serious harm to the integrity of electoral processes. The VEC acknowledges that while digital platform services have been working with electoral commissions to address the issue of misinformation and disinformation, volunteer actions from platforms have proven to be largely ineffective other than where the Electoral Act is breached.

At present, take down requests from electoral commissions may take significant time to be processed and actioned by a platform. Compounded by short election timeframes, serious harm to the integrity of elections can be caused by misinformation or disinformation by the time the information is removed from circulation.

The VEC's recent experience in the 2022 State election was that platforms only responded to take down requests where there was a clear breach of electoral law. As the Electoral Act defines misleading or deceptive matter narrowly, misinformation and disinformation may not be expressly prohibited if it otherwise satisfies requirements of the Act, i.e. authorisation requirements. This caused serious challenges for the VEC in combating misinformation and disinformation during the 2022 State election. As demonstrated by the example on page 8, where there is no clear breach of the Electoral Act or Terms and Conditions of the platform, the VEC has limited avenue for escalation beyond publishing on the VEC's misinformation register to address misinformation or disinformation about the election process.

Feedback on the Bill

The Bill seeks to increase transparency and accountability of digital platform services to respond to misinformation and disinformation by providing ACMA with additional powers. However, an exemption proposed in the Bill provides that all electoral and referendum content that is required to be authorised, as well as unauthorised electoral and referendum content that is misinformation, will not be covered by the code and standard-making powers of ACMA.¹⁴

While clause 2 of the Bill defines harm to the integrity of Australian democratic processes as a type of 'harm' that is intended to be covered by the Bill,¹⁵ the example provided by the Bill's Guidance Notes suggest that misinformation undermining the impartiality of an Australian electoral management body ahead of an election or a referendum will be exempted from any code or standard-making powers of the ACMA under the Bill if it is authorised.¹⁶ The VEC is concerned that the exemption regarding electoral and referendum content may leave a significant proportion of misinformation and disinformation that can cause serious harm to integrity of electoral processes unregulated. This is because electoral content containing misinformation or disinformation can be compliant with the Electoral Act.

¹³ Victorian Electoral Commission, Misinformation and Disinformation Survey Report 2022, p.5

¹⁴ Communication Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Cth) cl 35.

¹⁵ Ibid, cl 2.

¹⁶ Department of Infrastructure, Transport, Regional Development, Communications and the Arts, 'Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 Guidance Notes' (June 2023) p 11.

The VEC is concerned that the Bill treats unauthorised electoral or referendum content differently based on whether the content is misinformation or disinformation and notes that content is only captured by ACMA's code and standard-making powers if it is disinformation. The VEC observes that in an electoral context, misinformation and disinformation can pose the same level of threat to the integrity of democratic processes as each other. The distributor's intention is frequently irrelevant when assessing harm, as once the information is widely circulated, a large number of voters can be affected by the content regardless of the distributor's true intention.¹⁷

Additionally, the VEC has concerns regarding the potential time required for a regulator to ascertain the intent of disinformation distributors, especially when such determination is necessary to differentiate it from misinformation. This could potentially result in the regulator being incapable of implementing effective measures within the constraints of brief election timeframes. The substantial time that might be needed to establish the distributor's intent before regulatory actions can be initiated has the potential to render any codes or standards ineffective.

The VEC notes that while elections should be robust contests of ideas between electoral participants, misinformation and disinformation that undermines the integrity of democratic processes should be and can be curtailed without affecting policy debates.¹⁸ The VEC recommends that misinformation and disinformation about election processes should be captured by ACMA's code and standard-making powers.

While the recommendation will expand the remit of ACMA to the regulation of certain electoral and referendum content, the VEC also notes that ACMA already regulates electoral and referendum content to a certain degree. The *Broadcasting Services Act 1992* (Cth) imposes a 'relevant period' (also known as election or referendum blackout period) where election or referendum advertisement cannot be broadcasted on TV or radio station.¹⁹ The blackout period applies to parliamentary elections at the Commonwealth, State and Territory levels.

¹⁷ For example, during the 2022 State election the VEC uncovered online content stating that people who aren't vaccinated would not be able to vote. Whether the content was misinformation or disinformation did not materially affect the harm it posed to the integrity of the electoral process and confidence of the public in the conduct of the election. Victorian Electoral Commission, 'Sorting Fact From Fiction', *Misinformation Register* (web page) <<https://www.vec.vic.gov.au/voting/learn-to-vote/sorting-fact-from-fiction#MisinfoRegister>>.

¹⁸ For example, disinformation about election processes may include disinformation distributed by a foreign power to convince electors that their personal information will be unlawfully disclosed by electoral commissions if they cast a vote.

¹⁹ *Broadcasting Services Act 1992* (Cth) Sch 2 Pt 1 Div 2 Cl 1.

Recommendations

The VEC recommends that:

1. DITRDCA considers misinformation or disinformation about election processes as a sub-set of electoral or referendum content that is not limited by clause 35 of the Bill.
2. The Bill enables ACMA to register enforceable codes of conduct and develop standards on misinformation or disinformation about the election processes for all social media platforms, regardless of whether the content is authorised or otherwise.
3. DITRDCA considers whether ACMA should be provided with further enforcement powers, for example civil penalties, to effectively ensure compliance with industry standards.

