To: Department of Infrastructure, Transport, Regional Development, Communications and the Arts
Attention:Pauline Sullivan,
First Assistant Secretary • Online Safety, Media and Platforms Division

By email:information.integrity@infrastructure.gov.au.

18 August, 2023

Dear Ms Sullivan,

The Digital Industry Group Inc. (DIGI) thanks you for the opportunity to provide our views on the exposure draft of Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (the Bill).

DIGI is a non-profit industry association that advocates for the interests of the digital industry in Australia. DIGI's founding members are Apple, eBay, Google, Linktree, Meta, TikTok, X (f.k.a Twitter), Spotify, Snap and Yahoo. DIGI's vision is a thriving Australian digitally-enabled economy that fosters innovation, a growing selection of digital products and services, and where online safety and privacy are protected.

At the outset, DIGI wishes to underscore that our members share and support the Government's commitment to combating the risks posed by disinformation and misinformation while ensuring that freedom of speech and privacy is protected. DIGI supports legislation that strengthens the ACMA's oversight of the Australian Code of Practice on Disinformation and Misinformation (ACPDM), developed and administered by DIGI.

DIGI worked with eight major digital service providers to develop the ACPDM. The ACPDM was launched in February 2021 in response to government policy as set out in *Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry.*[1] The ACPDM is a dynamic self-regulatory tool that DIGI has continued to update and strengthen through periodic review and other enhancements since it was first introduced.

The ACPDM adopts an outcomes based approach that aims to incentivise signatories to be more transparent and accountable for their response to harms caused by disinformation and misinformation. To date, the code has been adopted by Apple, Adobe, Google, Meta, Microsoft, Redbubble, TikTok and X (f.k.aTwitter). These companies have all committed to implement safeguards to protect Australians against online disinformation and misinformation. Mandatory code commitments include: Publishing & implementing policies on misinformation and disinformation, providing users with a way to report content

[1] The Treasury (12/12/19), *Regulating in the digital age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry*, https://treasury.gov.au/sites/default/files/2019-12/Government-Response-p2019-41708.pdf

against those policies and implementing a range of scalable measures that reduce its spread & visibility (Mandatory commitment #1). Every signatory has agreed to prepare annual transparency reports about those efforts to improve understanding of both the management and scale of mis- and disinformation in Australia (Mandatory commitment #7).

Additionally, there are a series of opt-in commitments that platforms adopt if relevant to their business model: (Commitment #2) Addressing disinformation in paid content; (#3) addressing fake bots and accounts; (#4) transparency about source of content in news and factual information (e.g. promotion of media literacy, partnerships with fact-checkers) and (#5) political advertising; and (#6) partnering with universities/researchers to improve understanding of mis and disinformation.

We also acknowledge that drafting legislation that regulates misinformation and disinformation is inherently challenging, because it must strike a balance between regulating lawful but potentially harmful online communications while upholding Australians' freedom of expression, particularly concerning political matters. Some of the key recommendations DIGI advances in this submission include:

A. The Bill should be focused on providing the ACMA with clearly scoped oversight and information gathering powers.
B. In this regard, the Bill should give priority to tackling the most harmful forms of disinformation which can artificially manipulate online discourse, and seriously threaten democratic processes such as elections and social welfare.
C. The Bill should be amended to include stronger safeguards for free speech and greater transparency and parliamentary accountability concerning the exercise of ACMA's powers.
D. In particular, the powers to request codes and make standards should not be capable of being exercised as the Bill provides where the ACMA simply deems it 'convenient' but only where it has determined that the code is needed to address systemic failures of the industry to implement adequate measures to protect the community in relation to *disinformation*.

Our submission contains specific suggestions and recommendations for changes to the Bill in these areas and others.

We thank you for your consideration of the matters raised in this submission. DIGI considers itself a key partner in the Government's efforts to address mis- and disinformation online, and we look forward to our continued dialogue on our shared goals in this area. Should you have any questions about this submission, please do not hesitate to contact me.

Yours sincerely,

[redacted]

Dr Jennifer Duxbury
Director Policy, Regulatory Affairs and Research

Digital Industry Group Inc. (DIGI)

Section 1: Summary of key recommendations of this submission.

The overarching theme of this submission is that the scope of the (Combatting Misinformation and Disinformation) Bill (the Bill) requires considerable revisions, including amendments limiting the range of content and services subject to regulation and stronger safeguards concerning the bases upon which the ACMA can exercise the powers conferred by the Bill. The scope of services covered by the Bill should also be much more specifically defined to address those services that carry particular risk of being the target of disinformation campaigns.

DIGI makes **47 specific recommendations** in this submission, drawing on our experience developing and administering the *ACPDM*[2], and research in the field, including research commissioned by DIGI into Australians' perceptions of misinformation[3]. This section of the submission contains a summary of DIGI's specific suggestions regarding the form of these safeguards.

Recommendation concerning process of development for the Bill

A. While DIGI considers that mis- and disinformation online require concerted efforts from industry, which has informed our development of the ACPDM, we recommend that the Government reconsider the very broad scope of the Bill in the light of the range of existing legislative frameworks concerning harmful and false and misleading content. Where areas of overlap are identified, we recommend that the scope of the Bill be reduced to avoid regulatory duplication.

Recommendations concerning regulatory priority of the Bill

B. Tackling disinformation rather than misinformation should be the Government's regulatory priority. As a general principle, the Bill should primarily focus on providing the ACMA with powers to ensure platforms implement adequate measures (systems and processes) to protect the community from disinformation, and grant the ACMA a more limited set of oversight powers with respect to platforms' responses to misinformation.

C. *We recommend that the codes and standards-making powers of the ACMA in the Bill, should be limited to disinformation, not misinformation*.

D. We support the ACMA being granted power under the Bill to require platforms to keep and provide records and information concerning misinformation and disinformation on their services, although we recommend that these powers be better scoped.

Recommendations concerning scope of content subject to the Bill

E. The Bill should be amended to be consistent with the Government's intent to make it exceedingly clear that the ACMA's powers do not extend to regulating individual instances of misinformation or disinformation, for example, by being able to take-down any content, or obtain access to non-public content, consistent with the statement of intention in the *Guidance Note*.

F. In order to ensure that the ACMA and digital platform services in scope of the Bill have a common understanding about the content that is to be the subject of regulation, the Government needs to reconsider the proposed scope of 'disinformation' and 'misinformation' as defined under the Bill. To address this need we have proposed specific amendments in G to O of this submission.

G. The definitions of misinformation and disinformation in clause 7(1) and (2) of the Bill should be amended to ensure that they apply to content that digital platforms can 'reasonably verify' to be false, misleading or deceptive.

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[2] *Australian Code of Practice on Disinformation and Misinformation*, updated 22 December 2022 (ACPDM) available at https://digi.org.au/disinformation-code/.

[3] Resolve Strategic 'Research on Australians' perceptions of misinformation' in DIGI, *Australian Code of Practice on Disinformation and Misinformation Annual Report* https://digi.org.au/disinformation-code/code-review/.

H. *The definition of disinformation should be subject to an objective test, which enables platforms to more readily determine whether content is disinformation in practice*. Specifically, sub-clause 7(2) of the Bill should be redefined to remove the requirement in sub-clause 7(2)(e) that the person disseminating or causing the dissemination of the content must 'intend to deceive another person'. This should be replaced with a requirement that the content be disseminated by 'deceptive, manipulative or bulk, aggressive behaviours (which may be perpetrated via automated systems) and includes behaviours which are intended to artificially influence users' online conversations and/or to encourage users of digital platforms to propagate content'.

I. The 'contributes to' serious harm element of the definitions of misinformation and disinformation in the Bill in sub-clauses 7(1)(d) and (2)(d) of the Bill should be removed as this is a highly subjective test and impractical for platforms to apply.

J. *The term 'serious harm' should be defined as a harm that causes 'severe and wide-reaching impacts on the community which are reasonably foreseeable*. We support the requirement to have a 'serious harm' threshold for content in scope of the Bill. Clause 7(3) of the Bill lists the factors that are relevant to the assessment of serious harm, however, these factors should not individually, or in combination, be the sole determinants of whether content is in scope.

K. *The types of harms attributed to misinformation and disinformation in clause 2 of the Bill should be limited to harms that can be objectively assessed by providers of digital platform services based on evidence of actual harms caused by the dissemination of false, misleading or deceptive content online, rather than by reference to the hypothetical examples in the Guidance Note*. For examples, this list might be restricted to:

    a. undermining the integrity of Australian democratic processes (such as elections and referenda).
    b. endangering the health, safety, or security of Australians.

    To further ensure the ACMA and regulated platforms have a common understanding of the harmful content in scope of the Bill, the criteria for the types of content that falls in scope of the definitions of misinformation and disinformation should be further explained in regulatory guidelines.

L. Harm to the' 'integrity of Commonwealth, State, Territory or local government institutions should be excluded from the lists of harms in scope of the Bill (clause 2), as it implies that platforms should take measures to protect public institutions (including, for example, the executive government and ministerial offices) from public criticism, when this is vital to robust political debate.

M. Harm to the economy related to mis- and disinformation online being otherwise addressed by the Government through competition and consumer laws, and initiatives concerning scams, and should be out of scope of the Bill.

N. Harm to the environment does not need to be explicitly within the scope of the Bill, as the most serious harms to the community that concern false, misleading or deceptive information that could harm the environment are those which can endanger the health, safety, or security of Australians and are covered by recommendation I.

O. DIGI supports strengthened regulation of existing State, Territory and Commonwealth laws concerning hate speech via legislation of general application. Hate speech should not be

regulated as a type of misinformation or disinformation (as provided for in clause 2 (a) of the Bill) because the harm it causes is not related to matters of truth or falsity; such an approach would not be comprehensive in addressing harms related to hate speech.

Recommendations concerning scope of services subject to the Bill

P. The "tiered approach" to defining the services in scope of this Bill has the potential to extend this regulatory scheme to an extremely broad range of services and leaves considerable discretion to the ACMA to determine which services/service categories will eventually be subject to codes/standards. *As a matter of principle, we think that the scope of services subject to the Bill should be clearly dealt with by parliament via the provisions of the Bill. To the extent decisions about the services subject to regulation are delegated to the ACMA the Bill should set out the relevant criteria that will be used to make such decisions.*

Q. To ensure low risk services are excluded from the regulatory scheme, the categories of services currently in scope of the Bill should be limited to those types of services that:

   a. host content at the user's request and disseminate such content to the public i.e making the content available to a potentially unlimited number of persons at the user's request;

   b. enable widespread ease of distribution (virality) of content via public means.

R. The Bill be amended to create more specific proposed categories of services than the broad categories listed in sub-clause 30(2) so that codes/standards can be more readily developed for 'like' services.

S. The definition of 'content aggregation services' in scope of the Bill (sub-clause 4 (2)) should be amended so that it relates to services which have 'the primary function of creating a collection of content (excluding exempted content such as professional news) that the provider has sourced from multiple locations on the world wide web to enable users of the service to view the collection of content on the service in an aggregated format'.

T. If it is intended that search engines are in scope of the Bill, search engines should be treated as a separate service type as they have different primary function to content aggregation services. We recommend that an internet search engine service is defined as an electronic service that satisfies all the following conditions:

   a. the service is designed to collect, organise (index) and/or rank material on the world wide web;
   b. the service has the primary function of enabling end-users to search the service's index of material on the world wide web or relevant results in response to the end-user's queries; and
   c. the service returns search results in response to end-user queries.

U. The definition of 'connective media services' in scope of the Bill (sub-clause 4(3)) should be amended so that it only captures services where the primary function of the service is to enable online interaction between end-users via an interactive feature.

V. The definition of 'media sharing services' in scope of the Bill (sub-clause 4 (4)) should be amended so that only services that have an interactive feature fall within this category.

W. The Government should consider if the current self regulatory and co-regulatory codes that apply to providers of professional news online should be updated to address misinformation and disinformation.

X. The concept of 'excluded content' in clause 2 of the Bill as compared to 'excluded services' and the interaction of the two definitions should also be clarified. If a service is limited to providing excluded content the service should be treated as an excluded service and be out of scope of the Bill.

Y. The scope of the exemptions for private communications services should be clarified so that the Bill excludes all types of services that enable communication between a finite group of end users similar to the approach in the EU under the Digital Services Act. For example, communication services that are analogous to SMS and MMS services should be excluded from the scope of the Bill.

Recommendations concerning the exercise of the ACMA's regulatory powers

Z. The statement of parliamentary intent in clause 32 should be amended to make clear whether parliament intends that the signatories to the ACPDM should request that it be registered or that it should be replaced by a new code.

AA. The powers to make standards in section 50 of the Bill for 'exceptional and urgent circumstances' should be removed, or at least 'exceptional and urgent' circumstances should be defined clearly and any standards made in these circumstances subject to a sunset clause so that the standards do not remain in place longer than necessary .

BB. Consistent with the *Guidance Note*, the ACMA should only be empowered to request an industry code where it has determined that the code is needed to address systemic failures of a section of the industry to implement adequate measures to protect the community in relation to *disinformation* (consistent with our recommendation in C that the ACMA's code and standards making powers should be limited to disinformation).

CC. Platforms within a section of the industry subject to a registered industry code should not be subject to a standard unless the ACMA has determined that a standard is needed to address systemic breaches by those platforms concerning the implementation of measures under a code.

DD. DIGI requests further clarity about how the ACMA's powers to make standards for services in particular sections of the industry will apply where a service in that section is an ACPDM signatory and is complying with its commitments.

Recommendations about the powers of the ACMA to obtain information, request codes and make standards

EE. The power of the ACMA to make rules that require platforms to keep/provide records and the power to obtain additional information should be limited to the purpose of:

a. determining if providers of platforms have implemented measures (systems and processes) that are adequate to protect the community from disinformation and misinformation on the service;
b. enabling the ACMA to publish information about the extent platforms have implemented measures that are adequate to protect the community from disinformation and misinformation; and
c. in the case of disinformation, enabling the ACMA to determine if there is a need for industry codes or standards.

FF. The scope of the ACMA's powers in relation to requiring and obtaining records and information should be further limited to specific types of records and information, proportionate to the different level of harm posed by misinformation and disinformation.

GG. The cadence for demands by the ACMA on digital platforms for records, the time period for platforms to respond, and the period for which records must be retained should be set out in the legislation.

HH. The references to the prevalence of false, misleading or deceptive content in sub-clause 14(1)(e) and sub-clause 18(2)(c) should be replaced with the 'trends relating to misinformation and disinformation'. The scope of these clauses, as currently drafted, is highly problematic as in effect gives ACMA power to require platforms to monitor the truthfulness of all the content that is provided on a platform. In our view, this would be impossible for platforms to implement..

II. The open-ended powers of the ACMA to obtain additional information about misinformation and disinformation from individuals in clause 19 of the Bill are excessive and should be removed.

JJ. The content of codes and standards should be clearly limited to the purpose of ensuring services that are at risk of disseminating disinformation (in accordance with criteria set out in the legislation) have measures in place that provide appropriate protections for the community against disinformation on their services. As recommended in Q, the risk of virality/widespread ease of distribution of disinformation via public means should be a key marker of a service in scope of the Bill.

KK. The Government should give further consideration to specifying the criteria for 'systemic' failures, breaches or issues (as the case may be) that will trigger an exercise of the ACMA's powers to make a code or standard.

Recommendations concerning the processes for development of codes and standards

LL. The Bill should provide for a minimum period of 12 -24 months for industry associations to develop a new code, depending on the size of the industry section in scope and the number of codes that the ACMA requests be developed concurrently.

MM. A minimum of 12-24 months should be allowed for a code to be in force before ACMA determines that a code has failed/partially failed under sub-clause 48(1) and 49(1) as a precondition to making a standard.

NN. The ACMA should be required to undertake public consultation prior to making an industry standard. This is critical when taking into account the public's interest in this Bill.

Recommendations about transparency and accountability requirements

OO. Decisions by the ACMA concerning industry codes and standards should be conditional on the ACMA publishing reasons for its decision, substantiated by relevant evidence (e.g a decision to require a code/standard or deregister a code should be substantiated by evidence of systemic failures/breaches by platforms to safeguard the community from disinformation). The assessment should include an analysis of the records/information obtained from digital platforms concerning the measures (systems and processes) that they have implemented to protect the community from disinformation.

PP. The registration of codes and the making of standards by the ACMA should also be subject to additional human rights impact assessments.

QQ. Rules and standards made by the ACMA under this legislation should be disallowable instruments.

RR. The Bill should make provision for a statutory review after 12 months to assess its impact on freedom of speech and communication, privacy, and other human rights.

Recommendations concerning coordination between government agencies on industry codes

SS. The Government should consider if there is a need for additional structures to facilitate cross portfolio cooperation and to enable codes and standards for the online industry to be developed under a more streamlined process, for example using a common framework or model definitions.

Recommendations concerning penalties

TT. Penalties under the Bill should be comparable to those in the *Broadcasting Act 1992 (Cth),* including for breaches of broadcast codes and standards. The maximum penalties under the Bill should be limited to systemic breaches of standards concerning disinformation and capped at 10,000 penalty units. The Bill should define a 'systemic breach' by reference to the criteria by which such breach will be assessed.

UU. The Bill should include a provision that makes the mass marketing or sale of disinformation campaigns a crime.

Section 2: Discussion of DIGI's key issues with Bill

1. Process of development for the Bill.

1.1. ***Key Issue: It is not evident that there is a need for the broad range of services and harmful content in scope of the Bill to be subject to such an extensive suite of additional regulatory interventions given the range of existing laws that cover the harms in scope of the Bill.***

1.2. As drafted, there appears to be a considerable overlap between the powers afforded to the ACMA to regulate misinformation and disinformation under the Bill and laws of general application that for example, prohibit cyber-abuse[4], use of a carriage service to menace, harass or cause offence,[5] pro-terror conduct and materials[6], misleading or deceptive conduct and false statements in trade or commerce,[7] defamation[8], hate speech[9] and scandalising contempt that is either 'scurrilous abuse', or 'excites misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office'[10].

1.3. There is a problematic area of direct overlap between this Bill and the Basic Online Safety Expectations Determination 2022 (Cth) (BOSE) under the Online Safety Act 2021 (Cth) because the term "harmful" in the BOSE is used in a completely undefined manner. Arguably a provider could have BOSE obligations with respect to harmful content or activities that are intended to be regulated under the scheme under this Bill and vice versa. Note that clause 36 of the Bill indicates that a misinformation code or misinformation standard will have no effect to the extent it deals with a matter covered by the BOSE. The overlap in harms regulated by the BOSE and under this Bill is therefore a real issue. As a practical matter, this adds an additional layer of complexity for platforms complaint-handling processes as well as imposing significant challenges for platforms in assessing what information they should provide to respond to requests about 'misinformation and disinformation' or 'false, misleading or deceptive content' under the record keeping and information gathering powers set out in Division 2 and 3 of the Bill. Given changes to the Online Safety Act 2021(Cth)(OSA) are included in the Bill, we recommend that the Government further consider under which legislative frameworks and by which regulators relevant harms are best addressed.

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[4] For example section 36 and 37 Online Safety Act 2021 (Cth).
[5] Section 474.17 of the Criminal Code Act 1995 (Cth).
[6] Division 101 of the Criminal Code Act 1995 (Cth).
[7] Section 18 and section 29 of the Australian Consumer Law.
[8] Australian Uniform Defamation Laws.
[9] Section 18 (c) Racial Discrimination act 1975 (Cth).
[10] R v Kopyto (1987) 62 OR (2d) 449, 910; A-G (NSW) v Mundey [1972] 2 NSWLR 887.R v Dunbabin; Ex Parte Williams [1935] 53 CLR 434, 442 (Rich J); A-G (NSW) v Mundey [1972] 2 NSWLR 887, 910.

Specific recommendation

A. While DIGI considers that mis- and disinformation online require concerted efforts from industry, which has informed our development of the ACPDM, we recommend that the Government reconsider the very broad scope of the Bill in the light of the range of existing legislative frameworks concerning harmful and false and misleading content. Where areas of overlap are identified, we recommend that the scope of the Bill be reduced to avoid regulatory duplication.

2. Regulatory priority of the Bill

2.1. ***Key Issue: The Bill assumes that disinformation and misinformation are equally harmful and provides the ACMA with very broad powers to regulate both of those online activities. Disinformation should be understood as an online activity that poses a much greater and more objectively assessable threat to the community whilst misinformation is more complex, contestable and of a lesser threat level. The powers granted to the ACMA under the Bill should be proportionate to the greater severity of harm posed by disinformation compared to misinformation.***

2.2. There is considerable debate, including amongst academic experts, as to the meaning of the terms disinformation and misinformation[11]. However, it is widely accepted that coordinated online activity in the form of a 'disinformation campaign' may cause systemic public harms if they promote false, misleading or deceptive claims at a large scale, or if they discourage citizens from engaging with high-quality sources of information. For example, in the United States, Russia-backed actors have promoted pseudoscience conspiracies about government vaccination programs online, while also attacking expert institutions that make high-quality information claims[12]. As explained in the 2020 discussion paper prepared by the Centre for Media Transitions at the University of Technology in Sydney:

> *The entities that engage in disinformation have a diverse set of goals. Some are financially motivated, engaging in disinformation activities for the purpose of turning a profit. Others are politically motivated, engaging in disinformation to*

[11] Andrea Carson and Liam Fallon *Fighting Fake News: A Study of Online Misinformation Regulation in the Asia Pacific,* (La Trobe University, 2021).

[12] DiResta, R., K. Shaffer, B. Ruppel, D. Sullivan, R. Matney, R. Fox, J. Albright, and B. Johnson. 2018. *The Disinformation Report: The Tactics & Tropes of the Internet Research Agency. Austin: New Knowledge.* https://disinformationreport.blob.core.windows.net/disinformation-report/NewKnowledge-Disinformation-Report-Whitepaper-121718.pdf In 2016 The Mueller Report established the social media campaign by Russian actors included a hacking operation against the Clinton Campaign which released stolen documents in Robert S Mueller III, *Report on the investigation into Russian Interference in the 2016 Presidential Election,* Volume 1, March 2019. See https://www.justice.gov/storage/report.pdf, Page 4.

foster specific viewpoints among a population, to exert influence over political processes, or for the sole purpose of polarising and fracturing societies.[13]

2.3. Misinformation, in contrast, is much more complex and subjective as the concept of misinformation is fundamentally linked to people's beliefs and value systems.[14] A coordinated disinformation campaign by foreign actors during an election is of different order of harm to the community than a group of citizens using a digital platform to challenge prevailing or 'orthodox' views on Covid 19 or climate change, which may be treated as misinformation under the current definitions in the Bill. The question of assessing the extent to which there is a need for misinformation to be regulated in the Australian context is itself very challenging. For example, the Australian population's self-reported exposure to misinformation or levels of concern about misinformation are not robust metrics for assessing the actual impact of misinformation on the community because of widely different perceptions of the meaning of the term and the fact that individuals make value-laden assessments of the validity of online content based on their personal characteristics including their political preferences.[15] In a worst-case scenario, heavy-handed intervention by the Government requiring wide-spread removal of 'misinformation' from online services could conceivably fuel conspiracy theories and contribute to erosion of trust in democratic institutions. A 2022 report from the Royal Society, the United Kingdom's National Academy of Science, for example, says 'there is little evidence that calls for major platforms to remove scientific misinformation content will limit scientific misinformation's harms' and warns such measures could even 'drive it to harder-to-address corners of the internet and exacerbate feelings of distrust in authorities'.[16]

2.4. Further, as defined in clause 7(1) of the Bill, misinformation includes content that may be posted by a user as a result of an honest mistake without any intention to cause harm. This makes misinformation an inherently difficult issue for the Government to effectively address by regulation (as opposed to through other mechanisms such as implementing media literacy initiatives or providing funding to support the development of fact-checking organisations).

2.5. *Because disinformation campaigns pose a different order of harm to the community than misinformation, the regulatory priority of the Bill should be to regulate disinformation, proportionate to the greater severity of harm posed by disinformation compared to misinformation.* We therefore recommend that the Bill should be primarily focused on

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[13] University of Technology Sydney, Centre for Media Transition, *Discussion Paper on An Australian Voluntary Code of Practice for Disinformation*, October 16 , 2020, Page 18.

[14] Ecker, U.K.H., Lewandowsky, S., Cook, J. *et al.* The psychological drivers of misinformation belief and its resistance to correction.*National Review Psychology* , Volume 1, 2022, Pages 13–29. (https://doi.org/10.1038/s44159-021-00006-y'.

[15] Ibid.

[16] Royal Society, *The online information environment Understanding how the internet shapes people's engagement with scientific information* (United Kingdom, 2022).

providing the ACMA with powers to ensure high risk platforms adopt adequate measures (systems and processes) to protect the community from disinformation (subject to definitional changes suggested in Section 3 of this submission). In our analysis, there is insufficient evidence to support strict Australian regulation of misinformation via enforceable codes and standards at this time. The granting of powers to the ACMA to require enforceable codes and standards concerning misinformation is also likely to encourage over-removal of lawful online communications.

2.6. We therefore recommend that the powers of the ACMA to make codes and standards should be limited to disinformation (being content that poses the greatest risk of harm to the community), not misinformation. The Government should further consider whether other policy interventions might be more appropriate for addressing misinformation such as increased funding for media literacy programs and fact-checking organisations.

Specific recommendations

B. Tackling disinformation rather than misinformation should be the Government's regulatory priority. As a general principle, the Bill should primarily focus on providing the ACMA with powers to ensure platforms implement adequate measures (systems and processes) to protect the community from disinformation, and grant the ACMA a more limited set of oversight powers with respect to platforms' responses to misinformation.

C. *We recommend that the codes and standards-making powers of the ACMA in the Bill, should be limited to disinformation, not misinformation*.

D. We support the ACMA being granted power under the Bill to require platforms to keep and provide records and information concerning misinformation and disinformation on their services, although we recommend that these powers be better scoped.

3. Scope of content subject to the Bill

3.1. ***Key Issue: The bar for online content that is in scope of the Bill is too low, and is based on an overly subjective test which captures material that may contribute to harms in the distant future which are difficult to predict and vaguely defined.***

3.2. The intention of the Government, as set out in the *Guidance Note* on the Bill, is to require platforms to implement measures in the form of systems and processes to tackle misinformation and disinformation. In exercising its powers under the Bill, the ACMA would not determine truth nor be empowered to regulate individual pieces of content. This is intended to strike an appropriate balance between the public interest in combatting the serious harms that can arise from the propagation of misinformation and disinformation, with rights of free speech and expression. But this statement of intention

in the *Guidance Note* is potentially at odds with the broad scope of the powers given to the ACMA under the Bill. The Bill should be amended so that it is clear that the ACMA's powers do not extend to regulating individual instances of misinformation or disinformation, for example by being able to take-down any content, or to request access to content, consistent with the statement of intention in the *Guidance Note*.

3.3. The ACMA will inevitably need to make judgments about whether individual items of content or topics of online debate are false, misleading or deceptive in determining whether to exercise its broad powers under the Bill. This is because the subject matter of the Bill (i.e.misinformation and disinformation) are defined by reference to the false, misleading or deceptive nature of online content[17]. For example, in making a determination on the need for codes the ACMA will likely form a view that specific platforms' current systems and processes are inadequate to deal with disinformation and misinformation. Presumably, this requires an evaluation of whether the systems and processes of the platforms are working to protect users from being exposed to content that the ACMA considers to be instances of disinformation and misinformation.T*o ensure that the ACMA and digital platforms services in scope of the Bill have a common understanding about the content that is to be the subject of regulation, the government needs to rethink the proposed scope of 'disinformation' and 'misinformation' as defined under the Bill.*

3.4. *The definitions of misinformation and disinformation should be amended to more objectively differentiate the two concepts.* DIGI acknowledges that defining misinformation and disinformation for the purposes of regulation is hard, not the least because there is no universally accepted definition of these terms, and they are often used to attack opponents' positions in value-laden debates on matters of public concern about which reasonable people may disagree. This understanding is reflected in the *Australian Code of Practice on Disinformation and Misinformation* (ACPDM).[18]

3.5. A common element of misinformation and disinformation as defined in sub-clause 7(1)(a) and 7(2)(a) of the Bill is that it is 'false, misleading or deceptive.' As a matter of principle we consider that the definitions of misinformation and disinformation in the Bill should not encompass communications between citizens that fundamentally concern issues of opinion. In defining misinformation and disinformation for the purposes of the Bill it is important to acknowledge that public debate on contentious topics is integral to well-informed and legitimate public decision making in democratic societies. Public opinion on complex social issues including their factual premises is contestable, evolving and changing over time as is exemplified by the lessons of the Iraq war in which the 'coalition of the willing' including the Australian government, used a false narrative

[17] clause 7, *Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2023* (the Bill).
[18] See section 1.2 of the *Australian Code of Practice on disinformation and Misinformation* (ACPDM).

concerning 'weapons of mass destruction' to justify their involvement in the war.[19] More recently, public understandings about the origin of the Covid 19 pandemic, including questions around whether the virus was released because of a 'laboratory accident' or 'from human contact with an infected animal', are still evolving.[20] These examples also demonstrate the inherent challenges faced by platforms in verifying whether contentious online content is 'false, misleading, or deceptive' at a particular moment in time. At the very least, sub-clauses 7(1)(a) and 7(2)(a) of the Bill should limit the definition of misinformation and disinformation respectively to information that is *reasonably verifiable as* false or misleading or deceptive. This is consistent with the approach in the ACPDM.

3.6. The key distinguishing feature between misinformation and disinformation in the Bill is whether 'the person disseminating, or causing the dissemination of the content intends that the content deceive another person.'[21] This is problematic as the intention of persons 'disseminating or causing the dissemination' of online content cannot be reliably assessed by digital platforms either on an individual basis or at scale. The tactics used to propagate seriously harmful false, misleading or deceptive content at scale are more readily observable by providers of digital services and for example, include the use of trolls, spam bots, false identity accounts known as sock puppets, paid accounts and artificial intelligence to increase the volume and speed via which content is spread online. DIGI recommends that the definition of disinformation in sub clause 7(2)(e) of the Bill should be amended to replace the intentionality requirement with a requirement that the content is disseminated by 'deceptive, manipulative or bulk, aggressive behaviours (which may be perpetrated via automated systems) and includes behaviours which are intended to artificially influence users' online conversations and/or to encourage users of digital platforms to propagate content'[22]. This would extend to the use of artificial intelligence to deliberately deceive other users. We think this approach would enable 'disinformation' to be more clearly differentiated from misinformation, consistent with recommendation B of this submission.

3.7. *The Bill seeks to regulate content that may contribute to harms in the distant future that cannot be predicted. The Bill should instead be limited to foreseeable threats of serious harm*. To qualify as misinformation or disinformation under the Bill it is sufficient that 'the provision of the content on the digital service is reasonably likely to cause or contribute

[19] Owen D Thomas 'Good faith and (dis)honest mistakes? Learning from Britain's Iraq War Inquiry', *Politics,* Volume 37, Issue 4 (2017); Sir John Chilcot's public statement in *The Iraq Inquiry* [online], (July 6 ,2016). Available at: http://www.iraqinquiry.org.uk/the-inquiry/sir-john-chilcots-public-statement.
[20] See for example 'COVID origin still a mystery despite release of intelligence report' *Sydney Morning Herald,* (June 24, 2023), https://www.smh.com.au/world/north-america/no-direct-evidence-covid-started-in-wuhan-lab-us-intelligence-report-20230624-p5dj4z.html
[21] Clause 7 of the Bill.
[22] Section 3.5, ACPDM.

to serious harm'.[23] The Bill's treatment of 'misinformation' and 'disinformation' therefore requires digital platforms and the regulator to make 'crystal ball' assessments concerning whether instances of lawful but 'wrong' speech (whether or not these are likely to be disseminated at scale on a platform) may 'contribute to' harm in the distant future.

3.8. DIGI considered whether the bar for harm in the ACPDM should be lowered in its 2022 review of the code, by removing the requirement that misinformation or disinformation pose an 'imminent and serious threat of harm' so that a broader scope of future 'chronic harms' would be in scope. While recognising the need for a less strict approach to the harm threshold, we concluded:

> *The difficulty with that approach is that it is extremely difficult for platforms to foresee when an accumulation of instances of misinformation on a given topic is likely to result in harm that may be years or decades away. Further, many examples of chronic harm resulting from misinformation and disinformation are contentious. For example, lack of trust by citizens in democratic institutions is a complex phenomena which cannot readily be assigned to any single cause or point in time. On the other hand, platforms recognise that an accumulation of misinformation can pose an imminent threat, for example, to public health during a pandemic and that this threat can be ongoing and persistent in nature that needs to be addressed on an ongoing basis*[24].

For these reasons, DIGI updated the harm threshold to cover credible threats of harms but required that these should be foreseeable to meet the definitional threshold for misinformation or disinformation. We think this approach should be replicated in the Bill i.e the 'contributes to' serious harm element of content in scope of the Bill should be removed.

3.9. *The serious harm threshold for content in scope of the Bill should be better defined.* DIGI supports the requirement to have a serious harm threshold for content in scope of the Bill. The factors that are relevant to the assessment of serious harm are listed in sub-clause 7(3) of the Bill, however, these factors should not individually, or in combination, be the sole determinants of whether content is in scope. The *Guidance Note* says that it is intended that a serious harm 'must have severe and wide-reaching impacts on Australians'. DIGI recommends that serious harm must be defined as a harm that 'has severe and wide-reaching impacts on the community which are reasonably foreseeable' and includes consideration of the factors set out in sub-clause 7(3) of the Bill which should be non-exclusive.[25]

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[23] Clause 7 of the Bill.
[24] DIGI, *2022 Review of the Australian Code of Practice on Disinformation and Misinformation; Discussion paper,* (June 2022).
[25] See section 3.4, ACPDM.

3.10. *The types of harms in scope of the Bill should be more specifically defined.* The list in clause 2 of the types of harms in scope of the Bill are problematic as they are broad and undefined and require highly subjective and therefore contestable judgements. In the absence of a clear justification for the range of harms in scope of the Bill, we recommended that the list of harms in scope of the Bill (clause 2) should be limited to very specifically and objectively determinable harms, informed by evidence and experience to date, rather than the hypothetical examples in the *Guidance Note* such as:

a. undermining the integrity of Australian democratic processes (such as elections and referenda); and
b. endangering the health, safety or security of Australians.

3.11. *Harm to institutions should not be in scope of the Bill*.The inclusion of institutions in the list of harms associated with misinformation and disinformation as defined under the Bill could be interpreted as discouraging public criticism of government institutions online, when in fact such criticism is an important aspect of democratic discourse. The concept of 'institutions' is undefined in the Bill and would arguably include institutions such as the executive government, ministerial offices, government departments and agencies as well as constitutional institutions such as 'responsible government', 'federalism' and even the constitution itself. Furthermore, we are concerned that platforms and the ACMA could be placed in an untenable position if they must adjudicate on whether trust in institutions may potentially be harmed by online discourse, for example, based on complaints made by the executive government of the day or public officials before or after an election.

3.12. In addition there is no clearly established nexus between misinformation and 'harm to the integrity of institutions'. Clause 2 of the Bill could be interpreted to include diminished public trust in particular government institutions. However, the trust of citizens in government institutions is highly complex, constantly in flux and dependent on multiple factors.[26] There is a strong body of research that suggests that trust in government primarily reflects public perceptions of governmental performance, rather than being determined by the content that is disseminated on the world wide web[27]. In the Australian context there is also evidence that, rather than moving inexorably downward, political trust is cyclical[28]. For example, there is evidence to suggest that in Australia and New Zealand public trust rose in 2021 because of citizens' confidence in the government's

[26] See for example Lee Rainie, Scott Ketter and Andrew Perrin, Pew Research Center (22 July,1919), *Trust and distrust in America,* https://www.pewresearch.org/politics/2019/07/22/trust-and-distrust-in-america. Also for a more recent Australian example see 'Scott Morrison's secret ministries undermining trust in government' *The Guardian* , August 17, 2022).
,https://www.theguardian.com/commentisfree/2022/aug/17/scott-morrisons-secret-ministries-undermine-public-trust-and-we-should-be-deeply-concerned,
https://www.lowyinstitute.org/publications/morrison-s-secret-appointments-are-slippery-slope.

[27] Lee Rainie, Scott Ketter and Andrew Perrin, Pew Research Center (22 July, 1919), *Trust and distrust in America,* https://www.pewresearch.org/politics/2019/07/22/trust-and-distrust-in-america.

[28]Clive Bean,'Party Politics, Political Leaders and Trust in Government in Australia' *Political Science*, Volume 53, Issue 1 (2002) Pages 17-27.

management of the pandemic[29]. Factors such as institutional design and regulatory settings are important factors in ensuring the public confidence in the decisions made by certain types of institutions such as electoral bodies responsible for electoral processes.[30]

3.13. We therefore recommend that harm to 'the integrity of Commonwealth, State, Territory or local government institutions' should be removed from the list of harms in clause 2 of the Bill. While DIGI considers that harm to the integrity of institutions should be out of scope of the Bill, it is open to the government to regulate denigrating speech that can seriously damage public confidence in the proper functioning of specific institutions on a case by case basis. Australian laws currently prohibit 'scandalising contempt" that denigrates judges or the court so as to undermine public confidence in the administration of justice[31]. If, for example, the government considers that there is a need to protect the the Australian Electoral Commision from denigrating commentary during electoral periods, this could best be achieved by changes to the Electoral Act 1918 (Cth).

3.14. *Harm to the economy should not be in scope of the Bill.* DIGI also recommends that harm to the economy should be out of scope of the Bill as it is being addressed by the government through consumer laws such as section 18 of the Australian Consumer Law and policy interventions to target scams currently under development, including industry codes.

3.15. *Harm to the environment should not be a separate harm in scope of the Bill.* The most serious potential harms to the environment are adequately dealt with under 'harms to the health, safety, or security of Australians'. We are concerned that the inclusion of environmental harm implies that platforms should have a role in censoring important scientific and public debate on issues around the rate, and impact of climate change.

3.16. *Hate speech should not be treated as a form of disinformation or misinformation and should be removed from the scope of the Bill.* The list of harms in section 2 of the Bill included 'hatred against a group in Australian society on the basis of ethnicity, nationality, race, gender, sexual orientation, religion or physical or mental disability.' Hate speech" is already regulated via the OSA and BOSE as well as under a patchwork of State, Territory and Commonwealth laws of limited scope.[32] It's worth pointing out that hate speech is a

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[29] Shaun Goldfinch, Ross Taplin, Robin Gauld,'Trust in government increased during the Covid-19 pandemic in Australia and New Zealand' *Australian Journal of Public Administration,* Volume 80, Issue 1 (March 2021), Pages1-160.

[30] Sarah Birch, 'Electoral institutions and popular confidence in electoral processes: A cross-national analysis' *Electoral Studies* Volume 27, Issue 2, (June 2008), Pages 305-320

[31] N 11, We note that scandalising contempt has been criticised in the United Kingdom as an untenable limitation on freedom of expression. Committee on Contempt of Court (UK), Report of the Committee on Contempt of Court (December 1974), Pages 69, 162.

[32] Note that the *Racial Discrimination Act 1975* (Cth) , makes it unlawful for a person to insult, humiliate, offend or intimidate another person or group in public on the basis of their race colour or national or ethnic origin. Victims of

denial of the values of tolerance, inclusion, diversity and the very essence of human rights norms and principles.[33] The potential for hate speech to cause harm online is not related to the extent the speech is true or false and so its inclusion in a Bill regulating false, misleading or deceptive material is inappropriate. We also understand that the broader question of how hate speech laws can be strengthened will be considered by the government. In March 2023 the government presented its Response to the House of Representatives Select Committee on Social Media and Online Safety report[34], which stated that the government would consider what more can be done to address group hate speech online and would take a principled and evidence-based approach to ensure the response is effective and supports members of our community who are targeted by online hate[35]. This seems a sensible way forward. We acknowledge that hate speech has been a politically charged field of regulation for the Australian government but that does not justify the approach in this Bill which focuses exclusively on platforms but exempts the perpetrators of hate speech from liability.

Specific recommendations

E. The Bill should be amended to be consistent with the Government's intent to make it exceedingly clear that the ACMA's powers do not extend to regulating individual instances of misinformation or disinformation, for example, by being able to take-down any content, or obtain access to non-public content, consistent with the statement of intention in the *Guidance Note*.

F. In order to ensure that the ACMA and digital platform services in scope of the Bill have a common understanding about the content that is to be the subject of regulation, the Government needs to reconsider the proposed scope of 'disinformation' and 'misinformation' as defined under the Bill. To address this need we have proposed specific amendments in G to O of this submission.

G. The definitions of misinformation and disinformation in clause 7(1) and (2) of the Bill should be amended to ensure that they apply to content that digital platforms can 'reasonably verify' to be false, misleading or deceptive.

H. *The definition of disinformation should be subject to an objective test, which enables platforms to more readily determine whether content is disinformation in practice.* Specifically, sub-clause 7(2) of the Bill should be redefined to remove the requirement in sub-clause 7(2)(e) that the person disseminating or causing the dissemination of the content must 'intend to deceive another person'. This should be replaced with a requirement that the content be disseminated

online racial hatred within the scope of the Racial Discrimination Act can make complaints to the Human Rights and Equal Opportunity Commission through a conciliation-based mechanism.

[33] See Preamble of *United Nations Declaration of Human Rights*, and preamble *International Convention on the Elimination of All Forms of Racial Discrimination.*

[34] Presented on 15 March 2022

[35] The Australian Government Response to the House of Representatives Select Committee on Social Media and Online Safety Report, (March 2023), Page 5.

by 'deceptive, manipulative or bulk, aggressive behaviours (which may be perpetrated via automated systems) and includes behaviours which are intended to artificially influence users' online conversations and/or to encourage users of digital platforms to propagate content'.

I. The 'contributes to' serious harm element of the definitions of misinformation and disinformation in the Bill in sub-clauses 7(1)(d) and (2)(d) of the Bill should be removed as this is a highly subjective test and impractical for platforms to apply.

J. *The term 'serious harm' should be defined as a harm that causes 'severe and wide-reaching impacts on the community which are reasonably foreseeable*. We support the requirement to have a 'serious harm' threshold for content in scope of the Bill. Clause 7(3) of the Bill lists the factors that are relevant to the assessment of serious harm, however, these factors should not individually, or in combination, be the sole determinants of whether content is in scope.

K. *The types of harms attributed to misinformation and disinformation in clause 2 of the Bill should be limited to harms that can be objectively assessed by providers of digital platform services based on evidence of actual harms caused by the dissemination of false, misleading or deceptive content online, rather than by reference to the hypothetical examples in the Guidance Note*. For examples, this list might be restricted to:

   a. undermining the integrity of Australian democratic processes (such as elections and referenda).
   b. endangering the health, safety, or security of Australians.

   To further ensure the ACMA and regulated platforms have a common understanding of the harmful content in scope of the Bill, the criteria for the types of content that falls in scope of the definitions of misinformation and disinformation should be further explained in regulatory guidelines.

L. Harm to the' 'integrity of Commonwealth, State, Territory or local government institutions should be excluded from the lists of harms in scope of the Bill (clause 2), as it implies that platforms should take measures to protect public institutions (including, for example, the executive government and ministerial offices) from public criticism, when this is vital to robust political debate.

M. Harm to the economy related to mis- and disinformation online being otherwise addressed by the Government through competition and consumer laws, and initiatives concerning scams, and should be out of scope of the Bill.

N. Harm to the environment does not need to be explicitly within the scope of the Bill, as the most serious harms to the community that concern false, misleading or deceptive information that could harm the environment are those which can endanger the health, safety, or security of Australians and are covered by recommendation I.

O. DIGI supports strengthened regulation of existing State, Territory and Commonwealth laws concerning hate speech via legislation of general application. Hate speech should not be regulated as a type of misinformation or disinformation (as provided for in clause 2 (a) of the Bill) because the harm it causes is not related to matters of truth or falsity; such an approach would not be comprehensive in addressing harms related to hate speech.

4. Scope of services subject to the Bill

4.1. **Key *Issue: The scope of services regulated by the Bill is unclear and all services in scope are regulated in the same way regardless of their risk profile. It is unclear how the Bill applies to different types of online services. The scope of the services should be clarified and the powers of the ACMA to regulate individual online services should be proportionate to a service's risk profile.***

4.2. *The different categories of services set out in the Bill are difficult to apply to different types of services and potentially unworkable if rules, codes or standards concerning misinformation and disinformation are developed using these terms.* The powers of the ACMA to make rules, codes and standards in the Bill apply to different sections of the industry and categories of services:

a. digital platform providers who provide content aggregation services;
b. digital platform providers who provide connective media services; and
c. digital platform providers who provide media sharing services[36].

These sections of the industry and categories of services in scope of the Bill are very broadly defined.The 'tiered approach' to defining the services in scope of this Bill has the potential to extend this regulatory scheme to an extremely broad range of services (in the interests of future proofing the regulation of misinformation and disinformation) and leaves considerable discretion to the ACMA to determine which services/service categories will eventually be subject to codes/standards.

4.3. *Low risk services should not be regulated under the Bill.* As a general rule the categories of services currently in scope of the Bill (clauses 4, sub-clause 30 (2)) should be limited to those types of services that host information at the user's request and disseminate it to the public i.e making it available to a potentially unlimited number of persons at the user's request, in line with the approach in the EU under the Digital Services Act. In order to avoid imposing broad obligations on a range of low risk platforms, the Bill should make this a baseline threshold for a service to be in scope of the regulatory scheme. Given that the focus of the Bill should be on digital platform services that are at risk of being the target of disinformation campaigns, we also recommend that the risk of virality/widespread ease of distribution of disinformation via public means on platforms with a large user base should be a key indicator of services in scope of the Bill. These requirements are particularly important if the broad categories of services are retained. Our comments below regarding the sub-categorisation of in-scope service should be read in light of this overarching recommendation.

4.4. We also recommend that the Bill be amended to differentiate between more specific subsets of each of the currently proposed categories of services so that appropriate

[36] clause 4 and sub-clause 30(2) of the Bill.

codes/standards can be more readily developed for 'like' services. The development of useful sub-categories should be informed by industry's recent experience of developing industry codes under the OSA in which industry was more readily able to develop codes for the better defined and analogous category of services such as social media services and ISPs compared to the broader and more diverse categories of services such as 'designated internet services' which covered diverse services such as file storage services and most apps and websites.

4.5. *The basic test for assessing whether a service belongs to a section of the industry is confusing.* This is of concern as it is possible that an individual online service may in future be covered by several different, and potentially conflicting, codes and standards as the sections of the industry set out in clause 30(2) of the Bill are specifically not 'mutually exclusive' (sub-clause 30(7)). Further, the Bill distinguishes between the different categories of services based on a 'a primary function' test that confusingly assumes a service may have one or more 'primary functions.'[37] This test does not provide platforms with enough clarity as to the section of the industry to which they belong. We recommend that the 'a primary function test' should be replaced with a test that is based on 'the primary function' of the service.

4.6. *The definition of content aggregation services in sub-clause 4 (2) of the Bill is too broad and unclear*. A digital service is a content aggregation service if 'a primary function of the digital service is to collate and present to end-users content from a range of online sources, including sources other than the digital service'. This definition potentially captures all websites, software and apps that provide online content. This definition should be specifically targeted at digital services that have 'the primary function of creating a collection of content that the provider has sourced from multiple locations on the world wide web to enable users of the service to view the collection of content on the service in an aggregated format'. Further, services should be excluded from the scope of the Bill where the primary function of the service is to create collections of excluded content such as professional news. We think this approach is consistent with the intent expressed in the *Guidance Note*.

4.7. *Internet search engine services should form a specific stand alone category of regulated service*. In addition, it is unclear whether search engine services are in scope of the definition of content aggregation services, although we understand from the *Guidance Note* that is the intention of the Government that they be so[38]. We would recommend that search engine services should be a separate category of services as they have a primary function of enabling users to conduct searches for information utilising an index of materials on the world wide web which is different to what the industry typically understands to be the function of a content aggregation service. We recommend that an

[37] sub-clause 4(2)(a), 4(3)(a) and 4(4)(a) of the Bill.
[38] *Guidance note*,9.

internet search engine service is defined as an electronic service that satisfies all the following conditions:

a. the service is designed to collect, organise (index) and/or rank material on the world wide web;
b. the service has the primary function of enabling end-users to search the service's index of material on the world wide web for relevant results in response to the end-user's queries; and
c. the service returns search results in response to end-user queries.

4.8. *The definition of connective media services in sub-clause 4(3) requires clarification and encompasses low risk services.* A digital service is a connective media service if:

a. a primary function of the digital service is to enable online interaction between two or more end-users;
b. the digital service allows end-users to link to, or interact with, some or all of the other end-users; and
c. the digital service has an interactive feature.

This is a broad definition and may capture many digital services that pose a low risk of widespread and viral dissemination of misinformation and disinformation. For example, this definition captures all websites and apps with a comment or forum feature even if the website or app is for an enterprise, public service, or specialised purpose (e.g., academic research, customer service etc.). There is also potential duplication and lack of clarity between the three limbs of this definition. We recommend that, at a minimum, the definition be amended so that it only captures services where the primary function is to enable online interaction between end-users via an interactive feature.

4.9. *The definition of media sharing services in sub-clause 4(4) is overly complex and encompasses low risk services.* A digital service satisfies the definition of a media sharing service if 'a primary function of the digital service is to provide audio, audio-visual or moving visual content to end-users'. DIGI recommends that the definition of media sharing service is amended so that it only covers services that have an interactive feature. In other words, the carve out from sub-clause 6(1)(b) should be incorporated into the definition itself, in order to align with the approach taken for connective media services.This broad definition and may also unintentionally capture services that have a low risk of widespread and viral dissemination of misinformation and disinformation. For example, a media sharing service's primary function may not be interactive, but there could be a limited function that would satisfy this definition (such as a subscription video on demand streaming service with a chat functionality or the ability to leave reviews). See our general recommendation in para 4.4 above regarding the need to exclude low risk services from the scope of the regulatory scheme.

4.10. *Exemptions for professional news services.*The Bill excludes professional news content from the definition of misinformation in clause 2 .This in effect exempts providers of

professional news services from being subject to regulation concerning misinformation. These services are already subject to regulation under a range of other industry codes or standards. As researchers from the University of Technology Sydney (UTS) have observed, the regulatory framework for news media is 'highly fragmented.' In December 2018, research by UTS identified 14 different codes that oversee Australia's journalists and news companies: seven codes for broadcasters; four codes for narrowcasters; the codes of the APC and the Independent MediaCouncil; and the MEAA Journalist Code of Ethics.[39]

4.11. There is evidence that news outlets in Australia have contributed to amplifying misinformation into online spaces, and led to harmful assumptions which can open the way for agents of disinformation to use professional news content to push their own agenda[40]. In 2021 the Australian Senate committee handed down its report following a year-long inquiry into media diversity, and concluded that the current regulatory arrangements were deficient and recommended the establishment of a judicial inquiry, with the powers of a royal commission, into media diversity, ownership and regulation:

> *Media convergence due to technological change has greatly strengthened the argument in favour of a single regulator across all platforms. As a consequence, the committee further recommends that the judicial inquiry's terms of reference include consideration of a single, independent media regulator to harmonise news media standards and oversee an effective process for remedying complaints*[41].

DIGI recommends that the Government consider how the existing self and co-regulatory frameworks for professional news can be updated to address mis- and disinformation in a manner that is equivalent to the proposed regulation of digital platforms under the Bill's proposed regulatory scheme.[42]

4.12. *Exemptions for services*.The concept of 'excluded content' as compared to 'excluded services' and the interaction of the two definitions in the Bill should also be clarified. If a service is limited to providing excluded content the service should be treated as an excluded service and be out of scope of the Bill.

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[39] Wilding, Derek, Fray, Peter, Molitorisz, Sacha and McKewon, Elaine, *The Impact of Digital Platforms on News and Journalistic Content*, University of Technology Sydney, NSW 2018.

[40] See for example< Carlotta Dotto and Jack Berkefeld, 'From coronavirus to bushfires, misleading maps are distorting reality' *First Draft News* , (February 2020,) News.https://firstdraftnews.org/latest/from-coronavirus-to-bushfiresmisleading-maps-are-distorting-reality/.

[41] Parliament of Australia, *Media Diversity in Australia: Executive Summary.*' (2021). https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Mediadiversity/Report.

[42] Some researchers have concluded that journalists from mainstream news outlets played major roles in promoting disinformation, in the 2016 US election advancing partisan interests. See Benkler, Y., R. Faris, and H. Roberts. *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics*. (Oxford University Press, 2018).

4.13. *Treatment of Private communications*. As discussed in paragraph 4.3 above above, DIGI recommends that the services in scope of the Bill should be limited to those types of services that host information at the user's request and disseminate it to the public ie making it available to a potentially unlimited number of persons at the user's request, and to services where there is a high risk of content becoming viral. Correspondingly most forms of private communications services that allow communications between a finite number of users should be out of scope of the Bill. The intention of the current drafting of the Bill in relation to private communications is very unclear e.g., the *Fact Sheet* indicates that the Bill is intended to exclude the ACMA from being able to access the content of private messaging, and will not require breaking of encryption. However, the way this is drafted and its potential impact on potential code obligations of providers is unclear; see sub-clause 34 which states that a code must not have a requirement that "relates to" the content of private messages or their encryption. Yet, all code measures arguably relate in some way to content so it is unclear how this is intended to be applied. We suggest that private messaging services akin to SMS or MMS or that do not have the scope of wide scale potential distribution (i.e. limited numbers of messaging recipients) to be a target of disinformation campaigns, should be clearly excluded from the Bill.

Specific recommendations

P. The "tiered approach" to defining the services in scope of this Bill has the potential to extend this regulatory scheme to an extremely broad range of services and leaves considerable discretion to the ACMA to determine which services/service categories will eventually be subject to codes/standards. *As a matter of principle, we think that the scope of services subject to the Bill should be clearly dealt with by parliament via the provisions of the Bill. To the extent decisions about the services subject to regulation are delegated to the ACMA the Bill should set out the relevant criteria that will be used to make such decisions.*

Q. To ensure low risk services are excluded from the regulatory scheme, the categories of services currently in scope of the Bill should be limited to those types of services that:

   a. host content at the user's request and disseminate such content to the public i.e making the content available to a potentially unlimited number of persons at the user's request
   b. enable widespread ease of distribution (virality) of content via public means.

R. The Bill be amended to create more specific proposed categories of services than the broad categories listed in sub-clause 30(2) so that codes/standards can be more readily developed for 'like' services.

S. The definition of 'content aggregation services' in scope of the Bill (sub-clause 4 (2)) should be amended so that it relates to services which have 'the primary function of creating a collection of content (excluding exempted content such as professional news) that the provider has sourced from multiple locations on the world wide web to enable users of the service to view the collection of content on the service in an aggregated format'.

T. If it is intended that search engines are in scope of the Bill, search engines should be treated as a separate service type as they have different primary function to content aggregation services. We recommend that an internet search engine service is defined as an electronic service that satisfies all the following conditions:

   a. the service is designed to collect, organise (index) and/or rank material on the world wide web;
   b. the service has the primary function of enabling end-users to search the service's index of material on the world wide web or relevant results in response to the end-user's queries; and
   c. the service returns search results in response to end-user queries.

U. The definition of 'connective media services' in scope of the Bill (sub-clause 4(3)) should be amended so that it only captures services where the primary function of the service is to enable online interaction between end-users via an interactive feature.

V. The definition of 'media sharing services' in scope of the Bill (sub-clause 4 (4)) should be amended so that only services that have an interactive feature fall within this category.

W. The Government should consider if the current self regulatory and co-regulatory codes that apply to providers of professional news online should be updated to address misinformation and disinformation.

X. The concept of 'excluded content' in clause 2 of the Bill as compared to 'excluded services' and the interaction of the two definitions should also be clarified. If a service is limited to providing excluded content the service should be treated as an excluded service and be out of scope of the Bill.

Y. The scope of the exemptions for private communications services should be clarified so that the Bill excludes all types of services that enable communication between a finite group of end users similar to the approach in the EU under the Digital Services Act. For example, communication services that are analogous to SMS and MMS services should be excluded from the scope of the Bill.

5. The exercise of the ACMA's regulatory powers

5.1. ***Key issue: There should be better incentives in the Bill to encourage a graduated approach of self-regulation, co-regulation, and standards as set out in the Guidance Note and clear articulation of the thresholds for the exercise of the ACMA's powers[43].***

[43] See *Guidance note*, 6.

5.2. There are various advantages and disadvantages of different regulator mechanisms for regulating disinformation and misinformation. A key benefit of a self-regulatory code such as the ACPDM is that it can be updated to address advances in threats and technology faster than legislation or a co-regulatory code. A self regulatory code requires constant efforts by signatories to meet their commitments, and to adapt their responses to emerging threats. It incentivises proactive, rather than reactive action in a rapidly changing environment. In contrast, the process for amending co-regulatory mechanisms and legislation is slower and more cumbersome which may make these mechanisms insufficiently flexible to adapt to the rapid environmental changes that characterise the digital information ecosystem.

5.3. *DIGI considers that it is important the ACMA does not take pre-emptive action to require codes and standards under the Bill, given the substantial progress made by the signatories of the ACPMD to date.*The DIGI-administered ACPDM is just over two years old, and in our view, industry has met its commitment to strengthen its measures and improve its approach to providing transparency concerning its efforts on an ongoing basis. In October 2021, DIGI put in place governance arrangements to strengthen the ACPDM and its effectiveness. DIGI appointed an independent complaints committee to resolve complaints about possible breaches by signatories of their code commitments, and created a portal on DIGI's website for the public to raise such complaints. We appointed an independent reviewer to fact check and attest all signatories' transparency reports prior to publication, who also developed best practice reporting guidelines to drive improvements and consistency in 2022 transparency reports.[44] In its June 2021 *Report to government on the adequacy of digital platforms disinformation and news quality measures*[45] (ACMA Report to Government), released in March 2022, the ACMA reviewed the ACPDM, finding that 'the code objectives and principles meet the government objective of striking a balance between encouraging platform interventions and protecting freedom of expression, privacy and other rights.

5.4. In June 2022, DIGI commenced a review of the code, which included close consideration of the ACMA's recommendations as well as submissions received as part of a public consultation process.[46] Some of the key changes DIGI made as part of the 2022 review of the code included:

a. encouraging greater participation in the code by smaller digital platforms, including by modifying the transparency reporting requirements for services with less than one million active monthly users in Australia.This acknowledged the likelihood for misleading content to proliferate elsewhere online as mainstream platforms strengthened approaches to tackling misleading content;

[44] DIGI (2023), *Governance,* https://digi.org.au/disinformation-code/governance/
[45] ACMA (21/03/2022), *Report to government on the adequacy of digital platforms' disinformation and news quality measures*, https://www.acma.gov.au/report-government-adequacy-digital-platforms-disinformation-and-news-quality-measures
[46] DIGI (2022), *Code Review,* https://digi.org.au/disinformation-code/code-review/

b. an updated definition of 'harm' in relation to mis and disinformation, addressing stakeholders' concerns that the threshold of 'serious and imminent' threat of harm was too high. The new threshold is 'serious and credible' threat of harm.
c. additional commitments reflecting updates to the strengthened EU Code of Practice in relation to recommender systems, and deterring advertisers from repeatedly placing digital advertisements that propagate mis- and disinformation;
d. there are also updates to further clarify that both sponsored content and paid for advertising are in scope of relevant commitments on demonetising mis- and disinformation;
e. retaining the pre-existing exclusion of professional news content from being treated as misinformation under the code, and the pre-existing obligation for signatories to address this content when it is being disseminated as disinformation; and
f. requiring greater transparency around the specific products and services that are within scope of the signatories' code commitments, through updates to the code, transparency reporting requirements and the DIGI website.

DIGI is currently working with signatories to the code to consider the assessment and recommendations made by the ACMA in its second report to the government concerning digital platforms' efforts under the ACPDM.[47]

5.5. The *Guidance Note* says that the Bill provides a 'graduated set of powers that allows the ACMA to act if voluntary efforts are inadequate[48]'. As drafted, the statement of parliamentary intention in clause 32 is that *industry should develop one or more codes (misinformation codes) that require participants in those sections of the digital platform industry to implement measures to prevent or respond to misinformation and disinformation on digital platform services.* This creates considerable uncertainty regarding the status of the ACPDM i.e. whether DIGI should apply to the ACMA for the current code to be registered or if it is intended that it be replaced. This should be addressed in clause 32.

5.6. The Bill as currently drafted would not prevent the ACMA from bypassing both self-regulatory codes and industry codes in order to make a standard under Division 5 of the Bill. The powers granted to the ACMA to make standards in clause 50 of the Bill for 'exceptional and urgent circumstances' should be removed because of the risk that they may be exercised to incentivise platforms to censor public communications about sensitive issues at times when open debate is critical. At a very minimum, there should be a clear definition of what types of circumstances constitute 'exceptional and urgent circumstances' (which as drafted is subjective and open to multiple interpretations). There should also be a sunset clause in the Bill that limits the time period for which such standards can be in force to the period in which the exceptional and urgent circumstances are extant.

[47] ACMA, *Digital platforms' efforts under the Australian Code of Practice on Disinformation and Misinformation Second report to government* (July 2023).
[48] Ibid

5.7. *The Bill fails to articulate clear preconditions that must be satisfied before the ACMA can exercise its code and standard making powers.* The *Guidance Note* provides that 'Where voluntary efforts provide inadequate protection and the ACMA is satisfied that it is necessary to address systemic issues in relation to misinformation or disinformation on digital platform services, the ACMA will be able to request the industry make a new code.[49] However, this is not reflected in sub-clause 38(3)(a) which lists the bases upon which the ACMA can request codes of a section of the industry including where it deems the development of the code is *necessary or convenient* in order to prevent or respond to misinformation or disinformation.

5.8. We recommend that sub-clause 38(3) should be amended so that the ACMA can only request a code where it has determined that an industry code is needed to address *systemic failure*s by a section of the industry to implement adequate measures to protect the community relation to *disinformation* (consistent with our Recommendation C that the ACMA's powers to request codes/make standards should be limited to disinformation).[50] Similarly, platforms within a section of the industry that are subject to a registered industry code should not be subject to a standard unless ACMA has determined that a standard is needed to address *systemic breaches by* those platforms concerning the implementation of measures under a code in relation to disinformation[51].

Specific recommendations

Z. The statement of parliamentary intent in clause 32 should be amended to make clear whether parliament intends that the signatories to the ACPDM should request that it be registered or that it should be replaced by a new code.

AA. The powers to make standards in section 50 of the Bill for 'exceptional and urgent circumstances' should be removed, or at least 'exceptional and urgent' circumstances should be defined clearly and any standards made in these circumstances subject to a sunset clause so that the standards do not remain in place longer than necessary .

BB. Consistent with the *Guidance Note*, the ACMA should only be empowered to request an industry code where it has determined that the code is needed to address systemic failures of a section of the industry to implement adequate measures to protect the community in relation to *disinformation* (consistent with our recommendation in C that the ACMA's code and standards making powers should be limited to disinformation).

CC. Platforms within a section of the industry subject to a registered industry code should not be subject to a standard unless the ACMA has determined that a standard is needed to address

[49] *Guidance Note*,5.

[50] Note: the governance arrangements for the ACPDM establish an independent complaints committee that has power to determine if a signatory has committed material breaches of the codes and systemic breaches.

[51] clause 48 of the Bill provides that the ACMA's power to make a standard is contingent on a code being assessed to be *totally deficient* in that it is not operating to adequately safeguard the community from misinformation or disinformation, on the services. We suggest this be amended so this is intended to apply to a systemic failure of the industry participants regulated by the code to implement the measures required under the code.

systemic breaches by those platforms concerning the implementation of measures under a code.

DD. DIGI requests further clarity about how the ACMA's powers to make standards for services in particular sections of the industry will apply where a service in that section is an ACPDM signatory and is complying with its commitments.

6. Powers of the ACMA to obtain information, request codes and make standards

6.1. ***Key Issue: In order to strengthen protections for free speech, the powers of the ACMA to obtain records and other information and require codes and make standards concerning misinformation and disinformation must be tied to a clear public purpose.***

6.2. The Bill gives the ACMA broad and open-ended power under Part 2, Division 2 to make rules that require digital platforms to keep and supply records and under Part 2, Division 3 to provide information about various matters including:

a. misinformation or disinformation on a service; measures implemented by the provider to prevent or respond to misinformation or disinformation on the service (including the effectiveness of the measures); and
b. the prevalence of content containing false, misleading or deceptive information provided on the service.

6.3. *The information gathering powers of the ACMA are too broad and onerous*.The Bill gives the ACMA broad powers to make rules that require record keeping and to obtain records and information from platforms (clauses 14, and 18) that enable the ACMA to initiate frequent and onerous requests for information, simply to satisfy an interest in learning more about the subject of mis and disinformation online. We consider these powers should only be exercised for a clearly defined public purpose, proportionate to the different level of harms posed by misinformation and disinformation. We suggest that this be for the purpose of determining if:

a. providers of platforms have implemented measures (systems and processes) that are adequate to protect the community from disinformation and misinformation on the service;
b. enabling the ACMA to publish information about the extent platforms have implemented measures (systems and processes) that are adequate to protect the community from disinformation and misinformation; and
c. In the case of disinformation, enabling the ACMA to determine if there is a need for industry codes or standards.

6.4. We further recommend that types of records and information that the ACMA may require be further specified in a way that is proportionate to the different level of harms posed by misinformation and disinformation. For example, in relation to disinformation the ACMA's powers could be limited to requiring platforms to keep records and provide information concerning the type and range of measures that digital platforms have in place to protect the community from disinformation and information about the impact of those measures.

6.5. We recommend that the cadence for demands by the ACMA on digital platforms for records, the time period for platforms to respond and the period for which records must be retained should be set out in the legislation.

6.6. *Platforms should not be required to collect and provide information about false, misleading or deceptive content on their services.* Clause 14(1)(e) and clause 18(2)(c)of the Bill give the ACMA broad powers to obtain records and collect information from an digital platforms concerning the prevalence of content containing false, misleading or deceptive information on the service (other than excluded content for misinformation purposes) i.e. any 'untrue content' on a service, regardless of whether it is harmful. It is highly problematic to give the ACMA powers that in effect require platforms to monitor the truthfulness of all the content that is provided on a platform. DIGI recommends that the references to the prevalence of false, misleading or deceptive content clause 14(1)(e) and clause 18(2)(c) should be replaced with the 'prevalence of misinformation and disinformation'.

6.7. Currently clauses 18 and 19 of the Bill enable the ACMA to obtain any type of information about 'dis and misinformation' on a digital platform from individuals and digital platforms. We recommend that the Bill be amended to provide stronger safeguards in Part 2 , Division 3 of the Bill for requests by the ACMA for information that is confidential or commercially sensitive. For example, there should be a process whereby a platform can identify that certain information is not publicly disclosed.

6.8. *Powers to gather information from any individual are excessive.* The information gathering powers afforded to the ACMA in clause 19 of the Bill extend to any Australian that may have information about mis- or disinformation on a service. These powers apply to individuals that have a key role in strengthening the information ecosystem: professional researchers, fact checkers, free-lance journalists, authors, and expert contributors to online publications. The first category are key partners in the fight against misinformation and disinformation under the ACPDM. DIGI is concerned that targeting these stakeholders may have an adverse impact on cooperation between platforms and these individuals, which we consider to be contrary to the aims of ACPDM. The latter category, alongside mainstream news, also plays a critical role in increasing the diversity of information sources in the Australian market. There is no clear rationale to subject an unlimited category of individuals to these powers. To the extent individuals fall within the scope of sections of the industry, they should be subject to the powers of the ACMA

concerning the relevant industry section. For example, a podcaster might be required to keep records concerning misinformation or based on risk indicators published in regulations, and may also be subject to a code or standard concerning disinformation. We therefore recommend that clause 19 be deleted.

6.9. The content of codes and standards should also be clearly limited to the purpose of ensuring platforms in scope of the legislation have measures in place that provide appropriate protections to the community from disinformation on their services. As stated in recommendation B and C , we consider that, at this time, misinformation should not be in scope of the powers to make codes and standards. The scope of codes and standards for disinformation should be further confined to a specific list of matters such as measures to reduce the spread of disinformation and not open-ended as currently drafted. Specifying the subject- matter of codes and standards will further safeguard legitimate freedom of expression.

6.10. We also recommend that the Government give further consideration to how the ACMA will determine that a code or standard is required. For example, we have recommended that under clause 38(a) the powers of the ACMA should be conditional on a determination that there has been a systemic failure by a section of the industry to implement adequate measures (systems and processes) to protect the community. Similarly, we have recommended that platforms that are subject to a registered industry code should not be subject to standard unless ACMA has determined that a standard is needed to address systemic breaches concerning the implementation of measures (systems and processes) under a code in relation to disinformation. The Bill should define 'systematic' failures or breaches or at least the considerations that the ACMA must take into account in determining whether there are systemic issues, for example, the frequency and severity of breaches over a given time-period.

Specific recommendations

EE. The power of the ACMA to make rules that require platforms to keep/provide records and the power to obtain additional information should be limited to the purpose of:

a. determining if providers of platforms have implemented measures (systems and processes) that are adequate to protect the community from disinformation and misinformation on the service;
b. enabling the ACMA to publish information about the extent platforms have implemented measures that are adequate to protect the community from disinformation and misinformation; and
c. in the case of disinformation, enabling the ACMA to determine if there is a need for industry codes or standards.

FF. The scope of the ACMA's powers in relation to requiring and obtaining records and information should be further limited to specific types of records and information, proportionate to the different level of harm posed by misinformation and disinformation.

GG. The cadence for demands by the ACMA on digital platforms for records, the time period for platforms to respond, and the period for which records must be retained should be set out in the legislation.

HH. The references to the prevalence of false, misleading or deceptive content in sub-clause 14(1)(e) and sub-clause 18(2)(c) should be replaced with the 'trends relating to misinformation and disinformation'. The scope of these clauses, as currently drafted, is highly problematic as in effect gives ACMA power to require platforms to monitor the truthfulness of all the content that is provided on a platform. In our view, this would be impossible for platforms to implement.

II. The open-ended powers of the ACMA to obtain additional information about misinformation and disinformation from individuals in clause 19 of the Bill are excessive and should be removed.

JJ. The content of codes and standards should be clearly limited to the purpose of ensuring services that are at risk of disseminating disinformation (in accordance with criteria set out in the legislation) have measures in place that provide appropriate protections for the community against disinformation on their services. As recommended in Q, the risk of virality/widespread ease of distribution of disinformation via public means should be a key marker of a service in scope of the Bill.

KK. The Government should give further consideration to specifying the criteria for 'systemic' failures, breaches or issues (as the case may be) that will trigger an exercise of the ACMA's powers to make a code or standard.

7. The process for making codes and standards

7.1. ***Key issue: The digital platforms in scope of this regulation are very diverse. Therefore, code making across an online industry section as defined in the Bill will be complex, time consuming and will also require extensive collaboration amongst industry participants.The Bill needs to ensure that the process for making codes and standards is fair and allows sufficient time for code and standards development.***

7.2. The need for adequate time to make codes for the online industry sections is reinforced by DIGI's experience co-leading the development of eight industry codes under the Online Safety Act 2021(Cth) which has taken more than 20 months since regulatory guidance was first released. As discussed in section 5 of this submission, the Bill should be amended to reflect the graduated approach to the exercise of the ACMAs powers and the

relationship between those powers i.e. codes and standards should in accordance with the intention in *Guidance Note* only be made where existing regulatory mechanisms have failed, informed by evidence.

7.3. The timelines in the Bill for making codes and standards are much too short to achieve appropriate and effective regulation in such a challenging policy space. It is not realistic to expect an industry section to make a code within 120 days.[52] Given the broad and very diverse sections of the industry that may be requested to make codes, we suggest that a minimum of 12 -24 months would be required for industry associations to develop a code, depending on the size of the industry section in scope and the number of codes under development at any given time. Drawing from DIGI's direct experience with code development for the digital industry, allowing more time allows for public consultation and other meaningful stakeholder engagement that yields better outcomes.

7.4. Further we consider that the 180 day timeline in which the ACMA can make a determination that a code has failed/partially failed under sub-clause 48(1) and 49(1) as a precondition to making a standard is insufficient and should be extended to at least 12-24 months.

7.5. The ACMA should be required to undertake public consultation prior to making an industry standard. This is consistent with the approach taken under the OSA (section 148) and the Telecommunications Act 1997 (section 132), which requires the eSafety Commission and the ACMA, respectively, to conduct public consultation of at least 30 days prior to making an industry standard. Given the implications for Australians freedom to communicate online and the substantial penalties for non-compliance, it is important that stakeholders have an opportunity to comment on a proposed standard. It is also not clear why industry associations developing an industry code should be required to publicly consult on a draft code (sub clause 37(1)(f)) while the ACMA is only required to consult with respective industry associations, and therefore their codes would not be subject to public consultation. This is critical given the public interest in this Bill.

Specific recommendations

LL. The Bill should provide for a minimum period of 12 -24 months for industry associations to develop a new code, depending on the size of the industry section in scope and the number of codes that the ACMA requests be developed concurrently.

MM. A minimum of 12-24 months should be allowed for a code to be in force before ACMA determines that a code has failed/partially failed under sub-clause 48(1) and 49(1) as a precondition to making a standard.

[52] Clause 38(2) of the Bill.

NN. The ACMA should be required to undertake public consultation prior to making an industry standard. This is critical when taking into account the public's interest in this Bill.

8. Transparency and accountability requirements

8.1. ***Key Issue: The ACMA's exercise of powers under the Bill should be subject to greater accountability to parliament and the public to strengthen the Bill's protection for freedom of speech. DIGI supports policy settings that encourage diversity and innovation in the digital information ecosystem. The Bill may limit many valuable sources of online information and may discourage media diversity and innovation in the Australian market***.

8.2. Given the broad scope of this Bill and its impact on lawful communications online across services which facilitate vital every day communications of Australians the exercise of the powers afforded to the ACMA needs to be subject to greater scrutiny by the public and legislature. While alleged misuses of these powers by the regulator could be challenged by larger platforms under judicial review this is a costly, uncertain and reactive process.

8.3. Further, diverse sources of online information are in scope of the Bill and may be treated as 'misinformation' including content created by freelance journalists, researchers, podcasters, and expert commentators for a range of other types of online publications that encourage public debate on social issues. This broad scope may discourage distribution of these materials to the Australian market. This reinforces the need to limit the scope of the powers of the ACMA to require codes or make standards to disinformation and for greater accountability measures regarding the ACMA's exercise of its powers. We suggest that the Government give further thought to ensuring the Bill provides the public and parliament with additional accountability and transparency measures which can give the public greater confidence in the implementation of the proposed regulatory scheme.

Specific recommendations

OO. Decisions by the ACMA concerning industry codes and standards should be conditional on the ACMA publishing reasons for its decision, substantiated by relevant evidence (e.g a decision to require a code/standard or deregister a code should be substantiated by evidence of systemic failures/breaches by platforms to safeguard the community from disinformation). The assessment should include an analysis of the records/information obtained from digital

platforms concerning the measures (systems and processes) that they have implemented to protect the community from disinformation.

PP. The registration of codes and the making of standards by the ACMA should also be subject to human rights impact assessments.

QQ. Rules and standards made by the ACMA under this legislation should be disallowable instruments.

RR. The Bill should make provision for a statutory review after 12 months to assess its impact on freedom of speech and communication, privacy, and other human rights.

9. Coordination between government agencies on industry codes

9.1. ***Key issue: There are a large number of legislative initiatives currently in train in different policy portfolios that contemplate potentially overlapping sets of industry codes or standards that apply to providers of online platforms, including codes concerning online safety, privacy and scams.***

9.2. We suggest that there is a need to ensure that regulators take consistent approaches to the development of these codes and standards and coordinate the timing to avoid a situation where multiple codes and standards are being developed at the same time. This is important, to maximise the engagement of the gamut of businesses impacted by codes or standards.

9.3. DIGI recommends that consideration be given to additional mechanisms for cross portfolio cooperation[53] to enable codes and standards for the industry to be developed under a more streamlined and consistent process, for example using a common framework or model definitions. We note that the industry found it useful to use a common set of Head Terms to enable the simultaneous development of eight Class 1 Content codes under the OSA.[54] Another initiative that is helpful in thinking about how the terminology for regulation of harmful online content can be made more consistent is the Digital Trust and Safety Partnership's recently published glossary of terms[55].

[53] Australian National University, Tech Policy Design Centre, *Cultivating Coordination Research Report* February 2023.
[54] Available at https://onlinesafety.org.au/codes/.
[55] Digital Trust & Safety Partnership, *Trust & Safety Glossary of Terms*, July 2023.

Specific recommendations

SS. The Government should consider if there is a need for additional structures to facilitate cross portfolio cooperation and to enable codes and standards for the online industry to be developed under a more streamlined process, for example using a common framework or model definitions.

10. Penalties

10.1. ***Key issue: As drafted, the threat of high penalties, the broad power of the ACMA to make standards, combined with the low bar for misinformation and disinformation, collectively incentivises platforms to take down speech that runs contrary to government or regulator positions e.g. issues of public concern like climate change policy.***

10.2. The Bill provides that any breach of a code or standard incurs a maximum of 10,000 penalty units ($2.75 million in 2023) or 2 percent of global turnover (whatever is greater) for corporations or 2,000 penalty units ($0.55 million in 2023) for individuals. The rationale for this high penalty is that it provides a clear signal that systemic non-compliance with obligations to prevent and respond to misinformation and disinformation is unacceptable and that platforms need to protect end-users.

10.3. The *Guidance Note* compares these penalties with the penalties in the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019.* However, this Act concerns *seriously illegal materials*, where the Bill concerns *lawful materials*. Further, as noted above the harms of disinformation and misinformation are of a different level of severity. The maximum penalties should be limited to systemic breaches concerning standards concerning disinformation and should not exceed 10,000 penalty units. The Bill should further define a 'systemic breach' by reference to the criteria by which such breach will be assessed, for example the frequency and severity of breaches during a defined period.Other breaches should be subject to lesser fines, comparable to those for beaches of codes/standards in the *Broadcasting Act 1992 (Cth)* .

10.4. The Bill makes platforms solely accountable for addressing misinformation and disinformation, while exempting third parties who market, sell or intentionally promote or coordinate disinformation campaigns from liability.[56] The Guardian reported in 2022 how 'for-profit' disinformation networks have seized on the popularity of conspiracy movements and far-right groups online, creating content aimed at anti-vaccine protesters

[56] See Josh A. Goldstein and Shelby Grossman, *How disinformation evolved in 2020* https://www.brookings.edu/articles/how-disinformation-evolved-in-2020/.

and QAnon followers[57].This should be addressed by the introduction of a provision in the legislation that makes the mass marketing, sale and promotion of disinformation campaigns illegal.

Specific recommendations

TT. Penalties under the Bill should be comparable to those in the *Broadcasting Act 1992 (Cth),* including for breaches of broadcast codes and standards. The maximum penalties under the Bill should be limited to systemic breaches of standards concerning disinformation and capped at 10,000 penalty units. The Bill should define a 'systemic breach' by reference to the criteria by which such breach will be assessed.

UU. The Bill should include a provision that makes the mass marketing or sale of disinformation campaigns a crime.

[57] 'Disinformation for profit: scammers cash in on conspiracy theories ' Guardian, 21 February 2022 https://www.theguardian.com/media/2022/feb/20/facebook-disinformation-ottawa-social-media.