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Department of Infrastructure, Transport, Regional Development, Communications and the Arts
Australian Government

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To Whom It May Concern

Submission on proposed new ACMA powers to combat misinformation and disinformation

I write to make a submission on the exposure draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Cth).

Generally, I support the enactment of the draft Bill. The following submission qualifies that general position with respect to issues identified in the draft Bill's Guidance Note on page 7.

In particular, I oppose the content exception for so-called 'professional news content', and so I oppose the current wording of the definitions of 'misinformation' and 'disinformation'.

The 'professional news content' exception

The exclusion of so-called 'professional news content' lacks a coherent basis. Some of the most pervasive examples of misinformation and disinformation in recent years have emerged from news organisations that would be characterised in terms of 'professional news content'.

I share the view of ACMA itself, as expressed in its 2021 *Report to government on the adequacy of digital platforms' disinformation and news quality measures* on page 56:¹

The ACMA acknowledges that professional news should be treated differently from other types of online content, as most news content is already covered by separate regulatory frameworks that promote accuracy and impartiality in reporting, and provide separate avenues for complaints handling. However, there is concern that news content that does not present a high risk of harm at the publisher level can sometimes present a higher risk once it is taken out of that context...

In the ACMA's view, the exclusion of professional news from misinformation is unnecessary. The outcomes-based model can accommodate the different treatment of professional news compared to other content, allowing platforms to apply different measures in consideration of the editorial standards and complaints processes that may already apply.

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<https://www.acma.gov.au/sites/default/files/2021-11/Adequacy%20of%20digital%20platforms%20disinformation%20and%20news%20quality%20measures.pdf>

The Guidance Note on page 11 overstates the significance of editorial independence as the criterion of content being 'professional news content'. A company may call itself a news organisation, and may purport to have editorial independence, while those editors nonetheless align the direction of the platform to the whim of the organisation's proprietors.

A prominent recent example is the approach of Fox News to its coverage of the US presidential election, and its criticism of Dominion Voting Systems.² The evidence that emerged from the Dominion case before it even came to trial casts serious doubt on the editorial independence of not only Fox, but other outposts of the News Corp empire.

My view of the draft Bill is that the content of organisations like Fox, and Australian counterparts, would be presumptively beyond the reach of the effect of this new regulation. That is unfortunate: such organisations are regularly responsible for not only misinformation (eg, sloppy journalism), but also disinformation (the deliberate dissemination of known lies).

An American case study

In the United States, the role of Fox News in propagating lies concerning Russia³ and the election defeat of former President Trump⁴ have had a corrosive effect on not just American democracy, but democratic institutions worldwide.⁵

It is notable that Fox News is part of a transnational corporate group, which itself controls a disproportionate share of the Australian market of so-called 'professional news content'.

An Australian case study

During the height of the COVID-19 pandemic, Sky News Australia published a swathe of misinformation concerning the public health response by Australian governments.⁶

More recently, Australian News Corp publications are driving the 'No' case for the referendum on a Voice in the Australian constitution.⁷ They are prioritising legal commentary that might (and should) be characterised as misinformation.⁸

The case for removal of the exception

The professional news content exception ought to be removed in its entirety, for seven reasons.

First, because misinformation and disinformation are often spread by professional news content.

Second, as ACMA acknowledges, because misinformation and disinformation may cause greater and more serious harm when they emanate from professional news content.

² See <https://www.washingtonpost.com/media/2023/03/10/fox-news-lawsuit-key-players/>; see also <https://www.afr.com/companies/media-and-marketing/who-is-on-the-block-for-fox-news-disaster-20230419-p5d1k3>.

³ <https://www.nytimes.com/2022/04/15/technology/russia-media-fox-news.html?smid=nytcore-android-share>.

⁴ See eg <https://www.nytimes.com/2023/02/27/business/media/fox-news-dominion-rupert-murdoch.html?smid=nytcore-android-share>.

⁵ See generally <https://www.theguardian.com/media/2023/may/19/fox-news-lawsuit-nina-jankowicz>.

⁶ <https://www.google.com/amp/s/amp.theguardian.com/media/2021/aug/10/sky-news-australia-deletes-dozens-of-videos-promoting-unproven-covid-treatments>.

⁷ <https://www.thesaturdaypaper.com.au/news/politics/2023/04/01/how-news-corp-framing-the-no-case>.

⁸ See <https://www.afr.com/companies/media-and-marketing/inside-news-corp-s-pitch-to-advertising-buyers-on-the-indigenous-voice-20230728-p5ds1i>.

Third, because removal of access to such content on social media and other digital platforms will be effective in reducing harm caused by malign professional news content. (See the discussion of digital channels by which traditional media content is disseminated in the *Digital Platforms Inquiry Final Report*).

Fourth, because taking this regulatory approach would not unjustifiably limit freedom of expression. News organisations would still be free to express themselves. Freedom from external constraints on expression should not be confused for freedom to disseminate information through certain channels.

Fifth, because the regulation would be constitutional. This proposition deserves its own detailed treatment but to put the matter succinctly: well-drafted regulation that limits dissemination of misinformation created by traditional media on digital platforms would be consistent with the High Court's approach to the implied freedom of political communication in the *Commonwealth Constitution*.

Sixth, because this approach would be more coherent than the proposed approach. Apart from the considerations mentioned above, it is notable that Australian law already responds negatively to misinformation and disinformation spread by professional news content. Examples include:

- misleading or deceptive conduct under section 18 of the Australian Consumer Law in *Competition and Consumer Act 2010* (Cth) schedule 2;
- the prohibition of offensive behaviour because of race, colour or national or ethnic origin under section 18C of the *Racial Discrimination Act 1975* (Cth), as demonstrated by *Eatock v Bolt* (2011) 197 FCR 261;
- the cause of action for defamation, which now requires an element of 'serious harm' in most of Australia;
- Australia's foreign interference laws; especially the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth).⁹

Seventh, and most importantly, because taking this step would safeguard Australian democracy, diverting power from foreign-based digital platforms and foreign-owned traditional media conglomerates into ACMA, a public institution ultimately accountable to the Australian public.

Thank you for your consideration.

Yours faithfully

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**Dr Michael Douglas is a Senior Lecturer at the University of Western Australia, where he teaches and researches media law (including privacy law and defamation law), and private international law, among other things. He is a Consultant at Bennett, a litigation firm with a specialisation in defamation and media law. Views are his own.*

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See https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/Briefing_Book46p/FakeNews.