Submission by Free TV Australia

Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023

August 2023

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1. Executive Summary

- Free TV appreciates this opportunity to provide a submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts in relation to the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (Bill).
- The Bill proposes to introduce a new Schedule 9 in the *Broadcasting Services Act 1992* (BSA), to regulate digital platform services and content, in each case, subject to limited exceptions. The proposed Schedule 9 provides information gathering powers to the Australian Communications and Media Authority (ACMA), together with code and standards making powers, to address online misinformation and disinformation. The policy intent is to regulate harmful end-user generated content that is not otherwise subject to any form of meaningful regulation.
- Free TV recognises the concerns expressed by the Government regarding the negative impacts that online misinformation and disinformation have. Nonetheless, Free TV and its members have significant concerns with the Bill in its current form.
- Free TV cautions the approach taken by the Government in the development of this Bill to ensure that it does not inadvertently limit free speech. As media companies, Free TV members wish to ensure that the industry is valued for the high quality, trusted content that it provides, while not suppressing the reasonable expression of ideas, beliefs and opinions in the wider community. In the capture of both mis- and disinformation, this Bill puts these freedoms at risk.
- In addition, Free TV is concerned that, as it is currently drafted, the proposed new Schedule 9 of the BSA would apply to certain online services of Free TV's members as well as to the content that Free TV's members make available to Australians through other online channels. Therefore, content will be treated differently, depending on how it is accessed by Australians.
- Free TV's members are subject to Australian law, including for example the Australian Consumer Law, in all of their activities. If Australian consumers or regulators have concerns with the content, whether it is programming content or advertising content, made available online by any Free TV member, whether or not on a service controlled by that Free TV member, complaints may be made to that Free TV member. If there is a potential breach of law arising from the actions of a Free TV member, regulatory or other legal action may be taken. A further layer of regulation through the proposed Schedule 9 is unnecessary.
- A further concern with the Bill is that it will require digital platform services providers, such as Meta, Twitter and TikTok, to determine what content of Free TV's members may be accessible through their platforms. In other words, those platforms would act as gatekeepers in determining what content of commercial free-to-air (FTA) television broadcasters may be viewed by Australians through the online channels that many Australians commonly use.
- As a consequence, applying the proposed Schedule 9 of the BSA to Free TV's members is not appropriate. The expansive scope is not required to address the policy objectives of the Bill in relation to online misinformation and disinformation.
- Free TV therefore strongly recommends that the proposed Schedule 9 should be limited to exclude not only all of the online services of Free TV's members, but all of the content made available by Free TV's members, even when this content appears on a regulated digital platform service.

- Free TV also supports some minor amendments to the definition of ‘news source’, ‘professional news content’ and ‘professional news content service’, and inclusion of professional content services as excluded services, combined with the broadcaster exclusion above, to ensure that the Bill appropriately excludes the range of regulated content services available to Australian audiences.

2. Introduction

2.1 About Free TV and Australia's commercial FTA TV broadcasters

Free TV is the peak industry body for Australia's commercial FTA TV broadcasters. We advance the interests of our members in national policy debates, position the industry for the future in technology and innovation and highlight the important contribution commercial FTA TV makes to Australia's culture and economy.

Australia's commercial FTA TV broadcasters create jobs, provide trusted local news, tell Australian stories, give Australians a voice and nurture Australian talent. A 2020 report by Deloitte Access Economics, *Everybody Gets It: The economic and social benefits of commercial television in Australia,* highlighted that, in 2019, the commercial TV industry supported 16,300 full-time equivalent jobs and contributed a total of $2.3 billion into the local economy. Further, advertising on commercial TV provided an additional $4.4 billion worth of economic benefit.

The industry's unique contribution to Australia's shared culture and civic life cannot and should not be understated. Collectively, our members spend around $1.5 billion every year on Australian content and broadcast more than 25,000 hours of local programming. More than 13 million Australians tune into commercial FTA TV every day to watch sports, local news and Australian content.

Free TV members are vital to telling Australian stories to Australians, across news, information and entertainment. FTA TV broadcasters understand and appreciate the cultural and social dividend that is delivered through the portrayal of the breadth and depth of Australian culture on television, and Australians prefer local stories. The 2020 Deloitte Access Economics report found that 95 percent of people think that losing commercial television would have an impact on society and 89 percent think commercial television is a valuable service. The report also found that during peak times, half of all TV viewers watch together with family or friends.

Additionally, research from C|T Group for Free TV in 2021 found that 67% of respondents considered that commercial FTA TV services are inherently egalitarian because they can be accessed by all Australians no matter where they live or how much they earn and 72% of respondents agreed that 'Free TV means I can enjoy television without straining my budget'.

2.2 Free TV safeguards for reliable news and information

For more than two-thirds of Australians, Australian broadcasters a trusted source of public interest journalism, which is essential to society and democracy. During the 2022 federal election, commercial broadcasters were rated as the most useful news source. These results do not come by chance.

The broadcasting activities of Free TV's members are regulated under the BSA, through the broadcasting licences that members must hold, and the Commercial Television Industry Code of Practice. It should also be remembered that commercial FTA TV broadcasters, in providing their services and content, including advertising content, to Australians, whether by broadcast and made available online, or only made available online, must comply with generally applicable laws – including for example the Australian Consumer Law and defamation laws.

3. Application of the Bill to Free TV members

3.1 No policy rationale for FTA commercial TV broadcaster services or content to be subject to proposed regime

The policy intention of the Bill is to provide powers to the ACMA to combat online misinformation and disinformation. It is intended to regulate the end-user generated content that is posted on digital platform services such as Facebook, Twitter and TikTok. This end-user generated content, which is often distributed by unknown entities, is not currently appropriately regulated. It is very difficult for third parties, such as Australian regulators, to track this content and also it is very difficult, if not impossible, for third parties to determine the identity of the entities behind that content.

The Bill would incorporate a new Schedule 9 in the BSA to give effect to this policy intention. The proposed Schedule 9 provides that broadcasting services – and the content provided on broadcasting services – is exempt from the new regime. However, as discussed below, online services provided by Free TV's members, and the content made available through those services (which in many cases is the same content that is broadcast), may nonetheless be subject to Schedule 9. This is inconsistent with the policy intent of the Bill.

The online services of Free TV's members, and the content provided on them, are not the types of services and content that spread misinformation or disinformation. Free TV's members stand behind these online services, and that content, and are regulated by a broad range of laws in relation to these services, even though such services are not regulated broadcasting services. The audiences of Free TV members may easily contact broadcasters to make complaints about online services and content. Individuals and regulators such as the Australian Competition and Consumer Commission (ACCC) may take action if content on these online services is considered to breach any existing law, for example, if it is considered to be misleading and deceptive.

As Free TV's members, and the content they make available online, are already appropriately regulated under Australian laws, there is no reason to add another layer of regulation, particularly when this would mean, as discussed in greater detail below, that such content will be treated differently depending on how it is accessed by Australians. In addition, where the online content of Free TV members is regulated under the proposed Schedule 9, digital platform service providers will be the arbitrators of whether that content constitutes misinformation or disinformation.

Substantial changes should be made to the scope of the Bill to exclude both the online services *and* content made available by Free TV's members from the proposed new regime.

3.2 Broadcaster services likely to be regulated digital platform services

Definitions are key in determining both the services and content to which the proposed Schedule 9 would apply.

In short, the proposed Schedule 9 will apply to:

(a) services that are "***digital platform services***". Digital platform services are a subset of "***digital services***". The only circumstances in which a digital platform service will not be regulated is if it is an "***excluded service for misinformation purposes***"; and

(b) "***content***", which is very broadly defined to include any type of content, other than "***excluded content for misinformation purposes***".

The proposed section 3 provides that (subject to additional requirements and exclusions not currently relevant) a digital service is a "service" that:

(a) delivers content to persons having equipment appropriate for receiving that content, where the delivery of the service is by means of an internet carriage service; or

(b) allows end-users to access content using an internet carriage service.

The term "service" is a critical element of the definition of digital service in the Bill and therefore also the definition of digital platform service. Notwithstanding how critical this term is, service is not defined. Instead, the proposed section 2 provides that service "*includes*" a website. No guidance is given as to what else it might include.

Proposed section 4 provides that a digital service will be a digital platform service if it falls within one of four listed categories. Of most relevance here is the "media sharing services" category. Media sharing services include those with the primary function of providing audio-visual content to end-users (and which meet any other conditions set out in the ACMA's rules, though no rules currently appear to be contemplated). Given the definition of media sharing services, all digital services provided by any of Free TV's members would be digital platform services.

The inclusion of FTA broadcasters' online services as digital platform services contrasts to, for example, the treatment of the online services of another type of media company, broadly falling under the category of print media. Traditional media companies such as, say, Australian Community Media (ACM), which have primarily text based content on their websites and other online services, and even "new media" companies that have websites and other online services that are primarily text based (such as, say, Crikey), while they would be digital services would not be within the category of media sharing services and therefore would not be digital platform services. It is unclear why these two types of services are treated differently.

In addition, the scope of the term "service" creates confusion as to what online "services" of Free TV's members would be considered to be digital services and, accordingly, digital platform services. Looking at the online services that Free TV's members may offer, it is clear that a broadcaster video on demand (BVOD) service, or a website of one of our members, would be both a digital service and a digital platform service. But this issue is not clear cut when other types of online services are considered, given that service is undefined and also the breadth of the definition of digital service, which is highlighted as a key feature of the Bill in the Guidance Note.

To take one example, given the general law meaning of "service", and the broad scope of the definition of digital service in the Bill, the conclusion would seem to inevitably be reached that not only would YouTube be a digital service and digital platform service, but also each separate channel, such as a channel of a commercial FTA TV broadcaster on YouTube, would be likely to be a digital service and accordingly a digital platform service. This is because each separate channel, of itself, would fall within the general ordinary meaning of the word "service" and delivers content to end-users using the internet (i.e., is a digital service as defined in the Bill).

The same argument could apply to, for example, a social media platform such as Facebook where a number of broadcasters have one or more accounts through which users may access the content of the relevant broadcaster. Again, it seems that the conclusion must be reached that each separate account would be a "service" that delivers content to end-users using the internet. This would mean that both the social media platform *and* the separate account would be both a digital service and a digital platform service.

As a result, all of these different types of online services made available by certain Free TV members, that is, BVOD services, websites and separate services (such as channels or accounts) on the platforms of third parties, will be regulated services under the proposed Schedule 9 of the BSA, unless an exclusion applies. Therefore, it is also necessary to look at the exclusions from regulation that are provided in the Bill. As noted above, the key provisions of the proposed Schedule 9, being Parts 2 and 3, will not apply where a relevant service is an excluded service for misinformation purposes.

As relevant here, an excluded service for misinformation purposes is a "media sharing service that does not have an interactive feature". An "interactive feature" of a digital service is a feature that provides for any one or more of the following:

(a) end-users may post content;

(b) end-users may share content from the digital service with other end-users of the digital service; and

(c) interactions between end-users or interactions by end-users with content provided on the digital service are observable to other end-users.

The Guidance Note states that this exemption is intended to exclude BVOD services from Parts 2 and 3 of the proposed Schedule 9. Whether any website of a broadcaster would also be an exempt service is likely to be determined by whether or not that website allows even the most innocuous form of a "like" comment or similar to be made by viewers, as that would be an interactive feature. Even in cases where text comments may be made in relation to audio-visual content on such services, such comments are not misinformation or disinformation of the type that the Bill should be seeking to regulate. Such comments are by their nature not authoritative and are very clearly the opinions or comments of audience members who have viewed the relevant audio-visual content. Accordingly, this type of interaction with content should not be sufficient to bring the digital services of Free TV members within the scope of the regime.

While BVOD services do not have interactive features and at least some broadcasters' websites may not have interactive features, most, if not all, of the other online services of Free TV's members would be likely to have one or more interactive features. Those other services will therefore be regulated under the proposed Schedule 9.

Take for example the Facebook account of a commercial FTA TV broadcaster. For those Free TV members that provide online services, having a Facebook account is important as this is one of the many different ways Australians access the content of Australia's commercial FTA TV broadcasters. Each Facebook account would have interactive features. This is because, on Facebook:

(a) end-users may post content;

(b) end-users may share content from Facebook with other Facebook end-users; and

(c) interactions between users of Facebook, or interactions by users of Facebook with content provided on Facebook, is observable to other users of Facebook.

Accordingly, in considering which online services of Free TV's members may be regulated by the proposed new regime, the following conclusions are reached:

(a) terrestrial broadcasting services are excluded, because these are not digital services;

(b) BVOD services and potentially some websites made available by Free TV members are excluded on the basis that while these are digital services and digital platform services these are excluded services for misinformation purposes;

(c) websites of Free TV's members which have even the most innocuous interactive functions such as the potential for users to "like" content will be regulated services; and

(d) the services of Free TV's members on the platforms of others will be regulated services.

As can therefore be seen, the different treatment of different services also means that services that provide *the same content* may either be within, or excluded, from the proposed Schedule 9 regime. It is assumed that such inconsistent treatment cannot be the intention of the Government in proposing the regime.

This outcome also does not reflect the policy intention of the Bill. The content that is made available by our members online is not the type of content that is intended to be regulated by the proposed new regime. This is acknowledged even in the ACMA's own guidance on this topic. For example, that guidance recognises that not knowing the source of content is particularly problematic. The ACMA suggests, as one of the quick ways to determine whether content is misinformation or disinformation, to:

> ***Check the source**. Does the story come from a credible website or a verified account? Check if other credible sources are covering the story.*[1]

All of the online sites that Free TV members provide, whether these are "stand alone" BVOD services or websites or pages or channels on third party platforms, are credible sites and should be excluded from the proposed Schedule 9 regime.

3.3 Broadcaster content will be regulated content

Leaving aside the question of whether any digital service provided by a broadcaster is a regulated service, there is also a separate question of whether the content that broadcasters make available online is regulated content for the purposes of the Bill. This is an important issue because – as discussed below – regulated content will be subject to the proposed Schedule when it is shared from a digital service (irrespective of whether that initial digital service is itself a regulated digital platform service) to a separate regulated digital platform service. Examples of this would be where an audio-visual news clip was shared by a user on Facebook from the website of the relevant broadcaster.

For the purposes of this discussion, it is helpful to look at the proposed Schedule 9 of the BSA in more detail. Under the proposed Schedule 9:

(a) Part 2 would require providers of regulated digital platform services (that is, digital platform providers) to comply with record keeping rules determined by the ACMA and also would require those providers, and others, to provide information to the ACMA. The record keeping rules, and the information gathering powers, relate broadly to content that may be misinformation and disinformation; and

[1] See: https://www.acma.gov.au/online-misinformation

(b) Part 3 allows for the implementation of codes and the imposition of standards relating in each case to digital platform providers in sectors of the digital platform industry relating to content that may be misinformation and disinformation.

Misinformation and disinformation is content that meets certain thresholds. As applies in the case of digital platform services, there are certain types of content that is excluded from regulation. This is "excluded content for misinformation purposes". As relevant to broadcasters, the exclusions are:

(a) content produced in good faith for the purposes of entertainment, parody or satire; and

(b) professional news content.

With regard to the first category of excluded content, "good faith" is not defined. No information is provided in the Guidance Note as to what it might mean. While "good faith" is used in (a very few) other contexts in the BSA, it is not used in the context of the production of content. Therefore, it is impossible to say what interpretation should be given to that term.

"Entertainment, parody or satire" are also very limited categories. To take just one example, educational programs produced by one of Free TV members would not fall within these categories (and would not necessarily be within the second category of professional news content either).

The second category of excluded content, that is, professional news content, is defined on broadly similar terms as "core news content", as used in the mandatory news media bargaining code provisions of Part IVBA of the Competition and Consumer Act 2010 (CCA). In summary, it is news content produced by a news source which is subject to some form of journalism rules where the news source has editorial independence. Free TV and its members commented extensively on the difficulties with that definition as part of the stakeholder consultation regarding Part IVBA of the CCA. Those difficulties remain with the definition of professional news content in the Bill.

One simple example demonstrates this issue. Take a TV morning breakfast show. It contains both news bulletins and other content. If a segment of that show is watched by a viewer on a regulated digital platform service such as Facebook, that segment is prima facie subject to Schedule 9 because Facebook, and likely also the separate Facebook account of the broadcaster on which the segment is viewed, are not excluded services. Therefore, it will be necessary to establish that the segment itself is "news content" produced by a "news source" in order for the professional news content exemption to apply.

Considering the definition of professional news content, presumably it is intended that the FTA broadcaster is the "news source", on the basis that it is a "television program or channel" that "produces and publishes online" news content, but only the specific items on the program that are produced by the broadcaster and that constitute "news content" will have the benefit of the exemption. If the segment viewed is not a news bulletin, it will be necessary to establish instead that it has been produced in "good faith" for entertainment purposes in order for the segment to qualify as excluded content for misinformation purposes.

Another obvious problem with the definition of professional news content is that it relates only to news content produced *by* a news source. Keeping with the example of a segment from a TV breakfast show viewed on a Facebook account, if that segment was a news story produced by an independent production company that was not subject to a journalism regime of the type referred to the definition of professional news content, that segment would not be professional news content. It would therefore, again, be necessary to establish that the segment was content produced in "good faith" for the purposes of entertainment, parody or satire for it to be excluded content.

The above outcome is not appropriate, given that the breakfast program is made available by a commercial FTA TV broadcaster and would not be regulated under Schedule 9 at all when broadcast. There is simply no reason to impose this additional layer of regulation on Free TV's members. Our members are already subject to appropriate regulation. As mentioned, if any consumers have any concerns with the online content made available by any of our members, they are able to easily contact our members to raise those concerns. The same applies to regulators. Additional steps may be taken if the content potentially breaches any law.

In addition to the problems regarding the scope of the content exclusions set out above there is a more significant and fundamental problem with the definition of excluded content for misinformation purposes. This relates to the question of which entity actually makes the determination as to whether or not content is excluded content.

Keeping with the example of a segment from a TV breakfast show on Facebook, it would be Meta that would make the determination as to whether or not that content was excluded content or potentially could be seen as misinformation or disinformation. Even where the accounts that our members have on Facebook are determined to be separate digital platform services, as we have argued above, it would remain the case that Facebook itself would be a digital platform service and Meta would need to determine whether *any* of the content of our members made available on Facebook was either excluded content or potentially regulated for the purposes of complying with its obligations under the proposed Part 2 or any code or standard that may be put in place under the proposed Part 3.

This problem is even more apparent when content aggregation services are considered. Content aggregation services are defined in the Bill as those which have the primary function of collating and presenting to end-users content from a range of online sources. Content aggregation services are regulated digital platform services – there is no category of such services that is exempt. Google News would be an example of a content aggregation service. This would mean that Google would be required, in order to comply with its obligations under the proposed Schedule 9, to make a determination as to whether or not the content of our members was excluded content (and, if not, whether it was misinformation or disinformation) before making it accessible to end-users through Google News.

These examples demonstrate very clearly that digital service providers, whether it is Facebook, Google, TikTok or others, will truly be gatekeepers of the content of Free TV members that is made available online if the Bill remains in its current form. Their decision-making processes will be opaque and unable to be scrutinised by Free TV members. Their processes may result in content that is able to be broadcast by our members, in full compliance with all laws, being banned from different online platforms. It is assumed that this outcome cannot be the intention of the Bill.

3.4 Content is regulated even if it is excluded content

The Guidance Note states that the proposed Parts 2 and 3 of Schedule 9 do not apply to excluded content for misinformation purposes. This is not correct. The proposed sections 13 and 29 provide only that Parts 2 and 3 respectively do not apply to an excluded service for misinformation purposes.

To take some examples:

(a) the proposed section 14(1)(e), which is in Part 2 of the proposed Schedule 9, allows the ACMA to make digital platform rules to require digital platform providers to make and retain records relating to (emphasis added) "the prevalence of content containing false, misleading or

deceptive information provided on the service ***(other than excluded content for misinformation purposes)***". The Guidance Note states that this power to make rules regarding other types of content is required to allow the ACMA to make "complete assessments". It is recommended that this provision is deleted as it is not necessary to enable assessments of the prevalence of misinformation and disinformation on digital platform services; and

(b) the proposed Part 3 provides for codes and standards that apply to digital platform services that are not excluded services for misinformation purposes. It is irrelevant, in determining the application of that proposed Part, whether all or any part of the content on the relevant digital platform service is excluded content for misinformation purposes. In other words, a code or standard may still apply to a service even if all of the content on that service is excluded content for misinformation purposes. There are many elements of, for example, a code that a provider of such a service would still need to comply with even if no misinformation or disinformation could appear on the service, such as fact checking requirements (see proposed section 33(3)(f)) and the requirement to provide information to end-users about the source of political or issues-based advertising, notwithstanding the other laws that regulate this type of advertising (see proposed section 33(3)(h)).

The above examples demonstrate that Parts 2 and 3 may regulate services that do not make content that could be misinformation or disinformation available and also content that is neither misinformation nor disinformation. This is not an appropriate regulatory outcome and is not consistent with the policy objectives of the Bill.

3.5 Suggested resolution

The only resolution that is feasible to address the significant issues that are outlined above is to exempt all FTA TV broadcaster services and all FTA TV broadcaster content from the regime, in an objective and transparent manner that leaves no ability for digital platform providers to make any decisions as to whether or not Australians are able to access those services or content.

This could be achieved by amending the Bill in the manner set out below.

To give effect to the exclusions set out above would require the definition of digital service in the proposed section 3 of Schedule 9 to be amended as follows (proposed changes marked up):

*For the purposes of this Schedule, a **digital service** is a service that:*

(a) delivers content to persons having equipment appropriate for receiving that content, where the delivery of the service is by means of an internet carriage service; or

(b) allows end-users to access content using an internet carriage service;

where:

(c) the service is provided to the public (whether on payment of a fee or otherwise); and

(d) any of the content accessible using the service, or delivered by the service, is accessible to, or delivered to, one or more end-users in Australia;

but does not include a service to the extent to which it is:

(e) ~~a broadcasting service~~an Excluded Broadcaster Service; or

(f) a datacasting service.

The definition of excluded content for misinformation purposes would also require amendment as follows (proposed changes marked up):

excluded content for misinformation purposes *means any of the following:*

(a) content that is available on an Excluded Broadcaster Service, irrespective of whether it is accessed from that Excluded Broadcaster Service or from any other digital service;

(b) content produced in good faith for the purposes of entertainment, parody or satire;

(~~b~~c) professional news content;

(~~c~~d) content produced by or for an educational institution accredited by any of the following:

(i) the Commonwealth;

(ii) a State;

(iii) a Territory;

(iv) a body recognised by the Commonwealth, a State or a Territory as an accreditor of educational institutions;

(~~d~~e) content produced by or for an educational institution accredited:

(i) by a foreign government or a body recognised by a foreign government as an accreditor of educational institutions; and

(ii) to substantially equivalent standards as a comparable Australian educational institution;

(~~e~~f) content that is authorised by:

(i) the Commonwealth; or

(ii) a State; or

(iii) a Territory; or

(iv) a local government.

The following definitions would also be incorporated in section 3 of the proposed Schedule 9:

- **Broadcaster** means the holder of a commercial television broadcasting licence, the Australian Broadcasting Corporation or the Special Broadcasting Service Corporation.
- **Excluded Broadcaster Service** means a free service delivered by or on behalf of a Broadcaster, or a related body corporate of a Broadcaster, including a free service that is part of or accessed through another service (including an online channel or social media account), that:

  (a) delivers content to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, internet carriage service, satellite or any other means or a combination of those means; and

  (b) without limiting paragraph (a) of this definition, delivers, whether by radiofrequency spectrum, cable, optical fibre, internet carriage service, satellite or any other means or a combination of those means, content on a point-to-point or point-to-multipoint basis.

- **Related body corporate** has the meaning given to that term in the *Corporations Act 2001* (Cth)

3.6 Support for wider industry exclusion

In addition, Free TV would support a wider definition which results in the exclusion of professional content published by the media industry, as suggested in submissions of our industry colleagues. This definition amendment (including consequential amendments throughout the Bill), and inclusion of professional content services as excluded services, combined with the broadcaster exclusion above, will ensure that valued, trusted content, produced by professional sources, is not inadvertently caught by this Bill.

2 Definitions

In this Schedule:

news source means any of the following, if it ~~produces, and~~ publishes online, news content:

(a) a newspaper masthead;
(b) a magazine;
(c) a television program or channel;
(d) a radio program or channel;
(e) a website or part of a website;
(f) a program of audio or video content designed to be distributed over the internet.

professional ~~news~~ content means ~~news~~ content (whether or not the content is news content) ~~produced~~ published by a news source who, in respect of that published content:

(a) is subject to any of the following:
  (i) the rules of the Australian Press Council Standards of Practice or the Independent Media Council Code of Conduct;
  (ii) the rules of the Commercial Television Industry Code of Practice, the Commercial Radio Code of Practice or the Subscription Broadcast Television Codes of Practice;
  (iii) rules of a code of practice mentioned in paragraph 8(1)(e) of the *Australian Broadcasting Corporation Act 1983* or paragraph 10(1)(j) of the *Special Broadcasting Service Act 1991*;
  (iv) rules or internal editorial standards that are analogous to the rules mentioned in subparagraph (i), (ii) or (iii) to the extent that they relate to the provision of quality journalism;
  (v) rules specified for the purposes of this paragraph in the digital platform rules; and
(b) has editorial independence from the subjects of the news source's ~~news coverage~~content;

and includes derivative content and such content as republished by a digital service provider that is not a news source.

professional ~~news~~ content service means the publication by a news source of professional ~~news~~ content.

6 Excluded services for misinformation purposes

(1) For the purposes of this Schedule, the following services are ***excluded services for misinformation purposes***:
  (a) an email service;
  (b) a media sharing service that does not have an interactive feature;
  (c) a professional ~~news~~ content service;
  (de) a digital platform service specified by the Minister in an instrument under subclause (2).

4. Other comments

The comments in this section generally apply only in the event that the proposed amendments to exclude all FTA TV broadcaster services and content from the proposed Schedule 9 are not adopted.

4.1 Definition of harm

The elements dealt with in the proposed definition of 'harm' are largely dealt with in other legislation (vilification, foreign interference, terrorism). Free TV members have raised concerns that the proposed drafting sets a threshold that is far too low, and will have the unintended effect of restricting freedom of expression on government and political matters, and has the potential for misuse to restrict debate on topics related to health, the environment and the economy. The concept of 'harm' should be a high threshold (eg. 'serious harm') and should be limited to issues of public safety and attempts to undermine the effective operation of democratic processes.

4.2 Duplicative powers

The ACMA has information gathering powers under Part 13 of the BSA that apply to Free TV members and their broadcast content. As is made clear in the Bill, the proposed new Part 2 of Schedule 9 is intended to apply in addition to Part 13 of the BSA. It is unreasonable that the ACMA should have powers under both the proposed Part 2 and the existing Part 13 in relation to Free TV's members and their broadcast content simply because that content is also made available online. Accordingly, the proposed Part 2 of Schedule 9 should not be capable of applying where Part 13 of the BSA applies.

4.3 Self-incrimination and protection of sources

There are two other important issues that require remedy in the proposed Part 2 of Schedule 9:

(a) *Self-incrimination*

Proposed section 21 of Schedule 9 expressly provides that an individual is not excused from giving information or evidence or producing a document on the basis that it might incriminate them.

The first reason given for this approach in the Guidance Note is that proposed section 21 applies only to individual natural persons who own and operate a digital platform service and the "vast majority of providers of digital platform services are body corporates, which have no privilege against self-incrimination" (page 16). Section 21 is not qualified to apply only to such a category of individual natural persons. Individuals who are engaged by a digital platform provider may be required to give evidence under the proposed Part 2 (see proposed section 18(3)(e)). Further, the ACMA may obtain information, documents and evidence from other individuals under the proposed section 19(3). This means that each of those categories of individuals, who would otherwise be entitled to this privilege, may be compelled to provide information, documents and evidence even if it incriminates them.

The second reason given is that the policy intent of the Bill overrides an individual's rights against self-incrimination. It is not agreed that this is the case. In the context of the BSA more broadly, it is clear that this very important individual right has greater weight than the policy objective of ensuring comprehensive investigations of compliance with the BSA are able to be undertaken under Part 13. Part 13 appropriately protects the entitlement of individuals not to provide information or give

evidence if it would tend to incriminate them. The same approach should be taken in the proposed Schedule 9.

The proposed section 21 should accordingly be amended to provide rights to individuals to refuse to provide information, documents or evidence if it would tend to incriminate them.

(b) *Protection of sources*

Part 13 of the BSA enables journalists to protect their sources, in other words, a person who is a journalist cannot be compelled under Part 13 to reveal their sources. There is no equivalent exemption in the proposed Part 2 of Schedule 9.

While the proposed Bill is not intended to apply to professional news content it is not clear, as the Bill stands, that the ACMA would not be able to use its powers under the proposed Part 2 of Schedule 9 to, for example, question whether particular content does in fact constitute professional news content. Therefore, there may well be cases where the ACMA may seek to determine the sources of a journalist. Schedule 9 should not be capable of having this effect and an exclusion on the terms of sections 202(4) and 202(5) of the BSA is required to be included in the proposed Part 2 of Schedule 9.

4.4 Scope of the ACMA's rule making powers

The rule making powers given to the ACMA under the proposed Schedule 9 are very broad. For example:

(a) the proposed section 14(1)(a) enables the ACMA to determine what digital platform services will be subject to the ACMA's record making rules and there are no parameters specified for how the ACMA may make such a determination; and

(b) the definitions of content aggregation service, connective media service and media sharing service (being categories of digital platform services) may be adjusted by the rules made by the ACMA, though again there is no parameters specified for what rules may be made by the ACMA in this regard.

It is recommended that strict parameters are established for when the ACMA can exercise its very broad rule making power under the proposed Schedule 9.

In addition, the proposed section 64 of the Bill gives the ACMA power to make rules to, amongst other matters, prescribe matters "necessary or convenient to be prescribed for carrying out or giving effect" to the proposed Schedule 9. No reasons are given in the Guidance Note as to why such a broad and discretionary rule making power is required by the ACMA. The proposed section 64 should be amended so that the ACMA may only make those rules which it is expressly required to make in accordance with Schedule 9.