[redacted]

23 August 2023

The Secretary
Information Integrity Section
Department of Infrastructure, Transport, Regional Development, Communications and The Arts
GPO Box 2154
CANBERRA ACT 2601

Dear Secretary

RE: COMMUNICATIONS LEGISLATION AMENDMENT (COMBATTING MISINFORMATION AND DISINFORMATION) EXPOSURE DRAFT

Further to a request from the Department named above to make submissions with respect to the above legislative proposal, I am forwarding a hard copy printed version to you. I have previously sent an emailed document regarding this matter to your section on Saturday 19 August 2023. There may potentially be difficulties in how the word file I emailed formats itself when it arrives at your office, potentially making it difficult to read or unreadable. I believe this issue will be resolved by sending a printed paper copy to you.

Please let me know if you wish to discuss anything further.

Thank you.

Yours Sincerely

[redacted]

SUBMISSION INTO COMMUNICATIONS LEGISLATION AMENDMENT (COMBATTING MISINFORMATION AND DISINFORMATION) BILL 2023

NAME OF SUBMITTOR: [redacted]

DATE OF SUBMISSION: 19 AUGUST 2023

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OVERVIEW

Australians would be justified to be concerned about the Federal Government's intrusions into the private lives of individuals and their rights to free speech and expression. These rights ought to be natural and inalienable to our people. The Government itself, and through affiliated agencies like the Australian Communications and Media Authority, ("ACMA"), need to exhibit an honesty and integrity that warrants the substantial powers they are given over the community.

A question needs to be determined as to whether the Government and its parliamentary allies always discharge their requirements to be honest, transparent and accountable to our nation. Many would argue this did not occur when the Australian Parliament recently blocked proposed enquiries by concerned politicians. They acted honourably and in the national interests of their constituents, by seeking answers about post COVID-19 rates of excess deaths in this country at the same rate experienced in Australia during World War II and greater than at the height of the pandemic ,(Above Top Secret; " Australian Senate Votes Against Looking Into Excess Deaths", 24 May 2023). This was coupled with Prime Minster Albanese's ongoing failure to establish some form of enquiry into Australia's response to COVID-19 promised in January 2022. (Editorial; "Albanese Cannot Keep Running From COVID-19 Inquiry Promise", Sydney Morning Herald, 14 June 2023).

The COVID-19 pandemic caused major disruption to the fabric of Australia economically and socially and resulted in major health impacts, including psychologically, to the populace. Mr Albanese has been fond of saying "if not now, when" in relation to the upcoming Aboriginal and Torres Islander Voice to Parliament referendum proposal (Payne S. et al; "Prime Minister Proposes Draft Referendum Question On Indigenous Voice To Parliament- As It Happened", ABC News, 30 July 2022) . Respectfully, with even greater importance such a notion ought to apply to a Royal Commission or some form of enquiry into Australia's responses to the COVID-19 pandemic. Are these examples of a desire by Parliament to suppress the public knowing the truth behind certain national issues which could by association extend to ensuring people do not read on digital platform services, information the Government, and even the broader Parliament, does not wish the populace to see or know?

The proposed Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023, ("The Bill"), would appear to be aimed at not only blocking the public's right to know what the Federal Government wishes to keep from them, it allows them as well as State and Territory and Local Governments, the mass media and educational entities to be exempt from scrutiny for their misinformation and disinformation (The Bill Clause 2). Unwarranted impediments to open dialogue amongst Australian citizens should rightly be viewed as an impingement and affront to our nation's democratic principles.

Media lawyer Justin Quill has stated, truth ought to prevail through the open contest of ideas and things develop over time. Things that people think were absolutely not true at one point may subsequently be shown to be so and vica versa. Views need to develop and not be set in stone, and this development occurs through people putting across views that are then debated, (Hannaford, P.; "Albanese Government's Draft Information Laws Denounced As The 'Worst Piece of Legislation For Free Speech' ", Sky News Australia, 30 June 2023). These principles ought to apply to views expressed on digital platform services and those using them need to be afforded the freedom to determine what they will believe and not believe as long as this causes no legitimate "serious harm" to others.

The difficulty lies in the potential for this principle to be abused as the definition of serious harm in The Bill is not clearly indicated. Whilst harm is defined in Clause 2 and provides a list of items which could be considered harm, what will be the criteria to determine what these and possibly other factors constituting serious harm as indicated in Clause 7 of The Bill might be? How will the possibly faceless decision makers determine what took a situation from harm to serious harm and will they release information in relation to the arguments that lead them to determine the relevant details were likely to cause serious harm? What ability will those impacted by the decisions of ACMA have to appeal on line take downs on the basis of what was determined serious harm? Kneejerk reactions and a failure to use transparency and objectivity by those determining serious harm constituting misinformation and disinformation on digital platforms has the potential to have far reaching consequences for the freedom of speech and expression of regular Australian people.

On the surface wrongly, the proposed Bill does not appear to suggest any form of compensation to those people, who as a result of these laws might have their digital media posts unfairly removed, despite the content in them being factually correct. The populace will rightly have mistrust in a process that has Government as the arbiter of what is best for the public to know. Admittedly there are definitely limited circumstances where the Government and digital platform service providers might be required to remove details from on line facilities. A more appropriate approach would be to grant limited rights for social media companies under the exercise of Executive Government powers to remove terrorist, child abuse and other relevant offensive materials from social media platforms. This to be followed with a proper Government accounting to the public as to why these actions were necessary. Yet to pass laws like this one, probable given the Federal Government's and its allies' numbers in Parliament, smacks of overreach and potentially excessive power to control Australians' free speech on digital platforms. The Bill is far too broad to justifiably be potentially applicable to all Australians on social media platforms, the overwhelming majority of whom should pose no threat to our social fabric or national security. Many will see the passing of The Bill into law as being excessively authoritarian.

DEFINITIONS OF MISINFORMATION AND DISINFORMATION

A key to whether a communication is misinformation or disinformation relies principally on Clause 7(1)(a)(d) and 7(2)(a)(d)(e) of The Bill, qualified by the definitions of "harm" in Clause 2. The harm that needs to be assessed is serious harm. A clear question that arises is who or what is qualified to determine the seriousness of the harm and what side of the fence falls under the rule in the case of a close adjudication. Will the public even know the identity of those charged by the Government with making potentially far-reaching decisions as to what constitutes misinformation and disinformation? Does freedom of speech get the benefit of the doubt in close determinations or the more authoritarian need to prevent and respond to misinformation and disinformation. What qualifications do the social media companies/digital platform companies and ACMA possess to identify situations of serious harm when The Bill is seemingly silent on this point? If outside experts need to be consulted will there be transparency as to who the decision makers were and will they provide reasons for their determinations? Will there be a process to challenge their findings?

One could argue the benefit of the doubt will go to the Government. In other words, if those charged with the responsibility to rule on misinformation and disinformation don't believe they have the expertise, say in environmental or health matters to make an appropriate assessment of serious harm under The Bill, will they just automatically make the contents of these posts reportable? This could lead to unjust results when better qualified people than the digital media companies and ACMA opine on these matters, not necessarily agreeing with the Government stance on an issue or issues. This also creates voluminous amount of data which is unnecessary to be captured and creates unwarranted impingements on the free speech rights of the community.

Clause 33(3)(f) of The Bill refers to the misinformation codes and misinformation standards developed by digital industry providers and/or ACMA, potentially using the support of fact checking as a criterion in their formulation. It has been noted that distortions and outright lies by pundits and politicians have become so common, major news outlets like CNN, BBC and Fox use journalists and fact checkers to verify their claims. People may often see different things when looking at the same event, and fact checkers are subject to the same psychological biases as everyone else. The analysis of what constitutes "facts" will be assessed by their own political and ideological values, (Ceci, S.J. and Williams, W. M.; "The Psychology of Fact-Checking", Scientific American, 25 October 2020).

If fact checking is being "supported" by The Bill, it would be instructive to know if those doing it have certain Government or establishment alliances the Government knows it can count on when this facility is being used. Fact checking is a very imprecise and subject to flaws and difficulties. It should not be given blind approval by the legislators of the proposed Bill without qualification.

It has been noted that Australians are concerned about the spread of fake news and COVID-19 has been citied, along with the war between Russia and Ukraine, as subjects to which this situation may apply. Deliberate dissemination of disinformation has also been a concern and there has been a shift to "trusted" news with credible and verified sources, even if it has to be paid for to be acquired, (Mediaweek; "Most Australians Are Worried About The Spread Of Fake News, Study Finds", 18 March 2022).

An instance where there could be differences in how a purveyor of online information is perceived could well depend on who he or she may be. As was seen during COVID-19, narratives by the Government, legacy media and aligned health experts tended to be given significantly more weight than those of politicians, independent media and highly qualified doctors and scientists with differing views about the pandemic. Section 7(3)(a)-(i) of The Bill lists matters which can be considered in determining whether serious harm on an issue or issues would be identified from digital platform providers and/or ACMA deliberations concerning misinformation and disinformation. This could include the circumstances of the dissemination of information, (e.g. about COVID-19), the subject matter of the false, misleading and deceptive information, (e.g. immunity to viruses), severity of potential impacts from the dissemination, the author of the dissemination and the purpose of the dissemination. Apart from the difficulties in objectively determining the harmful intent from someone allegedly spreading misinformation and disinformation, this was imputed in some cases to people who genuinely had the best interests of the community at heart merely because they questioned the various Governments around the nation, and allied corporations with vested interests.

In a United States House Oversight Committee, Rep Nancy Mace expressed her concerns about at the time, a specific Twitter official and other employees of Twitter censoring information from Harvard and Stanford University educated doctors, as well as the Center For Disease Control. She noted Dr Jay Bhattacharya, a Standford University medical professor, being blacklisted for writing an article on natural immunity, presumably against the then prevailing narrative of vaccine induced immunity to COVID-19. Another prominent doctor, Dr Martin Kulldorff, a Harvard educated epidemiologist, negated the necessity for COVID vaccination for those with prior natural infection or children and was subsequently labelled a purveyor of false information because it ran contrary to CDC's views on the same issue.

Rep Mace obtained testimony from Twitter executive Vijaya Gadde that she had not gone to medical school. Despite Ms Gadde's protestation Twitter's policies were designed to protect individuals, Rep Mace mentioned that the social media company silenced those highly qualified medical voices and queried how anyone at Twitter could think they had the medical expertise to censor a doctor's expert opinion. Indicating that she had been a COVID-19 "long hauler" she also indicated she had developed asthma, heart pain and tremours from COVID-19 vaccination. She expressed her anger that Twitter's "..unfettered censorship spread into medical fields and affected millions of Americans by suppressing expert opinions from doctors and censoring those who disagree with the CDC".

Ms Gadde admitted she received legal demands from the US Government and Governments around the world to remove content from Twitter's platform. Rep Mace indicated that not having access to important information removed by Twitter "put real Americans' lives in danger", (Wallace,D.; "House GOP Rips Former Twitter Executive For Censoring Vaccine Data From Doctors, CDC: 'Not Just About The Laptop', Fox News, 9 February 2023 and also on Youtube).

In considering Clause 7(3)(a)-(e) criteria, when it comes to digital platform providers and ACMA accessing how serious harm should be evaluated, possibly through fear or the threat of fines from the Government, from whose side would they likely decide there is misinformation and disinformation? The Government aligned doctors and scientific "experts" as they are called? Or the well-researched medical professionals or scientists questioning these narratives. The even-handed application of rules applying to digital platform providers under this Bill therefore needs to be seriously questioned and examined.

DIGITAL PLATFORM SERVICES

Clause 4(1) of The Bill provides that digital platform services include content aggregation, connective media services, media sharing services and those specified by the Minister. Under Clause 4(6) of The Bill, the Minister by legislative instrument may specify "..a kind of digital service is a digital platform service if the Minister is satisfied it is appropriate to apply provisions... to the digital service to provide adequate protection to the community".

A concern with respect to the exercise of the Minister's functions under subclause (6) is that internet carriage service providers, SMS services or MMS services are specified to be excluded as digital services for the purposes of combatting misinformation and disinformation in order to protect the community. Under Clause 4(1)(e)(f)(g), internet carriage service providers, SMS services and MMS services could be caught under the exercise of the Minister's specified digital platform services declarations and therefore represent a significant impingement on the privacy of users of these services. In short, Clause 4(1)(e)(f)(g) appears to be in conflict with Clause 4(6) in that the latter gives far reaching powers for the Minister to declare anything a digital platform service thereby providing a potential overreach of her powers which could be more than adequate "protection to the community".

It seems that whilst the Minister is required under Clause 4(7) to consult with ACMA before exercising a purported power under 4(6), there is a potential for digital platform services to be obliged to aggregate the data of end users of internet carriage service providers, SMS services and MMS services for the Government. The need for the Minister to consult ACMA under Clause 4(7) does not mean that the Government can't force the digital platform providers to give them information from those facilities, broadening the scope of information required to be gathered and imparted to the communications agency.

Furthermore Clause 4(5) states that there are exemptions to particular traffic on content aggregation services, connective media services and media sharing services. The provision for advertising material on a digital service and the collection of data on a digital service appear to be excused from monitoring by the digital platform providers.

The difficulty with Clause 4(5) is that it would appear an end user opposed to receiving on-line potential Government propaganda covering issues such as transgenderism, the Voice Referendum or the need to take vaccinations, would possibly not be in a position to challenge the Government or other presumed misleading advertiser, over the alleged misinformation/disinformation or messaging they received. The digital platform provider would also seemingly not be under the same obligation to record keep and gather information for the benefit of consumers as they would be for the Government.

This would also appear to be the case for the collection of data by the digital provider. If an end user was concerned about how and why the digital platform provider, ACMA or the Government collected their data through the digital platform service, possibly to be used against them in some way, the consumer would seemingly have no ability under The Bill to question how the data was collected, the content of the data and whether it was retained solely by the company or passed to third parties. The platform provider may be under no binding obligation to provide these details to the consumer for misinformation/disinformation purposes. Nevertheless there could be pressure on them from the Government to not release this perhaps "commercially sensitive" information to aggrieved consumers.

Many agencies use these programs to target minority communities and social movements and are not helpful in identifying threats. Government monitoring of social media can work to people's detriment in four ways, (1) wrongly implicating an individual or group in criminal behavior based on their activity on social media, (2) misinterpreting the meaning of social media activity, sometimes with severe consequences, (3) suppressing people's willingness to talk or connect openly online and (4) invading individual's privacy (Levinson-Waldman, R. et al., ibid).

An issue with Government sponsored, often suspicious monitoring of social media is that individuals being surveilled may fear expressing themselves freely out of concerns over Government scrutiny and retaliation, and this "chilled" speech prevents vibrant conversations and exchanges of ideas. Individuals who post publicly on line with The Bill if enacted, have legitimate fears the Government could "digitally archive their online activity without any suspicion, or scrutinize their friends, contacts and associations on social media platforms". (Rather S. et al.; "Is The Government Tracking Your Social Media Activity?' (ACLU), American Civil Liberties Union, 24 April 2023). For these reasons unascertainable Government interference and intrusion, even through so called independent agencies like ACMA over the public communications of people on digital service platforms like social media is totally unacceptable and an affront to Australian democracy.

INFORMATION GATHERING AND RECORD KEEPING

Page 14 of The Bill's Guidance Note states that ACMA is able to exercise its information powers regardless of whether or not digital platform providers are already signatories to an existing voluntary code of practice. ACMA is also provided the power to make rules requiring digital platform providers to make and retain records relating to misinformation on digital platforms, take measures to prevent or respond to misinformation including noting their effectiveness, and recording the prevalence of false, misleading and deceptive information. Coupled with the information gathering powers, ACMA can compel digital platform providers to give information, documents and evidence relevant to the same matters as relate to record keeping, (Guidance Note P15). There are strict rules applying to digital platform providers and other individuals, body corporates and partnerships to give information, documents, copies of documents or give written or oral evidence before ACMA, (The Bill Clauses 18-20). Civil penalties and infringement notices apply for people or bodies that do not comply with these requirements.

There are exceptions to the disclosures to ACMA including the contents of private messages, (The Bill Clause 19(4)). ACMA will not have the power to request specific content or posts be removed from digital platform services, (Guidance Note Page 7). A number of issues arise in relation to the potential conduct of digital platform service providers in relation to ACMA's record keeping and information gathering powers. An obvious one relates to the digital platform providers being under the threat of civil penalties and infringement notices referred to at various places in The Bill as well as overreaching/overcompensating and going beyond what is necessary to combat misinformation and disinformation. This could well result in digital platform users having their information aggregated with other posts which justifiably may require greater surveillance by Government and digital platform providers in some instances.

In other circumstances, Government surveillance of online communications could cause unjustifiable and unfair situations in which the social media posts of people having critical views toward the Government's policies, procedures and laws are aggregated with those who plan to commit terrorist of other heinous activities in relation to these policies, procedures and laws. There is nothing in The Bill indicating that this could not arise, and a mention there would be filtering of posts to protect the privacy of end users does not seem apparent from that document.

There has been commentary on how large groups of social media users have been targeted by Governments abroad in an overly unnecessary and over intrusive manner. In the United Kingdom it was reported London police tracked 9,000 activists across the political system, many without criminal backgrounds, who were monitored using geolocation tracking and sentimental analysis from Facebook, Twitter and other platforms, which resulted in secret dossiers being compiled on each campaigner. Similar lists were created in the United States targeting greater scrutiny at the US- Mexico border and leading to arrests in 9 cases.

The opportunity for abuse of information gathered by Government associated agencies cannot be overlooked. As has been noted, the use of State social media monitoring , "..in the past typically justified..to combat serious crimes such as terrorism, child sexual abuse and large-scale narcotics trafficking" is being repurposed for more questionable tactics like, "..political views, tracking students' behaviour or monitoring activists and protestors." (Shahbaz A and Funk A; "Social Media Surveillance- Freedom On The Net 2019 Key Finding: Governments Harness Big Data For Social Media Surveillance", Freedom House).

It was seen during the COVID-19 lockdowns in Victoria, Australia, where a woman posted details of a proposed freedom protest on social media against these measures, and was subsequently arrested prior to the event even taking place, how heavy handed and abusive State intrusions into citizens' use of social media can occur, (McGowan, Michael; "Pregnant Woman Arrested In Ballarat For Creating Anti-Lockdown Protest Event On Facebook", The Guardian, 02 September 2020). This Governmental conduct was subsequently criticised by the Victorian Bar, (Zhou N; "Victorian Bar Criticises Arrest Of Pregnant Woman For Facebook Lockdown Protest Post As 'Disproportionate'", The Guardian, 03 September 2020).

As part of their attempts to curb misinformation and disinformation, ACMA is empowered to publish information with respect to these perceived conducts under Clause 25 of The Bill. Whilst digital platform service providers can object to such publication and make submissions to ACMA under Clause 26 of The Bill, they have no apparent ability to prevent such publication even if they disagree with or object to it. This can impact the commercial interests of various persons caught under ACMA's record keeping and information gathering provisions. This because whilst ACMA apparently can receive submissions from digital platform providers seeking non-publication of various people's information, they are not bound to follow them and can publish these details in any case. The publishing powers given to ACMA seems too broad scoped and lacking in sufficient detail to protect social media users.

CODES AND STANDARDS

On the face of it, ACMA would not appear to be beholden to digital platform service providers with respect to codes or standards, and can exercise its information powers regardless, (Guidance Note P14). This tends to make the power of ACMA to request digital platform providers to develop their own misinformation codes under Clause 38 redundant. The difficulty lies in the seeming entrapment of digital service providers who otherwise would be operating without a code and could implement their own disinformation and misinformation policies. This is a clear Government intrusion into the operations of private digital platform companies who should have the freedom to operate as they wish in most contexts, as dubious as their operations may be, (and potentially not much better or even worse than under greater Government control). Nevertheless, the ability of ACMA to monitor these conscripted digital service providers with the threat of civil penalties and infringement notices is a power provided to the Government agency at the behest of the Federal Government.

It is arguable that whatever the merits of the manner in which digital platforms monitor misinformation and disinformation on their platforms, democracy is placed at a great disadvantage by having a Government gifted bureaucracy like ACMA, engaging in the surveillance of social media users in Australia. What constitutes misinformation and disinformation is rightly open to conjecture. In any case and quite justifiably, people could argue such matters relate to opinions and viewpoints which will clearly be tilted towards the Government's biases and attitudes if ACMA are regulating laws in relation to misinformation and disinformation. There can be no doubting if this Bill was to pass, the perceptions in the community would be the underlying purpose of it was to control and remove on line content which was spreading information, whether true or false, that the Government did not want disseminated.

Clause 37 of The Bill describes the implementation and subsequent assessment of the measures put in place by digital platform providers to combat misinformation and disinformation on their platforms. A clear example where this could be found deficient with respect to objectivity is in relation to the potential for freedom of political communications under the same clause. If the code necessarily burdens freedom of political communication, what criteria would be used to determine if the burden is "reasonable and not excessive" as stated in The Bill? Page 11 of the Guidance Note suggests that a health harm to Australian people would be misinformation causing them to ingest or inject bleach products to treat viral infection. This was seemingly a reference to then President Donald Trump's White House briefing where he encouraged health officials to study the injection of bleach into the human body as a means of fighting against COVID-19.

It could be reasoned President Trump was not directly urging people to inject bleach into their bodies. Rather it was a suggestion that scientists merely study this possibility, so it could be argued what the US Commander in Chief said was not technically misinformation or disinformation, (McGraw, M and Stein S; "Its Been Exactly One Year Since Trump Suggested Injecting Bleach. We've Never Been The Same", Politico, 23 April 2021). At the end of the day people need to take some personal responsibility by listening carefully to what is said and themselves taking reasonable steps to ascertain the accuracy of the information imparted to them before engaging in courses of action, including seeking the views of their trusted professionals.

Are we moving to a situation where Government and media need to "educate" the people on just about everything because people are too "dumbed down" to at least do a modicum of critical thinking themselves? It appears the Australian Government would suggest posts such as the one noted about former President Trump above should be removed if the Federal Government Guidance Note is anything to be believed. Regardless, it has been revealed the Government removed some approximately 4,200 posts during the COVID-19 pandemic, some of which were shown to contain factual information, (Fordham B, "'Proof Of Censorship': Senator Blasts Government's COVID Control", 2GB, 23 May 2023). Senator Alex Antic is on the record as saying, "The Federal Government intervened over 4,000 times to restrict speech.. the reasons why are a mystery". It was alleged that the Federal Department of Home Affairs had an arrangement with the social media industry to take down posts questioning aspects of the official handling of COVID-19 (audio of interview related to same news item by Ben Fordham).

It is a reasonable assumption that if social media posts were removed by Government intervention for being factual, the Government and social media companies were no doubt by analogy, maintaining posts which were conveying misinformation and disinformation or in the words of Clause 17(1)(ii) of The Bill, omitting "...any matter or thing without which the record is misleading".

Clearly Clause 37 of The Bill dealing with ACMA's power to potentially remove political communication for misinformation and disinformation is rife for abuse by the Government and bureaucracies administering The Bill if passed into law, with biased application in ways that favour Government and legacy media over the general public with opposing views.

Another questionable aspect to The Bill is Clause 39, which discusses ACMA "inviting", with all the pressure that word entails, bodies or associations to come into existence to develop a code. One could get the impression that allowing presently fictitious bodies to come into existence represents a Governmental overreach designed to make ACMA and the Government's controls of online media as watertight and incredibly undemocratic as possible.

The ability for ACMA to determine standards under Clause 46 and 47 of The Bill are clear examples of this body trying to be as tight as possible in its control of misinformation and disinformation. Saying if a request for digital service providers to develop a code is not complied with, targets for code development have not been met or ACMA otherwise refuses to register a code, suggests ACMA need only subjective criteria for it to register a more stringent and punishable standard in place of a code. What is the point of saying a standard will be developed because a code was not created or a code development target was not met if ACMA can in its discretion refuse to register a code for any reason they deem expedient? Is there likely to be proper transparency around this issue, especially with regard to its powers to register a mandatory binding standard on digital platform service providers?

Section 50 of The Bill allowing for the development of standards due to exceptional and urgent circumstances, requires accountability and transparency of the highest order.

Whilst it is appropriate ACMA allows submissions from the public and at least one body or association representing consumers, there does not appear to be any mechanism short of appeal to a judicial or quasi-judicial body, to challenge the registration of a code by ACMA, (Clause 37(f)(h) of The Bill, Section 204(4A) of the Broadcasting Services Act , "BSA", 1992). Furthermore, there needs to be reliance by aggrieved parties under Section 204(4A)(4) of the BSA, on ACMA's decisions being reviewable, which prima facie suggests that ACMA is formulating its own criteria as to which of its decisions are reviewable under its rules. This presents as draconian, anti- democratic and usurping the role of the judicial and non-judicial bodies.

Finally, if a misinformation code has been removed from the Register under Clause 55(2) of The Bill, ACMA ought to be accountable and transparent enough to enable this content to be accessed by members of the public for their important purposes, including potential litigation.

HOW DIGITAL INDUSTRY OPERATIONALISES THE BILL AND VARIOUS CONTENT EXEMPTIONS

It would seem obvious to many that providing strict rules around digital industry participants through the development of mandatory codes and standards with the sanction of severe fines attached, will make them lapdogs of ACMA and The Government. As has been stated, the social media and other applicable platform providers have pressure on them to over record and over information gather to avoid harsh consequences.

There seems to be nowhere in the legislative proposal that suggests social media companies in particular, which have a tendency to promote what many would deem fashionable "woke" and left of centre political views and are more than happy to remove anti-establishment centre right ones, will need to account for the kinds of material they submit to ACMA as representing disinformation and misinformation. Yet even being aggregated as part of the data sent to the communications regulator for presumed misinformation and disinformation smacks of an infringement on the Australian population's freedoms of speech and expression.

If the right to free speech and expression is not impliedly stated in the Commonwealth Constitution then it ought otherwise be a part of our natural and inalienable human rights. Having views contrary to the Government's on matters like gender, race, the climate and health should require a high bar to be viewed as misinformation and disinformation causing serious harm. Yet how much content aggregation will include the posts of those who have every right to express their views but fall into a whole class of posts the Government deems unacceptable to be published on social media?

The Federal Government ought to be mindful of legislation such as the Victorian Charter of Rights and Responsibilities Act 2006. Section 15(1) of the Charter lays down the rights of everyone to hold an opinion without interference. Section 15(2) states that every person has the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and includes by oral, written, print, art or any other medium chosen by that person. There are reasonable exemptions to that rule including respecting the rights and reputations of others and the protection of national security, public order, public health or public morality. There would no doubt be situations where free speech may need to be constrained for valid reasons which would fall short of providing the Government a broad scope to implement such actions. Sadly the principles espoused by documents such as the Victorian Charter seem to be increasingly ignored by Governments around the world as even once thriving democracies seem to moving toward more totalitarian systems of Government.

I have alluded elsewhere to the Federal Government's role in suppressing and deleting posts critical of its narratives concerning COVID-19. The dangers of having Government control over misinformation and disinformation couldn't be more clearly exhibited than the manner in which the work of even Government scientists has been allegedly suppressed in some instances, (Kilvert, N; "More Than Half Of Government Environmental Scientists Say Their Work Has Been Suppressed: Report", ABC News, 09 September 2020).

There appears to be no valid reason why Governments should be excluded from laws related to preventing or responding to misinformation and disinformation if this legislation is to pass. A clear case has been presented by Prime Minister Albanese's conflicting statements regarding the proposed referendum on the Aboriginal and Torres Islander Voice to Parliament to be held later in 2023. Mr Albanese has indicated in a recent interview that the Voice was not about a treaty despite his past utterances of support for a treaty, including his wearing a T-Shirt at a music concert in 2022 which carried the message, "Voice, Treaty, Truth". These situations have been well documented, (Hannaford, P; "Anthony Albanese Accused Of Making Misleading Statements On Voice To Parliament In Ben Fordham 2GB Interview", Sky News Australia, 20 July 2023 and Mageros A; "Albanese's 'Voice, Treaty, Truth' T-Shirt At Midnight Oil Concert Sparks Fierce Debate During Question Time", Sky News Australia, 31 July 2023). Clearly the public has a right to be skeptical about how Governments can often provide conflicting and misleading narratives which clearly at least on one side of the argument is disinformation and misleading. Why are we to assume what the Government puts out is always, if ever truth, and their information and statements cannot be questioned?

A problem with giving professional news a clause 2 exemption from disinformation and misinformation scrutiny is that the media has often been accused of telling lies, or at the very least making bald assertions without any evidence of their truth. In itself professional news could reasonably, at least to some extent, be labelled as providers of false, misleading and deceptive reporting and commentary and warrant a tag of misinformation and disinformation. In relation to a defamation case brought against Fox Media by Dominion Voting Systems, it was revealed Fox executives and stars made comments that there was a need to give viewers ".. the red meat they wanted. If that includes falsehoods, so be it.", (Wolf, M; "Media Lies Threaten The Truth And Decency On Which Democracy Depends", Financial Times, 03 May 2023). Other printed news media noted that an advocate was making allegedly fake claims as stated in an article headline despite no evidence being adduced in the relevant piece that what he had said was false, (Baker, E; "This Man Advises His Clients That Elections, Rates and Mortgages Are Invalid", ABC News, 02 May 2023).

In media reporting there will always be two sides to a story and certain news outlets have well known political biases. Is it appropriate to censor the views of one news source on social media, which doesn't agree with the Government narratives in preference to one that does? Where this kind of suppression arises, including the take downs of independent media posts on social media, clear violations of the rights to the peoples' free speech and expression and to be informed of a diversity of views and opinions arise. The unfettered sharing of ideas and viewpoints is the hallmark of a healthy and thriving democracy and in the overwhelming number of instances will pose no threat to the stability or security of an applicable nation state.

It seems apparent that universities, schools and other educational institutions, far from being objective centres of open-minded exchanges of ideas and concepts, have been politicised and should not be free from censorship if the ideas of everyday Australians are to be blocked. Quite clearly neither should be. A recent report described how a female university researcher uncovered censorship, smearing and silencing of other female academics when they questioned "gender identity theory" and their views did not comport with their liberal institutions', (Russell, N; "Researcher Ousted For 'Dangerous' Study Into Censorship Of Feminists In Academia Who Don't Buy Into Transgenderism", The Daily Signal, 25 April 2023). There are other similar reports claiming free speech does not overwrite transgender rights.

The Bill appears to provide that the only legitimate criticism of The Government's policies, practices and laws is through the satire exemption in Clause 2 of The Bill. Yet at what point will the Government attempt to remove this provision when proponents of free speech and expression start to mock the Parliamentarians in what they deem is an unacceptable and excessive level of ridicule of the politicians' activities? Will they tolerate the spotlight being applied to their own alleged misinformation and disinformation as well as their other perceived poor policies, practice and laws, even in jest? The objective citizen would no doubt know the answer to that question.

APPROPRIATE CIVIL PENALTIES AND ENFORCEMENT MECHANISMS

It may appear reasonable to have a graduated scale of enforcement measures to ensure compliance of digital platform services with ACMA's record keeping and information gathering requirements surrounding misinformation and disinformation. This in addition to adherence to industry developed codes and ACMA's standards. However, it is not the enforcement that is the issue, it is the principle that the legislation exists at all.

The whole issue of compliance by platform industry participants will presumably rest largely on their own commercial interests. Large scale social media companies like Meta and Instagram may determine that the resources they need to devote to complying with The Bill is not worth their efforts. Rather than their compiling data and formulating and providing reports, these companies may find it easier with their vast resources, just to pay the pecuniary penalties attached to not adhering to the legislation. This may especially apply if the digital platform providers determine that there may be future Government actions pressuring take downs of posts of specific on-line individuals or groups which may significantly impact their advertising revenue streams.

A difficulty with the enforcement regime for The Bill is that large organisations will find disobedience to the legislation and its consequent penalties easier to stomach than smaller operators. The larger operators may not bother to gather information and provide reports on information which is of great interest to the Government. On the other hand the smaller organisations fearing potentially less affordable fines, may go to a proportionately higher expense to record and document just about any traffic on their platforms, even if the data collected is worthless to the Government. Clearly this situation if neither equitable, efficient nor productive in relation to the legislation's intentions.

It has been noted by previously mentioned prominent media lawyer, Justin Quill, that despite the punitive actions formulated by the Government for non-compliance with the proposed misinformation and disinformation laws, even high-level obedience by the digital platform providers to tackling these situations is likely to be counter-productive. One has to start with the proposition that many large digital platform participants will be only too happy to cooperate or partner with the Government's attempts to combat misinformation and disinformation, which in any case are concepts incapable of precise definition, and can no doubt be subject to bias and a lack of objectivity from those determining what constitutes this category of allegedly false information. For instance, it has been noted in recent times that there is "...a growing concern in the community that the Voice To Parliament debate is being rigged by governments, big business and foreign big tech companies, working together to censor mainstream opinion". (Wild, D; "Federal Government Must Stop Big Tech's Censorship Of The Voice To Parliament Debate", Institute of Public Affairs, 01 March 2023).

The Institute of Public Affairs reportedly provided analysis to Prime Minister Albanese that their videos had been censored by Facebook and Google as well as advice on how the Government could immediately stop foreign big tech censorship that is preventing free and fair debate, (Wild, D; ibid.). Will formal warnings, remedial directions, enforceable undertakings, infringement notices, injunctions and civil penalties create any significant worry or concern to technology companies that are willing accomplices with the Government's attempts to censor what they call disinformation and misinformation? It is probably fair to assume that there will be considerable pressure applied to regulators to ensure the proposed legislation's penalty provisions will not often be activated and much of the dealings between the Government and ACMA will be kept out of the public domain.

Regardless of the level of suspected collusion between the Government and digital platforms to contain the flow of information on the latter, Mr Quill, in discussing the futility of The Bill, questioned the logic of the Government attempting to stop conspiracy theorists by pushing them underground. Just because the politicians have sought to "disappear" a post will not make the poster or others with whom he/she has been in contact believe the information in it is untrue. The likely impact is a belief that the information contained in the communication is true and contrary to the Government's narratives, which is the very reason the post was sought to be removed by our nation's rulers, (Hannaford, P; op cit.).

It is hard to see how there would be sufficient proof to successfully make a claim that a digital platform provider knowingly made or retained false and misleading records, or omitted any matters which made them misleading, (Guidance Note P24). According to one source alluding to a criminal standard of proof, an intention to make a false or misleading statement would require the statement to be significant, capable of influencing another to take action, potentially seek a property or financial advantage or to cause a financial disadvantage, and the actions were done deceptively and dishonestly, (Australian Criminal Law Group, "Intention To Defraud By False And Misleading Statement").

The false and misleading provision would not apply when the digital platform provider or other persons, provided ACMA with information containing false and misleading content for the purpose of complying with the powers, (including examples of misinformation removed from the platform), (Clause 22(2)(a)(b) of The Bill). A key difficulty with Clause 22(2) is the possibility that the digital media company makes an incorrect assessment that the information provided to ACMA from a relevant person or body corporate is certifiably false and misleading according to strict criteria required to determine this issue. It would appear that ACMA is merely required to acquiesce to what the digital provider has determined was misleading or false information on its platform. What efforts would ACMA make to verify that the information provided to them by digital platform service providers from end users was misinformation or disinformation?

There is the distinct possibility that the digital providers are impinging on the free speech rights of numerous end users of platforms through this clause, who were subsequently proven to be right in some of the posts sanctioned by the platform providers. A clear example is how the originally scorned idea about COVID-19 originating from the Wuhan Institute of Virology was subsequently confirmed by US Intelligence to be widely accepted. (Hannaford, P; ibid.).

Enforcement provisions and penalties to obtain compliance from digital platform providers appear to lack teeth and the purported fines for non-compliance with the legislation present as unwarranted, unneeded and ineffective overreach. The actions by digital platform providers and ACMA to seek to remove content on posts inimical to their world views represents a gross affront to democracy and free speech in our nation. This bill is a pre cursor to legislation that has no place in countries like Australia.