MAAT'S METHOD

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To: Director
Online Safety, Media and Platforms
Department of Infrastructure, Transport, Regional Development,
Communities and the Arts
GPO Box 594
Canberra ACT 2601

Submission: Statutory Review of the Online Safety Act 2021

Dear Officer,

Introduction

The Online Safety, Media and Platforms Division of the Department of Infrastructure, Transport, Regional Development, Communications and the Arts ("The Department") have invited public submissions as part of a statutory review of the *Online Safety Act 2021* ("The Act").

This is a joint submission by Maat's Method and Alexander Hatzikalimnios.

Maat's Method is a dedicated human rights law firm. That is, it practices only in areas of law which are corollary to, or influenced by, the obligations Australia holds under the various international human rights treaties and covenants Australia is a signatory to. This submission is authored by Peter Fam, Principal Lawyer, who has particular expertise and experience as a specialist human rights lawyer.

Alexander Hatzikalimnios is a PhD Candidate and lawyer who found his passion for human rights law during the Covid-19 pandemic. Alexander's primary objective is to promote the advancement of human rights in Australia and foster discourse on topics that are often disregarded, or dismissed, by human rights bodies and advocates.

In this submission, we will provide recommendations based on the following points:

A. The overreaching power of eSafety Commissioner ("the Commissioner")

B. The determination of basic online safety expectations

C. Material that depicts abhorrent violent conduct – implications on free press and speech

D. Industry codes and Industry standards

E. Conclusion

A. The overreaching power of eSafety Commissioner

1. The eSafety Commissioner gains its power specifically from Part 2 of the Act. Per Section 28 of the Act, the Commissioner "*has power to do all things necessary or convenient to be done for or in connection with the performance of the Commissioner's functions*." The language "all things necessary or convenient" is so broad that it is primed for uncertainty (at best) or abuse (at worst). The language "for or in connection with" creates a scope of almost indefinable ambit. Together, these amorphous phrases are essentially meaningless, allowing the Commissioner to do whatever she wants. This is not a reasonable power.

2. The problem crystallises when the Commissioner's functions located under Section 27 of the Act are examined. Such functions include, but are not limited to:

    a) To promote online safety for Australians

    b) to support and encourage the implementation of measures to improve online safety for Australians

    c) to coordinate activities of Commonwealth Departments, authorities and agencies relating to online safety for Australians

d) to collect, analyse, interpret and disseminate information relating to online safety for Australians

e) to support, encourage, conduct, accredit and evaluate educational, promotional and community awareness programs that are relevant to online safety for Australians

f) to give the Minister reports about online safety for Australians

g) to advise the Minister about online safety for Australians

h) to consult and cooperate with other persons, organisations and governments on online safety for Australians

i) to advise and assist persons in relation to their obligations under this Act

j) to monitor compliance with this Act; to promote compliance with this Act

k) to formulate, in writing, guidelines or statements that recommend best practices for individual's and bodies involved in online safety for Australian's.

3. In general, the language used in both Sections 27 & 28 of the Act is ambiguous. With respect to Section 28 giving the Commissioner "power to do all things necessary" to perform its functions; the Act does not provide, or refer to, a limit to the power held by the Commissioner. Therefore, the power cannot be meaningfully challenged, or even questioned.

4. Section 27 of the Act, although less ambiguous, is still subjective in nature. Specifically, the Commissioner has the power to "promote online safety to Australians". The particularisation of this function can be found under Part 5 of the Act, which provides a definition for such power stating that "*online safety for Australians means the capacity of Australians to use social media services and electronic services in a safe manner.*" The term "safety" and "safe manner" are mentioned constantly throughout the Act, but no such specificity surrounding what determines safety, or its manner, are provided. How can such vague,

all-inclusive language that provides almost unrestricted power to the Commissioner be allowed to be bestowed on an individual who is not subject to a democratic election or appointment by the general public the Commissioner serves?

5. Moreover, the definition belies a lack of utility. Using "social media services and electronic services in a safe manner" is a redundant phrase if "safe manner" is not itself defined. In any case, the illusion of safety is as much of a false dawn in the online space as it is in nature. There is no such thing as 'safety', because one thing might be safe for one person but dangerous for somebody else. In addition, there is no growth and no humanity without harm and without suffering, because such is the human condition. The idea that anybody needs to be kept safe is not only infantilising, because we are capable of encountering and processing danger, but a profound misinterpretation of the human experience, because *we have to encounter and process danger in order to grow*.

6. In the language of human rights law, there can be no 'self-determination',[1] the cardinal principle of the seven primary international human rights treaties and covenants Australia is signatory to, without the freedom to place oneself, or find oneself, in danger.

B. The determination of basic online safety expectations

7. Part 4 of the Act includes information regarding basic online safety standards and the power for the Minister and the Commissioner to work together to enforce said standards.

8. Section 45 of the Act defines three segments where basic online safety expectations can be formed. They are as follows:

    a. Social media service

    b. Relevant electronic service

    c. Designated internet service

[1] For example, see Part 1 Article 1 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

9. The three segments may be subject to legislation administered by the Minister that determines the basic online standards each segment is expected to enforce. It is important to note that online safety expectations cannot be enforced through court proceedings. However, individuals or organisations can be penalised for failing to adhere to the basic online safety standards that have been placed on their segment by the Minister through the powers granted to the Commissioner under the Act (refer to Part 3).

10. Section 46 of the Act outlines the core expectations related to the determination of basic online safety standards. In brief, such expectations include:

    a. That the online service provider will take reasonable steps to ensure users are safe when using their services;

    b. Online service providers will consult the Commissioner when contemplating what steps are reasonable to promote online safety; and

    c. That the provider of the service will take reasonable steps to minimise the extent of certain material. Such material can include cyber-bullying material, cyber-abuse material, non-consensual sharing of intimate images, material that promotes abhorrent violence, the ability to provide reports and identifiable mechanisms put in place by service providers to combat such content, and more.

11. The powers granted under Section 46 also prescribe the Commissioner with the ability to regulate "Class 1" and "Class 2" content. Per Sections 106 and 107 of the Act, such material includes a seemingly all-encompassing definition including all film, television, video games, published material and even non-published material regardless of its classification. Section 46 places a burden on online service providers to ensure that such content is monitored and that there are sufficient protections against the spread of such content. For the purpose of protecting material pointed out in paragraph 9, such powers may be necessary to prevent non-consensual distribution of sensitive content. However, it is important to ensure that the online safety standards are not too restrictive to the

point where free speech and press may be restricted due to a subjective "expectation" of the Commissioner.

12. Section 47 does provide the ability for consultation and commentary to be provided regarding online safety expectations. However, we believe that 30 days provides a rather short timeframe for detailed submissions, whether in support or contradiction of the online safety expectations, to be gathered from impacted bodies, businesses and individuals.

    Recommendation 1: We suggest that the period specified after the publication of a determination notice be extended from 30 to 90 days to allow appropriate time for industry bodies, corporations and individuals to respond.

13. Section 63 refers to "Self-incrimination". Specifically, 63(1) states that "*A person is not excused from giving a report under this Division on the ground that the report might tend to incriminate the person*." Although 63(2) provides that such evidence will not be held against an individual in a criminal or civil proceeding unrelated to the proceedings under the Act, it is hard to believe that the forfeiture of self-incriminating evidence would not be held against someone once the information is made public.

14. At an international human rights standard, the right to not self-incriminate is safeguarded under Article 14.3(g) of the International Covenant on Civil and Political Rights[2] ("ICCPR"). Article 14.3(g) provides that everyone is entitled not to be compelled to testify against himself or confess guilt. The High Court of Australia has evidenced its support of Article 14 of the ICCPR in precedent, noting that international law is an important influence on the development of common law in Australia.[3] Further, the High Court of Australia has described privilege in the context of self-incrimination:

[2] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[3] *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499 (Mason CJ and Toohey J).

"A person may refuse to answer any question, or to produce any document or thing, if to do so 'may tend to bring him into the peril and possibility of being convicted as a criminal'".[4]

15. Thus, it is important that the statutory review of the Act considers the impacts Section 63 has on the human right to not self-incriminate and ensure that appropriate measures are taken to protect this right at common law.

Recommendation 2: We suggest that Section 63 of the Act be amended comply with international human rights standards, Australian common law and the rule of law in Australia.

C. Material that depicts abhorrent violent conduct – implications on free press and speech

16. Part 8 of the Act includes references to "material that depicts abhorrent violent conduct". Specifically, Section 95 describes a blocking request regarding content available on the internet and provided by a service provider. If the Commissioner is satisfied that the content promotes, incites, instructs, or depicts abhorrent violent content, a blocking request will be issued to the service provider. A blocking request can ask the online service provider to block domain names, block URLs and block IP addresses that provide access to the online material. Further, the Commissioner is not required to observe any requirements of procedural fairness in relation to issuing a blocking request under Section 95(3).

17. Procedural fairness relates to the making of fair decisions in the administrative process. Under Section 75 of the Australian Constitution, and other legislation[5], a person may seek judicial review of a judicial decision if they believe procedural fairness has not been observed. Although procedural fairness may be limited through provisions in legislation, the exclusion must be "properly construed" because it "limits or extinguishes the obligation to accord natural justice".[6] The statement by the High Court of Australia in

[4] *Sorby v Commonwealth* (1983) 152 CLR 281, 288. The Court cited *Lamb v Munster* (1882) 10 QBD 110, 111.
[5] *Judiciary Act 1903* (Cth) s 39B; *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(a).
[6] *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 (4 November 2015) [30] (Kiefel, Bell and Keane JJ); Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters Australia, 2013) 397.

the case of *Saeed v Minister for Immigration and Citizenship*[7] has indicated that procedural fairness is protected in the Australian legal system under the principle of legality, which makes the enforcement of legislative exclusion very difficult to uphold in practice.

Recommendation 3: We suggest that Section 95(3) of the Act be amended to comply with the administration of procedural fairness to allow for judicial and merits review of decisions made by the Commissioner.

18. Under Section 99, the Commissioner may issue a blocking notice. A blocking notice contains all the same characteristics as a blocking request and the language used in the Act does not provide any differentiating factors that would justify having two variations of the same legislative arm of power given to the Commissioner.

Recommendation 4: We suggest that Section 95 & 99 either be updated to clearly reflect any key differences in the sections, or, have one section be removed entirely to ensure that extra, unnecessary, powers are not granted to the Commissioner.

19. Per Section 96 & 100 of the Act, the duration of a blocking request/notice indicates an ability for the Commissioner to indefinitely renew the request/notice, providing further evidence of the overbearing power of the Commissioner. If the Commissioner is satisfied that the availability of the material online is likely to cause significant harm to the Australian community, a blocking request/notice will be issued to an online service provider. The maximum duration of a blocking notice or request is 3 months, with the scope for the Commissioner to extend the request/notice before the original one expires for a further 3 months, with seemingly no limitation on how many times an extension can be granted.

Recommendation 5: We suggest that Section 96 & 100 of the Act be amended to enforce limitations on the ability for the Commissioner to renew blocking notices/requests indefinitely to ensure that procedural fairness is adhered to.

[7] (2010) 241 CLR 252.

20. We have recently experienced controversy in Australia at the prospect of a Government official, the Commissioner, seeking to issue blocking notices in relation to footage on social media platform X of a public stabbing. In that case, the Court noted that the Commissioner's notice was onerous in its intention and unrealistic in its stated enforceability. As Justice Kennett acknowledged, for example, "…*there is widespread alarm at the prospect of a decision by an official of a national government restricting access to controversial material on the internet*".[8] This is because it is generally the case that controversial material does exist, and that in general, people expect to retain their ability to choose whether or not to engage in this content. In addition, and critically, her Honour found that the Commissioner's demands were not reasonable, and that it is all well and good as long as individuals and corporations have the meaningful opportunity to challenge those demands. The recommendations we have made above are critical in ensuring this opportunity is genuine.

D. Industry codes & Industry standards

21. Reference to industry codes is contained in Division 7 of the Act. Per Section 135, the online industry is categorised into sections for the purpose of issuing industry codes & standards. Such categories include, but are not limited to, the following:

    a. Providers of social media services

    b. Providers of electronic services

    c. Providers of designated internet services

    d. Providers of internet search engines

    e. Providers of hosting services

    f. Groups who manufacture, supply, maintain or install any equipment involved with the services described in a-e above.

[8] *eSafety Commissioner v X Corp [2024] FCA 499* at [40].

22. Per Section 137 of the Act, Parliament's intentions with the Act were to provide the Commissioner, and bodies or associations that represent an industry, powers to develop industry codes that apply to the categories as described in paragraph 20 of these submissions. Seemingly, the Commissioner and industry groups/bodies that represent their industry can work, or be forced to work, on an industry code that will be implemented in a category listed in paragraph 20. Some questions arise:

    a. Who determines which bodies or groups represent an industry?

    b. Are these representatives democratically elected to represent or are they chosen by the Commissioner?

    c. Are government bodies allowed to be considered representatives?

23. The latter two questions, in our opinion, would form a conflict of interest on behalf of the Commissioner or the Australian government.

    Recommendation 6: We suggest that Section 137 be amended to clarify how industry groups and bodies are chosen to ensure that the process of electing such groups is subject to a democratic process with regular review/re-elections held every 1-3 years.

24. Section 138 of the Act lists a large scope of matters that may be dealt with by industry codes. Most importantly, Section 138(zf) includes the ability for complaints to be referred to the Commissioner regarding a lack of compliance with an industry code or standard by an online service provider. Such complaints are administered under Section 143 & 144 of the Act, in which the Commissioner can issue a formal warning or a civil penalty if a participant of an online service industry has contravened the industry code.

25. Section 148 of the Act contains reference to public consultation regarding the establishment of industry standards. Public notice must be given through the Commissioner's website when an industry standard is to be established or renewed. Per 148(2), public consultation is 30 days in length after the publication of the notice, to which responses or written comments can be provided to the Commissioner within the

specified period. However, Section 148(3) distinguishes that public consultation is not required if the variation is "minor in nature". With no definition provided relating to what could be considered minor in nature, this clause seems to provide a loophole for the Commissioner to vary industry codes without public consultation.

Recommendation 7: We suggest that Section 148 of the Act be changed to increase the consultation period from 30 to 90 days, to ensure adequate scrutiny, and that 148(3) be removed from the Act as it provides a method of exploitation in updating industry codes for the Commissioner.

E. Conclusion

26. The ability for an unelected individual within a democratic nation to be given the power to develop industry standards, remove & block content indefinitely, ignore key human rights principles, ignore procedural fairness & legality, and commence legal proceedings against apps that provide news services far overreaches any power that should be held by one person. The recommendations provided in these submissions are in-line with international human rights standards and look to uphold the rule of law in Australia.

27. As it stands, the Act contains components that are in direct breach of human rights and the democratic process. We hope our analysis highlights the importance for our recommendations to be considered as part of the statutory review of the Act.

18 June 2024

Sincerely,

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Maat's Method
[redacted]

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