Institute of Public Affairs

# CANBERRA'S DIGITAL MINISTRY OF TRUTH

Research report provided to the Public Consultation on the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023

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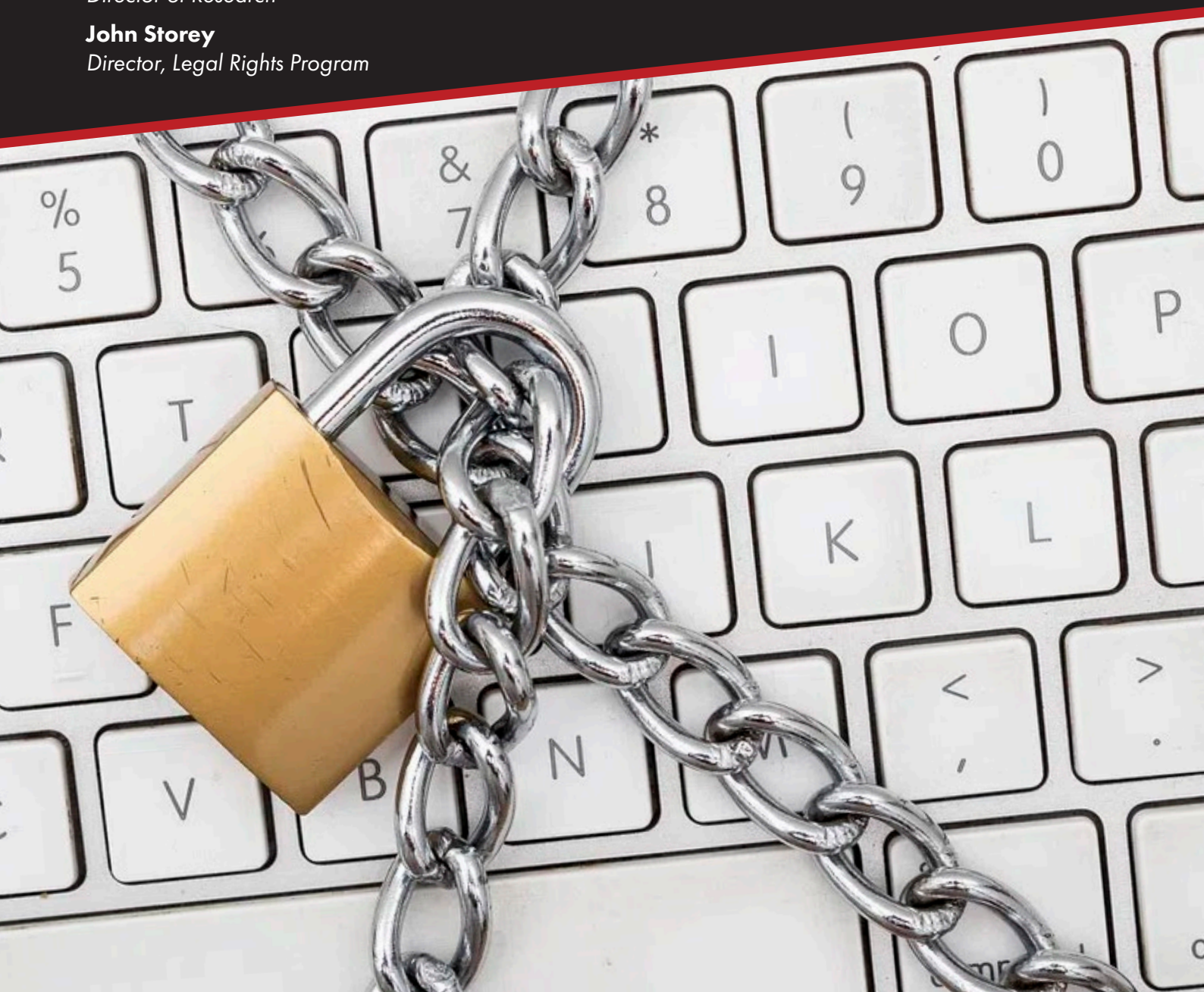

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# Foreword

The proposed Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill would be the single biggest attack on freedom of political communication in Australia's peacetime history, and could be used to outlaw disagreement, dissent, and criticism of government policy.

Never before has an Australian government sought to weaponise its bureaucracy by compelling a private digital organisation to shut down the speech and communication of Australian citizens.

Describing these laws as illiberal and undemocratic barely scratches the surface of just how insidious the provisions in this Bill are. This Bill takes the very worst features of Section 18C and the abandoned Finkelstein laws, supercharges them, removes any protections that Australians have, or would have had, and would empower a vast and secretive bureaucracy to hunt and shut down Australians who disagree with contentious government policies.

Under the Bill, exempt entities, such as government, would be permitted to spread misinformation, yet citizens who share that same information could be censored, including through imprisonment under certain circumstances. That an Australian government would even contemplate a scenario whereby one of its citizens could be censored and potentially jailed for merely expressing an opinion which they hold to be true violates every principle of human rights and is an affront to human dignity and respect.

Further, the Bill would permit government to spread its messages on highly contested public policy issues, such as the Voice to Parliament, but prohibit Australians from then criticising or questioning the government. This would create a two-track society with one set of rules for the powerful elite, and another set for mainstream Australians. If misinformation and disinformation are truly problems in our society, as is the presupposition of this Bill, then it is unclear why the source of that misinformation or disinformation has any bearing on the purported resultant societal harms.

Under the laws, an unelected and unaccountable star-chamber bureaucracy in the Australian Communication and Media Authority (ACMA) would be empowered to produce the official definition of the truth. This is because, under the proposed laws, ACMA would be required to make determinations in relation to the extent to which social media companies have properly enforced misinformation codes. As such, ACMA would be required to adjudicate on whether something is 'misinformation' or 'disinformation'. Yet, as ACMA itself has previously noted, online 'misinformation' and 'disinformation' are 'relatively novel and dynamic phenomena' with 'no established consensus on the definition of either term.'

On top of this, ACMA would be given the unprecedented power to enforce on big tech companies an obligation to adopt measures to prevent misinformation. In effect, the big tech companies will become the censorship enforcement arm of the federal government.

The scope of what could be considered harmful is so broad that it could potentially capture any difference of opinion. For instance, criticism of government policy positions such as the proposed Indigenous Voice, could be labelled as 'hatred'. Criticism of public health measures during a declared pandemic could be labelled as harmful to the health of Australians. Debate about the quality of climate science could be labelled as harmful to the Australian environment.

Of perhaps even greater concern, is that under the proposed laws, not even the truth would be a defence. For instance, if a citizen were to disseminate information which was factually true, but ACMA or a tech company labelled it as 'misleading' or 'deceptive', then that information would fall within the scope of these laws. In other words, if ACMA's perspective was verifiably false, and the accused disseminator of misinformation's perspective was verifiably true, it would be ACMA's perspective which prevails and which would, in effect, become the official 'truth'.

Under the proposed laws, ACMA can even bypass the big tech companies and directly target Australian citizens. For example, Division 3 of the draft Bill would empower ACMA to compel citizens to provide information to ACMA and to appear before ACMA in what could be described as a kangaroo-court style arrangement. Failure to follow this process in the specified manner could lead to 12 months imprisonment.

At the same time, the Bill removes critical legal protections, such the privilege against self-incrimination (which dates to seventeenth century English common law), and the vagaries of the Bill are such that no Australian could be sure if at any point in time they are following the law. A foundational principle of the rule of law is that for law to be followed, it must be capable of being understood. Yet terms such as 'misleading' and 'deceptive' are inherently vague and evolving and subject to interpretation.

It may be a cliché, but it is true that debate and discussion are the lifeblood of democracy. Every Australian has the right to express their opinion, even if that opinion is considered controversial by the powers that be at the time. The human progress enabled by the institutions and culture of Western Civilisation has often been propelled and accelerated by those who challenged the received wisdom of their age, and, in doing so, enlightened humanity. This Bill, though, is reflective of a common practice of the Dark Ages which weaponised censorship to protect established interests, chief among them the main governing institutions of the time.

Only a government scared of debate and its own citizens would seek to revert to such suppressive and undemocratic means to control debate and the flow of information through our society.

The Bill must be scrapped.

**Daniel Wild**
**Deputy Executive Director**

# Executive summary

This research report has been prepared to provide an analysis of the Exposure Draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023.

The analysis finds:

- The meaning of misinformation in the Bill is so broad and subjective that it would be impossible for a person to know how the rules would be enforced over time. It would be open to regulators to pick and choose which perspectives qualify as meeting the definition of misinformation, and truth would not be a defence.
- The Bill would also give ACMA extraordinary new powers to directly interpret and apply the meaning of misinformation, and enforce on big tech companies an obligation to adopt measures to prevent misinformation. In effect, the big tech companies would become the censorship enforcement arm of the federal government.
- Under the Bill, the meaning of misinformation would not apply to government authorised content, but would apply to critics of the government. Also protected are professional media entities and academia, which are collectively the most powerful potential conveyers of false information in society.
- The structure of the Bill and the potential penalties would incentivise big tech companies to over-comply with their obligations to censor. ACMA, who is imposing the obligation, would not be accountable to Australians who have no right of appeal or review if their communications are wrongly censored.

# Introduction

The Institute of Public Affairs (IPA) has a longstanding commitment to conducting research into the fundamental human right to freedom of speech. In 2012, the IPA exposed through its research how the recommendations of the Finkelstein Report into Media and Media Regulation would censor, regulate, and licence the printed and online press. The IPA's research and analysis explained why Finkelstein's recommendations—which failed to be enacted into law—were a significant threat to freedom of speech.

In 2016, the IPA published *The Case for the Repeal of Section 18C*, which explored the fundamental philosophical and practical flaws of laws that prohibit 'harmful' speech. This analysis has been applied not only to section 18C of the federal *Racial Discrimination Act 1975*, which makes it unlawful to offend, insult, humiliate, or intimidate a person or group of people because of their race, but has also been used in the context of state-based proposals to expand anti-vilification laws.[1]

It is because of the depth of this research that the IPA recognises how broad and subjective laws can invite government overreach and threaten the freedoms of Australians. It is in this context that the IPA has prepared this research report to scrutinise the federal government's Exposure Draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (the Bill).

The Bill would give extraordinary new powers to the Australian Communications and Media Authority—a federal government agency—to oversee and enforce the development of codes that digital platforms such as Twitter, Facebook, and Google would need to adopt. The codes would outline the measures the platforms will adopt to prevent or respond to misinformation and disinformation.

The broad framework of the Bill follows the outline that was developed by ACMA in its 2021 *Report to government on the adequacy of digital platforms' disinformation and news quality measures* (ACMA Report). After the report was released in March 2022, the IPA noted ACMA's proposed measures would mean the government would be responsible for defining the 'official' truth and controlling acceptable opinion. We noted further the broad and subjective nature of ACMA's proposal would make it operate as an all-purpose, universal restriction on freedom of speech equivalent to section 18C to censor speech about almost anything controversial on the internet. The analysis of the Bill reveals the same concerns, though as the report will explore, in some cases the threshold for misinformation is even lower in the Bill compared to ACMA's original proposal.

This research report provides an analysis of the Bill, but it is important to acknowledge that this proposal is not happening in a vacuum. In recent years Western governments have taken significant steps to directly and indirectly regulate the dissemination of information in digital spaces. In what some have labelled the 'censorship industrial complex',[2] an assortment of government, intelligence, big tech, and academic interests have co-ordinated to censor online speech under the guise of removing harmful misinformation.

1 See Morgan Begg, *IPA Research into Anti-vilification Protections in Victoria* (Institute of Public Affairs, June 2020).

2 See Michael Shellenberger's testimony to the Congress of the United States: *The Censorship Industrial Complex: US Government Support for Domestic Censorship and Disinformation Campaigns, 2016-2022* (Testimony of Michael Shellenberger to the House Select Committee on the Weaponization of the Federal Government, 118th Congress, 9 March 2023).

In Australia linkages between government and the big tech companies has been in place for some time. In February 2021, it was reported that the Department of Home Affairs, despite having no regulatory oversight of social media or public health responsibilities, had at that time sent more than 500 takedown requests to Facebook relating to covid misinformation—more than even the health department or communication department.[3] By May 2023, the federal government had requested social media companies to censor at least 4,213 posts during the pandemic.[4] In a specific example, the public release of 18 emails sent by the Extremism Insights and Communication branch of the Department of Home Affairs to Twitter's main office in San Fransisco collectively demanded 222 Twitter posts be taken down. Among the affected posts was content making fun of Premier of Victoria Daniel Andrews, criticism of former Minister for Health Greg Hunt, and content that 'undermined confidence in the Covid-19 vaccination program.'[5]

In 2021, the federal government passed the *Online Safety Act 2021* to in part expand the role of the eSafety Commissioner (formerly the Children's eSafety Commissioner). This role forms an integral part of the governmental infrastructure that gives the executive, and in particular the Minister for Communications, the perceived legitimacy to pressure digital platforms to self-censor content the government would like to see minimised.[6]

For instance, *The Guardian* reported in April 2023 the communications minister and eSafety Commissioner were to

> ... meet the eSafety Advisory Committee, including members of the digital industry and government, which will discuss the role of digital platforms in protecting and supporting Indigenous Australians during the [Aboriginal and Torres Strait Islander Voice] referendum.
>
> The group is engaging with Twitter, Microsoft, Google, TikTok and others around the referendum. [eSafety Commissioner Julie] Inman Grant said the committee was seeking information from the tech giants about their policies on the vote, and would provide 'guidance about what more we expect them to do'.[7]

3 See Josh Taylor, 'Australia's Department of Home Affairs made most requests for Covid misinformation takedowns', *The Guardian* (17 February 2021): https://www.theguardian.com/australia-news/2021/feb/17/australias-department-of-home-affairs-made-most-requests-for-covid-misinformation-takedowns.

4 Chris Kenny, 'Antic probe reveals Canberra silenced 4213 Covid posts', *The Australian* (22 May 2023): https://www.theaustralian.com.au/nation/antic-probe-reveals-canberra-silenced-4213-covid-posts/news-story/9afc4362197af63454bd3fa89285c282.

5 Adam Creighton, 'Government sought removal of tweet making fun of Daniel Andrews', *The Australian* (24 May 2023): https://www.theaustralian.com.au/nation/politics/government-sought-removal-of-tweet-making-fun-of-daniel-andrews/news-story/3363e77338dead6bac69e70084f352f5.

6 Morgan Begg and John Storey, *Voice to Parliament: Research report provided to the Parliamentary Joint Committee into the Aboriginal and Torres Strait Islander Voice Referendum* (Institute of Public Affairs Research Report, April 2023) 14-15.

7 Josh Butler, 'Government puts social media giants on notice over misinformation and gate speech during voice referendum', *The Guardian* (29 March 2023): https://www.theguardian.com/australia-news/2023/mar/29/government-puts-social-media-giants-on-notice-over-misinformation-and-hate-speech-during-voice-referendum.

In March, the federal government agency responsible for overseeing elections and referendums—the Australian Electoral Commission—announced that it was considering partnering with third party 'fact checking' organisations reportedly to counter misinformation during the Voice referendum debate.[8] The prominent fact-checking organisations include AAP Fact Check, RMIT FactLab, and RMIT ABC Fact Check, and are typically non-government organisations, affiliated with academic institutions, or in the latter case directly affiliated with a government broadcaster.

Big tech platforms such as Facebook will rely on the third party factcheckers to assist in enforcing their own rules on misinformation: if for instance RMIT ABC Fact Check make a determination that content is false, Facebook will rely on that determination to restrict the posting and sharing of that content.

The big tech platforms have for the most part voluntarily participated in this arrangement. Meta (parent company of Facebook and Instagram), Google, Twitter, Microsoft, TikTok, Apple, Adobe, and Redbubble are signatories to a voluntary code on misinformation and disinformation under a process overseen by ACMA,[9] and social media platforms have a demonstrated record of suppressing or restricting the expression of opinions relating to critical public policy matters. For example, during the declared pandemic YouTube's 'Covid-19 medical misinformation policy' was defined to mean the platform would not allow content that 'contradicted local health authorities' or the World Health Organization's medical information about Covid-19. This meant that assertions challenging the efficacy of lockdowns, face masks, or other mandatory pharmaceutical interventions were not allowed because it was inconsistent with government public health officials.

These decisions to censor debate were made by digital platforms in the absence of legislative coercion or regulatory obligation. Under the Bill, the digital platforms will be required to continue to censor, and the exorbitant financial penalties attached to failing to do so will mean platforms are incentivised to excessively censor to minimise risk. It is a critical failure of the Bill that it does not—and probably cannot—address the problem of over-compliance.

The promise to defeat lies and falsehoods is admirable in the abstract sense, but is impossible to achieve practically. As the IPA noted in the 2022 research letter:

> The suggestion that government officials could be employed as reliable arbiters of truth is idealistic but unrealistic. More realistic is that the 'official' truth would be determined not by reference to its accuracy, but according to whether it is politically uncomfortable or unacceptable for certain opinions to be expressed.[10]

This is reinforced not only by the history of misinformation, but also by human nature. When people are presented with information, they interpret it in light of their individual values and experiences. Two different people presented with the same information might come to two entirely different conclusions based on their subjective interpretations. While these interpretations might be disputed, it is not for these disputes to be adjudicated—they are matters of debate. The effort then of central authorities to make determinations about the information being circulated is not an issue of accuracy, but one about controlling which interpretations are allowed to be drawn from the information.

8 Sam Buckingham-Jones and Mark Di Stefano, 'AEC eyes tie-up with fact checkers for Voice referendum', *The Australian Financial Review* (19 March 2023): https://www.afr.com/companies/media-and-marketing/aec-eyestie-up-with-fact-checkers-for-voice-referendum-20230317-p5ct0r.

9 See Australian Communications and Media Authority, *Digital platforms' efforts under the Australian Code of Practice on Disinformation and Misinformation: Second report to government* (July 2023).

10 Morgan Begg, *Federal government must abandon plan for internet censorship* (Institute of Public Affairs Research Letter to the Minister for Communications, Urban Infrastructure, Cities and the Arts, 12 May 2022) 3-4.

With this wider context in mind, the IPA has analysed the Bill and found that

- The meaning of misinformation in the Bill is so broad and subjective that it would be impossible for a person to know how the rules would be enforced over time. It would be open to regulators to pick and choose which perspectives qualify as meeting the definition of misinformation, and truth would not be a defence.
- The Bill would also give ACMA extraordinary new powers to directly interpret and apply the meaning of misinformation, and enforce on big tech companies an obligation to adopt measures to prevent misinformation. In effect, the big tech companies would become the censorship enforcement arm of the federal government.
- Under the Bill, the meaning of misinformation would not apply to government authorised content, but would apply to critics of the government. Also protected are professional media entities and academia, which are collectively the most powerful potential conveyers of false information in society.
- The structure of the Bill and the potential penalties would incentivise big tech companies to over-comply with their obligations to censor. ACMA, who is imposing the obligation, would not be accountable to Australians who have no right of appeal or review if their communications are wrongly censored.

There is no legal, moral, or political justification for any large entity—whether multinational digital platforms or Australian governments—to be entrusted with this kind of power over online communications. It is a repudiation of the idea of Australia as a democratic society, where it is acknowledged that people inevitably have a variety of different perspectives about any issue, and that it is important to give everyone a chance to have their say. Giving government the draconian and authoritarian power to police the internet for 'accurate' content will mean some opinions and perspectives will be unfairly excluded from the debate. It has no place in the free society that Australia has historically been.

The Bill should be abandoned.

# Misinformation laws are an assault on freedom of speech

Misinformation laws require power to be transferred to a central authority—the government—to adjudicate on the quality of information being shared by members of the public. That a government could wield the power to make pronouncements on the validity of expressions based on subjective assessments relating to accuracy would have a chilling effect on the speech of all Australians.

Freedom of speech is fundamental to individual liberty and a healthy democracy. A precondition of individual liberty is a recognition that each person possesses beliefs and convictions that makes them unique. These beliefs and convictions inform a person's worldview and informs what a person believes to be right. The ability to speak and act in accordance with those convictions is freedom of conscience.

The respect for individual autonomy underlying freedom of conscience implies that the ability to give action to individual thought and conscience is limited only to the extent that doing so interferes with the autonomy or rights of others. If 'misinformation' is truly a problem that requires a solution in the law, then this is an admission that individual autonomy is not recognised: if a recipient of alleged misinformation is not assumed to be capable of independently and autonomously accepting or rejecting the information according to their own judgement, the law is operating under the assumption that people need protection from themselves, rather than the actions of others.

Australia, as a democratic society, depends on the freedom of people to have and to express their perspectives on matters of public policy that affect them. If democracy is a mechanism by which the preferences of members of the body politic are aggregated, it follows that individuals must have the ability to not only express their preferences, but also to access the ideas of others so as to form their preferences. Misinformation laws require restricting the boundaries of public debate, which comes at a cost to all who participate in it. The costs of restricting freedom of speech are therefore high because it harms the practice of democracy itself. This has been acknowledged by the High Court of Australia under its jurisprudence on the implied right to the freedom of political communication.

# The definition of misinformation is broad and subjective, and truth is not a defence

It is cornerstone of the rule of law that the people who are subject to the law are able to know what the law is and how it will be applied. The vague and subjective definitions of concepts such as misinformation mean it will be almost impossible to predict how the legislation will be enforced and applied. The digital platforms will be required to predict what AMCA may or may not consider to be misinformation in order to design and enforce their own codes on misinformation. Users will similarly not be able to anticipate how the digital platforms will make and apply these decisions.

ACMA has itself acknowledged, in a 2021 report to the federal government on the adequacy of existing misinformation measures, that online 'misinformation' and 'disinformation' are 'relatively novel and dynamic phenomena' with 'no established consensus on the definition of either term.'[11] Despite the acknowledged uncertainty about what the terms mean, ACMA nonetheless asserted that there is an 'emerging consensus' on the need to give government the power and responsibility to ensure Australians don't engage in it. To meet this responsibility, ACMA would be required to make determinations about what types of content should be regarded as misinformation so that it can assess the adequacy of how digital platforms are performing.

The Bill defines 'misinformation' under clause 7:

(1) For the purposes of this Schedule, dissemination of content using a digital service is misinformation on the digital service if:

(a) the content contains information that is false, misleading or deceptive; and

(b) the content is not excluded content for misinformation purposes; and

(c) the content is provided on the digital service to one or more end-users in Australia; and

(d) the provision of the content on the digital service is reasonably likely to cause or contribute to serious harm.

(2) For the purposes of this Schedule, dissemination of content using a digital service is disinformation on the digital service if:

(a) the content contains information that is false, misleading or deceptive; and

(b) the content is not excluded content for misinformation purposes; and

(c) the content is provided on the digital service to one or more end-users in Australia; and

(d) the provision of the content on the digital service is reasonably likely to cause or contribute to serious harm; and

(e) the person disseminating, or causing the dissemination of, the content intends that the content deceive another person.

...

11 Australian Communications and Media Authority, *A report to government on the adequacy of digital platforms' disinformation and news quality measures* (June 2021) 7.

The above definition is an expansion of what was originally proposed in ACMA's 2021 report. Under the Bill, the threshold for what is misinformation has been lowered from 'verifiably false' to 'false, misleading and deceptive.' The new wording introduces added subjectivity to the interpretation of the provision. Moreover, the terms 'false, misleading or deceptive' are not defined in the Bill, nor does the Bill provide for a transparent process for determining if content is 'false' or not. Proof that online information was true may not be defence under the Bill. Evidence of the content's accuracy may not be accepted by the platform, or the platform may nonetheless regard the accurate content as being misleading or deceptive. For example, accurately citing an academic or scientific paper might 'lack context' and thus still be considered 'misleading'.

Also expanded is the element of misinformation relating to harm. In the ACMA Report, harm was proposed to refer to harms which cause an imminent and serious threat to

A. democratic political and policy making processes such as voter fraud, voter interference, voting misinformation; or

B. public goods such as the protection of citizens' health, protection of marginalised or vulnerable groups, public safety and security or the environment.

Under the Bill, content will be misinformation if 'it is reasonably likely to cause or contribute to serious harm', which severs the causative standard of 'imminent and serious threat'. In addition to the lower threshold, the definition of harm is proposed to be extended to have broader application. The Bill defines harm as:

(a) hatred against a group in Australian society on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion or physical or mental disability;

(b) disruption of public order or society in Australia;

(c) harm to the integrity of Australian democratic processes or of Commonwealth, State, Territory or local government institutions;

(d) harm to the health of Australians;

(e) harm to the Australian environment;

(f) or financial harm to Australians, the Australian economy or a sector of the Australian economy.

The scope of what could be considered harmful is so broad that it could potentially capture any difference of opinion. For instance, criticism of government policy positions such as the proposed Aboriginal and Torres Strait Islander Voice in the Constitution, could be labelled as 'hatred'. Criticism of public health measures during a declared pandemic could be labelled as harmful to the health of Australians. Criticism of the quality of climate science could be labelled as harmful to the Australian environment.

The proposal that debate needs to be controlled to protect against the vague notion of harm to the integrity of the vague notion of 'democratic processes' is a far-reaching claim, and one that is inconsistent with Australia's democratic traditions which have historically placed a high value on the freedom of political communication.

# Big tech companies would become the the censorship enforcement arm of the federal government

Under the Bill, digital platforms would be under an obligation to remove or restrict content that meets the vague and subjective definition of 'misinformation'. ACMA—a federal government agency—would be responsible for enforcing this obligation on the digital platforms.

To fulfil this role, AMCA will be granted coercive powers to compel digital platforms to enter into codes of practice to outline the measures the platform will implement to prevent or respond to misinformation and disinformation.

- The codes are not voluntary. Under clause 38 of the Bill, ACMA can compel digital platforms to develop a code if it is satisfied a code is necessary or convenient to 'prevent or respond to misinformation or disinformation'.
- ACMA can make determinations about what is in the code. If ACMA is satisfied that a code developed by a platform is deficient, it can determine 'misinformation standards'. Under clause 53, digital platforms are required to comply with the standards that apply to them.
- If ACMA considers the digital platforms are not enforcing the rules, or are not effectively addressing misinformation and disinformation, ACMA can issue the platforms with heavy financial penalties. Clause 43 of the Bill makes it a civil penalty for a digital platform to fail to comply with the code.

In order to give effect to its responsibilities under the Bill, ACMA would be required to make determinations about whether a code is adequate, or whether a platform is enforcing the code adequately. Making these determinations means ACMA will inevitably be required to determine the intended application of concepts such as misinformation and harm.

The key enforcement mechanism is the power to register codes and financially penalise platforms for failing to enforce codes. In order to make determinations about whether a platform is failing to address misinformation, ACMA will be required to make findings about content a platform has allegedly failed to take action against. Platforms must anticipate the findings and standards of AMCA to minimise the risk of enforcement actions.

# The Bill would not apply to government, but would apply to critics of the government

Clause 2 of the Bill excludes content produced by federal, state, and local governments, professional news entities, and academia, from the definition of misinformation or disinformation.

This means that content posted by ordinary Australians will be subject to censorship, but the same rules won't apply to the following types of content listed under clause 2:

> *excluded content for misinformation purposes* means any of the following:
>
> (a) content produced in good faith for the purposes of entertainment, parody or satire;
>
> (b) professional news content;
>
> (c) 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) 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) content that is authorised by:
>
> (i) the Commonwealth; or
>
> (ii) a State; or
>
> (iii) a Territory; or
>
> (iv) a local government.

The effect of these provisions would mean that where a government, media, or academic institution isseminates false information, their content would be exempt from the same rules that apply to individuals expressing the same speech.

Notably, the AMCA report did not include the above exceptions. The purpose of the Bill is purportedly to prevent the dissemination of harmful false information, but it has not been explained or justified why differential treatment according to the source of the information is desirable. For instance, it cannot be explained by reference to the above sources being incapable of producing false, misleading, or deceptive content, nor can it be contended that government, the media, and academia are not capable of causing serious harm—the opposite is true. Government, academia, and media institutions are among the most powerful sources of information disseminated in society, and their status as organs of power and expertise give them significant influence. For this reason they have the greatest potential to cause harm when communicating false information.

# Big tech companies would be incentivised to censor first, ask questions later

In a media release published in June 2023, the Minister for Communications asserted the 'proposed powers will bring greater transparency to efforts by digital platforms to respond to misinformation and disinformation on their services, while balancing freedom of expression which is at the heart of democracy.'[12] The structure of the Bill however incentivises over-compliance with obligations to censor, whereas digital platforms are under no obligation to protect freedom of speech.

Under the Bill, digital platforms will be required to censor content, while the financial penalties for failing to comply with vague misinformation standards will incentivise platforms to excessively censor to mitigate risk. This is known as over-compliance.

While the Bill imposes obligations and penalties for failures to censor inaccurate content, similar obligations and penalties do not apply in situations where a platform censors content that is not misinformation.

Additionally, the defences in the Bill are narrow to non-existent.

- The exclusion relating to 'content produced in good faith for the purposes of entertainment, parody or satire' only applies to a narrow range of activities, and depends on a decision maker considering the content being made in good faith. As IPA research has shown in relation to section 18C of the *Racial Discrimination Act 1975*, the good faith defences are subjective and difficult to consistently prove.[13]
- The limitation relating to 'electoral and referendum matters' is narrow: it only applies to 'authorised content', referring to a specific range of content, such as ads for a political candidate prior to an election, not expressions by individuals generally about an election.
- The consideration that ACMA must give to the freedom of political communication is unlikely to be legally meaningful. ACMA must only consider the freedom of political communication, but it remains at their discretion whether to act in accordance with the principle.

Further, the quasi-privatisation of internet censorship actions means the government will not be accountable for decisions made under the Bill. The effect of the Bill is to restrict what Australian can say and share online. The restrictive actions are undertaken by digital platforms under a legislative obligation enforced by ACMA. It is government censorship, but Australians who have their speech restricted would have no right of appeal or review against ACMA's decision making.

An aggrieved Australian may lodge a complaint with the digital platform, but the platforms are private entities and as such are not bound by the rule of evidence and the common law protections for procedural fairness. This Bill is designed in such a way that the government ensures censorship takes place, while avoiding any responsibility for the actions taken, and denying Australians an effective right of appeal.

The absence of defences for freedom of expression, the absence of accountability for censorship decisions, and the absence of penalties for wrongful censorship demonstrates that the Bill would not strike any amount of balance between free speech and minimising misinformation. At the very least this would require the big tech companies to be held equally accountable for wrongly censoring honest opinions as they would be for failing to censor misinformation.

The Bill represents a conflict between censoring content to address misinformation and the principle of freedom of speech. For the digital platforms, the material risk is only on one side of the conflict. If contentious information is being circulated on a digital platform, censoring that information comes at no cost to the platform. But there is a significant potential cost for the same information being left to circulate. If in doubt, the platforms are incentivised to censor so as to mitigate risk.

12 Michelle Rowland, 'Consultation opens on new laws to tackle online misinformation and disinformation' (Media release, 25 June 2023): https://minister.infrastructure.gov.au/rowland/media-release/consultation-opens-new-laws-tackle-online-misinformation-and-disinformation.

13 Chris Berg et al., *The Case for the Repeal of Section 18C* (Institute of Public Affairs Research Report, December 2016) 32-35.

# Coercive information gathering powers violate fundamental legal rights

Under the Bill, ACMA would be granted a range of coercive information gathering powers. There are broadly two separate but concerning categories of information gathering powers in the Bill:

- The first category refers to the use of information gathering powers against the platforms to determine whether a platform had failed to comply with a code. Concerningly, the ACMA Report that these powers would not merely be used as investigative tools, but as a weapon to name and shame companies for failing to meet ACMA's standards.
  As the ACMA Report noted at the time, the information gathering powers would 'incentivise behavioural change across the industry' as part of ACMA's efforts to regulate online content. Using coercive information gathering powers for a secondary regulatory purpose invites abuses of power.
- The second category refers to the use of information gathering powers against an individual, such as a person who uses a digital platform service. Under clause 19, ACMA can require a person to give to ACMA any such information or document within the period and in the manner and form specified in a written notice. A person's failure to comply with ACMA's written notice can result in the person being subject to a civil penalty, amounting to $8,250 every day the contravention continues.

  ACMA can request and require a person to give information and produce documents as specified in the written notice. The written notice can also request and require a person to 'appear before the ACMA at a time and place specified in the notice to give any such evidence.' The combination of ACMA's strict powers, absence of obligation to respect legal rights, and secretive proceedings, would make this process akin to a 'star chamber'.

The provisions remove the right to silence and abrogate the privilege against self-incrimination. Under clause 21(1), a person is not excused from complying with ACMA's broad information gathering powers even if to do so would tend to incriminate the individual in relation to a criminal offence. Provisions which abrogate the right to silence and the privilege against self-incrimination violate fundamental legal rights which protect people against potential abuses by the state. As former Chief Justice of the High Court Sir Harry Gibbs noted in *Sorby v The Commonwealth*, it is:

> a firmly established rule of the common law, since the seventeenth century, that no person can be compelled to incriminate himself.[14]

IPA has previously identified the right to silence and the privilege against self-incrimination as fundamental legal rights that are routinely violated in modern federal legislation.[15] It is never appropriate to abolish the legal rights of Australians.

The Bill also imposes criminal penalties that could mean a person would be imprisoned in relation to the operation of the proposed information gathering powers.

The powers contained in clauses 19, 21, and 22 are broad and the safeguards are minimal. Given this, it is necessary to consider the potential abuses of power that may occur. For instance, under the laws as currently drafted, it is possible that a person could be jailed for expressing a view that regulators consider misinformation.

To illustrate this, an individual who has shared alleged misinformation could be targetted by ACMA under clause 19 to produce that information. Given ACMA already considers the information false or misleading (hence the investigation) complying with the request will expose the person to liability of a criminal offence. In the example, simply by exercising its information gathering powers, ACMA escalates the matter to a criminal matter. This bizarrely unfair arrangement is exacerbated because subclause 22(2)(b) would exonerate the person complying with the information request if the individual 'identified to ACMA' that the information is false or misleading. This would operate as a powerful incentive for users to confess that the information is false or misleading in order to avoid liability. This would have the effect of vindicating ACMA's investigation and censorship of the targetted information. In effect, the threat of prison sentences could be used to force confessions and censor opinions an official disagreed with.

14 *Sorby v Commonwealth* (1983) 152 CLR 281, 288.

15 See Morgan Begg and Kristen Pereira, *Legal Rights Audit 2019* (Institute of Public Affairs Research Report, February 2020).

# Recommendations

On the basis of the analysis contained in this submission, the Institute of Public Affairs is recommending the federal government not proceed with the Bill in any form.

The IPA shares the concerns about the dissemination of information on digital platforms. Namely, the behaviour of the digital platforms to inappropriately censor content.

On no fewer than eight occasions that the IPA is aware of between September 2022 and July 2023, attempts by the IPA to share its research and analysis with the public were restricted by social media companies. In several cases, the social media companies relied on determinations by third party fact-checking organisations that the IPA's content was 'false', with reference to the opinions of individuals who disagree with the IPA's analysis.

The Institute of Public Affairs has recommended that the federal government should ensure large digital platforms are restrained from engaging in censorship by amending the *Broadcasting Services Act 1992*.[16] Currently, Schedule 2, Part 2, Section 3 of the *Broadcasting Services Act 1992* requires broadcasters to offer political parties the opportunity to broadcast election material during an election.

The most urgent priority for regulators is to address the censorship efforts taking place in relation to the Aboriginal and Torres Strait Islander Voice referendum (in all cases of censorship of IPA content, it has been in relation to referendum research). For this reason, the federal government ought to extend Schedule 2, Part 2, Schedule 3 so that it

- applies during the referendum period.
- expands the definition of broadcasters to digital platforms.
- Applies the requirement to give opportunity to broadcast referendum material to all referendum participants (presently the law applies to political parties and election candidates, but this standard would be inappropriate during a referendum because political parties are not seeking election, and every Australian has a direct stake in the debate).
- Clarifies that digital platforms censoring referendum content is unlawful.

16 See Morgan Begg and John Storey, *Voice to Parliament: Research report provided to the Parliamentary Joint Committee into the Aboriginal and Torres Strait Islander Voice referendum* (Institute of Public Affairs Research Report, April 2023) 13-15.

# About the Institute of Public Affairs

The Institute of Public Affairs is an independent, non-profit public policy think tank,dedicated to preserving and strengthening the foundations of economic and political freedom. Since 1943, the IPA has been at the forefront of the political and policy debate, defining the contemporary political landscape. The IPA is funded by individual memberships, as well as individual and corporate donors.

The IPA supports the free market of ideas, the free flow of capital, a limited and efficient government, evidence-based public policy, the rule of law, and representative democracy. Throughout human history, these ideas have proven themselves to be the most dynamic, liberating and exciting. Our researchers apply these ideas to the public policy questions which matter today.

# About the authors

**Morgan Begg** is the Director of Research at the IPA. Morgan joined the IPA in 2014 to advance the IPA's work on legal rights, the rule of law, and extending the rights and freedoms of Australians. Since joining the IPA, Morgan has been published on a variety of topics, from judicial appointments, public health restrictions and emergency powers, and the preservation of constitutional government.

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