

From the desk of John Storey, Director of Law and Policy
and the desk of Morgan Begg, Director of Research



30 September 2024

Committee Secretary
Senate Standing Committee on Environment and Communications
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Revised Misinformation and Disinformation Bill the most aggressive violation of freedom of speech in Australian peacetime history

The Institute of Public Affairs (IPA) welcomes the opportunity to make a submission to the Senate Standing Committee on the Environment and Communications (the Committee) regarding the newly released Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024 (the bill).

The IPA notes that the introduction of the bill follows the original Exposure Draft Communication Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023. In a submission (*attached*) to the federal government's public consultation into the Exposure Draft, the IPA observed:

- The meaning of the terms 'misinformation' and 'disinformation' in the Exposure Draft were so broad and subjective that it would be impossible for a person to know how the rules would be enforced over time, and truth would not be a defence.
- ACMA would be given extraordinary new powers to interpret and apply standards of 'misinformation', and through their enforcement powers turn big tech companies into the censorship enforcement arms of the state.
- The scope of the Exposure Draft excluded government authorised content, as well as professional media entities and academia, which are among the most powerful institutions and therefore most likely to cause harm through false information.
- The structure of the Exposure Draft and the potential penalties would incentivise big tech companies to over-comply with their obligations to censor content.

The concerns expressed in the IPA's 2023 submission have not been addressed in the new bill, and the revisions made to the bill have potentially broadened censorship concerns. IPA analysis of the bill finds:

1. The definition of 'misinformation' as content that is 'verifiable as false, misleading or deceptive' will empower politically and ideologically biased fact checking organisations to decide which opinions are allowed on social media.
2. The definition of 'serious harms' in the bill has been made even broader.
3. The excluded content provisions remain incoherent and retain two-tier treatment of content.
4. The Australian Communications and Media Authority (AMCA) will be empowered to launch investigations and hearings to ensure compliance with censorship guidelines that can target mainstream Australians.
5. The federal government has acknowledged that big tech companies will over-comply with their obligations under the bill.

The definition of ‘misinformation’ as content that is ‘verifiable as false, misleading or deceptive’ will empower politically and ideologically biased fact checkers to decide which opinions are allowed on social media

Section 13 of the bill defines misinformation as content that is ‘reasonably verifiable as false, misleading or deceptive’. The question of who is responsible for verifying whether content is false, misleading, or deceptive is addressed in page 44 of the Explanatory Memorandum to the bill, where it provides:

[s]ome matters that could be considered when determining if content is reasonably verifiable as false, misleading or deceptive include ... whether the information has been fact-checked by a third-party organisation.¹

Previous research by the IPA into Australia’s three largest third-party fact checking organisations—AAP FactCheck, RMIT FactLab, RMIT ABC Fact Check—found that these entities exercise consistent bias in how they deal with political parties and the persons they target on matters relating to major public policy debates. The research found:

- Between 2019 and 2024, these organisations collectively conducted 249 fact checking investigations into claims made by political figures. 65 per cent of verdicts were favourable to the political left, while 35 per cent of verdicts were favourable to the political right.
- Of the 534 fact checking investigations undertaken in relation to statements made about Covid-19 policy, 502 (94 per cent) targeted critics of the official response to the pandemic.
- Of the 153 fact checking investigations undertaken in relation to statements made about climate change and energy policy, 124 (81 per cent) targeted critics of the official climate response.²
- And in separate analysis of 187 fact checking investigations published between 22 May 2022 and 14 October 2023 relating to the Voice to Parliament referendum debate, 170 targeted statements critical of the Voice, with 99 per cent of those fact checking investigations producing a ‘false’ verdict. The remaining 17 targeted supporters of the Voice, with only 59 per cent of those fact checks producing a false verdict.³

Findings made by fact checking organisation include not just ‘false’ verdicts, but also those that are ‘missing context’. This is in situations where the statement being investigated may be factually true, but is nonetheless deemed to be misleading according to the fact checker. This reinforces the concern that truth will not be a defence to being censored if a decision-maker considers factually accurate content to be lacking context, and therefore ‘misleading’.

The wording of the bill requiring content to be verified as false will enable measurably untrustworthy third-party fact checking organisations to guide the censorship decisions being made by social media companies.

¹ Explanatory Memorandum, Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024, 44.

² John Storey and Margaret Chambers, *Fact Check or Stacked Deck? Analysis of Australian fact checking organisations from 2019 to 2024* (Institute of Public Affairs Research Report, April 2024).

³ John Storey and Margaret Chambers, *The Arbiters of Truth: Analysis of fact checking organisations during the 2023 Voice Referendum* (Institute of Public Affairs Research Report, November 2023).

The definition of ‘serious harm’ in the bill has been made even broader

The application of the bill is purported to be limited to misinformation and disinformation that is ‘reasonably likely to cause serious harm’. Although some revisions have been made to the meaning of ‘serious harm’ since the Exposure Draft (now contained in section 14 of the bill) the definition remains so broad that, in practice, it provides no limitation whatsoever.

The definition includes harm to the operation of an ‘electoral or referendum process’, harm to ‘public health’, or harm to ‘the Australian economy’. It is difficult to predict any alleged ‘false’ or ‘misleading’ content that could not fit within at least one of the listed categories of ‘serious harm’.

For example, an opinion on the Voice referendum that someone believed to be false or misleading could be interpreted as causing harm to a ‘referendum process’. A disputed opinion on the efficacy of measures to deal with the Covid-19 pandemic might be seen to harm ‘public health’. Criticism of the government’s handling of the economy construed as wrong or missing context might be considered ‘harm[ful] to the Australian economy’.

At least one of the categories has been broadened. The Exposure Draft provided that one of the limbs of serious harm was content that was ‘hatred against a group’ based on their race, sex, age, religion or physical or mental disability. The bill revises ‘hatred’ to ‘vilification’.

While both ‘hatred’ and ‘vilification’ are vague and subjective terms, most dictionaries give ‘vilification’ a broader meaning than ‘hatred’.⁴ ‘Vilify’ is a notoriously vague and subjective standard; there is in practice no meaningful or objective distinction between an act which is likely to offend another person or an act which vilifies. As such, the lack of clarity makes it an inappropriate term upon which regulatory liabilities and penalties should be imposed.⁵

The excluded content provisions remain incoherent and retain two-tier treatment of content

A central criticism of the Exposure Draft was the incoherent exclusion of certain categories of content from the application of the bill, namely, government information, professional news content, and ‘content produced by or for an educational institution’. As noted in the IPA’s 2023 submission:

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

⁴ According to the Oxford Dictionary, ‘vilify’ is defined as ‘to **depreciate** with abusive or slanderous language; to defame or traduce, to speak evil of’. In contrast, ‘hatred’ is defined as ‘a feeling of **intense dislike** or aversion towards a person or thing... **loathing, hostility**.’ The Collins Dictionary defines ‘vilify’ as the saying or writing of ‘**very unpleasant** thing’ about a person so that people will have a ‘low opinion’ of them. In contrast, ‘hatred’ is defined as ‘**extremely strong feeling** of dislike.’ The Merriam-Webster Dictionary defines vilify as ‘to utter **slanderous and abusive statements**’ or ‘to **lower in estimation** or importance’, while ‘hatred’ is defined as ‘**extreme dislike or disgust**’ [Emphasis added].

⁵ Morgan Begg, ‘IPA Research into Anti-vilification protections in Victoria’ (Institute of Public Affairs, 19 December 2019).

expertise give them significant influence. For this reason they have the greatest potential to cause harm when communicating false information.⁶

The revision made to the bill to remove from the list of excluded misinformation content authorised by an Australian government does not address the fundamental concern that this provision retains a two-tier treatment of content. In addition, the revision is not likely to be effective in bringing government content into the scope of the bill. For instance, the responsibility for enforcing misinformation standards rests with a government agency, and it is likely that a government agency will be sympathetic to government content. Moreover, governments often rely on experts when formulating and justifying policy decisions, and as explained in the Explanatory Memorandum, ‘expert opinion or advice’ is a key matter to consider when assessing whether or not content is verified as false, misleading, or deceptive.

ACMA will be empowered to launch investigations and hearings to ensure compliance with censorship guidelines that can target mainstream Australians

The consequential amendments contained in Schedule 2 of the bill would have the effect of inserting into the *Australian Communications and Media Authority Act 2005* (ACMA Act) new functions for the ACMA, including:

- (mc) to develop standards under Division 4 of Part 2 of Schedule 9 to the *Broadcasting Services Act 1992* (the provisions relating to misinformation and disinformation);
- (md) to monitor compliance with Schedule 9 to the *Broadcasting Services Act 1992* (BSA 1992), digital platform rules, misinformation codes and misinformation standards;
- (me) to conduct investigations relating to misinformation and disinformation on digital communications platforms; ...

The insertion of the above functions will have the effect of enlivening ACMA’s substantial investigative powers in relation to misinformation matters.

- Section 12 of the ACMA Act provides that ACMA ‘has power to do all things necessary or convenient to be done for or in connection with the performance of its functions.’
- Section 14 of the ACMA Act and section 171 of the *Broadcasting Services Act 1992* provides that the Minister for Communications may give written instructions to the ACMA to conduct an investigation into ‘any matter that the Minister is satisfied should be investigated in the interests of the due administration’ of the BSA 1992 (including the misinformation provisions).
- Division 3, Part 3 of the BSA 1991 empowers ACMA to hold hearings, which would be extended to matters relating to ACMA’s investigative functions and compliance monitoring.

Section 186 of the BSA 1992 requires ACMA hearings to be ‘informal, quick, and economical’, which means the formal rules of evidence are disregarded. Section 187 provides that ACMA officials can decide to hold hearings in private if satisfied that doing so would be conducive to the due administration of the Act.

⁶ Morgan Begg and John Storey, *Canberra’s Digital Ministry of Truth* (Institute of Public Affairs Research Report, September 2023) 12.

While a perfunctory proviso has been included in the bill that investigations and hearings are not to be launched in relation to specific points by a specific end-user, it is likely to be circumvented by instead launching an investigation into a *type* or *category* of content, rather than specific posts.

The effect of these provisions is that the Minister for Communications and unelected, unaccountable ACMA officials would be given significant discretion and scope to launch star chamber-like investigations into how digital companies are addressing misinformation.

The government has acknowledged that big tech companies will over-comply with their obligations under the bill

Under the bill ACMA would be empowered to impose substantial financial penalties on social media companies that fail to adequately address misinformation and disinformation on their platforms. Clause 205F(5D) would insert into the *Broadcasting Services Act 1992* new penalties of the greater of 5 per cent of turnover or up to 25,000 Commonwealth penalty units (currently \$7,825,000) for each failure to comply with a ‘misinformation standard’ that has been imposed on platforms by ACMA.

As the IPA noted in its 2023 submission:

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. ... The bill is designed in such a way that that the government ensures censorship takes place, while avoiding any responsibility for the actions taken ...⁷

The government has now acknowledged that there is a risk of overcompliance, but nonetheless has taken no action to address this problem. The federal government’s Impact Analysis notes at page 59:

Although the bill does not require ‘over-censorship’ it is possible that digital communications platforms providers could decide, in response to the bill, to operate their platforms in a manner that goes beyond what the bill requires of them. As operators of digital platforms, digital communications platform providers already have the ability to govern the types of content on their platform.⁸

Over-compliance is therefore an entirely foreseeable and, as acknowledged by the federal government, non-concerning feature of the bill.

On the basis of this analysis, the IPA considers the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024 to be one of the most offensive bills to the values of freedom of speech and liberal democracy that the Commonwealth parliament has introduced in the nation’s peacetime history. It should be rejected.

Kind regards

John Storey
Director of Law and Policy

Morgan Begg
Director of Research

⁷ Morgan Begg and John Storey, *Canberra’s Digital Ministry of Truth* (Institute of Public Affairs Research Report, September 2023) 13.

⁸ Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Online misinformation and disinformation reform: Impact Analysis* (Commonwealth of Australia, September 2024) 59.