Submission: new ACMA powers to combat misinformation and disinformation

Please find enclosed the submission by the Free Speech Union of Australia (**FSU**) in response to the consultation on the new ACMA powers to combat misinformation and disinformation.

The FSU is a non-partisan organisation established in order to promote the fundamental human right of Freedom of Speech within Australia. We defend, protect and promote the Free Speech rights of all Australians irrespective of the content of the speech.

The FSU strongly objects to the passing of the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (the **Bill**) into law, primarily due to the impact it will have upon Free Speech by encouraging censorship and by impeding innovation in the online media space.

We recommend that the attempt to regulate misinformation and disinformation is abandoned in its entirety, but at a minimum this Bill should be amended as follows:
1. The regulation of misinformation should be removed so that unintended sharing of false information is not captured;
2. The exemptions for media and government sources should be removed;
3. Exemptions that allow individuals to engage in good faith debate and discussion should be introduced; and
4. A threshold test should be introduced so that new entrants in the media market are not unduly burdened with this regulation.

If there are any questions in respect to this submission, please direct them to Dara Macdonald using the details below.

Yours sincerely,

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Misinformation and Disinformation Regulation: Unnecessary, Unjust and Unworkable

The FSU strongly opposes passing the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* into law. This law is unnecessary, encourages the censorship of unorthodox and unpopular ideas, and is unjust in its treatment of different media sources.

By impinging on the Free Speech of Australians and preventing the new entrants to the online media landscape this law will have far more negative consequences than positive ones.

1. Actions Not Ideas Should Be Regulated

The first reason for the FSU's strong opposition to this law, is that it seeks to regulate the dissemination of ideas.

The FSU disagrees that there is a need to regulate misinformation and disinformation. We note that ACMA's report which is asserted to justify these new powers only identifies one instance of serious harm that is directly and unequivocally caused by misinformation: that of damage to 5G telecommunications infrastructure. There is a lack of evidence of a significant increase in harm caused by misinformation and disinformation. Further, all the categories of 'harm' that this Bill seeks to prevent by regulating information have existing remedies in law.[1] To take the example of damage to 5G infrastructure, existing criminal laws in all states penalise damage to property and as such would address any harm caused in this instance.

With Australia's sophisticated system of laws already regulating all manner of harmful actions that people can engage in, we are more protected from 'misinformation' and 'disinformation' than ever before in history. Action, not information or ideas, is also the proper place of regulation, firstly because in terms of preventing harm, regulation of actions is far more effective, and, more importantly in our view, the regulation of information and ideas will ultimately lead to censorship which is seriously detrimental to Australian democracy and society .

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[1] This includes. various state and federal anti-vilification laws, such as the Racial Discrimination Act 1975 which already prevents "hatred against a group in Australian society on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion or physical or mental disability", state-based summary offences which already prevent harm caused by the "disruption of public order or society in Australia", whilst offences under various state and federal laws such as the *Commonwealth Electoral Act 1918* already prevent "harm to the integrity of Australian democratic processes or "of Commonwealth, State, Territory or local government institutions. Existing state and federal environmental laws already make it illegal to harm the environment, and economic harm of all kinds is captured under various laws including the *Competition and Consumer Act 2010.*

2. This Law Encourages Censorship

The primary reason for the FSU's opposition to this Bill is that it encourages and promotes censorship. It does this by compelling digital platforms to create a means to identify and remove misinformation and disinformation, which will inevitably require them to make a determination as to the truth of information.[2] This is a technologically and practically challenging task which will mean that the digital platforms will need to use heuristics (or assumptions that may not be completely accurate) to determine whether information is 'true' or not. The problem with using assumptions such as the "orthodox understanding is true" is that it will invariably mean important information will be censored because it does not fit within the heuristic that the platforms are using.

The COVID-19 pandemic provided ample examples of the danger of determining truth by orthodoxy (or what the official information was at the time). There were many instances of social media platforms removing or shadow banning information from prominent scientists for disagreeing with the dominant theory or narrative, but in many cases the theories that were removed from social media platforms as misinformation soon became the dominant theory or vindicated as correct.

Removing information that contradicts the government or official narrative is most concerning, not least because it prevents course correction where the position taken by an authority is wrong. It undermines the quality of decision making and diminishes public trust.

The social media giants have also been known to remove accounts and information based on the popular narrative within the company in question. Given that these companies are mostly headquartered in the US, this has led to an increased dominance of American ideas and discourse in Australia.[3] One unfortunate example of this is the Twitter ban placed on Australian Associate Professor Holly Lawford-Smith for challenging the idea that being a woman is an identity unrelated to biological sex.[4] This idea is a subject for intense and legitimate debate in much of the world and particularly by feminists that are concerned about the erasure of sex-based rights. The removal of feminists like Lawford-Smith is an intervention by the big tech platforms that unfairly favours one side of a contentious issue that requires legitimate public debate.

By judging truth on the prevailing orthodoxy (which is inevitably how they will make such a determination), digital media platforms will be distorting important public debates by giving

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[2] We note that the Bill enforces the creation and application of codes that digital platforms must follow for the identification and removal of misinformation and disinformation, but these codes will likely leave the determination of factualness to the digital platforms. There is also a risk that ACMA becomes further involved in the removal of misinformation and disinformation given the powers contained in Part 3 of the Bill.

[3] Existing AI systems have been known to unlawfully discriminate and we can expect that people from minority groups will be more likely to be censored. For example, indigenous people using particular terminology e.g. 'Blak', 'Meanjin', 'Palawa', or equally someone who has a disability that impairs communication, are more likely to be subject to erroneous flagging by an AI system (as it has less training data to use for these groups and it seems unlikely that US centric tech-companies will trouble to train their systems to be fair for these groups).

[4] We note that some of the actions taken against A/Prof Lawford Smith likely amount to unlawful discrimination under existing laws, including victimisation.

preference to "the status quo" over new information or competing ideas. This will likely have the effect of atrophying our knowledge and limiting access to certain cross-sections of the public, especially those less connected to existing debates (e.g. people without a University education).

Free speech is the best corrective mechanism we have to ensure that what the ideas we hold are correct: 'more speech' has been long known to be the answer. By encouraging censorship this Bill will not improve people's access to information but rather it will limit it and make it more difficult to update our understanding of the world where the prevailing narrative is incorrect. For this reason, the FSU believes that the introduction of this law is more dangerous than any of the 'misinformation' and 'disinformation' it is apparently concerned with. In fact, we consider that it is a recipe for fuelling misinformation and disinformation, contrary to the stated objective of this proposed law.

3. **This Law is Unjust in its Treatment of New Entrants to the Media Market and Undermines Technological Innovation**

If passed, this Bill will not only prevent the main mechanism for updating our understanding of the world from functioning: free speech. It also prevents the dynamism required to update our institutions, risking the ossification of Australian society.

One of the most egregious aspects of this Bill is the preferential treatment it offers to legacy institutions and existing media organisations by exempting them from these regulations, whilst simultaneously heavily regulating new entrants to the media landscape. It is unfair for regulation to treat new technologies and media business models differently to existing media and platforms.

Consider the example of Substack, a new platform that has been an important source of income and independence for many writers and journalists. Substack will be caught twice by this law. Firstly, because it will be regulated as a digital platform it will have to ensure that any content that appears on Substack is not misinformation. Monitoring all of the posts, videos, podcasts released on Substack and any user comments on any content for misinformation and disinformation will be an incredibly costly exercise. Secondly, anything shared from Substack to another digital platform (like Twitter, now called "X") will also be caught by this regulation. This increases the risk that either platform will deem the information contained in a Substack post to be misinformation and censor it from the Australian audience - at the very least - if not remove it entirely and block the account that it was shared from.

This Bill places a considerable burden upon new entrants to the media landscape and given the size of the Australian market, many may simply choose not to operate in Australia, which will only serve to disadvantage Australians by depriving them of new media sources and preventing innovation in the digital platform space.

4. Regulating Misinformation and Disinformation is a Futile Exercise

This proposed regulation is already not able to contend with the technology that exists to enable people to access the vast array of information contained on the internet. This lag between the law and the technology may ultimately render it futile.

If this Bill is passed, existing platforms that are designed to respect free speech and privacy (such as DuckDuckGo) may simply decide not to operate in the Australian market rather than comply with the requirements to collect information on Australians and censor their content.[5] This is particularly likely given that leaving the Australian market will not prevent Australians from unofficially accessing these platforms.

If Australians cannot access the information and platforms that they currently do on the open web, this will merely encourage the use of technology like VPNs. Some platforms may even reconfigure themselves to circumvent the laws so that they are classified as private messaging or email rather than a digital platform, which would not be a difficult adjustment for many.[6]

The reality is that existing technology already allows for the easy circumvention of this proposed regulation by end users. If people want to access information that is classified as misinformation or disinformation there are ample opportunities for them to do so, irrespective of if this Bill is passed. This Bill - as is inevitable from what it attempts to do - simply amounts to red tape for digital businesses, making it less economically viable for them to operate in Australia.

5. Recommendations

The FSU opposes the entirety of this law and recommends that it is not passed for the reasons we have already provided. However, if this law is to be passed, then at a minimum the following amendments should be made.

a) **Remove the regulation of misinformation**
   The regulation of misinformation should be removed from this Bill. There is an argument for regulating information that is intended to mislead or deceive people, but 'misinformation', which the Bill defines as "content [that] contains information that is false, misleading or deceptive" that is shared without intent to mislead, should not be regulated. The category of 'misinformation' creates far too much scope for digital platforms to classify genuinely held opinions expressed about controversial issues of significant public debate as misinformation and censor it.

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[5] It is impossible to comply with the EU GDPR and the 'misinformation' Bill simultaneously: it still captures a range of personal information (such as unpublished posts removed for 'misinformation' purposes) and proposes to process this arbitrarily and unfairly.
[6] The risk is that organisations actually attempt to comply with it, which involves reacting to rapidly introduced 'codes', and by doing so, introduce errors and bugs that inadvertently expose personal information and increase the likelihood of successful cyberattacks.

b) Remove exemptions for media and Government sources

Sources of information should be treated equally with no preference given to existing information institutions. By exempting government and mainstream media sources and regulating other sources, the proposed legislation unreasonably hampers the criticism of these institutions as well as impeding the introduction of new media platforms. For this reason, exemptions should not be granted based on the publisher of the information but based on the merits of the content.

c) Introduce exemptions for individuals

The FSU would suggest amending this Bill, so there are exemptions individuals can rely on when engaging in good faith discussion and debate, much like existing defences in defamation law. This would better protect whistle-blowers, academics, independent journalists and others who disseminate important information that may be contrary to prevailing views and ideas. This would also encourage digital platforms to implement proper due process, which allows individuals and organisations to contend the classification of anything they publish as misinformation.

d) Introduce a threshold test

Introduce a threshold test (for instance, less than 5 million Australian uses or less than $100 million annual worldwide revenue) for compliance with this law that allows new and smaller media companies and digital platforms to start up and operate in Australia without being hampered by the prohibitive compliance costs. Media and communications platforms with fewer Australian-based users also represent a significantly reduced risk for spreading misinformation and disinformation, so it is reasonable that they would also be exempted on this basis.