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Jointly with:

ASF | AUSTRALIANS FOR SCIENCE & FREEDOM

To: The Department of Infrastructure,
Transport, Regional Development,
Communications and the Arts,
GPO Box 594
Canberra ACT 2601

Re: New ACMA powers to combat misinformation and disinformation (the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023*)

Dear Officer,

SUBMISSION

Introduction

The Department of Infrastructure, Transport, Regional Development, Communications and the Arts (**the Department**) have invited feedback on an exposure draft of the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (**the Bill**).

This is a joint submission by Maat's Method and Australians for Science and Freedom.

Maat's Method is a dedicated human rights law firm. That is, we practice 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, our Principal who has particular expertise and experience as a specialist human rights lawyer.

Australians for Science and Freedom (**ASF**) is a diverse group of Australian clinicians, academics, lawyers and public intellectuals who united in growing disquiet at federal and state responses to the COVID-19 pandemic. As a truly independent think tank, ASF creates and disseminates information and opinions from across the professions about what ails our society and how to rebuild Australian institutions. ASF promotes intellectual and personal freedom in public debate and public policy, championing the application of classic scientific methods to the analysis of scientific questions and the transparency, contestability and accountability of public decision-making.

The Bill, if passed in its current form, would allow the Australian Communications and Media Authority (**ACMA**) substantial, unilateral and discretionary authority to govern all forms of media save those explicitly excepted from the Bill's operation. Such law would render Australia's commitment to freedom of speech and expression nugatory. The Bill is also, frankly, a poorly drafted piece of proposed legislation that does not do enough to define the key terms it is reliant on to give it any utility. Apart from being unworkable, such amorphism also renders the Bill apt for misapplication by nefarious or negligent future and/or current members of ACMA; or Government more generally.

In this submission, we focus on the following key points, with recommendations included:

A. What are Australia's obligations with respect to freedom of speech and freedom of expression?
B. What does the Bill do and why is it problematic?
C. Conclusion

A. Australia's obligations with respect to freedom of speech and freedom of expression

1. Australia is a party to the seven core international human rights treaties.[1] Mostly relevantly, this includes the *International Covenant on Civil and Political Rights* (**ICCPR**).

Article 19 of the ICCPR – Freedom of Expression

2. The natural and most obvious Article to focus on from within those agreements is Article 19 of the ICCPR, extracted as follows:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

3. It is important to say something at this stage about the exception presented by Article 19(3) above. The Bill, in its definition of 'Misinformation' at Section 7, incudes the qualifier that such

[1] It is worth noting that the seven core international human rights treaties are merely modern distillations of much older principles. Jurisprudentially, freedom of speech and freedom of expression, for example, have been recognised as sacrosanct since the Magna Carta, and indeed, by many human societies for thousands of years prior.

information is "reasonably likely to cause or contribute to serious harm". We assume, therefore, that Parliament will attempt to justify the clear encroachment on Articles 19(1) and (2) of the ICCPR that the Bill allows by suggesting that it is compliant with Article 19 in general due to the exception provided in Article 19(3). Such justification, however, would be a misappropriation of the exception, and a dilution of the intent of Article 19 in general.

4. We will provide more detail on the function of the Bill below, but in brief, it allows ACMA the power to, among other things, create 'Misinformation Codes' and 'Misinformation Standards' which would apply to anybody who disseminates information publicly save for those explicitly excepted from the Bill's operation (mainstream/professional media and Government).

5. The exception in Article 19(3) above states that the right to freedom of expression "may be subject to certain restrictions, but these shall only be such as are provided by law **and are necessary**…for the protection of national security or of public order, or of public health or morals" (emphasis added).

6. "Necessary" is a high bar. It is also a very specific phrase, referring to something that is *essential*, and indeed, *absolutely essential*. In order for the Bill to claim compliance with the ICCPR, and in particular with Article 19, Parliament must justify why the Bill in its totality, and all of the individual powers it grants to ACMA, are **necessary** for the protection of national security, public order, public health or morals. This would mean that there are no alternative solutions available to the problem Parliament is trying to solve. It would also necessitate a particular and precise explanation of what that problem actually is, and how the onerous approach the Bill proposes would resolve that problem. None of that has occurred.

Recommendations:

1. **Specific particularisation of why the various powers granted to ACMA by the Bill are necessary for the purposes outlined in Article 19 of the ICCPR, including reasons as to why less onerous approaches are not sufficient.**

Other Relevant Articles in the ICCPR

7. There are two other Articles from the ICCPR containing rights which the Bill threatens to impede. First, Article 1 of the ICCPR contains the right of self-determination, often referred to as the bedrock of human rights. That is;

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

8. In today's world, freely pursuing one's economic, social and cultural development is a process intertwined with and dependent on digital platforms, and the internet generally. Most individuals and most businesses use websites and social media platforms to share information. "Social and cultural development" necessarily includes the interaction with, and sharing of, ideas online. All of these processes have become integrated and intertwined. It would be a simplistic and naïve view to claim that restrictions placed on people and their businesses by ACMA with respect to what they can and cannot post on the internet would not impede on their right to self-determination.

9. Article 18(1) is also relevant:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.

10. Freedom of thought necessarily entails the freedom to express those thoughts, and freedom of conscience necessarily entails the right to have access to a broad range of information which might inform that conscience. Forcing independent disseminators of information to comply with codes and standards imposed from on high does not facilitate an environment where freedom of thought and conscience are possible. Even Article 4, which states that "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation",[2] does not apply to Article 18, such was and is its import.

Enforceability

[2] It is worth noting the care with which the drafters of the ICCPR, and its signatories in agreeing to it, included very strict exceptions to the rights contained within, triggered only by events that were, without exaggeration, existential.

11. There is an unfortunate impression in Australia that because the ICCPR and other treaties and covenants have not been ratified into domestic law that they are totally meaningless. Such an interpretation totally divorces Australia from its obligations under those instruments, rendering the citizens of Australia without meaningful human rights protections. It also ignores the fact that, as a nation, we have covenanted into those agreements, including agreeing to uphold them, and failing to do so renders our collective word meaningless in the international sphere.

12. Beyond that, the argument that the treaties and covenants are 'meaningless' is also an oversimplification of the true state of play. The ICCPR, for example, requires signatory governments to create statutory bodies with the power to oversee and ensure that Governments comply with the rights and protections within. In Australia, the *Australian Human Rights Commission Act 1986 (Cth)* created the Australian Human Rights Commission (**AHRC**) who as one of their explicit statutory functions within that Act are obligated to, among other things;[3]

> (e) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, are, or would be, inconsistent with or contrary to any human right, and to report to the Minister the results of any such examination; and
>
> (f) to:
>
> (i) inquire into any act or practice that may be inconsistent with or contrary to any human right; and
>
> (ii) if the Commission considers it appropriate to do so—endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry…

13. The AHRC, therefore, has an obligation to examine the Bill to ascertain whether it is inconsistent with any human right (we say it clearly is). In addition, Section 11(f) arguably allows the submission of complaints by people who might be affected by the Bill, if passed, on the basis that their right to freedom of expression has been curtailed (for example). The AHRC, and

[3] *Australian Human Rights Commission Act 1986 (Cth),* s11.

the Department, should be aware of this. There could be an avalanche of complaints given the poor drafting of the Bill and the broad and unchecked power it purports to give to ACMA.

14. In addition, under the *Human Rights (Parliamentary Scrutiny) Act 2011* all new Bills must be accompanied by a Statement of Compatibility, which assesses the compatibility of the proposed legislation with the rights and freedoms recognised in the seven core international human rights treaties that Australia has ratified, including the ICCPR. Such statement should be publicly released immediately given the gravity and proposed scope of the Bill, so that the public can meaningfully consider whether the Department has paid appropriate mind to those rights. In addition, the necessary establishment of a Parliamentary Joint Committee on Human Rights should occur early and in a transparent manner for the same reason.

15. There is, within the Bill, an accommodation for, and an acknowledgement of, the implied freedom of political communication that the High Court has held exists as an indispensable part of the system of representative and responsible government created by the Constitution.[4] As a result, at several points, such as in the creation of 'Misinformation standards' the Bill says that ACMA;

> …must consider:
> (a) whether the standard would burden freedom of political communication; and
> (b) if so, whether the burden would be reasonable and not excessive, having regard to any circumstances the ACMA considers relevant.

16. If it is not already obvious, the above provides illusory protection. The framing of it, firstly, renders ACMA the sole arbiter, at its sole discretion, of whether the standard (in this example) burdens freedom of political communication, and in any event only forces them to "consider" the possibility, rather than to ensure such a burden is avoided or mitigated in any tangible way. In addition, ACMA is left to adjudge reasonableness based on "any circumstances [it] considers relevant". This is, all in all, hardly an effective protection of one of the only human rights that our Constitution protects; albeit via implication. Thankfully, to the Bill's credit, Section 60 does exclude the operation of the Bill itself, as well as any rules, codes or standards created under it, to the extent that "their operation would infringe any constitutional doctrine of implied freedom of political communication". However, this is only the bare minimum, given the High

[4] See *Nationwide News Pty Ltd v Wills (1992)* 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth (1992)* 177 CLR 106; reaffirmed in *Unions NSW v New South Wales [2013]* HCA 58.

Court has emphatically recognised the existence of that right within our constitution. And, problematically, the construction of Section 60 invites retrospective correction via litigation, as opposed to ensuring ACMA pays appropriate mind to the right in the first place.

17. By way of comparison, it is worth examining the following extract from the Fact Sheet:[5]

> **Code of practice registration**
> Should the ACMA determine that stronger action is needed to protect Australians, it could request that a section of the industry put in place a new and more effective code of practice (than the existing DIGI voluntary code of practice, for example). Once the ACMA is satisfied a draft code presented to it by industry meets a number of criteria, it may register it which makes compliance with it compulsory for all digital services providers in the relevant segment of the industry. This would include those providers who chose not to sign up to a voluntary code.

18. The 'DIGI voluntary code of practice' (**the DIGI Code**) referred to above, which the Fact Sheet somewhat ominously suggests that ACMA may find ineffective and subsequently replace, is a current, voluntary code of practice which several of the largest social media companies in Australia have already subscribed to. Interestingly, that Code does something which the Bill does not do, which is to include explicitly, as one of its 'Guiding Principles', an acknowledgement of freedom of speech and freedom of expression, as follows:[6]

> 2. Guiding Principles
> 2.1. Protection of freedom of expression: Digital platforms provide a vital avenue for the open exchange of opinion, speech, information, research and debate and conversation as well as creative and other expression across the Australian community. Signatories should not be compelled by Governments or other parties to remove content solely on the basis of its alleged falsity if the content would not otherwise be unlawful. Given its subject matter, the Code gives special attention to international human rights as articulated within the Universal Declaration on Human Rights, including but not limited to freedom of speech. Signatories are encouraged to, in developing proportionate responses to Disinformation and

[5] Fact Sheet, Page 7.
[6] *Australian Code of Practice on Disinformation and Misinformation*; the Digital Industry Group Inc. (DIGI); published 22 February 2021.

Misinformation be cognisant of the need to protect these rights.

19. The above extracted principle suggests a sound approach. By centering itself on the foundation that the open exchange of opinion and ideas is vital to a democratic society, and that such openness is vital to human rights protections, the DIGI Code is able to provide a much more tangible approach to the control of online information. That is, that "signatories should not be compelled by Governments or other parties to remove content solely on the basis of its alleged falsity if the content would not otherwise be unlawful". There is no such acknowledgement, and no such attempt at reasonable mitigation of power, in the Bill; and it is concerning, to say the least, that the Fact Sheet (and the construction of the Bill itself) suggests that the DIGI Code may be deemed insufficient, in circumstances where the proposed replacement is woefully drafted and befitting of corrupted and/or negligent application.

Recommendations:

2. **The Department and the AHRC should collaborate to ensure, as per the AHRC's statutory function, that the Bill is compatible with Australia's human rights obligations at international law;**
3. **The Department should immediately release the Statement of Compatibility for public scrutiny, and confirm the establishment of the Parliamentary Joint Committee on Human Rights with respect to the Bill;**
4. **Stronger, proactive protections for the implied right to freedom of political communication;**
5. **Include Guidance Principles within the Bill that make clear the importance of freedom of speech and expression, and which force ACMA to acknowledge these rights when making decisions;**
6. **Follow the DIGI Code's lead in ensuring that content producers should not be compelled by Governments or other parties to remove content solely on the basis of its alleged falsity if the content would not otherwise be unlawful.**

B. What does the Bill do and Why is it Problematic?

The Bill's stated Intention

20. The Bill has been released to the public for comment alongside a 'Guidance Note' and a 'Fact Sheet'. Both of those documents seek to justify the Bill's existence by stating that

"misinformation and disinformation pose a threat to the safety and wellbeing of Australians, as well as our democracy, society and economy".[7]

21. There are also several comments made in an effort to mitigate any perceived overreach within the Bill. For example:

    a. "The ACMA will not have the power to request specific content or posts be removed from digital platform services";[8]

    b. "the Bill is directed at encouraging digital platform providers to have robust systems and measures in place to address misinformation and disinformation on their services, rather than the ACMA directly regulating individual pieces of content";[9]

    c. "rules made under the Bill may require digital platform services to have systems and processes in place to address misinformation or disinformation that meets a threshold of being likely to cause or contribute to serious harm";[10]

    d. "the proposed ACMA powers will support the success of the voluntary industry code currently in place";[11]

    e. "the proposed powers will only apply to misinformation and disinformation that is reasonably likely to cause or contribute to serious harm";[12] and

    f. "the proposed powers are designed to encourage digital platform services to be accountable for improving and implementing measures to counter the spread of misinformation and disinformation online (i.e. they have a 'systems' focus rather than an individual content focus".[13]

22. With respect to the interplay of the proposed powers that the Bill would grant to ACMA and freedom of speech and expression, the Guidance Note states as follows:

[7] Fact Sheet, page 1.
[8] Fact Sheet, page 1.
[9] Fact Sheet, page 2.
[10] Fact Sheet, page 2.
[11] Fact Sheet, page 3.
[12] Fact Sheet, page 3.
[13] Fact Sheet, page 4.

> The proposed powers seek to strike a balance between the public interest in combatting the serious harms that can arise from the propagation of misinformation and disinformation, with freedom of speech.
>
> The Bill aims to incentivise digital platform providers to have robust systems and measures in place to address misinformation and disinformation on their services, rather than the ACMA directly regulating individual pieces of content. The Bill does not seek to curtail freedom of speech, nor is it intended that powers will be used to remove individual pieces of content on a platform. The proposed definition of misinformation and disinformation is intended to provide guidance on the types of harms the powers are designed to address. The concept of 'serious harm' is intended to ensure that the ACMA's use of its powers, and the platforms' systems and processes, are targeted at harms with significant implications for the community.

23. In brief, the Department wants to say that the Bill:

    a. is necessary to protect Australians from misinformation and disinformation, which is harmful;
    b. allows ACMA powers which will only be used when and if necessary (being, in circumstances where the industry does not adequately regulate itself); and
    c. is targeted towards digital platform companies, rather than individuals.

24. All of the above may very well be a genuine expression of the intent of the Department in drafting and proposing the Bill. However, problematically, there is a significant chasm between those stated intentions and purported safeguards, and the wording and proposed operation of the Bill itself.

What does the Bill do?

25. In brief, the Bill would enable ACMA three broad powers:

    a. to gather information from, or require digital platform providers to keep certain records about matters regarding misinformation and disinformation;

b. to request industry develop a code of practice covering measures to combat misinformation and disinformation on digital platforms, which the ACMA could register and enforce; and

c. to create and enforce an industry standard (a stronger form of regulation), should a code of practice be deemed ineffective in combatting misinformation and disinformation on digital platforms.

The Bill places unacceptable restrictions on any Individual who posts content online

26. As noted above, there is a stated intention with the Fact Sheet and Guidance Note that the Bill is aimed at 'digital platform providers' and not at individual content or posts. This, however, despite misleading assertions to the contrary in the Fact Sheet and Guidance Note, is not how the Bill actually works.

27. The Bill makes clear that "content is provided on a digital service if the content is…accessible to end-users using the digital service".[14] In addition, a "service is provided to the public if…the service is provided to at least one person outside the immediate circle…of the person who provides the service".[15] The above definitions taken in tandem mean that an individual who posts content online which is accessible to more than one other person is captured by the various powers the Bill grants ACMA. That individual (any Australian citizen who posts something online) would need to comply with any digital platform rules, or misinformation codes or standards, that ACMA implements under the Bill. That individual would also be subject to the severe civil and criminal penalties that the Bill implements if those codes/standards are breached.

28. This approach is, quite frankly, an unacceptable and inappropriate imposition of executive regulation on the citizenry of Australia. It is a flagrant dismissal of the rights to freedom of speech and expression Australia has covenanted into protecting. It would render any citizen who chooses to express themselves in a digital form subject to regulatory frameworks that have not even been created yet, unilaterally imposed by ACMA, and not subject to meaningful challenge. That is not the way a democratic society works. It would signal the end of the

[14] The Bill, Section 9.
[15] The Bill, Section 10.

internet as a free market of ideas and opinions and render criticism of Government, an essential element of any healthy democracy, vulnerable to civil and criminal prosecution.

Recommendations:

7. **Amend the definition of 'digital service' to clarify and ensure that an individual who posts on a social media platform is outside of the scope of the Bill's operation.**

<u>The Definitions of Misinformation, Disinformation and Serious Harm are vague, and as a result are not functional</u>

29. The Bill is predicated on the idea that 'misinformation' and 'disinformation' are harmful to Australians; and that Australians must be protected from it via Government regulation. It is therefore essential to consider the definitions of these terms within the Bill, which in many ways are at its centre.

30. The definition of 'misinformation' within the Bill is as follows:[16]

> (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.
>
> (**The Misinformation Definition**)

[16] The Bill, Section 7(1).

31. The definition of 'disinformation' within the Bill is functionally similar, except that it includes an additional qualifier, being that "the person disseminating, or causing the dissemination of, the content **intends** that the content deceive another person" (emphasis added).[17]

32. The primary issue with these definitions is that they rely on an assessment that the impugned information is "false, misleading or deceptive". None of the terms "false", "misleading" or "deceptive" are defined in the Bill itself. This may be because what is considered "false or misleading", or what is considered truthful, is rarely straightforward. In science, for example, there is no such thing as 'truth'. There are only hypotheses, based on data and evidence, which themselves are frequently subject to change. A collective and unchallenged scientific position is rare – and even then it will seldom be referred to as 'truth', but merely the best available current theory. It is a dangerous idea to suggest that only 'true' information should be allowed to be disseminated to the public, when not everybody agrees on what is 'true' and what isn't. Such an approach will have the consequence of stifling scientific debate; and particularly in areas of current controversy, which are usually the most pressing and important.[18]

33. The Guidance Note states that "ACMA [will not] have a role in determining what is considered truthful".[19] This is misleading. While the Bill itself doesn't explicitly allow ACMA to define or determine what information is true, misleading or deceptive, it does allow ACMA the power to create enforceable and compulsory rules, codes and standards that will do just that. The Bill also creates an obligation for 'digital platform services' to themselves define those terms, because if they don't, for example, "prevent or respond to misinformation on digital platform services"[20] they may be subject to civil and criminal penalty. In this way, the drafters of this Bill have avoided the impossible task of drafting definitions of "false, misleading or deceptive" by passing the buck to social media companies, without considering that it will be impossible for those companies to properly define those terms themselves. The result of all of this will be ACMA and/or digital media companies arbitrarily, and without proper qualification, frantically

[17] The Bill, Section 7(2).

[18] It is useful to consider the pandemic as an example of these issues. Throughout 2020 and 2021, the World Health Organisation frequently changed their recommendations with respect to several aspects of pandemic management, due to the constantly changing nature of the science and evidence. The State and Territory Governments were similarly turbulent in their recommendations; many of which have subsequently proven to be incorrect. If the Bill had been passed before the pandemic, thousands of Australians who shared their opinions, often evidence based, on these recommendations could have been found to have engaged in 'misinformation'; despite later being vindicated as the science and evidence properly emerged. This would be an unacceptable, counterproductive and dangerous state of affairs.

[19] Guidance Note, page 7.

[20] The Bill, Section 33.

determining what is true and what isn't, in a world where what is true and what isn't is constantly changing. It will be a mess for ACMA, for digital platforms and for individuals; with civil and criminal consequences. The uncertainty this creates would almost certainly result in censorship out of caution in an effort to avoid potential liability.

34. This is not helped by the definition of "serious harm" that the Bill includes, which is itself more of a principle of guidance than a definition, imbued with enough subjectivity to make the purported definition meaningless. Section 7(3) of Schedule 1 states:

> 7(3) For the purposes of this Schedule, in determining whether the provision of content on a digital service is reasonably likely to cause or contribute to serious harm, have regard to the following matters:
>
> (a) the circumstances in which the content is disseminated;
> (b) the subject matter of the false, misleading or deceptive information in the content;
> (c) the potential reach and speed of the dissemination;
> (d) the severity of the potential impacts of the dissemination;
> (e) the author of the information;
> (f) the purpose of the dissemination;
> (g) whether the information has been attributed to a source and, if so, the authority of the source and whether the attribution is correct;
> (h) other related false, misleading or deceptive information disseminated; and
> (i) any other relevant matter.

35. This is particularly concerning given that one of the primary checks and balances that the Guidance Note and Fact Sheet point to is the idea that it is only misinformation that might cause 'serious harm' that the Bill seeks to mitigate. Unfortunately, as is clear from the construction of the Bill, "any other relevant matter" could be seen to characterise information that is "reasonably likely to cause or contribute to serious harm". It is a catch-all definition with boundaries insufficient for the conveyance of any real meaning. Such definitions are apt for negligent and intentional misuse.

Recommendations:

8. **The current definitions of 'Misinformation', 'Disinformation' and 'Serious Harm' within the Bill are unworkable. Given that the Bill rests upon these definitions, this renders the Bill itself unworkable. The definitions should be amended such that they are not contingent on the identification of "truth", but are rather aimed at capturing content that is of a criminal character, or which constitutes a criminal offence.**

The Principle of Legality

36. If the Bill is allowed to pass in its current or in a comparable form, such amorphous definitions will pose issues for future Courts in their attempted interpretation of it. Via what is commonly known as the principle of legality, Brennan J noted in *Re Bolton* that "unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation". In this case, the Bill is supposedly intended to strike a balance between protecting Australians and ensuring freedom of speech and expression. Inherent in that stated intention is an acknowledgement that freedom of speech and expression are important, and the Guidance Note and Fact Sheet both espouse this view as well. The issue is that the Bill is unclear on the extent to which it seeks to abrogate those rights; and the vague definitions within do not help. In *R v Secretary of State for the Home Department; Ex parte Simms [2000],*[21] Lord Hoffman stated as follows:

> the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

37. The Bill is, contrary to Lord Hoffman's well-known judgment, and as outlined above, riddled with generality and ambiguity. It incorporates a disingenuous attempt by its drafters to state an affinity for freedom of speech and expression, despite offering several mechanisms for those rights to be curtailed. It is difficult to imagine how a Court will properly interpret the terms of

[21] 2 AC 115, 131.

the Bill in the inevitable contests that would follow its passing, particularly in light of the principle of legality.

Recommendations:

9. **The drafters of the Bill must be clear in their intentions. At present, the Guidance Note and the Fact Sheet say one thing whilst the functionality of the Bill suggests something else. This will result in complex and costly litigation;**
10. **If the Bill is to be allowed to pass, stronger protections for free speech must be incorporated into it, which would require a drastic re-drafting of the Bill. Anything less should not be allowed, because freedom of speech and expression are such fundamental rights in our democracy.**

The Bill allows ACMA too much Power

38. On its current construction, the Bill allows ACMA inappropriate power:

    a. First, it allows ACMA to unliterally govern the digital content creation space by creating rules, codes and standards which every single producer of content on the internet must comply with; and

    b. Second, it turns ACMA into a quasi-judicial body capable of holding what are essentially 'misinformation hearings' involving other quasi-judicial powers such as the forced production of evidence.

39. With respect to the former, it is rare that a piece of legislation allows a Government body unchecked authority to create enforceable rules without any meaningful checks and balances in place. The reason for this is demonstrated by the Bill's current construction. On current construction, if the Bill is passed, ACMA could create and then enforce rules, codes and standards that contain anything ACMA wants; without oversight, and without the ability for users of digital platforms, or those platforms themselves, to question or challenge those rules (unless ACMA decides to incorporate these mechanisms within those rules, codes or standards). The provision of this arbitrary rule making authority subverts representative democracy while granting ACMA a head of power not found under the Constitution.

40. Although the Guidance Note and Fact Sheet, and elements of the Bill's construction, suggest that ACMA's creation of codes and standards would only apply in circumstances where the industry does not sufficiently regulate itself, this is, again, not how the Bill actually works. ACMA, for example, is given authority by the Bill to simply choose not to register a code which industry creates.[22] In addition, if ACMA in its sole discretion determines that a code created by industry is "deficient", it can simply create its own codes and standards. A code is "deficient if, and only if, the code is not operating to provide adequate protection of the community from misinformation or disinformation on the services".[23] Again, this is an amorphous definition which essentially allows ACMA unfettered discretion to unilaterally declare a code deficient, based on a definition of 'misinformation' that is already itself broken. This is further exacerbated by the additional power that the Bill grants ACMA to "determine standards [in] emerging circumstances"; that is, that ACMA only needs to consider it "necessary **or convenient**" (emphasis added) to create standards "in order to provide adequate protection for the community from misinformation or disinformation on the services".[24] The use of the word "convenient" betrays the intent of the drafters; the discretion offered to ACMA is designed to be as broad, and as difficult to challenge, as possible. The test, in its current drafting, is basically meaningless.

41. Of additional concern are the quasi-judicial powers that Division 3 of the Bill, innocuously titled "Information gathering" grants to ACMA. Apart from allowing ACMA to, in any circumstance where it "considers that it requires the information", require a "digital platform provider" (recall the scope of that definition) to provide to ACMA any "information, documents or evidence" it desires,[25] it also allows ACMA to force an individual "to appear before the ACMA at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents", at risk of civil penalty for non-compliance.[26] That is, on any reading, a subpoena power designed to force individuals (and representatives of corporations) to provide written and oral evidence on demand. There is no concession for any potential breaches of the state or federal privacy statutes, and the Bill even goes so far as to ensure that "an individual is not excused from giving information or evidence or producing a document or a copy of a document under this Division on the ground that giving the information or evidence or

[22] The Bill, Division 4, Section 37.
[23] The Bill, Section 48.
[24] The Bill, Section 49.
[25] The Bill, Section 18.
[26] The Bill, Sections 18 and 19.

producing the document or copy might tend to incriminate the individual in relation to an offence".[27] That is, even the protections available to defendants in the criminal charge and hearing process are not afforded to digital platform providers (which again, can be individuals) under this Bill. The provision of this unbounded quasi-judicial authority subverts the rule of law and common law rights, while granting to ACMA a star chamber-like authority not afforded under the Constitution.

42. These powers are, in their current form, a clear attempt to wrap an iron fist around the sharing of information online by forcing content creators to front up and provide evidence before a murky Government body with an incredible and unprecedented degree of discretion to mete out civil and criminal penalties. It is a threat wrapped in a regulatory nightmare; and it completely ignores the legislative protections for the sharing of private information that already exist in Australia.[28]

Recommendations:

11. **Stronger checks and balances need to be incorporated into the Bill such that ACMA is not allowed unchecked, unilateral, unchallenged power to create codes, rules and standards;**
12. **Statutory mechanisms for review and challenge of ACMA decisions must be incorporated into the Bill, with external and independent oversight that is timely and efficient;**
13. **ACMA's discretion should be limited and couched within clear parameters for reasonable assessment by a Court;**
14. **The Bill must include a Clause excepting the provision of any information that would render the provider in breach of Privacy legislation.**

C. Conclusion

43. When the public is no longer the arbiter of truth, and that role becomes usurped by bureaucrats and governments, history suggests that the resultant censorship erodes the public's collective trust in authority.

[27] The Bill, Section 21.
[28] See the *Privacy Act 1988 (Cth)* and all State and Territory equivalents.

44. In its current form, not only is the Bill unworkable and illogical, but it betrays a fundamental lack of understanding, or lack of care, for the human rights of Australians; and in particular for the right to freedom of speech and expression. It is unlikely that minor amendments will be enough to save this Bill. Its sponsors provide no evidence to justify the intrusions it proposes into the private and civil autonomy of Australian citizens, whilst purporting to vest unrestrained investigatory, quasi-judicial and non-reviewable policing power into a body without Constitutional authority. Should such laws be enacted there is little doubt that complex litigation will ensue. The impact on the Australian legal system could prove to be detrimental to the administration of the entire legal system.

45. As it stands, we fundamentally and vehemently oppose this Bill. If such law is allowed to pass, it will not only signal the death knell of the internet as a free marketplace of ideas in Australia, but it will signal to Australian citizens, and to citizens of the globe, that the Australian Government seeks total control of the dissemination of information within its borders, and that such control is more valuable to that Government than the individual rights of its citizenry. That would be a dark day for democracy indeed, were such a thing to pass.

23 July 2023

Sincerely,

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