# Submission to the Senate Environment and Communications Legislation Committee inquiry into the Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2024

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Dear Committee

Thank you for the opportunity to provide a submission on the Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2024.[1]

We are writing in our capacity as academic economists (Berg) and lawyers (Lane) as well as long standing contributors to debates over freedom of speech, privacy, social media regulation, and public culture.[2]

Misinformation and disinformation are a perennial concern of democratic discourse. Plato even complained about it.[3] The government is right to identify that the mechanisms for the transmission of mis/disinformation have changed significantly since the advent of social media. The innovation and consumer benefit from social media and digital platforms has been overwhelmingly positive. Nevertheless, it is plausible that the harm and consequences of misinformation have materially increased as a consequence of these changing patterns of transmission. Even if so, this bill is badly misconceived.

We consider here four key reasons why this bill should be withdrawn: the bill presents a significant threat to free speech, the bill delegates too much responsibility to regulators,

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[1] Some of this submission drawn from Chris Berg, 'Albo's reckless and draconian misinformation legislation completely undermines itself', *Crikey*, 19 September 2024.

[2] See particularly Chris Berg 2012, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt*, Institute of Public Affairs and Mannkal Economic Education Foundation; Chris Berg 2018, *The Classical Liberal Case for Privacy in a World of Surveillance and Technological Change,* Palgrave Macmillan; Chris Berg and Gus Hurwitz 2019, Submission to the Australian Competition and Consumer Commission's Digital Platforms Inquiry, 14 February.

[3] Brian Vickers. *In Defence of Rhetoric*, Oxford University Press, 1989. https://doi.org/10.1093/acprof:oso/9780198117919.003.0002.

the bill will undermine trust in public debate, and the bill mischaracterises the misinformation problem.

## 1. The bill presents a significant restriction on free speech

Freedom of speech is a core human right, fundamental to the liberal tradition, and a foundation of democracy. As the High Court has determined, freedom of political communication is inherent to a system of democratic governance where members of Parliament are chosen 'by the people'.[4] In the absence of a broad individual right to freedom of speech explicitly enshrined in the constitution, legislators have a responsibility to safeguard this freedom. Legislators should be concerned about whether or not the bill threatens freedom of speech, not merely whether the bill might offend the implied right of political communication.

The government argues that the bill does not present a violation of free speech as it does not directly give the ACMA power to order takedowns of content or users on social media platforms, and therefore does not present a limitation on freedom of expression by the government. This argument is unconvincing. The bill creates a regulatory architecture that is not meaningfully different from direct content takedown, and provides ACMA with more than enough power to intervene in content – albeit at one step removed.

The bill requires social media companies to enter into codes of practice that detail how they will prevent the spread of misinformation and disinformation. The ACMA has the power to compel these companies to create a code if it believes such a code is necessary to address misinformation. If the ACMA is not satisfied with the code a platform develops, it can determine its own "misinformation standards" which the platform is then required to comply with. The regulator can enforce compliance by issuing heavy financial penalties to platforms who do not effectively address misinformation and disinformation in a way that satisfies the ACMA. It is correct to say that this is not a *direct* power to intervene in content, but the fact that a free speech restriction is implemented at arms length does not mean it is not a free speech restriction. Indeed, the opaque environment where code negotiations and monitoring will occur removes the sort of accountability and legal oversight that more direct controls on speech (such as those embodied in the Racial Discrimination Act) have. In this regulatory risk context, and also taking into account the real costs of compliance, it is foreseeable that digital platforms will err on the side of removing content.

[4] Australian Capital Television v Commonwealth (1992) 177 CLR 106; Nationwide News v Wills (1992) 177 CLR 1.

Additionally, the bill *does* give the ACMA power to directly intervene in content, by allowing it to require the takedown of users and content that display “inauthentic behaviour”. Further, clause 15(1)(d) of the bill effectively delegates legislative authority to ACMA to develop its own definitions of “inauthentic behaviour” and enforce content restriction accordingly.

Fundamentally, the idea that ACMA – or indeed any central authority – could arbitrate misinformation assumes that there is a single, objective truth that can be neutrally enforced. In reality, what is “misinformation”, “inauthentic behaviour” and “serious harm” are all matters for political judgement. Consensus on shared facts will best emerge through discourse and free debate.

## 2. The bill delegates too much policy design and decisionmaking to regulators

The bill delegates the supervision of highly sensitive political debates to a collaboration between social media platforms and a low-profile Australian regulatory agency. ACMA’s policy and rule making authority will not be subject to adequate democratic accountability mechanisms.

It is not clear whether ACMA has the necessary expertise and resources to effectively supervise the regulation of online content and make nuanced judgments about misinformation, particularly in politically charged contexts. ACMA’s relatively low-touch role in supervising broadcasting standards is inadequate preparation for a role fraught with challenges, especially in areas like science where consensus can shift over time, as seen with the COVID-19 pandemic. This concern speaks to the potential for regulatory capture, where ACMA, influenced by political pressures or lacking the resources for independent oversight, might be susceptible to aligning with the government's or dominant platforms' perspectives.

The bill's definitions of "misinformation," "disinformation," and "serious harm," create a high risk of overreach and censorship.

ACMA, with broad and imprecise definitions, is handed significant discretion as to how it chooses to exercise its regulatory powers. For example, “serious harm”, is flexibly defined to include “harm”, “imminent harm”, “significant and far reaching” or “severe” depending on the particular context (all of those terms undefined and up to future courts to determine). Similarly, evidence of actual harm is not required, content might be misinformation if it is “reasonably likely” to cause serious harm.

The digital platforms, for their part, driven by commercial interests and facing pressure to curb misinformation, might prioritize swift content removal over nuanced assessments of free speech implications. As mentioned above, the bill strongly incentivises platforms to remove content above and beyond what the government may be envisioning in order to avoid hefty penalties, creating a system where freedom of expression is easily sacrificed for the sake of compliance.

One of the direct consequences of the arms-length approach that the government has designed here is that there will be little countervailing pressure to protect freedom of expression. We should expect profit-maximising firms for whom free speech is an only minor concern to shareholders to prefer over-compliance rather than risk under-compliance. This is certain to have a chilling effect on public speech online.

## 3. The bill will undermine trust in public debate

The bill is likely to contribute to the erosion of trust in the political system and institutions, rather than enhance trust. This is presumably not the intention of the government.

If passed, it would suggest to voters that the previously public square is now being curated, where only content that has passed the standards created by a relatively low-profile regulator and the compliance department of an opaque digital platform is permissible. Even if the standards are light-touch and limited only to the most egregious forms of disinformation, this arrangement is likely to foster conspiracy theorising. The bill will create the impression that public discourse is being artificially manipulated, even if the ACMA's actions are well-intentioned. This will likely lead to a decrease in trust in both the information being shared online and the institutions responsible for regulating it.

Consider the situation where a political party proposes a controversial policy proposal that would have an impact on the functioning of our democracy itself, such as a requirement that voters provide identification before voting. This would be a highly contentious debate and (as we have seen in a similar debate in the United States) be characterised by many accusations of misinformation.

While we expect that many theorists of misinformation and fact checking would argue this is when protections against misinformation are most important, it would be a serious error. It is in moments of high political and public tension that governments should strive most to avoid any sense that they are artificially restraining political debate. The appearance (or even suspicion) of censorship can lead citizens to believe that political debate is rigged against them - that ‘They’ are hiding something.

The fact that the Bill specifically exempts government communications from being categorised as misinformation will amplify this tendency – the voters who lack large

platforms are the targets of the code but a small minority of those with platforms are exempt.

## 4. The bill misdiagnoses the misinformation problem

The justification for the bill – as stated in the impact analysis – is based on supply-side externalities. That is, digital platforms and the producers of misinformation do not adequately account for social costs in deciding how much misinformation to manufacture, resulting in an oversupply. This rationale is overly simplistic. It suggests that all misinformation is the same. Ironically, it suggests that there is a socially-optimal level of misinformation that ACMA should attempt to target.

The steel-man argument for misinformation regulation is not externalities but adverse selection. Consumers of information, especially in the fast-paced online environment, have difficulty distinguishing between reliable and unreliable sources, creating an information asymmetry. Sensational content, regardless of accuracy, thrives as digital platforms favour content with high user-engagement. Misinformation crowds out high-quality information, or so the argument goes.

The premise of the bill is founded on a fundamental misdiagnosis. Misinformation is a demand-side problem, not a supply-side problem. The bill does not grapple with the reasons that users might demand misinformation. Some of those reasons include users engaging with content that aligns with their pre-existing biases (the so-called social media 'echo chamber'), users that distrust traditional sources of information, and users consuming misinformation for entertainment purposes. Misinformation would be ineffective without this captive audience and content moderation does not abate demand – creating a real risk that misinformation is pushed into other unregulated mediums.

Of course, digital platforms are indeed *platforms* - users are both producers and consumers of information, allowing users to produce, share and discuss content. Instead, the bill proceeds on the basis that users are easily-swayed passive consumers. This view neglects the role of personal responsibility, critical thinking, and the healthy scepticism ('don't believe everything you read') that mainstream Australians possess.

We would be pleased to provide any further information or testimony to the Committee if the opportunity arises.

Sincerely,

Professor Chris Berg and Dr Aaron M. Lane