

## Example

Dear Committee,

The Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (the "Bill"), though presented as a legislative tool to combat misinformation, poses a significant threat to freedom of speech and democratic processes in Australia. This submission outlines how the Bill, by empowering the Australian Communications and Media Authority (ACMA) to regulate online content, risks curtailing free speech, stifling dissent, and creating an environment where only government-endorsed narratives thrive. It further highlights the dangers of regulatory overreach, unequal treatment of different voices, and the suppression of alternative viewpoints.

### 1. The Government as an Arbiter of Truth

At the heart of the Bill is the assumption that ACMA should serve as the arbiter of truth. Section 7 of the Bill defines misinformation as "false, misleading, or deceptive" content that is "reasonably likely to cause or contribute to serious harm." Disinformation is similarly defined but includes intent to deceive. These broad and vague definitions give ACMA the power to decide what content is permissible, allowing it to determine what is true and what is not.

History demonstrates the danger of governments and regulatory bodies determining the truth. For instance, after the Reichstag fire in 1933, Adolf Hitler leveraged emergency powers via the Notverordnung to suspend civil liberties, including freedom of speech, under the guise of protecting the public from misinformation. More modern examples, such as Russia's Fake News Law and China's extensive censorship regime, show how governments use similar powers to control narratives and suppress dissent. If ACMA is allowed to function as an unchecked arbiter of truth, Australia risks moving towards a system where government-endorsed speech is privileged, while dissenting voices are silenced under the guise of preventing harm.

### 2. Vagueness of the "Serious Harm" Threshold

The Bill defines "serious harm" in an overly broad manner, including disruption to public order, harm to democratic processes, and threats to public health. The vague language used in Section 7(2)(a) creates significant room for interpretation and potential abuse. Content critical of the government or public policies, such as discussions around immigration or public health responses, could be labelled as harmful misinformation if it is deemed to undermine confidence in those areas.

During the COVID-19 pandemic, legitimate debates about vaccine efficacy and government responses were labelled as harmful or misleading. Under this Bill, the threshold for serious harm could be used to suppress valid criticisms, creating a risk that only the government's narrative is allowed. For instance, critiques of government pandemic responses—such as vaccine hesitancy or concerns about lockdowns—could be flagged as misinformation, even if the criticism is scientifically backed. This would stifle important public health debates and prevent democratic accountability.

### 3. Protection of Government-Approved Narratives and Banks

Section 6 of the Bill exempts government-endorsed content from being classified as misinformation, creating a concerning double standard. This means that content produced or authorised by the government, including narratives about public health, national security, and other significant issues, is immune from scrutiny, while dissenting views are subject to regulation.

Additionally, the Bill's focus on protecting "public confidence" in key sectors, such as banking and finance, may inadvertently shield these powerful institutions from scrutiny. By allowing ACMA to penalise platforms for disseminating content that could undermine public confidence in financial institutions, the Bill potentially creates a protective barrier around these sectors. This could result in criticism or negative discussions about banks and financial institutions being flagged as harmful misinformation, preventing legitimate scrutiny. Public confidence should be built on transparency and accountability, not enforced by censorship.

This imbalance between protected government-endorsed narratives and the risk of censorship for dissenting views mirrors similar issues in countries like Russia, where the Fake News Law has been used to protect the government from criticism while penalising independent media.

### 4. Economic Pressure on Digital Platforms and the Risk of Over-Censorship

The Bill places a significant financial and administrative burden on digital platforms to monitor, regulate, and report content. Section 14 empowers ACMA to enforce digital platform rules, requiring platforms to monitor misinformation activities and submit reports. Platforms that fail to comply with these rules face severe civil penalties. This creates immense economic pressure, particularly on smaller platforms and startups, which may lack the resources to comply with these stringent requirements.

This dynamic incentivises over-censorship. Platforms, fearing financial penalties, will pre-emptively remove or block user-generated content to avoid running afoul of ACMA's standards. This is particularly concerning for smaller platforms, which may lack the financial resources of Big Tech companies like Google or Facebook to absorb penalties or manage complex moderation systems.

The case of X Corp (formerly Twitter) being penalised by the eSafety Commissioner for failing to meet content moderation standards illustrates this risk. While larger platforms may survive these penalties, smaller companies are likely to exit the market or adopt extreme content moderation policies. This will stifle innovation, reduce competition, and limit the diversity of online platforms available to Australian users, contributing to a chilling effect on free expression.

### 5. Threat to Democracy: Collateral Censorship

The Bill introduces collateral censorship by placing the responsibility for determining what constitutes harmful misinformation on platforms, rather than independent bodies or the courts. This creates a situation where platforms, rather

than objective legal systems, are incentivised to make cautious, risk-averse decisions about content.

As noted by the Human Rights Commission, laws that attempt to regulate speech often oversimplify the complex nature of distinguishing truth from falsehood. Platforms, fearful of penalties, will be inclined to over-censor content that could be deemed harmful, even when that content is critical to democratic debate. For instance, discussions around government performance, immigration policies, or public health crises could be disproportionately targeted. This risks stifling the very marketplace of ideas that allows democracy to flourish.

Platforms may choose to remove content not because it is inherently harmful, but because the financial risks of leaving it online are too great. This form of self-censorship, driven by fear of penalties, undermines democracy by limiting public debate on key issues.

## 6. Favouring Big Tech and Undermining Startups

The Bill creates an uneven playing field between Big Tech companies and smaller startups. Section 14 gives ACMA the authority to demand records and reports from digital platforms regarding misinformation activities, placing a significant administrative and financial burden on these companies. While Big Tech companies can afford to comply with such regulations, smaller companies and startups may not be able to bear these costs.

This dynamic disproportionately favours established tech giants and stifles innovation by discouraging smaller players from entering the market. Over time, this could lead to a monopolistic environment, where only the largest companies can operate under these conditions. As smaller platforms exit the market, the diversity of voices and online platforms will shrink, limiting the public's access to alternative viewpoints and creating a concentrated control over online discourse.

## 7. Broad Censorship by ACMA: The Risk to Free Speech

The Bill grants ACMA broad enforcement powers to issue penalties, including fines, for content deemed harmful. Section 15 outlines how ACMA can enforce misinformation codes, leaving platforms and individuals vulnerable to regulatory overreach. This creates an environment where dissenting opinions—such as critiques of government immigration policies, vaccine efficacy, or political misconduct—could be censored, not because they are unlawful, but because they fall outside the government's preferred narrative.

The Bill's vague definitions of misinformation, combined with ACMA's broad powers, raise the risk that dissenting voices will be targeted for expressing inconvenient opinions. While there is no explicit provision stating that ACMA will target such groups, the combination of vague definitions and discretion opens the door to potential abuse. In politically charged environments, criticism of the government could be flagged as harmful misinformation simply because it is politically damaging to those in power.

## 8. Lack of Sufficient Protections for Freedom of Political Communication

Although the Bill mentions freedom of political communication in Section 45, the safeguards it provides are minimal. The decision as to what constitutes an unreasonable burden on political speech rests solely with ACMA, creating a subjective standard that is open to interpretation and potential abuse. Without clear, robust protections, political speech—particularly criticism of the government—remains vulnerable to censorship.

The Bill fails to provide adequate protections for whistleblowers, investigative journalists, or activists who seek to expose government misconduct or corruption. Without these protections, political dissent could easily be labelled as misinformation, silencing important voices that play a critical role in holding governments accountable. The lack of explicit safeguards for political dissent risks turning the Bill into a tool for suppressing opposition.

#### 9. Self-Censorship and Chilling Effects on Public Debate

The Bill's potential penalties will inevitably lead to self-censorship as individuals and platforms seek to avoid fines. Section 14 places legal obligations on platforms to monitor and remove content deemed harmful, and the fear of financial penalties will lead to the pre-emptive removal of legitimate but controversial content. This is particularly concerning in the context of public health, government accountability, and immigration policies.

Platforms may over-censor content that critiques the government or discusses controversial topics, even if that content doesn't strictly breach the misinformation standards. This chilling effect will suppress diverse viewpoints and limit public debate on key issues. Fear of regulatory penalties will prevent individuals from engaging in open discussions about sensitive or politically charged topics, further narrowing the scope of public debate.

#### 10. Unequal Treatment of Independent Media and Citizen Journalists

The Bill's exemption for professional news content creates an uneven playing field, disadvantaging independent journalists and citizen bloggers who lack the protections enjoyed by established media organisations. Section 6 explicitly exempts professional news from being classified as misinformation, but other content creators—particularly independent media outlets—are left vulnerable to censorship.

In today's media landscape, independent journalists and citizen bloggers play a critical role in holding governments accountable and amplifying minority voices. By placing them under greater scrutiny, the Bill risks limiting the influence of these alternative voices. This imbalance reinforces the dominance of established media organisations, creating a media environment where alternative perspectives are silenced.

#### 11. Exploitation of Exemptions to Create a State-Controlled Information Monopoly

The Bill creates significant exemptions for government-endorsed content, including content authorised by the government or produced by professional news outlets. This exemption creates the potential for a state-controlled information monopoly, where

only government-approved narratives are protected, while dissenting voices are silenced.

During public health crises or political scandals, the government could exempt its own content from misinformation regulations while penalising those who raise valid concerns. This selective enforcement of misinformation standards is inherently undemocratic, as it allows the government to protect its own narratives while censoring opposition. By creating a monopoly over information, the Bill undermines the principle of free speech and the public's right to scrutinise its leaders.

## 12. Lack of Accountability and Oversight Mechanisms

The Bill lacks sufficient mechanisms to ensure transparency and accountability in ACMA's decision-making process. While ACMA is empowered to issue fines, impose penalties, and demand compliance, there are no clear mechanisms for independent oversight of its actions. Without a transparent and independent review process, ACMA's decisions could become arbitrary, leading to regulatory overreach.

The appeals process for individuals or platforms penalised under the Bill is similarly unclear. Without clear legal recourse, those who are unfairly targeted by ACMA's enforcement actions may have little opportunity to challenge these decisions. This lack of judicial review and transparency undermines the rule of law, leaving the public vulnerable to unchecked regulatory powers.