THE VICTORIAN BAR INCORPORATED

SUBMISSION TO THE SENATE ENVIRONMENT AND COMMUNICATIONS LEGISLATION COMMITTEE

COMMUNICATIONS LEGISLATION AMENDMENT (COMBATTING MISINFORMATION AND DISINFORMATION) BILL 2024

A. INTRODUCTION

1. The Victorian Bar (**the Bar**) welcomes the opportunity to provide input to the Senate Environment and Communications Legislation Committee in relation to the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024* (Cth) (**Bill**). The Bar acknowledges the potential harm posed by the rapid and wide dissemination of false or otherwise harmful information online. However, the Bar is concerned that the Bill's response to that danger is insufficiently sensitive to, and insufficiently protective of, freedom of expression and related privacy interests.

2. This submission outlines the Bar's concerns about the Bill, commencing with a general concern that the Bill's proposed derogations of free expression are unwarranted or, at the least, premature given the availability of alternative means of protecting against false or otherwise harmful online information.

3. The submission then makes a number of comments about specific textual features of the Bill, including:

   (a) the definitions of 'misinformation', 'excluded dissemination', 'serious harm' and 'disinformation';

   (b) the power to compel production of documents and information; and

   (c) the burdensome regulatory and record-keeping requirements imposed on both the Australian Communications and Media Authority (**ACMA**) and platform operators.

ACKNOWLEDGEMENT

4. The Bar acknowledges the contributions of its Communications Legislation Amendment Working Group — Georgina L Schoff KC, Mark A Robins KC, Romauld Andrew KC, James McComish and Dr Julian R Murphy — in the preparation of this submission.

B. GENERAL CONCERNS

5. Freedom of expression is sometimes called 'the freedom *par excellence*; for without it, no other freedom could survive'.[1] It has also been said that the freedom of expression is 'closely linked to other fundamental freedoms which reflect … what it is to be human: freedoms of religion, thought, and conscience'.[2]

6. So important is the freedom of expression to Australian society that in 1992 the High Court identified an implied freedom of expression within the Constitution, albeit limited to *political* communication.[3]

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1 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.

2 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 13.

3 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.

Indeed, freedom of expression has been said to be 'the ultimate constitutional foundation in Australia'.[4]

7. The Bar is concerned about the Bill's interference with the identified benefits of free expression, namely:

> First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'. Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.[5]

8. Taking those matters in turn, the Bill's interference with the self-fulfilment of free expression will occur primarily by the chilling self-censorship it will inevitably bring about in the individual users of the relevant services (who may rationally wish to avoid any risk of being labelled a purveyor of misinformation or disinformation).

9. Even leaving aside this effect, it is not at all clear that the Bill is required. It is to be recalled that the problem of the dissemination of false information online has only relatively recently risen to prominence and has so far been relatively effectively responded to by *voluntary* actions taken by the most important actors in this space. In this regard, freedom of expression on the internet has been exercised since the 1990s.

10. The Bill's response to false information thus does not seem warranted. It may even be counter-productive when one recalls that the purveyors of so-called misinformation and disinformation are often part of relatively small online communities who are brought together by feelings of isolation and distrust of the State. The perceived silencing or targeting of these groups is unlikely to address the underlying social problems animating the dissemination of false information. It is widely accepted in liberal democratic societies that it is better to fight information with information and to attempt to persuade rather than coerce people towards positions grounded in evidence and fact.

11. Relatedly, the Bill incentivises digital communications platforms to introduce illiberal 'misinformation codes' for fear of a heavier-handed 'misinformation standard' being imposed at ACMA's behest. The simplest ways for a digital platform to avoid 'misinformation' being found on its service is to permit only the expression of views authored by the mainstream media (which, by statutory definition, is not 'misinformation'), or otherwise to forbid the expression of any controversial, debatable, factually uncertain or politically sensitive views.

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[4] *Wik Peoples v Queensland* (1996) 187 CLR 1, 182 (Gummow J).

[5] *R v Secretary of State for the Home Department; Ex Parte Simms* [2000] 2 AC 115, 126 (Lord Steyn).

C. SPECIFIC TEXTUAL COMMENTS

12. In addition to those fundamental concerns about the general tenor of the Bill, the Bar has the following concerns about specific features of it.

C.1 DEFINITIONS OF 'MISINFORMATION' AND 'DISINFORMATION'

13. At the heart of the difficulties presented by the Bill — not least the intrusion into freedom of expression — are the definitions of 'misinformation' and 'disinformation'. These raise at least three conceptual problems. The first is the substantive breadth of the definitions, including the concept of 'serious harm'. The second is the limited nature of the exemptions that take content outside the definition of 'misinformation'. The third is the statutory supposition that misinformation (however defined) is identifiable as such, and is capable of being so identified by ACMA (or indeed the service providers whom the Bill effectively requires to monitor the content published via their services).

14. Before proceeding to discuss those problems, it is necessary to emphasise how important the definitions of 'misinformation' and 'disinformation' are to the Bill. In a specific sense, the scope of almost all obligations under the Bill and the concomitant scope of ACMA's powers are hinged upon the concepts of 'misinformation' and 'disinformation' (see, e.g., clauses 19, 25, 30, 33, 34, 38, 44, 47). In a more general sense, those concepts define the scope of the 'mischief' which the statute purportedly aims to remedy,[6] and thus will inform the interpretation of every provision of the Bill. It is for these reasons that the problems with concepts of 'misinformation' and 'disinformation' are fundamental to the Bill's justifiability.

C.1.1 THE DEFINITION OF 'MISINFORMATION' IS OVER-BROAD AND UNWORKABLE

15. There are at least five principal respects in which the statutory definition of 'misinformation' is over-broad and unworkable.

16. First, the statutory definition requires a distinction to be drawn between 'information' and other forms of online content. What 'information' means in this context is unclear, but it is unlikely to be limited to 'positive claims about the truth of identified facts'. The Explanatory Memorandum is explicit that the term is 'intended to include opinions, claims, commentary and invective' (p 44), which gives the concept of 'information' an extraordinarily wide meaning, in the absence of any secure footing in the statutory text.

17. Much online content involves combinations of fact, opinion, commentary or invective. Speech about political, philosophical, artistic or religious topics often involves statements that are not straightforwardly 'factual', but which are not mere statements of subjective belief. Much scientific discourse involves the testing and rejection of hypotheses, in which even 'true' information is provisional or falsifiable. The prospect that ACMA — and digital platform providers — will be required

[6] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

to identify not merely misleading facts, but also misleading 'claims', 'opinions', 'commentary' and 'invective', will have an obvious chilling effect on freedom of speech; especially in sensitive or controversial areas.

18. The effect may be particularly pernicious if a regulator or platform administrator is tempted to be over-inclusive about what counts as 'information', and hence potentially 'misinformation'. The evident risk — made manifest in the Explanatory Memorandum — is that disfavoured opinions might come to be labelled and regulated as 'misinformation'. The burden on sound public administration is equally obvious: it is impossible for ACMA to assess whether platforms have appropriately categorised not merely every factual assertion, but also every claim, opinion, commentary and invective viewable by Australian internet users, as being, or not being, misinformation.

19. Second, the statutory concept of 'misinformation' in the Bill involves information that *is* reasonably verifiably false, misleading or deceptive; not merely information that is alleged or suspected to be so, or that is so in the opinion of a decision-maker. Whilst some objective criteria serve to limit the Bill's scope, the internet contains a vast amount of information, and the Bill is not confined to information authored by Australians. The burden of identifying which of that worldwide information is, in truth, 'misinformation' is likely to be intolerable. The risk of 'false positives' is real. An inaccurate allegation (especially by a regulator) that a true fact is 'misinformation' may be very damaging; and a wrongful accusation that a person is the author or purveyor of 'misinformation' could be seriously defamatory.

20. Third, the definition of 'misinformation' is over-broad, in that it is not confined to straightforward positively false statements of fact. The existing law of misleading or deceptive conduct in trade or commerce makes clear that conduct will infringe the statutory norm in a very wide range of circumstances; particularly because the concept of 'misleading' information is much broader than 'false' information. Here, it is immaterial that the Bill uses the language of 'information' rather than 'conduct'. The heartland of misleading or deceptive conduct under existing law is conduct that conveys inaccurate information to a recipient. Accordingly, the drafting of the Bill is likely to encompass not merely positive false statements, but also:

    (a) information that is partial or incomplete;[7]

    (b) information that is silent about some relevant contextual matter;[8]

    (c) information that is capable of two or more reasonable readings, only one of which is misleading;[9]

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[7] *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, [23] (French CJ and Kiefel J).

[8] *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357; *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.

[9] *Tobacco Institute of Australia Ltd v Australasian Federation of Consumer Organizations Inc* (1992) 38 FCR 1, 5, 27.

(d) information that is literally true but that may be said to be rendered misleading by its context;[10]

(e) information that is later rendered inaccurate by subsequent events, where the author fails to correct the initial impression;[11] and

(f) information that causes harm to a person *other* than the person who is misled.[12]

21. Given those principles, the statutory definition requires ACMA — and platform operators — to gather evidence of the entire extrinsic universe of facts in order to determine whether any given information is or is not misleading (and hence 'misinformation') by reason of, for example, unexpressed contextual matters. It is not clear how ACMA can be expected to undertake that burden within its available resources; or in a manner that is consistent with freedom of expression in a liberal society. The risk of a decision-maker taking short-cuts is real: on the current text of the Bill, one can label material as 'misinformation' because it is 'reasonably verifiable' to be 'misleading' because it lacks context or is incomplete; even if it is otherwise true. The zone of potentially 'misleading' information is much larger, and much harder to identify, than demonstrably false information. Equally, the references in the Bill to fact-checking (clauses 34(2)(a) and 44(3)(f)) highlight an ambiguity in what 'reasonably verifiable' is intended to mean. There is a real risk that a platform operator (or indeed ACMA) could treat the subjective view of a self-appointed fact-checker as showing that information was 'reasonably verifiable' (i.e. in the eyes of that fact-checker) to be false, without undertaking any objective investigation into whether that was indeed so.

22. Fourth, there is no content-based limit on the definition of 'misinformation'. It is not, for example, confined to information *about* the electoral process, public health, the economy, banking etc. Whether any given information is 'reasonably likely' to 'contribute' to 'serious harm' of the kinds specified in the Bill is a complex interpretative question which might not readily be determined by the apparent character of the information standing alone.

23. Fifth, the statutory definition labels content as 'misinformation' if it *contains* information that is false, misleading or deceptive: the 'misinformation' is not merely the false, misleading or deceptive information itself. There is no statutory requirement that the content *substantially* consist of false, misleading or deceptive information. This raises the prospect that the statutory category of 'misinformation' is radically over-inclusive. For example, the entirety of a long-form article may amount to 'misinformation' if it contains a single unwittingly misleading sentence; even if the author is blameless, and even if the vast bulk of the article is otherwise unimpeachable.

24. These five aspects of over-breadth and unworkability are underscored by the absence of any requirement — most notably in clause 13(3) — for either ACMA or platform operators to have regard

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[10] *Porter v Audio Visual Promotions Pty Ltd* (1985) ATPR 40-547.

[11] *Winterton Construction Pty Ltd v Hambros Australia Ltd* (1992) 39 FCR 97, 114; *Thong Guan Plastic and Paper Industries SDN BHD v Vicpac Industries Australia Pty Ltd* [2010] VSC 11, [123]–[125].

[12] *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526.

to the high value placed on free speech in a liberal society when considering whether information is, or is not, 'misinformation'.

C.1.2 THE CONCEPT OF 'EXCLUDED DISSEMINATION' IS INSUFFICIENTLY PROTECTIVE OF FREE SPEECH, AND PLACES EXCESSIVE INTERPRETATIVE POWER IN AN EXECUTIVE AGENCY

25. The definition of 'excluded dissemination' in clause 16 does not sufficiently protect freedom of expression. The proposed categories of 'excluded dissemination' are unhelpful, conceptually incoherent, and require ACMA to make contestable interpretative judgements that it is not well-placed to make.

26. First, the textual focus on kinds of 'dissemination' (not kinds of *content*) leads to unnecessarily difficult interpretative questions. Clause 16 tends to run together the ideas of both 'content' and 'dissemination' under the heading of 'excluded dissemination'; a conceptual confusion that is also manifested in the explanatory memorandum (p 63). If the *content* of a post is (for example) evidently created for an artistic purpose, why is it necessary to ask whether its *dissemination* was also for an artistic purpose? In particular, the concept of '*reasonable* dissemination' creates an evident risk to freedom of expression. What, for example, would amount to an '*unreasonable* dissemination' of artistic content? By what means could ACMA or a platform operator make such a judgement? It may be preferable to refer in clause 16 to (say) 'excluded material', and then specify — more comprehensively — both the kinds of content, and the kinds of dissemination, that are intended to be excluded.

27. Second, the exclusion in clause 16(1)(a) is under-inclusive. Many forms of comedy and entertainment are not readily identifiable as 'parody or satire'.

28. Third, the exclusion in clause 16(1)(b) of 'professional news content' creates an artificial distinction that is difficult to justify; and which tends to highlight the unstable conceptual structure of the Bill. In particular, the explanation for this provision and the related clause 16(2) (explanatory memorandum p 64) tends to underscore the conceptual confusion between *content* and its *dissemination*, which in turn highlights the Bill's apparent overreach.

29. Fourth, it is unclear how the exclusion in clause 16(1)(c) of 'reasonable scientific, academic, artistic, religious or public interest content' will interact with the definition of misinformation as content that is 'reasonably verifiable' as such; especially given the view expressed in the explanatory memorandum that 'claims' and 'opinions' may amount to misinformation. A real risk to freedom of expression remains, if the regulator (or platform) is empowered simply to consider such a 'claim' or 'opinion' to be 'unreasonable' despite its otherwise involving scientific, academic, artistic, religious or public interest content.

C.1.3 THE DEFINITION OF 'SERIOUS HARM' IS OVER-BROAD, AND DOES NOT SUFFICIENTLY LIMIT THE CONCEPT OF 'MISINFORMATION'

30. The definition of 'serious harm' in clause 14 is over-broad, especially when read in light of the definition of 'misinformation', under which material is caught not merely when it *in fact* causes serious harm (however defined) but also when it is only 'reasonably likely' to do so; or when it might only 'contribute to' such harm (clause 13(1)(c)). The width of that definition is significant, given that the concept of 'serious harm' involves value judgements that are likely to be contestable and politically sensitive. Given that the existence of 'serious harm' is the only substantive differentiation between 'misinformation' (as defined) and any other false, misleading or deceptive information that exists in the world, it is important that the definition be clear, sufficient, and easy to apply.

31. The labels 'significant and far-reaching consequences' or 'severe consequences' are vague and over-inclusive. There is no specification of the nature of the consequences that might engage the definition; nor any specification that those consequences must be adverse. Notably, the section is not limited to adverse consequences that involve a probable risk of (for example) loss of life, physical injury, property damage, or economic loss.

32. In clause 14(a), the concept of 'electoral or referendum processes' requires detail and clarity. Many broad aspects of the political system can plausibly be related to 'electoral processes'. The specific interaction with the *Commonwealth Electoral Act 1918* (Cth) must also be considered. In particular, that Act is likely to be the proper means by which to respond in a more targeted way to any actual interference in the conduct of an election.

33. In clause 14(b), the concept of 'harm to public health' — and in particular, harm to the 'efficacy of preventative health measures' — is vague and over-inclusive. Preventative health encompasses many broad aspects of diet, exercise or lifestyle choices that are far removed from urgent risks to life or limb, and which are often subject to differences of opinion about their efficacy or value in comparison with other social goods. Given that the definition of 'misinformation' requires only a *contribution* to serious harm, and given the breadth of 'preventative health measures', a great many practices and beliefs may potentially involve the reasonable likelihood of at least a contribution to a serious harm to health. It is unclear what expertise ACMA has to form such judgements about what does or does not amount to a harm to health. The reference in the explanatory memorandum (pp 48–49) to experiences during the COVID pandemic tends to underscore the difficulty in assessing what might actually harm public health in situations where scientific or medical knowledge is unsettled or subject to debate. Again, it may be that specific and urgent issues are better regulated through the state and federal Public Health Acts.

34. Clause 14(c) ('vilification of a group in Australian society') identifies a matter which is already captured by anti-discrimination and anti-vilification laws, but without the calibrated exemptions that those laws typically contain. In view of the textual limitation of the clause to groups *in Australia*, it is striking that the explanatory memorandum (pp 50–51) refers predominately to claims concerning groups *outside Australia*. The reference in the explanatory memorandum to each of the *Online Safety Act 2021* (Cth)

and the *Criminal Code Act 1995* (Cth) indicates the need for any provision on this topic to be appropriately targeted in its interaction with other statutes.

35. Clause 14(e) is inadequately defined. The real risk of over-inclusion is demonstrated by the explanatory memorandum itself. Many contestable assumptions underpin the suggestion that 'serious harm to critical infrastructure' could arise from 'false pricing information' and 'changes in user commodity consumption behaviour' (pp 54–55). The explanatory memorandum posits that ACMA and digital service providers will need to distinguish between those 'delays or diversions', 'vandalism', or 'strain' to emergency services (p 55) that *are* reasonably likely to contribute to serious harm, and those that are not. By what means — and with what expertise — will they do so?

36. The potential over-breadth of clause 14(f) (harm to the economy, including 'public confidence in the banking system') is emphasised by the lack of any requirement that the harm actually manifest itself in a risk of (relevantly) economic loss. The reference among economic harms to panic buying or bank runs highlights the unsatisfactory definitional complexities of the Bill, both in the meaning of 'harm' and also 'misinformation'. Panic buying and bank runs are typically associated with truthful (but potentially socially damaging) information about scarcity or financial difficulties. The reference in the explanatory memorandum to the collapse of Silicon Valley Bank (p 56) emphasises the point: its collapse was brought about through the dissemination of truthful, but damaging, information about its precarious financial position. Further, it is unclear how the category of harm in clause 14(f) is intended to apply, for example, to straightforward online fraud that may not involve systemic harm. A fraud having 'severe consequences for an individual' may nonetheless not involve any 'imminent harm to the Australian economy', nor to wider confidence in the banking system.

37. The definition of 'serious harm' is not improved by the contextual factors set out in clause 13(3). They repose significant discretion in executive decision-makers or platform operators, including by making judgements in respect of favoured and disfavoured 'authors' or 'purposes', without any express obligation to have regard to freedom of expression, privacy, economic liberty or any other countervailing policy concerns.

C.1.4 THE DEFINITION OF 'DISINFORMATION' REPLICATES AND EXTENDS THE DIFFICULTIES INHERENT IN THE CONCEPT OF 'MISINFORMATION'

38. The concept of 'disinformation' embeds the same difficulties that are inherent in the definition of 'misinformation', with the additional problems caused by the requirement that 'the person disseminating, or causing the dissemination of, the content intends that the content deceive another person', or 'involves inauthentic behaviour'. Three difficulties are of particular importance.

39. First, by what means will it be determined that the disseminator 'intend[ed] that the content deceive another person'? The mere intentional act of dissemination will not suffice: proof of intention to deceive will be needed. That will not often be apparent or inferable from the face of the allegedly misleading content. In the absence of coercive powers and the safeguards of the judicial process, people are not ordinarily compelled to disclose their unexpressed intentions, especially when what is alleged against them is actual deceit.

40. Second, the disseminator of content need not be its author. An author's innocent error may be misleading, and their content may amount to 'misinformation' (as defined) by reason of that innocent mistake. The content might then be disseminated by other innocent people who are ignorant of the error. If the content is thereafter disseminated by a malicious person who intends to deceive others, there is a risk that the pejorative label of 'author and disseminators of disinformation' will be applied to innocent people. Given that the observable conduct involved in innocent authorship, innocent dissemination and deceitful dissemination is the same (namely, transmission of particular information), there is a real risk of over-inclusion in any regulatory investigation into those people's intentions, and hence the existence of 'disinformation'.

41. Third, the definition of 'inauthentic behaviour' extends well beyond the stereotyped 'Russian bot accounts' referred to in the explanatory memorandum (p 61). It is of the very nature of much discourse about, say, politics, fashion and pop culture, that users may engage in 'coordinated action' that creates a misleading impression about 'the popularity of the content', or the 'purpose or origin of the person disseminating it'; thereby engaging clause 15(1)(b).

C.1.5 THE BILL WRONGLY ASSUMES THAT 'MISINFORMATION' AND 'DISINFORMATION' CAN READILY BE IDENTIFIED, AND THAT ACMA IS CAPABLE OF DOING SO WITHIN THE LIMITS OF ITS RESOURCES AND EXPERTISE

42. The statutory scheme of the Bill presupposes that misinformation is an identifiable category of online material. This is inherent in the definitions of 'misinformation' and 'disinformation', which do not depend on the mere existence of allegation, suspicion, or executive opinion that information meets the statutory definition. Equally, it is inherent in those clauses about regulating or reporting the existence of 'misinformation or disinformation on digital communications platforms'; and in those clauses about the 'effectiveness' of measures 'to prevent or respond to misinformation or disinformation on digital communications platforms'. Each of these, by definition, involve an objective assessment that such content *exists*.

43. The statutory scheme means that ACMA is the ultimate decision-maker about what is, or is not, misinformation; subject only to the (unexpressed) possibility of judicial review in the federal courts. There are three fundamental problems with these statutory presuppositions. First, the broad definition of 'misinformation' requires the decision-maker to distinguish 'information' (whether misinformation or not) from all other online content. It also requires the decision-maker within ACMA to identify the 'true' position against which the alleged misinformation is shown to be reasonably verifiable as false, misleading or deceptive. That is because the statutory definitions do not concern material that is merely alleged, suspected or believed in the opinion of the decision-maker to be misinformation. Given the vast amount of material available online on digital communications platforms, each of these aspects of the task of identifying 'misinformation' assumes heroic

proportions; especially in light of the High Court's recognition of the 'considerable difficulty' of discerning what is, and what is not, misleading and deceptive.[13]

44. Second, it is not clear what justifies the statutory presupposition that ACMA will have the expertise and intellectual resources to identify and distinguish 'misinformation' from other forms of online content. Taking only recent examples of contestable online claims, is ACMA well-placed to identify the economic cost-benefit analysis of major sporting events; the biological origin of novel viruses; the efficacy of newly-developed medical techniques; the extent of corruption on the part of foreign politicians; or the strategic motivations of the protagonists in major geopolitical events? The explanatory memorandum posits that even 'claims' or 'opinions' about those matters may constitute 'information', and hence potentially 'misinformation' (p 44).

45. Third, the everyday experience of the courts or commissions of inquiry shows that discerning truth from falsehood in a procedurally fair manner may be an elaborate, costly and time-consuming process. The statutory supposition that this can be done readily, uncontroversially, and with little effort by ACMA or by digital platform operators seems unrealistic in light of real-life experience in relation to, for example:

    (a) the truth (or otherwise) of allegations of war crimes committed in Afghanistan;[14]

    (b) the truth (or otherwise) of allegations of financial exploitation of Aboriginal people in remote communities;[15]

    (c) the truth (or otherwise) of allegations of inadequate medical care in psychiatric hospitals;[16] and

    (d) the truth (or otherwise) of allegations that widely-used medical devices were unsafe.[17]

C.2 POWER TO COMPEL PRODUCTION

46. The Bill arms ACMA with extraordinary coercive powers that can be exercised against any person who might have information or documents 'relevant' to the existence of, among other things, 'misinformation or disinformation on a digital communications platform' (clause 34(1)). Suspected authors or disseminators of alleged 'misinformation' are obvious targets for the exercise of such powers. That makes this part of the Bill somewhat unique within its overall scheme – here the Bill is concerned with the responsibilities of individuals, rather than service providers.

47. The limited restriction in clause 34(2) about 'content posted by the person' overlooks that the target of ACMA's coercive powers might not themselves have posted the content under investigation.

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[13] *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 197 (Gibbs CJ).

[14] *Roberts-Smith v Fairfax Media Publications Pty Limited (No 41)* [2023] FCA 555. Cf *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report* (2020).

[15] *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1.

[16] *Herron v HarperCollins Publishers Australia Pty Ltd* (2022) 292 FCR 336.

[17] *Ethicon Sàrl v Gill* (2021) 288 FCR 338.

C.3 THE IMPOSITION OF REGULATORY BURDENS AND OTHER CONCERNS

48. The Bill creates substantial regulatory burdens for the operators of 'digital communications platforms', not least elaborate record-keeping obligations that may be inconsistent with users' privacy. The width of the statutory definition of 'digital communications platforms' means that platform operators cannot all be assumed to be large international for-profit corporations. The marketplace of ideas is at risk of being impoverished both by dissuading new digital communications platforms to enter the market *and* by dissuading users from expressing themselves freely on such services as currently exist.

49. In the time allowed, the Bar has addressed its most fundamental objections to the proposed Bill. This submission is not comprehensive. There are many other issues of concern that call for close attention. They include:

    (a) Clause 3 – the extraterritorial operation of the Bill;

    (b) Clause 11 – the objects clause, which does not sufficiently address the basic concept of 'misinformation', 'disinformation' and 'serious harm' that the legislator has in mind, making it difficult (1) to assess the degree to which the Bill in fact meets its objectives, and (2) for a court to construe the statute by reference to its stated purposes;

    (c) Clauses 17, 22–24 – media literacy plans – the vague definition of 'media literacy plans' (including by reference to content that 'purports to be authoritative or factual') is ripe for misuse, in particular through regulatory overreach;

    (d) Clause 25 – the provisions about complaints handling (and the definition of 'misinformation complaints'), which do not adequately provide for complaints about the *wrongful* identification, labelling or taking down of content as alleged 'misinformation';

    (e) Clause 30 – whether the provisions with respect to record-keeping obligations are sufficient to protect the freedom and privacy of end-users of services;

    (f) Clauses 33–37 – the extent of the coercive powers conferred on ACMA;

    (g) Clauses 38–40 – ACMA's publication powers – the exclusion of 'personal information' within the meaning of the *Privacy Act 1988* (Cth) might not deal with the problem of people being labelled (perhaps not by ACMA itself) as 'purveyors of misinformation' because (say) they can be seen to have shared content that ACMA has labelled as 'misinformation';

    (h) Clause 54 – reference to the burden on political communication – the narrowness of this clause (referring only to misinformation standards) seems to highlight the broader inadequacy of the Bill's consideration of constitutional freedoms and wider norms of free speech;

    (i) Clause 67 – on removing content and blocking end users – it will be necessary to understand the interaction of this proposed provision with other laws (which appear to be intended to include such a power to compel removal of content or blocking users, but which equally require calibration to protect freedom of expression); and

(j) throughout the Bill – those provisions that grant powers where ACMA or another decision-maker is 'satisfied' that a state of affairs exists, without requiring (1) that the state of affairs objectively exists, or (2) that the decision-maker's satisfaction is objectively reasonable.

D. CONCLUSION

50. For the reasons identified above, the Bar considers that the Bill as it is presently drafted should not be enacted. While the Bar acknowledges the importance of responding to false and otherwise harmful information online, such responses ought to only make justifiable incursions into socially valuable freedom of expression. The present Bill is not justifiable in this respect and will have a chilling effect. It is also likely to be ineffective and unworkable in responding to the harms to which it is purportedly directed.