

**COMMUNICATIONS
ALLIANCE LTD**



Communications Alliance Submission

to the Department of Infrastructure, Transport, Regional Development,
Communications and the Arts

Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2023

Exposure Draft and supplementary information

18 August 2023

CONTENTS

COMMUNICATIONS ALLIANCE	2
INTRODUCTION	3
1. DEFINITIONS	4
MISINFORMATION	4
DISINFORMATION	4
RELEVANT MATTERS TO CONSIDER	5
INTERACTIVE FEATURE	5
2. SERVICES CAPTURED IN THE SCOPE OF THE DRAFT BILL	6
CONTENT AGGREGATION SERVICE	6
CONNECTIVE MEDIA SERVICE	6
MEDIA SHARING SERVICE	7
3. SERVICES OUT OF SCOPE OF THE DRAFT BILL	7
4. INDUSTRY CODES AND STANDARDS	8
5. RECORD KEEPING, REPORTING AND INFORMATION GATHERING POWERS	9
POWER TO COMPEL DIGITAL PLATFORM SERVICES TO PROVIDE INFORMATION	9
PUBLICATION OF INFORMATION	9
6. CONCLUSION	10

Communications Alliance

Communications Alliance is the primary communications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, platform providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to be the most influential association in Australian communications, co-operatively initiating programs that promote sustainable industry development, innovation and growth, while generating positive outcomes for customers and society.

The prime mission of Communications Alliance is to create a co-operative stakeholder environment that allows the industry to take the lead on initiatives which grow the Australian communications industry, enhance the connectivity of all Australians and foster the highest standards of business behaviour.

For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

Introduction

We welcome the opportunity comment on the exposure draft of the *Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2023* (Draft Bill), and the constructive engagement we and many of our members have had with the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA).

Communications Alliance and its members share Government's desire to combat the harms and risks associated with mis- and disinformation. We acknowledge that it is inherently difficult to appropriately balance the regulation of lawful content that may be harmful, against the need to protect freedom of expression. Our digital platform members already devote substantial resources to these aims and will work to continue to improve their systems, processes and technologies in this area.

In making this submission, we also expressly endorse the submission provided by the Digital Industry Group Inc. (DIGI) in response to the Draft Bill and the supplementary material.

In addition to lending our support to DIGI's feedback, we also take the opportunity to review and comment on the Draft Bill, ahead of its introduction into Parliament. The comments we have set out below are designed to help ensure that any new legislation does not have unintended consequences and is practical and effective in preventing and addressing misinformation and disinformation.

Free TV did not participate in the development of this submission (including the endorsement of DIGI's submission) and does not endorse its contents.

1. Definitions

Misinformation

- 1.1. Under the Draft Bill, content that would satisfy the definition of “misinformation” is content that (a) is false, misleading or deceptive; and (b) is not excluded for misinformation purposes; and (c) is provided on the digital service to one or more end users in Australia; and (d) is reasonably likely to cause or contribute to serious harm (subcl 7(1)).
- 1.2. In relation to the first limb of the definition, our observation is that requiring digital services to determine whether any piece of content is false, misleading or deceptive is challenging, and can require detailed investigation, as well as subjective and high-level judgement that is difficult to scale. We recommend adopting the terminology from the *Australian Code of Practice on Disinformation and Misinformation (ACPDM)*, which requires that the content is “verifiably” false, misleading or deceptive (ACPDM subcls 3.2 and 3.6), as there must be some objective means to determine whether content is false, misleading and deceptive, and that the assessment of the content (and subsequent action in relation to the assessed content) does not unduly infringe on freedom of expression. The Guidance Note to the Draft Bill states that the ACMA will not have a role in determining what is truthful. In the absence of any objective parameters, however, it is unclear how digital platform services could make this determination and how the regulator could enforce an industry code or standard without making such determinations; for example in relation to complaint handling with respect to content.
- 1.3. We also raise concerns in relation to the “contribute to [serious harm]” element of the definition. This sets a low threshold, and there should be greater emphasis on a causal, reasonably foreseeable link between the content and serious harm. Adopting this approach would assist regulated digital service platforms to identify and prioritise the type of misinformation or disinformation that pose the most severe risks based on their link to potential real-world serious harm.
- 1.4. Under the Draft Bill, the definition of “harm” in cl 2 includes hatred against a group in Australian society on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion and harm to the health of Australians. The concept of “hatred” can be subjective, and in and of itself is not a real-world harm. The term “harm” also includes harm to the health of Australians, which is a vague and broad concept that requires greater refinement.
- 1.5. Recommendations:
 - Amend cl 7 to include “verifiably” or a similar term before “false, misleading or deceptive”. The ACMA should provide guidance on content that it is aware of that is verifiably false, misleading or deceptive to enable digital platform services to monitor and respond to this content on their services.
 - Amend the language in cl 7 with the following: “the provision of the content on the digital service is reasonably likely to cause ~~or contribute to~~ serious harm”.
 - Clarify that hatred against a of group of Australians is a harm if it poses a credible and serious threat to the protection or safety of a group, particularly if that group is marginalised or vulnerable.
 - Clarify that harm to health requires the endangerment of the health of Australians.

Disinformation

- 1.6. Disinformation has the same definition as misinformation, with the additional requirement that the person disseminating, or causing the dissemination of, the content intends to deceive another person (subcl 7(2)). In addition to the comments above, our concern with the concept of “disinformation” is the onus placed on digital

platform services to determine whether or not content could be classified as disinformation. A service provider is unlikely to have insight into the intention of the person disseminating the content, and therefore will often not be in a position to assess whether, pursuant to subcl 7(2), a person is disseminating, or causing the dissemination of, the content intends that the content deceive another person.

1.7. Recommendation:

- Adopt the definitions of “disinformation” and “inauthentic behaviours” from the ACPDM. This would require an additional limb to the definition of “disinformation” in subcl 7(2) which is that disinformation is propagated amongst users of digital platforms via inauthentic behaviours, being spam and other forms of deceptive, manipulative or bulk, aggressive behaviours (which may be perpetrated via automated systems) and includes behaviours which are intended to artificially influence users’ online conversations and/or to encourage users of digital platforms to propagate digital content (ACPD subcls 3.2 and 3.5). This provides a scalable way for service providers to identify and address disinformation using objective, not subjective, criteria.

Relevant matters to consider

1.8. Subclause 7(3) outlines the matters that must be regarded in determining whether content on a digital service is reasonably likely to cause or contribute to serious harm. We support the requirement to have a serious harm threshold, however these factors should not individually, or in combination, be the sole determinants. Further, additional illustrative factors such as warnings or notices that may be presented in conjunction with an item of content to counteract any potential misleading or deceptive effect should be considered. This could come in the form of a banner or some other indication that the content has not been fact checked. The existence of warnings puts customers on notice, and is a scalable and effective way for digital services to balance freedom of expression against the need to protect consumers from misinformation or disinformation.

1.9. Recommendation:

- Clarify subcl 7(3) to specify that these factors are not the only factors used to determine serious harm when assessing the material, and expand the list of factors to include warnings or notices presented in conjunction with an item of content, and the identity of the person responsible for posting the content (in addition to the original author). This puts customers on notice and would reduce the likelihood of the content from causing serious harm in the context of misinformation and disinformation.

Interactive feature

1.10. Under subcl 5(c), a digital service has an interactive feature if the digital service makes interactions between end-users or by end-users with content provided on the service “observable” to other end-users. This would capture interactive features that enable “likes” or similar reactions. This is problematic, as the criterion would also apply where those interactions are “observable” but where they do not affect the reach of the content in question, i.e., even if the level of prominence given to the content on the service is not affected by the number of “likes” or other reactions it receives. From a misinformation perspective, this type of feature should only be problematic if it affects the potential virality of the content and, therefore, the likelihood that this content will cause serious harm.

1.11. Recommendation:

- Amend subcl 5(c) so that it only applies where the observable interactions also directly affect the level of prominence given to the content on the service.

2. Services captured in the scope of the Draft Bill

- 2.1. The ACMA's proposed new powers would apply to "digital platform services", except for any services excluded by cl 6. The Draft Bill separates digital platform services into the following three categories: (1) content aggregation services; (2) connective media services; and (3) media sharing services. The definitions of these categories as currently drafted are overly broad, and our comments below make recommendations on refining these definitions to ensure that the services captured are those that have a propensity for the dissemination of misinformation and disinformation.
- 2.2. The use of "a primary function" is, in our view, problematic for all three digital platform service categories. This terminology is ambiguous, contemplates a significant degree of overlap between these categories, does not provide digital services with clarity, and could potentially capture a broader swathe of services than intended.
- 2.3. We also recommend introducing a risk assessment as a factor when determining whether a digital service should be regulated by the ACMA. The definition of the categories is broad and could capture digital services that present a low risk of misinformation or disinformation that is reasonably likely to cause serious harm, for example, because the service does not facilitate virality and amplification of the content.
- 2.4. Recommendations:
- Replace "a primary function" with "the primary function" (emphasis added) in subcls 4(2)(a), 4(3)(a) and 4(4)(a).
 - Introduce a second limb to each of the three categories of digital platform services to include a risk assessment of the service to ensure low-risk services are not unintentionally captured. This provides for a flexible approach which would allow for digital services to be included at a future point, should it be established that they have new features that could facilitate misinformation or disinformation that have a potential to cause serious harm.

Content aggregation service

- 2.5. A digital service is a content aggregation service if "a primary function of the digital service is to collate and present to end-users content from a range of online sources, including sources other than the digital service". This definition ostensibly captures all websites, software and apps that provide content to end-users. We recommend this definition is specifically targeted at digital services that index or collate information from the world wide web, being search engines and news aggregation services, consistent with the intent expressed in the Guidance Note rather than broadly framed with vague terms such as "content from a range of online sources" (subcl 4(2)).
- 2.6. Recommendation:
- Amend the definition of "content aggregation service" in subcl 4(2) to: "(a) the ~~a~~ primary function of the digital service is to collate and present to end-users content from the world wide web ~~a range of online sources~~, including sources other than the digital service; (b) such other conditions (if any) as are set out in the digital platform rules."

Connective media service

- 2.7. A digital service is a connective media service if "(a) a primary function of the digital service is to enable online interaction between two or more end-users; (b) the digital service allows end-users to link to, or interact with, some or all of the other end-users; (c) the digital service has an interactive feature" (subcl (4)(3)).

- 2.8. This is a broad definition and may capture digital services that pose a low risk of widespread and viral dissemination of misinformation and disinformation. For example, this definition captures all websites and apps with a comment or forum feature even if the website or app is for an enterprise, public service, or specialised purpose (e.g., academic research, troubleshooting etc.). Further, the definition does not give consideration to other factors, such as total number of end users which will impact the risk of widespread dissemination of misinformation on that digital service. There is also potential duplication and lack of clarity between the three limbs of this definition (subcls (a), (b) and (c)).
- 2.9. Recommendations:
- Provide greater clarity between some of the limbs within the definition. Amend limb (a) of the definition so that it only captures services where the primary function is to enable online interaction between end-users via an interactive feature.
 - Subsequently, delete limbs (b) and (c) as they would be incorporated into the amended limb (a).

Media sharing service

- 2.10. A digital service satisfies the definition of a media sharing service if “a primary function of the digital service is to provide audio, audio-visual or moving visual content to end-users” (subcl 4(4)). The Draft Bill further provides that a media sharing service that does not have an interactive feature is excluded (subcl 6(1)(b)).
- 2.11. This is another broad definition and may unintentionally capture services that have a low risk of widespread and viral dissemination of misinformation and disinformation. For example, a media sharing service's primary function may not be interactive, but there could be a limited function that would satisfy this definition (such as a subscription video on demand streaming services with a chat functionality, or the ability to leave reviews). Notwithstanding this, if the service poses a low risk for misinformation and disinformation, we submit that the inclusion of such a service may be unintended.
- 2.12. Recommendation:
- Amend the definition of media sharing service so that it only covers services that have an interactive feature. In other words, move the carve out from section 6(1)(b) into the definition itself, in order to align with the approach taken for connective media services.

3. Services out of scope of the Draft Bill

- 3.1. The Draft Bill expressly identifies a number of services that would be excluded from the ACMA's proposed new powers. These include, internet carriage services, SMS, MMS, email services for misinformation purposes, and media sharing services that do not have an interactive feature. The exclusions are limited, drafted in a confusing manner (i.e., to be found in various places) and, in our view, fail to appropriately exclude some carriage services.
- 3.2. Subcls 4(1)(e), (f) and (g) appear to be intended to exclude carriage services as these services are prohibited by statute (*Telecommunications Act 1997* and *Telecommunications (Access and Interception) Act 1979*) from interfering with the privacy of communications. However, these subclauses fail to exclude all carriage services, for example, email services provided as a carriage services (e.g. Bigpond, Optusnet etc.). This ought to be corrected. (We note that the exclusion of email services in cl 6 only applies to misinformation.)
- 3.3. To ensure digital services that are not intended to be subject to ACMA's enhanced powers, we recommend the following.

3.4. Recommendations:

- Aggregate subcls 4(1)(e), (f) and (g) into one single class of exempted services, i.e., 4(1)(e) “a carriage service”, and include a definition under cl 2 which references the definition of carriage service in the *Telecommunications Act 1997*.
- Expressly list additional digital services that present a low risk for misinformation and disinformation. This could include e-commerce websites and marketplaces; messaging forums intended for customers of a specific organisation in relation to products and services supplied by that organisation, and services intended for the use within a specific organisation.

4. Industry codes and standards

- 4.1. The Draft Bill gives the ACMA the power to determine a binding standard, such as where a request to develop a misinformation code is not complied with (Division 5). There is no requirement for the ACMA to undertake public consultation prior to making an industry standard. This approach is at odds with the approach taken under the *Online Safety Act 2021* (s 148) and the *Telecommunications Act 1997* (s 132), which require the eSafety Commission and the ACMA, respectively, to conduct public consultation of at least 30 days prior to making an industry standard.
- 4.2. It is also not clear why industry associations developing an industry code should be required to publicly consult on a draft code (subcl 37(1)(f)) while the ACMA is only required to consult with respective industry associations. Given the substantial penalties for non-compliance, it is imperative all interested parties have an opportunity to comment on a proposed standard. The very large number of submissions in response to the public consultation on the Draft Bill also highlights the importance of and interest by the public in relation to these issues.
- 4.3. The Draft Bill sets the minimum period for the development of an industry code to 120 days (subcl 38(2)). This period is unrealistic as many code development processes that Communications Alliance has undertaken (individually or jointly) take substantially more time. For example, the development of the Online Safety Codes has taken more than 20 months. Similarly, the revision (let alone new development) of the major consumer protections code in the telecommunications sector (the *Telecommunications Consumer Protections Code*) regularly requires more than twelve months.
- 4.4. While the stated period sets a lower limit and longer periods for code development are possible, we believe the legislation ought not to state unrealistic timeframes which put the developing industry associations at the ‘mercy’ of the regulator (or Minister) to grant extensions to the timeframe.
- 4.5. Recommendations:
 - Consistent with the *Online Safety Act 2021* (s 148) and the *Telecommunications Act 1997* (s 132), require the ACMA to undertake a public consultation prior to making any industry standard on misinformation. This should include a requirement that the ACMA publish on its website the draft industry standard or variation and a notice inviting interested parties to comment, which should run for at least 30 days after publication.
 - Amend subcl 38(2) to extend the timeframe to 365 days or other reasonable period commensurate with the complexity of the code requested. This would allow for shorter timeframes (than 365 days) to be set, provided those timeframes remain reasonable for the task at hand.
 - Given the far-reaching potential for industry standards to curtail freedom of expression, make industry standards disallowable by Parliament.

5. Record keeping, reporting and information gathering powers

- 5.1. The Draft Bill gives the ACMA broad powers to, for example, obtain information and documents and make rules about the prevalence of content containing false, misleading or deceptive information provided on the service other than excluded content for misinformation purposes (see for example, subcls 14(1) and 18(2)). The definition of “excluded content for misinformation purposes” includes a narrow list of content such as content that is produced in good faith for the purposes of entertainment, parody or satire and professional news content. These provisions present challenges regarding the determination of content that is false, misleading or deceptive, as these concepts are ambiguous and service providers lack the means and expertise to fact-check content. The reference to “false, misleading or deceptive information” also introduces uncertainty regarding the difference between misinformation, disinformation and content that is false, misleading or deceptive.
- 5.2. The Draft Bill also sets out ACMA's proposed new rule-making powers. One is that reports must be prepared “as and when” required by ACMA (subcl 14(8)). We note that there is no minimum time frame to produce reports, which creates uncertainty for industry and potentially inconsistent approaches by the regulator.
- 5.3. Recommendations:
 - Replace the reference to “false, misleading or deceptive information” in the provisions dealing with ACMA's powers with “misinformation and disinformation” (which includes a harm threshold), as these concepts are clearly defined in the Draft Bill.
 - Specify a minimum timeframe for the production of a report such as 28 days, which is the timeframe provided under the *Online Safety Act 2021* for an analogous requirement.

Power to compel digital platform services to provide information

- 5.4. Under cls 18 and 19, the ACMA would have the power to compel digital platform providers and other persons to provide information and documents relevant to: misinformation and disinformation on the service; measures taken to prevent or respond to misinformation or disinformation; or the prevalence of false, misleading or deceptive information provided on the digital platform service.
- 5.5. These proposed information-gathering powers should be subject to limitations, including the protection of commercially sensitive information, and the requirement that the ACMA prepare guidelines on these powers as other regulators such as the Office of the eSafety Commissioner and the Australian Competition and Consumer Commission are required to do.
- 5.6. Recommendations:
 - Include safeguards to ensure that the ACMA exercises the proposed information-gathering powers in a proportionate manner. Factors could include whether the information requested is in the public interest, whether there is a history of complaints about misinformation regarding a particular service provider, and the burden on the service provider to provide the information. Note that these safeguards should also be applied to ACMA's record-keeping powers.
 - ACMA should be required to prepare guidelines on its information gathering powers.

Publication of information

- 5.7. Cle 25 sets out the ACMA's ability to publish information collected under the information-gathering and record-keeping powers on the ACMA's website. Clause 26 provides some balance, stipulating that the ACMA must consult with the relevant digital platform provider and invite the provider to identify any information that could

be expected to materially prejudice the commercial interests of a person and provide reasons. Notwithstanding this, the ACMA is only required to consider this response.

5.8. The publication of the information that the ACMA gathers about a digital platform service may not be proportionate to the prevalence of misinformation or disinformation, or reflect the steps that service has taken to address such content. Consequently, publications of such information could have a disproportionate impact on a digital platform service and, therefore, these powers ought to be exercised with caution.

5.9. Recommendations:

- Include requirements that the ACMA may only publish information that is in the public interest; that this information is a summary of the information gathered, unless the information is already available in the public domain; and commercially sensitive information is not published.
- Require the ACMA to also consider a range of factors when determining whether to publish information, such as whether publication may compromise safeguards that the digital platform service has in place to combat misinformation or disinformation.

6. Conclusion

Communications Alliance looks forward to continued engagement with DITRDCA and other relevant stakeholders to help ensure that the potential risks and harms associated with the dissemination and propagation of misinformation and disinformation are appropriately limited, while safeguarding freedom of expression and other fundamental democratic rights.

It is important that all stakeholders cooperate in the development of any legislation and regulation that has the potential to inadvertently infringe on Australia's democratic rights, and we welcome the consultative approach so far taken. We would welcome further debate in relation to the issues raised in this submission and stand ready to answer any questions that DITRDCA or other stakeholders may have.

For any questions relating to this submission please contact Christiane Gillespie-Jones on 02 9959 9118 or at c.gillespiejones@commsalliance.com.au.



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