

BRIEF: Mis/disinformation legislation puts Government credibility at risk

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Mis/disinformation bill puts Government credibility at risk

Abstract: There are undoubted harms being caused by social media, and an absolutist approach to freedom of speech is untenable. But government efforts to limit these harms now threaten to generate their own problems.

The Australian Government's Misinformation and Disinformation Bill 2024 is a risky move. The risks to freedom of speech have been widely discussed. Less discussed are the risks to the Government's own credibility. By setting up ACMA as an arbiter of truth is setting up the regulator for failure. This threatens both freedom of speech and public trust in government.

New bill moves the needle, but not enough to quell opposition

First, it is important to highlight what is good about the Bill. Like the exposure draft, the Bill gives the ACMA extensive information-gathering and record-keeping powers that can bring a new level of transparency to the influence of the platforms over contentious debates. This part of the draft bill has attracted little opposition and will be beneficial.

The contentious issue has always been how key terms – such as misinformation, disinformation and harm – are defined. The Australian Human Rights Commission in 2023 [highlighted four problems](#) with the exposure draft. It is instructive to check how the new Bill addresses these problems

- Overly broad definitions of mis- and disinformation.

The definition of mis- and disinformation in the exposure draft requires that “the content contains information that is false, misleading or deceptive”. In the new Bill, this has been revised to “the content contains information that is *reasonably verifiable as* false, misleading or deceptive”. The problem with this revision is that it just pushes the issue back a step. Verifiable how, and by whom? It is the very nature of problematic mis- and disinformation to be controversial, and the reliability of even professional “fact checkers” is also controversial.

- The low harm threshold established by the proposed law.

To be classified as mis or disinformation, content must also be “reasonably likely to cause or contribute to serious harm”. Harm was defined in the exposure draft to include hatred against a group in Australian society, disruption of public order or society, threats to the integrity of Australian democratic processes, harm to the health of Australians, harm to the Australian environment, and economic or financial harm to Australians, the Australian economy or a sector of the Australian economy.

These broad terms have been refined in the new draft to focus specifically on:

- Harm to the operation or integrity of a government electoral or referendum process.
- Harm to public health in Australia.
- Vilification of a group in Australian society, defined based on a wide range of protected characteristics.
- Intentionally inflicted physical injury to an individual
- Imminent damage to critical infrastructure or disruption of emergency services.

- imminent harm to the Australian economy, including harm to public confidence in the banking system or financial markets.

This is an improvement, but the definition of harm remains wide. Further, the harm threshold still captures content that will either “cause or contribute” to harm, and no minimum level of contribution is stated.

- Definition of “excluded content”, that is protected from being labelled as misinformation or disinformation.

Exemptions for satire and professional news content remain the same in the new draft. A controversial provision to exclude content authorised by Australian governments (but not political oppositions) has been removed. Instead of specific exemptions for educational institutions, a broad exemption for “for any academic, artistic, scientific or religious purpose” is now proposed.

- ACMA powers to determine what is and is not censored content

In the AHRC’s view, “there are inherent dangers in allowing any one body – whether it be a government department or social media platform – to determine what is and is not censored content... The risk here is that efforts to combat misinformation and disinformation could be used to legitimise attempts to restrict public debate and censor unpopular opinions.”

This is an inherent risk in the legislation that seems unavoidable.

Why does this matter?

As we remarked when the exposure draft was released in 2023 (see our report [“Mis/disinformation regulation – benefits, risks, and one big gap”](#)) the Government’s Bill has some strengths. ACMA proposed information-gathering and record-keeping powers can and should be used to promote transparency by social media. Social media platforms are already restricting the flow of information without oversight, and there is no reason to assume that these efforts are always benign.

But this highlights a fundamental lack of balance in the Bill. The “gap” we identified back in 2023 was that the ACMA will lack a specific remit to prevent unreasonable restrictions of speech by social media platforms. Adding this would have strengthened the Government’s claims to respect freedom of speech. Despite the latest changes, the Bill still prioritises the suppression of “bad” speech over freedom of speech.

There are several risks that flow from this imbalance.

The first is that the regulator could end up suppressing speech that is neither mis- or disinformation. To see this, consider a specific case: the so-called “lab leak” theory of the origins of COVID19 virus. During the pandemic, the idea that the virus could have originated as a leak from a Wuhan biological facility was labelled a conspiracy theory by highly placed authorities in the United States. Post-pandemic, major US intelligence agencies consider it a plausible account of the origins of the virus.

It is highly likely that the lab leak theory would have fallen foul of this Bill if it had been in force in 2021 or 2022. And if that had happened, it might have taken much longer for the

evidence of a leak to emerge. Or possibly it would never have emerged. This example shows that there are real risks that legitimate ideas could be suppressed.

The second issue is this: what would remain of the ACMA's credibility after such a blunder? It would be very hard to recover this credibility. And suppose then that conspiracy theories started to emerge that the ACMA had deliberately suppressed "the truth". Would these be suppressed as a threat to confidence in public health?

These significant risks can only be managed by a parsimonious approach to intervention that carefully distinguishes mis- and disinformation from the merely controversial. Freedom of speech needs to weigh heavily in the scales if regulation is to gain wide support.

But right now, this would be only at the ACMA's discretion, not because the Bill ensures it. In our view, the new draft Bill does not do enough to reduce the risks or to win wide support, and we expect a rocky reception in the Parliament.

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