City of Joondalup

agenda

Ordinary Meeting of Council
Addendum

NOTICE IS HEREBY GIVEN THAT THE NEXT ORDINARY MEETING OF THE COUNCIL OF THE CITY OF JOONDALUP WILL BE HELD IN THE COUNCIL CHAMBER, JOONDALUP CIVIC CENTRE, BOAS AVENUE, JOONDALUP

ON **TUESDAY 22 OCTOBER 2024**

COMMENCING AT **6.30pm**

JAMES PEARSON
Chief Executive Officer
18 October 2024

Acknowledgement of Traditional Custodians
The City of Joondalup acknowledges the traditional custodians of the land, the Whadjuk people of the Noongar nation, and recognises the culture of the Noongar people and the unique contribution they make to the Joondalup region and Australia. The City of Joondalup pays its respects to their Elders past and present and extends that respect to all Aboriginal and Torres Strait Islander peoples.

This document is available in alternate formats upon request

joondalup.wa.gov.au

TABLE OF CONTENTS

14 REPORTS OF THE CHIEF EXECUTIVE OFFICER

14.2 APPOINTMENT OF REPRESENTATIVE TO THE MINDARIE REGIONAL COUNCIL

WARD	All
RESPONSIBLE DIRECTOR	Mr Jamie Parry Director Governance and Strategy
FILE NUMBER	03149, 101515
AUTHORITY / DISCRETION	Executive - The substantial direction setting and oversight role of Council, such as adopting plans and reports, accepting tenders, directing operations, setting and amending budgets.

PURPOSE

For Council to appoint a representative to the Mindarie Regional Council (MRC), following the resignation of Mayor Jacob as the City's representative on the MRC.

EXECUTIVE SUMMARY

The MRC comprises delegates from each of the following member local governments:

- City of Joondalup.
- City of Perth.
- City of Stirling.
- City of Vincent.
- City of Wanneroo.
- Town of Cambridge.
- Town of Victoria Park.

At the Council meeting held on 6 November 2023 (CJ208-11/23 refers), Council appointed Mayor Albert Jacob and Cr Christopher May to be the City's representatives on the MRC. On Monday 14 October 2024, Mayor Albert Jacob tendered his resignation as the City's representative on the MRC, effective from 5pm on Tuesday 22 October 2024. It is therefore necessary to appoint an elected member to represent the City of Joondalup at MRC meetings.

It is therefore recommended that Council:

1 *APPOINTS Cr _____ to represent the City of Joondalup on the Mindarie Regional Council;*

2 *NOTES that Cr Chrisopher May continues to be the City of Joondalup's second representative on the Mindarie Regional Council, as resolved by Council at its meeting held on 6 November 2023 (CJ208-11/23 refers);*

3 *ADVISES the Mindarie Regional Council of its decision.*

BACKGROUND

The MRC is a regional local government established for the purpose of delivering effective, efficient and environmentally sound waste treatment and disposal and leading its community in sustainable waste management philosophy.

The MRC was formed in 1981 when the Cities of Perth, Stirling and Wanneroo purchased land in Perth's northern corridor that included a parcel of land deemed suitable for a landfill site. Formal incorporation and registration of the MRC occurred on 22 December 1987 when the Governor in Executive Council gave approval.

The MRC is now one of Western Australia's largest waste management authorities and manages waste disposal for each of its member Councils.

The MRC comprises delegates from each of the member local governments on a basis of the acknowledged equity held within the landfill enterprise. This currently constitutes the following representation:

- City of Joondalup Two delegates
- City of Perth One delegate
- City of Stirling Four delegates
- City of Vincent One delegate
- City of Wanneroo Two delegates
- Town of Cambridge One delegate
- Town of Victoria Park One delegate

No deputies are appointed to the MRC. Legal advice has confirmed that an alternate member to serve on the MRC can only be made under specific circumstances and not on an ongoing basis.

It is important to note, therefore, that should any of Council's appointed representatives not be available to attend a meeting of the MRC in the near future a special resolution of Council is required to appoint an alternate member for the specific period that the member is not available, in accordance with sections 52(b) and (c) of the *Interpretation Act 1984,* which provides:

- *"52(1)(b) where a person so appointed to an office or position is suspended or unable, or expected to become unable, for any other cause to perform the functions of such office or position, to appoint a person to act temporarily in place of the person so appointed during the period of suspension or other inability but a person shall not be appointed to so act temporarily unless he is eligible and qualified to be appointed to the office or position; and*
- *52(1)(c) to specify the period for which any person appointed in exercise of such a power or duty shall hold his appointment."*

DETAILS

At its meeting held on 5 April 2005 (CJ050-04/05 refers), Council resolved in part that:

> *"in the interests of good governance, AGREES that the City of Joondalup nominated representative on the Tamala Park Regional Council shall not be a member of the Mindarie Regional Council."*

At the Council meeting held on 20 September 2005 (CJ202-09/05 refers), during discussion on the appointment of representatives to the former Tamala Park Regional Council, it was recommended that when a report is presented to a future incoming Council, consideration be given to the Catalina Regional Council and Mindarie Regional Council each being represented by either the Mayor or Deputy Mayor, in order that a senior level of representation be maintained. However, it should be noted that this is a recommendation of Council and not a formal resolution (CJ202-09/05 refers).

At the Council meeting held on 6 November 2023 (CJ208-11/23 refers), Council appointed the following persons to represent the City of Joondalup on the:

1 Mindarie Regional Council:

Members

Mayor Albert Jacob, JP

Cr Christopher May, JP

2 Catalina Regional Council:

Members

Cr John Chester

Cr Lewis Hutton

Deputy Members

Cr Phillip Vinciullo

Cr Adrian Hill

On Monday 14 October 2024, Mayor Albert Jacob tendered his resignation as a Councillor of the MRC, effective from 5.00pm on Tuesday 22 October 2024. It is therefore necessary to appoint a second elected member to represent the City of Joondalup at MRC meetings.

Issues and options considered

Council may choose to:

- Appoint a second elected member to represent the City of Joondalup at MRC meetings. This is the recommended option to ensure the City maintains full representation on the MRC.
  or
- Not appoint a second elected member to represent the City of Joondalup at MRC meetings. This option is not recommended.

Legislation / Strategic Community Plan / Policy implications

Legislation *Interpretation Act 1984.*

52. Power to appoint includes power to remove, suspend, appoint acting officer etc.

(1) Where a written law confers a power or imposes a duty upon a person to make an appointment to an office or position, including an acting appointment, the person having such power or duty shall also have the power -

(b) where a person so appointed to an office or position is suspended or unable, or expected to become unable, for any other cause to perform the functions of such office or position, to appoint a person to act temporarily in place of the person so appointed during the period of suspension or other inability but a person shall not be appointed to so act temporarily unless he is eligible and qualified to be appointed to the office or position; and

(c) to specify the period for which any person appointed in exercise of such a power or duty shall hold his appointment.

10-Year Strategic Community Plan

Key theme 5. Leadership.

Outcome 5-1 Capable and effective - you have an informed and capable Council backed by a highly-skilled workforce.

Policy Not applicable.

Risk management considerations

Should another elected member not be appointed to represent the City, following the resignation of Mayor Albert Jacob as a Councillor of the MRC, then the City will not be fully represented and therefore not have its allocated voting rights on matters before the MRC.

Financial / budget implications

There are no budget implications for the City of Joondalup.

However, the following meeting fees and allowances apply to representatives of the MRC:

Mindarie Regional Council

	Meeting Fee ($) Per annum	**Allowance ($) Per annum**	**Technology Allowance ($) per annum**
Chairperson	16,480	20,875	3,500
Deputy Chairperson	10,990	5,090	3,500
Elected Member	10,990		3,500
Alternate Member	Nil.		
Other Expenses	Childcare and travel costs will be reimbursed in accordance with Reg. 31 and 32 of the *Local Government (Administration) Regulations 1996.*		

Regional significance

The MRC is a significant organisation within the northern metropolitan corridor, dealing with waste treatment / disposal.

Sustainability implications

Not applicable.

Consultation

Not applicable.

COMMENT

It is considered important that Council exercises its ability to be fully represented at each and every meeting of the MRC. It is therefore recommended that a second elected member be appointed, following the resignation of Mayor Jacob as a Councillor of the MRC, to represent the City at the MRC.

VOTING REQUIREMENTS

Simple Majority.

RECOMMENDATION

That Council:

1 APPOINTS Cr _____ to represent the City of Joondalup on the Mindarie Regional Council;

2 NOTES that Cr Chrisopher May continues to be the City of Joondalup's second representative on the Mindarie Regional Council, as resolved by Council at its meeting held on 6 November 2023 (CJ208-11/23 refers);

3 ADVISES the Mindarie Regional Council of its decision.

ATTACHMENTS

Nil

16 MOTIONS OF WHICH PREVIOUS NOTICE HAS BEEN GIVEN

16.1 NOTICE OF MOTION NO. 1 - CR DANIEL KINGSTON - PETITION TO THE LEGISLATIVE ASSEMBLY OF THE WESTERN AUSTRALIAN PARLIAMENT REGARDING THE WARWICK QUARTER DEVELOPMENT

In accordance with Clause 4.6 of the *City of Joondalup Meeting Procedures Local Law 2013*, Cr Daniel Kingston has given notice of his intention to move the following Motion at the Council meeting to be held on 22 October 2024:

That Council:

1 SUPPORTS making the petition in attachment 1 under its common seal;

2 REQUESTS the CEO to give public notice on the website and social media and make the petition available for 90 days for members of public to sign at the administration building, at all libraries and leisure centres, and allow members of the public to have copies to get signatures from others.

REASON FOR MOTION

The development application for the proposed mixed-use development at Lots 956 (99), 965 (95) and 944 (83) Ellersdale Avenue and Lots 961 (30) and 946 (14) Dugdale Street, Warwick requests approval for five residential mixed use apartment buildings.

Stage 1 of the development contains 7 storey and 12 storey apartment buildings, and with stage 2 containing three 25 storey apartment buildings. Overall, the five buildings will add 1042 new dwellings to the suburb of Warwick which currently contains approximately 1,600 dwellings.

As stated in Item 12.1, an application of this nature and scale within a secondary activity centre may be contrary to orderly and proper planning in the absence of a precinct structure plan being prepared and endorsed over the broader Warwick Activity Centre. But this is not a determination that can be made by the City of Joondalup.

The determination of the application will be by the Western Australian Planning Commission.

However, given the significant risk to the community from an approval of the application it is considered that the City of Joondalup should petition the Parliament to guarantee that any approval given will be cancelled.

Section 284 of the *Planning and Development Act 2005* (the Act) enables the Governor to cancel an approval granted by the Western Australian Planning Commission under Part 17.

The Governor acts on the advice of the Executive Council which is the Premier and Ministers.

A local government has the capacity to petition parliament as it is a body corporate with the legal capacity of a natural person and a common seal.

Local Government Act 1995

Section 2.5. Local governments created as bodies corporate

(1) When an area of the State becomes a district, a local government is established for the district.

(2) The local government is a body corporate with perpetual succession and a common seal.

(3) The local government has the legal capacity of a natural person.

Clause 64 (10) of the *Standing Orders of the Legislative Assembly of the Parliament of Western Australia* allows petitions from corporations, if made under its common seal.

Standing Orders of the Legislative Assembly of the Parliament of Western Australia

Clause 64. A petition will —

(10) A petition will if from a corporation, be made under its common seal.

ATTACHMENTS

1. Petition to the Legislative Assembly of the Western Australian Parliament regarding the Warwick Quarter Development [**16.1.1** - 2 pages]

OFFICER COMMENT

The development application for seven mixed use buildings in the Warwick Activity Centre, Ellersdale Avenue and Dugdale Street, Warwick is to be considered by Council at its meeting on Tuesday 22 October 2024 (Item 12.2 refers).

The Report to Council outlines the City's role in the application as a referral agency only, providing a submission for consideration by the Western Australian Planning Commission (WAPC) in their determination of the application. The application was formally referred to the City on 27 August 2024, with comments due to be provided by 29 October 2024. The WAPC is yet to make a decision on this development application.

The Notice of Motion, and proposed petition to be administered by the City of Joondalup and subsequently submitted to the Legislative Assembly of the Western Australian Parliament, raise several issues for Council's consideration, including the negative implications for the City's role in regard to the determination of the development application and the City's reputation; and uncertainty about the mechanism on how the petition would be conducted and resources required.

1 Ability of a local government to petition on behalf of its residents at the Legislative Assembly

The *Local Government Act 1995*, relevant regulations and the Rules of Petition contained in the Standing Orders (for the Legislative Assembly) from Parliament of WA Web - Preparing a Petition for the Legislative Assembly are silent on how a local government can petition on behalf of its residents at the Legislative Assembly.

A ‘corporation’ can make a petition, however it must do so in accordance with the authority given by its board of directors. The equivalent in local government would be the authority given by a Council of Elected Members. Pursuant to the Standing Orders for the Legislative Assembly there is no distinction made between a corporation petitioning on its behalf or petitioning on behalf of a number of petitioners. Notwithstanding that, it appears the City as a local government could be deemed a corporation.

2 Conflict of interest in the City’s role regarding the development application process and risk to the City’s reputation

There is a conflict of interest in respect of the City’s role with regard to the development application process. The Notice of Motion makes a distinction that it is the WAPC who will be making the determination. However, this does not take away the fact that the City has a role to play in providing recommendations to the WAPC in respect of the development approval. Neutrality and fairness principles must be adhered to.

The planning process requires the WAPC to exercise its discretion responsibly, having due regard to recommendations from the City and referral agencies, public consultation, orderly and proper planning principles and the applicable planning framework.

Council’s decision (recommendation), and the feedback through community consultation are the most appropriate ways for the community to convey a position in relation to the proposed development. A petition requesting cancelation of a WAPC decision *if* that decision is to approve the application, is considered inappropriate at this stage as the WAPC should first be given opportunity to demonstrate that it has followed due process and arrive at a decision.

If the Council decided to support making the petition to the Legislative Assembly, there is a concern that Council would be acting outside of the planning process to try and influence a WAPC decision before it has been made. This carries reputational risk for the City, both with the WAPC and in terms of not following due process.

3 Privacy considerations

The request appears to suggest that the petition would be in hard-copy format with copies made available at the administration building, all libraries and leisure centres. There is a further request to allow members of the public to have copies to get signatures from others.

Should the Council agree to petition on behalf of its residents via hard-copy forms, this presents a number of concerns with regard to privacy of individual petitioners. The petition form itself gathers such information as full name, full address and signatures. As the ‘lead petitioner’ the City of Joondalup has a duty to protect the privacy of its residents signing the petition. The City would also need to consider what, if any, liability it is exposed to should members of the public be provided with petition forms to obtain signatures. Privacy framework considerations may need to be implemented such as waivers/consent to release information/statement of collection of personal information.

Should the Council proceed with the petition on behalf of its residents, this would present a significant risk to the City in terms of breaching privacy principles and laws.

The City has considered whether an online petition would address the concerns relating to privacy matters. The Legislative Assembly does not allow for ePetitions. The Legislative Assembly adopted a Temporary Order regarding ePetitions which allowed for a trial period of ePetitions from 13 February 2024 to 16 August 2024. As the trial period has now concluded, the Legislative Assembly can only accept hard-copy petitions.

The City of Joondalup has recently implemented ePetitions through *my*Joondalup on the City's website however, it would not be possible to facilitate this petition through the City's website as the form is used to petition to the Mayor and Councillors of the City of Joondalup and not to the Legislative Assembly of the WA Parliament.

4 Resourcing and communications considerations

If City Officers were required to administer a petition on behalf of the City of Joondalup residents, there would be increased resourcing demands. For example, to address privacy concerns considered above, the petition forms will need to be carefully managed, potentially in designated safe areas, so as not to obstruct pathways or create congestion within City facilities. Guidance may also need to be provided to City Officers in terms of where and how the petition forms are displayed so as not to breach any privacy considerations.

Information materials would need to be prepared and distributed to clearly explain the purpose of the petition and how the data collected will be used. In addition, there may need to be some guidelines put in place to manage members of the public who attend City facilities for the purpose of encouraging others to sign the petition. Guidance will be needed to educate those collecting signatures on respectful and non-intrusive approaches. There would also need to be clear information with regard to the closing date of the petition, and that any signatures received after the closing date cannot be accepted.

5 Further consideration by Council following closing of the petition

The WA Parliament website provides that: *"Petitioners cannot personally present a petition to the House. They must request a Member to present it to the House on their behalf, they may ask either their local Member of Parliament or another Member. Standing Orders require that a Member of Parliament will, prior to presenting a petition to the House, forward the petition to the Clerks-at-the-Table who, if the petition is in order, will certify that the petition confirms with the Standing Orders. When presenting the petition, the Member rises to address the Speaker, announces the number of signatures, the subject of the petition and reads the requested action or remedy. The petition is then received by the Assembly. A summary of the text of the petition will then be recorded in the Assembly's votes and proceedings, and appears in full in Hansard."*

The Council would need to consider which Member of Parliament does the Council wish to ask to present the Petition, and, given the petition is asking for a specific action – that is, *if* the WAPC grants approval for the development, that the Governor cancel that approval – the Council would need to consider any decisions of the WAPC, should one be made within the period that the petition was open, or before it was presented to the Parliament.

For the reasons outlined above, the Notice of Motion is not supported.

16.2 NOTICE OF MOTION NO. 2 - CR DANIEL KINGSTON - COMMUNICATIONS LEGISLATION AMENDMENT (COMBATTING MISINFORMATION AND DISINFORMATION) BILL 2024 (CTH)

In accordance with Clause 4.6 of the *City of Joondalup Meeting Procedures Local Law 2013*, Cr Daniel Kingston has given notice of his intention to move the following Motion at the Council meeting to be held on 22 October 2024:

That Council REQUESTS the Chief Executive Officer to write to the relevant ministers that the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024 (Cth) should not be passed in its current form.

REASON FOR MOTION

Currently before the Federal Parliament is the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024 (the Bill). The Bill has progressed in the House of Representatives to the second reading debate.

In Australia, politics operate across the federal divide and impacts federal, State, Territory and local government levels. Policy or government action at one level may influence or have ramifications for another.

The Bill aims to prevent the spread of misinformation and disinformation. However, the definitions within the statutory scheme proposed for ‘misinformation’, ‘disinformation’, and ‘serious harm’ are likely to impact the freedom of expression of persons in the district, and to expression that may relate matters that come before the Council.

Freedom of expression includes the freedoms of religion, thought, and conscience.

Under the statutory scheme in the Bill the Australian Communications and Media Authority (ACMA) becomes the arbiter of what is misinformation or disinformation.

It is implausible that ACMA will be able to reliably distinguish what information, is, or is not misinformation or disinformation. Neither is it likely that ACMA could inform itself on the range of information it may come to be arbiter on from local issues such as significant planning and development matters or the release and sale of land, to informing itself on even more wide-ranging topics such policies of trade and commerce, external affairs, the intents of geopolitical actors, and the reputation of persons.

Given the impact the Bill could have on the freedom of expression within the system of local government it is considered that the Council should write to the relevant minister that the bill should not be passed in its current form.

Although there may have been a desire in when drafting the Bill to balance any negative impacts on freedom of expression, with the benefits of protecting against misinformation and disinformation, the Bill goes beyond what is necessary to safeguard the community.

Attached are submissions from the Australian Human Rights Commission, and the Victorian Bar Association which recommend the Bill should not be passed in its current form.

ATTACHMENTS

1. Australian Human Rights Commission Submission [**16.2.1** - 10 pages]
2. Victorian Bar Submission [**16.2.2** - 13 pages]

OFFICER'S COMMENT

On 19 September 2024, the Senate referred the provisions of the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024* (the Bill) to the Environment and Communications Legislation Committee for report by 25 November 2024.

The Bill proposes to amend the *Broadcasting Services Act 1992* and would make consequential amendments to other Acts to establish a new framework to safeguard against serious harms caused by misinformation or disinformation.

The Bill would provide the Australian Communications and Media Authority (ACMA) with new regulatory powers to require digital communications platform providers to take steps to manage the risk that misinformation and disinformation on digital communications platforms poses in Australia. These would include obligations on providers to assess and report on risks relating to misinformation and disinformation, to publish their policies in relation to managing misinformation and disinformation and develop and publish a media literacy plan.

The Bill would also provide ACMA with new information gathering, record keeping, code registration and standard making powers to oversee digital communications platform providers.

The Explanatory Memorandum related to the Bill can be accessed here.

A Fact Sheet published by the Australian Government can be accessed here.

To the City's knowledge the local government sector has not been engaged as part of the Bill's development nor has any representative body (ALGA or WALGA) engaged with local government to establish any position related to key considerations that local governments will need to take into account.

The *Communications Legislation Amendment Bill 2024* has potential implications for local governments in a number of ways:

1 **Increased accountability for local government communications:** The Bill may increase scrutiny of local government communications, particularly on social media platforms. Local governments may need to be able to demonstrate that their communications are accurate, truthful, and do not contribute to the spread of misinformation or disinformation as defined and regulated in proposed legislation. There may be an obligation to increase transparency about how misinformation and disinformation are handled on platforms which might include regular reporting to the ACMA.

2 **Potential for new regulations or guidelines:** The Bill may lead to the development of new regulations or guidelines specifically targeting local governments. These regulations could set standards for how local governments should communicate with their constituents and handle misinformation or disinformation, which itself may require local government compliance, risk, record keeping; reporting and policy/planning regimes to be implemented. It would be preferable that the sector understands the implications of any regulatory requirements affecting it.

3 **Increased costs for local governments:** Compliance with new regulations or guidelines could potentially increase costs for local governments, particularly for smaller local governments. These costs could include hiring additional staff, investing in new technology, or implementing new policies and procedures.

4 **Potential impact on public trust:** If local governments are found to be communicating in a way that is regarded under proposed legislation as spreading misinformation or disinformation, it could damage public trust in these institutions and make it more difficult for local government to take actions that would otherwise be in the community interest.

5 **Opportunities for improved communication:** The Bill could also provide opportunities for local governments to improve their communication practices. By being compliant with proposed legislation, local governments could potentially build greater trust with their communities and ensure that they are receiving accurate and reliable information; however this would likely come at a cost.

Overall, the implications of the *Communications Legislation Amendment Bill 2024* for local governments are likely to be mixed. While the Bill may increase scrutiny of local government communications and lead to additional regulatory requirements and costs, it could also provide opportunities for improved communication and public trust, within the right environmental context. However, local governments have not been engaged in the development of the Bill nor had the opportunity to consider the implications upon it and the communities they serve. This does not just extend to understanding the legal implications of terminologies ‘misinformation’; ‘disinformation’; and ‘serious harm’; but understanding how local governments are to manage the proposed regulatory reform and impacts upon it.

With regard to the Notice of Motion it is suggested that Council give consideration to the following:

- Knowledge of the Bill and its likely impact on the City of Joondalup is limited, and as such an informed Officer Comment on specific concerns of the Bill is unable to be provided.
- To the City’s knowledge no local government representative body (WALGA or ALGA) has developed any discussion/advocacy papers related to the proposed Bill, nor had the opportunity to engage with the local government sector.
- The Notice of Motion suggests the City write to relevant Ministers that the Bill not be passed in its current form. The Council should identify what elements of the Bill in its current form are not supported, and any matters for consideration to enable the Chief Executive Officer to draft appropriate correspondence.

Given the potential implications of the Bill on local government it is intended that the Chief Executive Officer will write to WALGA requesting that it provide advice to the local government sector on potential implications of the Bill, and engage on a possible advocacy position, as a matter of course.

Given the above it is considered that the Notice of Motion cannot be supported.

The City of Joondalup will stay informed about the progress of the Bill and be prepared to adapt its communication practices as needed.

22 OCTOBER 2024 - ORDINARY MEETING OF COUNCIL - ADDENDUM AGENDA ATTACHMENTS

The City of Joondalup of 90 Boas Avenue, Joondalup 6027, in the State of Western Australia, is the promoter of this petition which contains _____ signatures.

PETITION IN RELATION TO WARWICK QUARTER APARTMENTS AND COMMERCIAL

To the Honourable the Speaker and Members of the Legislative Assembly of the Parliament of Western Australia in Parliament assembled.

We, the undersigned, say that in relation to the development application (WAPC Ref: SDAU-063-23) for the proposed mixed-use development at Lots 956 (99), 965 (95) and 944 (83) Ellersdale Avenue and Lots 961 (30) and 946 (14) Dugdale Street, Warwick that consideration of an application of this nature and scale within a secondary activity centre is contrary to orderly and proper planning in the absence of a precinct structure plan being prepared and endorsed over the broader Warwick Activity Centre.

Now we ask the Legislative Assembly that if the Western Australian Planning Commission grants approval for development, that the Government cancel that approval.

Your petitioners therefore humbly pray that you will give this matter earnest consideration and your petitioners, as in duty bound, will ever pray.

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Please return this Petition to the City of Joondalup of 90 Boas Avenue, Joondalup 6027. This petition must not be altered or otherwise marked up or amended. Only original signatures are permitted. Photocopied or faxed signatures are not accepted.

Australian Human Rights Commission

Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024

Australian Human Rights Commission

Submission to Environment and Communications Legislation Committee

07 October 2024

ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
National Information Service 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
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ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
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General enquiries 1300 369 711
National Information Service 1300 656 419
TTY 1800 620 241

1 Introduction

1. The Australian Human Rights Commission (Commission) welcomes the opportunity to make this submission on the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024* (Bill) to the Environment and Communications Legislation Committee (Committee).
2. Any law aimed at combatting misinformation and disinformation must be framed around human rights, and include robust transparency and scrutiny safeguards. It should also be recognised that a multi-faceted policy response is required, with measures such as improving digital literacy and resilience amongst the broader Australian community also having an important role to play in designing an effective policy response to combat misinformation and disinformation.

2 Limited consultation

3. While the Commission appreciates the granting of an extension, it is disappointing that submissions were originally only open for a period of seven business days.[1] Given the immense impact the Bill could have on freedom of expression and democracy itself, more time should have been provided for stakeholders to provide considered responses to the Federal Government. This is particularly important given the clear public interest in this legislation, with the previous Exposure Draft of the Bill (Exposure Draft)[2] receiving approximately 20,000 comments and 2,418 public submissions during the public consultation period in 2023.[3]
4. As noted in several submissions on the Exposure Draft,[4] it is crucial that the proposed legislation strike the appropriate balance between combatting misinformation and disinformation while sufficiently protecting freedom of expression. This is a complex task, that requires nuance and feedback from experts and stakeholders across all communities. Seven business days does not provide sufficient time for stakeholders to share their views and risks damaging the broader public confidence that is necessary to ensure the effective implementation of any laws designed to combat misinformation and disinformation.

3 Freedom of expression

5. The Commission recognises that misinformation and disinformation can have real and significant impacts on human rights, social cohesion and democratic processes. Yet it also needs to be recognised that information may be opportunistically labelled as 'misinformation' or 'disinformation' to delegitimise alternative opinions, and limit open discussion about issues of public importance. These competing tensions are set out in the Commission's original submission to the Exposure Draft, which we would encourage the Committee to have reference to.
6. Freedom of expression is enshrined in a range of international and regional human rights instruments, including art 19 of both the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights (ICCPR).[5]
7. This right is not absolute, and its exercise carries with it special duties and responsibilities.[6] Freedom of expression may be subject to certain restrictions, however any restrictions must be provided for by law and may only be imposed for one of the grounds set out in art 19(3) of the ICCPR.[7]
8. Any such restrictions must also meet strict tests of necessity and proportionality. This requires that any proposed restriction pursues a legitimate aim, is proportionate to that aim, and is no more restrictive than is required for the achievement of that aim.[8]
9. In particular, the UN Human Rights Committee has highlighted that:

> … when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed.[9]

10. It is a welcome change that the Objects of the Bill now expressly considers freedom of expression in respect of the Australian Communications and Media Authority's (ACMA) powers. However, the language of s 11(e) presumes these powers respect freedom of expression – rather than requiring ACMA's powers to be carried out with respect for it. This is a concerning precedent to set in the Objects of the Bill.
11. However, there have been several improvements to the Bill which have increased necessary protections for freedom of expression, and which are welcomed. A key example is the provision of a broader exclusion under section 16(1)(c) allowing for the 'reasonable dissemination of content for any academic, artistic, scientific or religious purpose'.

4 Defining key terms

12. It is critical for any laws designed to combat misinformation and disinformation to define necessary terms with precision in order to ensure that the law does not end up improperly restricting access to diverse perspectives or censoring different views.

4.1 Meaning of 'serious harm'

13. There have been changes to the definition of key terms that have provided additional clarity. Removing the definition of 'harm' and instead defining 'serious harm' is a beneficial change which improves protection for free expression. However, the Commission continues to hold concerns about both the categories of misinformation and disinformation and the low harm threshold that remains.
14. For example, sections 14(f) and 14(h) remain too broad, defining 'serious harm' as 'imminent harm to the Australian economy, including harm to public confidence in the banking system or financial markets' that has either 'significant and far-reaching consequences for the Australian community or a segment of the Australian community' or 'severe consequences for an individual in Australia'. To give one example, legitimate discussion of interest rates may harm any number of Australians' confidence in financial markets, especially during times of economic hardship. However, this isn't information that should be captured as causing or contributing to serious harm.
15. Section 14(f) should not be included in the legislation. The practical effect of this could be the censorship of Australians expressing opinions that unfavourably affect market trends or corporate reputations. This could include, for example, criticising a major company's environmental or human rights record or policies. Including economic harms as a category also goes further than the limited restrictions to freedom of expression outlined in art 19(3)(b) of the ICCPR.
16. Section 13(3) of the Bill sets out non-exhaustive factors which are relevant in determining if content is reasonably likely to cause or contribute to serious harm.[10] The 'author' of content is listed as a factor in determining serious harm. This rightly allows decision-makers to consider trolls or repeat offenders in their consideration, as well as the potential reach and authority of an 'author'. However, there is concern that it may lead to

discretionary decisions being made about a person, rather than the content they post.

17. The Commission remains concerned that the Bill continues to set a low threshold for content moderation by allowing content that is reasonably likely to contribute to serious harm. While a lower threshold may assist ACMA in the operation of these new powers, it threatens the right to freedom of expression.

4.2 Misinformation and disinformation

18. Adopting a more broadly accepted definition of 'misinformation' and 'disinformation' improves workability and better protects freedom of expression. Requiring information to be 'reasonably verifiable as false, misleading or deceptive' strengthens the protection against opinions being unduly captured by the Bill, and more closely aligns with existing definitions of misinformation and disinformation.[11]

19. However, a number of concerns originally raised by the Commission's past submission about the definition of 'misinformation' and 'disinformation' have not been addressed. For example, the term 'information' is not itself defined – but instead it is stated in the Explanatory Memorandum that the term 'is intended to include opinions, claims, commentary and invective'.[12] Considerable caution should be exercised before including opinions and commentary within the scope of 'information' as this significantly broadens the potential reach of this legislation and increases the risk of it being used to censor legitimate debate about matters of public importance.

20. Any legislation aimed at combatting misinformation and disinformation should err on the side of ensuring robust protections for freedom of expression, noting that laws preventing misinformation and disinformation are only one component of what needs to be a multi-faceted policy response. Importantly, misinformation and disinformation also need to be countered by the provision of accurate and truthful information, as well as improving digital literacy and resilience amongst the broader Australian community so that they are more easily able to distinguish between the two.

4.3 Excluded dissemination

21. The shift to focus on 'excluded dissemination' rather than 'excluded content' is welcome, and has resulted in stronger protections for freedom

of expression. For example, including and broadening the exemption for the reasonable dissemination of content for an academic purpose is a positive change from the Exposure Draft.[13]

22. However, based on the Bill and Explanatory Memorandum it is still unclear if content disseminated by bodies that are not traditionally seen as 'academic' but which strongly contribute to the public discourse will be protected. For example think-tanks, non-governmental organisations, international bodies or organisations, or even National Human Rights Institutions (such as the Australian Human Rights Commission) would not be included within the scope of this exemption. One possibility would be extending the meaning of 'excluded dissemination' under s 16(1)(c) to also include 'reasonable dissemination of content for any other genuine purpose in the public interest' to provide further clarity on this point.

5 Platform reporting

23. Section 14(1)(e) of the Exposure Draft played an important role in requiring digital platforms to report on the 'prevalence of false, misleading or deceptive content'. Regulator and researcher access to this kind of information is essential to monitor and evaluate the prevalence of misinformation and disinformation in Australia. It also comes at a time when more social media platforms are reducing transparency and limiting access to avoid scrutiny.[14]

24. The removal of this obligation in the Bill is short-sighted if access is not strengthened in the broader transparency reporting regime for digital platforms. Transparency is a key factor in determining how misinformation and disinformation is affecting the online environment. It is also an important safeguard for freedom of expression as it may allow insights into the kinds of information which is being flagged.

6 Annual reporting

25. Although the inclusion of an annual reporting requirement for ACMA is welcomed, s 69 of the Bill is too vague in its current form. The reporting requirements should be more prescriptive and include an impact analysis of how the Bill has both countered misinformation and disinformation as well as any implications on freedom of expression.

7 Review mechanism

26. Section 70 of the Bill provides a review mechanism which includes an assessment of the impact of the Bill on freedom of expression three years after commencement. While this is a welcomed safeguard, three years is a long time in the digital environment given the rapid pace of technological development. At a minimum, an additional, initial review should take place twelve months after the commencement of the legislation.
27. Section 70(3) also provides that the review 'must be conducted in a manner that provides for public consultation'. Given the short consultation period provided for this submission, the Commission would emphasise the importance of ensuring that subsequent public consultations provide a full opportunity for meaningful engagement.
28. With the importance of third part access to data (as noted above), it is disappointing that the Federal Government has pushed back any decision on independent researcher access until the review takes place three years from the date of commencement.[15] If the Federal Government truly wishes to understand and combat misinformation and disinformation researcher access needs to be strengthened and supported now, and not in three years' time.
29. These reviews must also consider multi-faceted policy implications beyond the immediate reach of the Bill. For example, there is considerable misinformation and disinformation surrounding climate change on everything from 'greenwashing' to climate changes impact on bushfires in Australia.[16] While this topic is no longer considered by the Bill, it remains relevant when addressing misinformation and disinformation.
30. Given the serious concerns noted throughout this submission, the Bill does not strike the appropriate balance between freedom of expression and content moderation.

Recommendation

1. The Commission makes the following recommendation.

   Recommendation 1:

   The Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024 (Cth) should not be passed in its current form.

Endnotes

[1] The *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024* (Cth) was introduced to Parliament on 19 September 2024 and submissions close on 30 September 2024.

[2] Exposure Draft, *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (Cth). <https://www.infrastructure.gov.au/sites/default/files/documents/communications-legislation-amendment-combatting-misinformation-and-disinformation-bill2023-june2023.pdf>.

[3] Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *New ACMA powers to combat misinformation and disinformation* (Web Page) <https://www.infrastructure.gov.au/have-your-say/new-acma-powers-combat-misinformation-and-disinformation>.

[4] See e.g. Australian Human Rights Commission, Submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts' *Exposure Draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (Submission, 18 August 2023); Law Council of Australia, Submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts' *Exposure Draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (Submission, 29 August 2023).

[5] See e.g. *Convention on the Rights of Persons with Disabilities*, art 21; *Convention on the Rights of the Child*, art 12; *European Convention on Human Rights*, art 10; *American Convention on Human Rights*, art 13; *African Charter on Human and Peoples' Rights*, art 9; *ASEAN Human Rights Declaration*, art 23.

[6] *International Covenant on Civil and Political Rights,* art 19(3).

[7] *International Covenant on Civil and Political Rights*, art 19(3).

[8] Frank La Rue, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion* (UN Doc A/HRC/14/23, 20 April 2010) 13-15 [79]-[81]; See also United Nations ('UN') Human Rights Committee, *General Comment No 34 (Article 19: Freedom of opinion and expression)* (UN Doc CCPR/C/GC/34, 12 September 2011) 6 [22].

[9] UN Human Rights Committee, *General Comment No 34 (Article 19: Freedom of opinion and expression)* (UN Doc CCPR/C/GC/34, 12 September 2011) 5-6 [21].

[10] Explanatory Memorandum, *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024* (Cth) 45.

[11] See, for example, Digital industry Group Inc. (DIGI), *Australian Code of Practice on Disinformation and Misinformation,* 22 December 2022.

[12] Explanatory Memorandum, *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024* (Cth) 44.

[13] *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024* (Cth) s 16; cf *Exposure Draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* s 2.

[14] See generally Reset Tech Australia, *Achieving digital platform public transparency in Australia* (Report, June 2024).

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[15] *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024* (Cth) s 70(2)(c).

[16] See generally Climate Council, *Mythbusting* (Webpage) <https://www.climatecouncil.org.au/resources/explaining-bushfires-climate-change/?_gl=1*vl1pck*_up*MQ..&gclid=Cj0KCQjwo8S3BhDeARIsAFRmkOOV4-0--uDzMbSBrZuP-NFKXtscL2xSB_p9PP5dQjN_hp9WnwWxDhAaAkQQEALw_wcB>; United Nations, *Greenwashing – the deceptive tactics behind environmental claims* (Webpage) <https://www.un.org/en/climatechange/science/climate-issues/greenwashing>.

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

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[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.