

12 May 2022

The Hon Paul Fletcher MP
Minister for Communications, Urban Infrastructure, Cities and the Arts

CC: All Members of the Parliament of the Commonwealth of Australia

FEDERAL GOVERNMENT MUST ABANDON PLAN FOR INTERNET CENSORSHIP

Dear Minister,

I am writing to you and your colleagues on behalf of the Institute of Public Affairs (IPA) to share with you our research and analysis of the Federal Government's deeply concerning attack on freedom of speech with plans to censor the internet.

As you would be aware the IPA has a longstanding commitment to conducting research into the fundamental human right to freedom of speech. For example, in 2012 the IPA exposed how the recommendations of the Finkelstein Report into Media and Media Regulation would censor, regulate, and licence the printed and online press. The IPA's research and analysis explained why Finkelstein's recommendations – which failed to be enacted into law – were a significant threat to the freedom of speech of all Australians.

And in 2016 the IPA published *The Case for the Repeal of Section 18C*, which explored the fundamental philosophical and practical flaws of prohibitions on *harmful* speech.

It is because of the depth of our research that the IPA recognises how government overreach threatens the freedoms of Australians. And it is because of this research that we consider the Federal Government's proposal to give to the Australian Communications and Media Authority (ACMA) new powers to enforce rules for "misinformation" and "disinformation" on digital platforms to be such a concerning development.

IPA analysis finds the Federal Government's proposal would establish in ACMA the power to be Canberra's Thought Police. This would mean:

- the government would be responsible for defining the "official" truth and controlling acceptable opinion;
- the government would police what Australians and their friends and family are allowed to say to each other online; and
- this will only be the beginning of government internet censorship in Australia.

On 21 March 2022 the Federal Government released a report by ACMA (the ACMA Report) in which the regulator requested:

- new coercive powers to demand big tech companies keep and hand over information;
- new powers to register and enforce industry codes and develop standards on addressing misinformation and disinformation; and
- the creation of a Misinformation and Disinformation Action Group to collaborate and develop new practices on addressing online misinformation and disinformation.¹

The power to enforce the industry code, as sought by ACMA, would mean enforcing the commitments contained in the *Australian Code of Practice on Disinformation and Misinformation* (the Code). ACMA would be empowered to force digital platforms to take greater steps to meet the minimum commitment of “reducing the risk of Harms that may arise from the propagation of Disinformation and Misinformation on digital platforms by adopting a range of scalable measures.”

In broad terms, ACMA would be authorised and empowered to censor and regulate the communication and dissemination of news, material, and opinion on the internet which it deems harmful misinformation or harmful disinformation. The Code ambiguously provides the definition of “Harm” as harms which pose an imminent and serious threat to:

- A. Democratic, political and policy making processes such as voter fraud, voter interference, voting misinformation, or
- B. Public goods such as the protection of citizens’ health, protection of marginalised or vulnerable groups, public safety and security or the environment.

The idea that debate needs to be suppressed to protect against harms to “democratic processes” is a draconian and arrogant assumption that belongs in George Orwell’s *Nineteen Eighty-Four*, not in a genuine liberal democratic society. That a regulator would presume to exercise this kind of control over the electoral process, including what people are allowed to say in an election period, is completely inconsistent with Australia’s democratic traditions which have historically placed a high value on the freedom of political communication.

But it is the inclusion of a basket of “public goods” in the definition of harm that captures a nearly limitless range of topics that could be censored by the government.

It would operate as an all-purpose, universal restriction on speech equivalent to Section 18C to censor speech about almost anything controversial on the internet.

¹ ACMA, *A Report to Government on the Adequacy of Digital Platforms’ Disinformation and News Quality Measures* (June 2021) (“ACMA Report”)

Section 18C of the *Racial Discrimination Act 1975* makes it unlawful to do an act which offends or insults a person because of the race, colour or national or ethnic origin of a person or group of people.

Rather than a restriction on speech that offends or insults a person because of race, digital platforms would instead be under an obligation – enforceable by the government – to remove any content about almost anything deemed controversial according to the malleable standards of an unaccountable government agency.

This will be the tool by which the Federal Government can redraw the boundaries of legitimate debate because it will be given the power to manipulate the concept of *truth* and *harm* against mainstream Australians through the arbitrary concepts of “misinformation” and “disinformation”.

ACMA acknowledges that online “misinformation” and “disinformation” are “relatively novel and dynamic phenomena” with “no established consensus on the definition of either term.”² Despite the uncertainty about what misinformation and disinformation actually means, ACMA nonetheless asserts there is an “emerging consensus” on the need to give to government the power and responsibility to ensure Australians don’t engage in it. To meet this responsibility, ACMA would be required to make determinations about what types of content should be regarded as misinformation or disinformation. As noted, there is no settled objective interpretation of these concepts meaning, which is reflected in the vague and ambiguous definition that is provided in the Code:

The aspect of Disinformation that this Code focuses on is:

- A. Digital content that is verifiably false or misleading or deceptive;
- B. Is propagated amongst users of digital platforms via Inauthentic Behaviours; and
- C. The dissemination of which is reasonably likely to cause Harm.

Misinformation means:

- A. Digital content (often legal) that is verifiably false or misleading or deceptive;
- B. Is propagated by users of digital platforms; and
- C. The dissemination of which is reasonably likely (but may not be clearly intended to) cause harm.

The obligation to enforce standards on “verifiably false” content would make the government responsible for making determinations about what is true or false. The suggestion that government officials could be employed as reliable arbiters of truth is idealistic but unrealistic. More realistic is that the “official” truth would be determined not by reference to

² ACMA Report, page 7.

its accuracy, but according to whether it is politically uncomfortable or unacceptable for certain opinions to be expressed.

The ACMA Report specifically refers to “anti-lockdown conversations” as an example of a “misinformation narrative”.³ Lockdowns are one possible public health policy response, but being opposed to a policy option is not a question of fact or truth: it is an opinion. But this is evidently the type of discussion that is envisioned by ACMA to be included in the scope of disinformation and misinformation policies.

On 23 March 2022 *The Wall Street Journal* published an article by Eugene Kontorovich, a professor at George Mason University Scalia Law Centre, and Anastasia Lin that explained how, far from being a scientifically valid policy, lockdowns were regarded as inappropriate and extreme prior to their implementation in 2020:

Stay at home orders weren't part of the script in pre-Covid federal pandemic plans. The idea of “flattening the curve” through what are known as “layered non-pharmaceutical interventions” can be traced to an influential 2007 Centers for Disease Control and Prevention guidance paper, updated in 2017... Aside from suggesting limits on mass gatherings, the CDC paper makes no mention of closing workplaces. Instead, it concludes that such a severe pandemic could warrant recommending that employers “offer telecommuting and replace in-person meetings in the workplace with video or telephone conferences.” The closest it comes to lockdowns is recommending “voluntary home quarantine” for people with an infected family member.⁴

Lockdowns were an unprecedented solution to a foreseen problem, but because official public health bodies had adopted lockdowns as its chosen policy, the legitimacy of lockdowns became the “official” truth. And this view was protected by technology platforms. For instance, YouTube's ‘Covid-19 medical misinformation policy’ notes that

YouTube doesn't allow content that spreads medical misinformation that *contradicts local health authorities'* (LHA) or the World Health Organization's (WHO) medical information about Covid-19. [Emphasis added]

There was no evidence to suggest that lockdowns were the only valid or effective strategy to address Covid-19. But social media companies would not allow content that challenged the assertions of unelected public health bureaucrats, from lockdowns to other covid policies, such as the efficacy of face masks and mandatory pharmaceutical interventions.

³ ACMA Report, page 18.

⁴ Eugene Kontorovich and Anastasia Lin, ‘Covid Lockdowns were a Chinese Import,’ 23 March 2022, *The Wall Street Journal*.

This was not “science.” Engaging in science means being a part of a process of testing hypotheses and debating what conclusions should be drawn from the available evidence. What platforms did during Covid was not about science, but political and ideological bias.

There was a similar enforcement of ideological conformity about the origins of Covid-19. The theory that the virus originated in a research lab in Wuhan, China, was regarded by social media and digital platforms as misinformation until May 2021, when Facebook announced it would no longer act against the content. What had been misinformation suddenly became a valid theory.

In other words, often what is disinformation one day can be truth on another day.

In October 2020 Twitter banned the account of *The New York Post* for publishing and disseminating an article into the laptop belonging to Hunter Biden. The laptop included details of influence peddling and profiteering involving Biden and his father, Joe Biden, who was at the time a candidate to be the President of the United States. It was widely asserted to be disinformation, but *The New York Times* admitted in March 2022 that the existence of the laptop and its contents had been “authenticated.”

In contrast, the fabricated allegations that the Russian government interfered in the 2016 US Presidential election to ensure the election of Donald Trump have been allowed to proliferate on social media and digital platforms without consequence.

How social media platforms treated Biden and Trump was unrelated to accuracy. The election of Biden was preferred by big tech companies, and the election of Trump was not.

These decisions also did not protect democracy. In a free society, a private company should be able to make decisions about which content to host on their platform as long as it is free of political pressure or intimidation. But it is nonetheless concerning that a small number of large technology companies could exercise so much control over what is permitted to be said by Australians in Australia. It is even more concerning that these platforms would effectively be made instruments of government and that the limits on what opinions Australians are allowed to share with each other would be set by the Federal Government.

This policy would inevitably even extend to the opinions and expressions Australians share with their friends and family on private messaging services and emails.

Gillian Triggs, the former president of the Australian Human Rights Commission from 2012 to 2017, lamented near the conclusion of her term that “sadly you can say what you like around the kitchen table at home.”⁵ The context of Triggs’ complaint was that the effort to

⁵ Rachel Baxendale, ‘Gillian Triggs gets standing ovation,’ 31 March 2017. *The Australian*.

drive forbidden thoughts and opinions from society through laws such as Section 18C could never succeed as long as people could still express themselves privately. This is a concern shared by ACMA and one in which they plan to act.

Private, closed, and semi-public groups or pages on social media platforms are already included in the scope of the Code,⁶ and ACMA has further called for the scope of the code to be expanded to cover private messaging services.⁷ And Finding 19 of the ACMA Report called on industry participants to go above and beyond the confines of the Code and

consider the role of private messaging platforms and smaller alternative platforms in the amplification of disinformation and misinformation and explore options for how these platforms could be included within the code framework.

The Minister has promised to give ACMA the tools to “encourage platforms to be ambitious in addressing the harms of disinformation and misinformation”, which is not limited by the terms of the Code. According to Point 1.7 of the Code, an expansive approach to addressing disinformation is allowed. This would permit ACMA to pressure companies to regulate content on private messaging services without any change to the Code or legislation.

In addition to the above, the broad powers to be given to ACMA hand them the keys to encourage platforms to act beyond the commitments of the Code and kickstart an era of unprecedented internet censorship.

The first mechanism for expanding internet censorship is in giving ACMA the reserve powers to register industry codes, enforce industry code compliance, and make its own standards relating to how platforms should address misinformation and disinformation. As explained in the ACMA Report, these tools would give ACMA “a mechanism for further intervention if code administration arrangements prove inadequate, or the voluntary industry code fails.”

These powers would enable ACMA to devise its own standards and practices which would have the effect of unilaterally changing how the Code operates, all in the absence of any kind of democratic oversight. And platforms would likely be unable to avoid these changes, as the reference to addressing the failure of the “voluntary code” suggests ACMA could use its reserve powers to compel platforms to be signatories to the Code or to stop signatory platforms from leaving the Code.

The second mechanism for expanding internet censorship is in the use of coercive information gathering powers. While these powers are presented as a transparency measure, they would be weaponised to name and shame companies for failing to meet ACMA’s

⁶ *The Australian Code of Practice on Disinformation and Misinformation*, Provision 4.1.A.

⁷ ACMA Report, Finding 25. See also page 54-55 where ACMA says there “would be substantial public benefit in including messaging services within the scope of the code.”

standards. As the ACMA Report noted, these information gathering powers would “incentivise behavioural change across industry” in their efforts to censor content.⁸

The third mechanism to expand internet censorship is in the establishment of a Misinformation and Disinformation Action Group. This is designed to bring together “key stakeholders across government and the private sector to collaborate and share information on emerging issues and *best practice responses*.” In developing best practice responses, it would be led by representatives of government and representatives of platforms who already enforce internal disinformation polices, and who all agree with the manufactured consensus that greater regulatory action on internet content is required.

ACMA will continue to report to the parliament into the adequacy of disinformation policy and has already signalled areas of future regulatory expansion. In addition to the call for the Code to include private messaging, the ACMA Report also notes that consideration should be given to extending the Code “beyond digital platforms.” A future ACMA Report would likely consider expanding the scope of disinformation and misinformation laws to other mediums such as television and radio, which are already under the oversight of ACMA.

The Institute of Public Affairs is deeply concerned that these dangerous proposals have been generated in the bureaucracy in the absence of a genuine public debate.

The IPA also notes with disappointment that there is no significant political division in parliament on the proposed measures. It comes just nine years after a similar proposal to regulate the print media was rejected by the Commonwealth parliament when the Coalition was in Opposition. In 2013, the Gillard Labor Government abandoned its Media Reform Laws – based on the recommendations made in the Finkelstein Inquiry – when it became apparent that the legislation would be blocked by the Coalition Opposition in the Senate.

There is no distinction in 2022 between a Liberal Communications Minister and a Labor Communications Spokeswoman on seeing the need to censor the internet. This suggests there is a bipartisan consensus that the parameters of Australian democracy need to be confined and what Australians are allowed to debate and discuss needs to be limited.

This is in stark contrast to what is happening in the United States. When it was announced that the Disinformation Governance Board had been launched within the Department of Homeland Security, it was widely condemned by Republican politicians, including the leader of the Republican Party in the US House of Representatives Kevin McCarthy, who called it an “un-American” and “Orwellian idea.”⁹ Mainstream media outlets such as *The Wall Street*

⁸ ACMA Report, 79.

⁹ Kevin McCarthy, 1 May 2022, *Twitter* <<https://twitter.com/GOPLeader/status/1520496260381347841>>.

Journal and *The New York Post* and journalists such as Glenn Greenwald and Bari Weiss have also strongly criticised the idea.¹⁰

But when a similar scheme was announced by the Federal Government to apply in Australia, the only organisation to recognise the dangers of the proposal was the Institute of Public Affairs.

According to a News & Media Research Centre in 2022 found 91 per cent of Australians use social media regularly, and a Roy Morgan survey from 2020 found that 6-in-10 Australians use online platforms as their main source of news. The proposal to control what people say and see online is therefore a profound threat to freedom of speech.

Since its introduction into the Commonwealth statute books in 1995, Section 18C of the *Racial Discrimination Act 1975* has been the most notorious prohibition on freedom of speech under Australian law. But it is not unreasonable to observe that the dangers of Section 18C pale in comparison to the proposal to grant arbitrary powers to the government to censor the internet in the manner demanded by ACMA.

There is no moral, legal, or democratic justification for a government agency to be entrusted with this kind of power over online communications. It has no place in the free society that Australia has historically been and should always strive to be.

This is why the IPA is sending this letter to all MPs and Senators outlining our grave concerns about what the Federal Government is proposing to introduce.

We note that the Federal Government has not yet released draft legislation of the proposal. The IPA recommends that the plan for internet censorship be abandoned before it begins.

I would welcome the opportunity to discuss the research of the Institute of Public Affairs with you. Please do not hesitate to contact me on mbegg@ipa.org.au.

Kind regards,



Morgan Begg
Director of the Legal Rights Program

¹⁰ See for instance, Daniel Henninger, 'Pull the plug on the Disinformation Governance Board,' 4 May 2022, *The Wall Street Journal*; Bari Weiss, 'All hail America's new Truth Czar,' 4 May 2022, bariweiss.substack.com; Glenn Greenwald, 'Homeland Security's "Disinformation Board" is even more pernicious than it seems,' 5 May 2022, Greenwald.substack.com.