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**Short Article**

# Legislating Against Misinformation: Lessons from Australia's Misinformation Bill

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## ABSTRACT

Misinformation is decried in today's discourse. Governments have been tempted to attempt to restrict or outlaw it. This may not be possible where there are Constitutional protections for free speech. However, many countries lack rigorous protections. Australia shows us an approach where there are limited protections. It is a cautionary tale, exacerbating 'agency conflicts' both at the political and regulatory level and at the corporate level. The Australian government has attempted to curtail 'misinformation' and 'disinformation' through the proposed 'Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023'. But, in so doing, the proposed bill casts a wide net, has unintended consequences, and unnecessarily chills free speech and intellectual inquiry. Ironically, the Bill also exempts the government's own communications from attempts to curtail misinformation. The Bill would also incentivize corporate overreach by penalizing firms for inadvertently allowing 'misinformation', but not penalizing them for suppressing true information. The corporate governance literature gives additional insights into the value destruction that such a Bill could cause. The Bill's failures provide lessons for any government that seeks to legislate against misinformation.

## INTRODUCTION

It was once commonly believed that the Earth was the center of the universe. However, in the 1600s, Galileo changed this, defending and evidencing 'heliocentrism': the belief that the Earth revolves around the Sun. So controversial was this, that it was deemed heretical. In 1622, Galileo was deemed 'vehemently suspect of heresy'.[1] It was once 'misinformation' or 'disinformation' to claim that the Earth orbits the Sun. But, today we take that knowledge for granted. Unfortunately, governmental attempts to suppress 'misinformation' risk repeating the same mistakes of old.

Free speech is essential in a democracy and to human knowledge, as is clear from social justice reforms and from scientific advances. Without free speech, people cannot debate ideas

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[1] Jessica Wolf, 'The Truth about Galileo and His Conflict with the Catholic Church' (*UCLA Newsroom*, 22 December 2016) <https://newsroom.ucla.edu/releases/the-truth-about-galileo-and-his-conflict-with-the-catholic-church> accessed 8 March 2024.

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or hold powerful vested interests to account. Similarly, challenging status quo 'knowledge' is intrinsic to advancing, testing, and improving that knowledge. Free speech has limits. These include existing prohibitions on defamation. However, any restriction on speech must be precise, limited, and must not be open to political interference. Restrictions must be nuanced and carefully balanced. Governments have considered limited so-called 'misinformation' or 'disinformation'. Limits could involve outright prohibitions through procuring technology companies to suppress the offending speech.

Australia's government has sought to curtail 'misinformation'. The relevant Bill—the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (hereafter, 'Misinformation Bill') – has arisen under Prime Minister Albanese's first term in government. The Bill is an exposure draft and is not yet law. However, the Communications Minister has noted positively that the draft bill would give her the power to direct the regulator to investigate 'matters brought to the government's attention through public complaints or the media about online dis- and misinformation'.[2] Thus, even if the exposure draft is amended or shelved, there appears to be a clear desire to pursue regulations of this nature. In turn, this highlights the need for continued scrutiny and vigilance. The Bill is also an exemplar of how agency conflicts operate at both the political level and at the corporate level and the need for regulators to consider the governance and incentive effects of legislation.

There is an important context surrounding the Bill. It was coincident with his push for a referendum to change Australia's Constitution. This referendum involved amending the Constitution to insert another Chapter. The additional Chapter would create a body called the 'Aboriginal and Torres Straight Islander Voice'. This would have the right to make 'representations' to both the executive government and to parliament. It was controversial. Controversies included whether the government would be obligated to seek representations and inform the Voice body of policy proposals in advance. There were also concerns about whether the Voice would be given more access and funding than other entities, thereby giving access and funding to one group of Australians but not to others. This controversy was acrimonious. During this time, he had accused the opposition of spreading conspiracies,[3] and alleged that his political opponents spread misinformation and disinformation.[4] Prime Minister Albanese had also remarked—potentially jokingly—that 'if he were dictator' then he would be incline to ban social media.[5]

The Misinformation Bill empowers the regulator to require content platforms to monitor, report on, and implicitly deter alleged 'misinformation'. The Bill does not per se enable the regulator (the Australian Communications and Media Authority, ACMA) to suppress specific speech. Rather, it enables ACMA to do so indirectly. The Bill defines misinformation broadly to include content that is mere 'misleading' and that 'contributes to' 'harm', which is broadly

[2] This is from a reported letter between the Communications Minister Michelle Rowland and Prime Minister Anthony Albanese. The report is here: https://www.theaustralian.com.au/nation/minister-for-misinformations-secret-powers-prompt-free-speech-fears/news-story/efad79484ef4fc9d9c7d9d252353d1a5. The mechanism of action is twofold. First, the minister can already order the regulator to investigate matters (Broadcasting Services Act 1992) and to give directions to the regulator (Communications and Media Authority Act 2005). The argued effect of the Misinformation Bill would be to extend the matters over which investigations could arise. The Minister would also be able to refer to matters of misinformation by notifying the regulator, which can lead to one-sided investigations: the minister could notify the regulator of opponents' misinformation while failing to notify about pro-government misinformation.

[3] See for example, Prime Minister Albanese in parliamentary question time: https://www.theguardian.com/australia-news/video/2023/aug/09/voice-conspiracy-pm-factchecks-question-on-length-of-uluru-statement-from-the-heart-video

[4] See for example, https://www.skynews.com.au/australia-news/voice-to-parliament/anthony-albanese-takes-swipe-at-no-campaign-for-disinformation/video/b58c7d3b21e01eb74678a1a353b27482

[5] This is covered here: https://www.dailymail.co.uk/news/article-12411539/Anthony-Albanese-dictator-ban-social-media-abolish-states.html. The full interview is available here: https://www.3aw.com.au/why-anthony-albanese-almost-quit-politics/

defined. The Bill's ambit is both vague and broad. The regulator could name and shame platforms for having misinformation.

The Bill effectively deputizes corporations to police misinformation and this has unintended consequences. It does this by penalizing the relevant firms for allowing misinformation but not for suppressing 'correct' information. This creates several problems. The direct effect is that it incentivizes platforms to take an aggressive stance on content, potentially suppressing swathes of content even if they are not 'misinformation' as defined by the Bill. The indirect effect is how it interfaces with latent agency conflicts: managers are risk-averse and prefer to avoid controversy or litigation as it can harm their reputation and future career, and cannot benefit them personally. Thus, latent managerial risk aversion exacerbates the Bill's risk of overreach.

The Bill also evidences political 'agency conflicts': it highlights the risk of politicians passing self-interested laws. The Misinformation Bill also prioritizes media and the government by exempting them from its provisions, effectively deeming their communications to never be misinformation. In so doing, it enables organizations that are supposed to be trusted, and that are well-resourced, to be the most lax with their content. However, by exempting the government itself from misinformation prohibitions, the Bill implicitly allows politicians to mislead voters by more than would otherwise be the case. This would be akin to allowing corporate CEOs carte blanche to mislead their shareholders.

There are separate normative and practical issues about whether governments should curtail 'misinformation'. This article focuses on the legislation at hand. However, they are important context. Overbroad prohibitions could generate resentment. This resentment could—ironically—cause a cognitive 'backfire effect'. People might be more inclined to believe factually false information if they feel that their ability to discuss or contemplate matters is restricted. Thus, any impediment to speech must be well-calibrated and nuanced.

This article outlines the nature of the Bill and key areas where the bill undermines free speech. This article highlights that the Bill covers such a broad range of speech, would suppress even accurate speech, fails to acknowledge that human knowledge changes over time, and inappropriately exempts already powerful and well-resourced entities from its 'misinformation' provisions. In so doing, it imposes an unnecessary risk to free speech. Governments can learn from this Bill and its failures if/when they tackle misinformation.

## THE MISINFORMATION BILL IN BRIEF

The Misinformation Bill empowers the relevant regulator (ACMA) to impose rules onto 'digital platform providers' in relation to 'misinformation' and 'disinformation'. A digital platform service is any online service with content aggregation or media sharing.[6] It would include YouTube, Twitter, Facebook, Instagram, TikTok, and Substack.

ACMA can name and shame companies that it believes fail to suppress misinformation. This works via ACMA being able to require digital service providers to keep records on 'misinformation', its prevalence, and what the provider is doing to combat misinformation.[7] ACMA may also require service providers to prepare reports on misinformation at a periodicity that it specifies and in a manner that it specifies.[8] ACMA may then publish this information, including specifics of the nature and type of misinformation on each service provider and steps the service provider takes to combat misinformation.[9]

[6] Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 section 4.
[7] Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 section 14.
[8] Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 section 14(5).
[9] Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 section 25.

Second, ACMA may require social media platforms to suppress so-called misinformation. ACMA may require relevant industry bodies to prepare codes in relation to misinformation,[10] or may do so itself if there is no relevant body to prepare such a code, there is no consensus on the code, or the code is in adequate. The codes must 'provide adequate protection for the community from misinformation or disinformation on the services'.[11] Entities—such as social media companies—must comply with the code lest they face penalties.[12]

The devil is in the details, as will become apparent below. The Bill defines misinformation is speech that that is false, misleading or deceptive' and that 'is reasonably likely to cause or contribute to serious harm' (section 7(1)). Harm includes economic and environmental harm, harm to public order, and harm to the democratic process. The Bill exempts content from some entities – such as government, educational institutions, and news media – from its reach: social media companies need not screen it to determine whether it is 'misinformation'. The bill also seemingly imposes no penalty for erroneously suppressing content that is innocuous even under its own definition. The details raise issues, which we will explore below.

## WHAT IS MISINFORMATION?

A key challenge is defining precisely what is 'misinformation' or 'disinformation'. The government must know precisely what it is regulating. This is also core to determining whether a policy 'strikes a balance' between free speech and public safety. If the regulation defines 'misinformation' narrowly, a regulator might fear that speech could slip through the cracks. However, if—as here—the regulation defines 'misinformation' broadly, it risks suppressing free speech.

The Bill defines 'misinformation' broadly. In so doing, it chills not only political speech but also ordinary investigative inquiries. This is because the Bill's definition of 'misinformation' is itself question begging and is vague. In turn, this could encompass good faith communications that turn out to be wrong, potentially at a later time. It could also encompass communication that merely challenges the status quo.

The Bill defines 'misinformation' as content 'that is false, misleading or deceptive' and that 'is reasonably likely to cause or contribute to serious harm' (Section 7(1)). There is no inquiry into the person's state of mind when disseminating content or what the person meant by the words used. The definition contains no *mens rea* or state of mind. This is a strict liability. It is unnecessary to prove that the purveyor acted intentionally, recklessly, or even negligently. The bill effectively charges platforms with policing speech. Thus, platforms would render individuals liable for making a factually false statement even if they genuinely believe the statement to be true. Let us explore this further.

### What is 'false' under the Bill?

The definition of what is 'false' is a problem area. Presumably, content providers must rely on fact-checkers to determine whether content is false. But, what is false (or not) is not always clear-cut.

Consider, for example, empirical research. Empirical, data-driven, research involves analyzing data by using econometric techniques. Knowledge develops over time, including when new data emerges or when analytical techniques develop. This creates a conundrum. Suppose an old study is factually wrong because it used an incorrect or outdated analytical technique.

[10] Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 section 38.
[11] Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 section 48(6).
[12] Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 section 54.

This can be the case even if the prior study was done in good faith. Then, suppose a new study emerges to challenge it. That 'new' study might be erroneously seen as false because it challenges existing knowledge. This would presumably be the case unless and until the new research displaces the old research. However, until then, we would be deprived of open discussion of findings that subsequently emerge to be correct. In theory, one might argue that empirical analysis of this type could never be harmful and would be exempt. However, this relies on content providers developing sufficiently nuanced automated algorithms to distinguish between good faith empirical debates and simple falsehoods.

A concrete example illustrates the point: Consider the technical area of 'difference in difference' (DiD) tests. This is an empirical technique used to identify whether variable A causes a change in variable B. Researchers have DiD tests frequently. However, recent research suggests that standard DiD tests have econometric problems.[13]Previous research undertaken in good faith might yield misleading conclusions. Much of that research has significant policy implications. And, thus, if it is false, it could cause serious harm. Under this bill, the concern is whether the prior research is now 'false'; and thus, is misinformation. Further, it appears that disseminating the potentially 'false' findings now 'misinformation'. This is the case even if discerning whether prior research is accurate is a technical and complex area. This creates a chilling effect in disseminating such findings.

This could enable harmful findings to persist by chilling genuine critiques and challenges. For example, disseminating false information about corporate governance could cause companies to hire bad-quality CEOs; thereby 'seriously harming' shareholders. This type of economic harm could render something 'misinformation' if it is otherwise deemed false or misleading. However, it is not always easy to know what is false. Researchers conflict over what is 'good' governance. This is especially the case in hot-button areas such as 'ESG'.[14] However, knowledge evolves over time. Thus, factors that people perceive as bad might emerge to have a more nuanced effect. An example is anti-takeover provisions. These were once regarded as simply harmful.[15] However, over time, a more nuanced interpretation emerged, which posited that such provisions might be more (or less) harmful depending on the company's situation.[16] There has also been a critique of the measures used in some of this research.[17] Many of the advances have occurred *within* academic institutions. But, this need not always be the case. The private sector, including law firms and banks, could also undertake such research. Thus, the Bill, by deterring good faith inquiries into existing 'facts' could stymie intellectual advancement.

The Bill has no apparent remedy for this situation. The only purported remedy is that The Bill does exclude Educational Institutions from its 'misinformation' prohibitions. However, this would not solve the issue. Educational Institutions do not have a monopoly on research. Indeed, The Australian Government has emphasized industry-university linkages. The Bill exempts educational institutions, but not individual academics. Myriad PhD graduates work at standard businesses. Myriad businesses produce research and analyze data. However, the

[13] Andrew C Baker, David F Larcker and Charles CY Wang, 'How Much Should We Trust Staggered Difference-in-Differences Estimates?', 144 J Finan Eco (2022) 370.

[14] See for example the critique in Alex Edmans, 'The End of ESG' [Forthcoming] Financial Management.

[15] Paul Gompers, Joy Ishii and Andrew Metrick, 'Corporate Governance and Equity Prices', 118 Quart J Econ 107 (2003); Lucian Bebchuk, Alma Cohen and Allen Ferrell, 'What Matters in Corporate Governance?', 22 Rev Finan Stud (2009) 783; Ronald W Masulis, Cong Wang and Fei Xie, 'Corporate Governance and Acquirer Returns', 62 J Finan (2007) 1851; Jarrad Harford, Mark Laurence Humphery-Jenner and Ronan G Powell, 'The Sources of Value Destruction in Acquisitions by Entrenched Managers', 106 J Finan Econ (2012) 247.

[16] Mark L Humphery-Jenner, 'Takeover Defenses, Innovation, and Value-Creation: Evidence from Acquisition Decisions' 35 Strat Manage J (2014) 668; William C Johnson, Jonathan M Karpoff and Sangho Yi, 'The Life Cycle Effects of Corporate Takeover Defenses', 35 Rev Finan Stud (2022) 2879.

[17] Jonathan M Karpoff, Robert J Schonlau and Eric W Wehrly, 'Do Takeover Defense Indices Measure Takeover Deterrence?', 30 Rev Finan Stud (2017) 2359; Jens Frankenreiter and others, 'Cleaning Corporate Governance', 170 Univ Pennsylvania L Rev (2021).

Misinformation Bill could chill research activity in the private sector as inadvertently producing or disseminating false information could enliven liability.

Governments could seek to address this by qualifying the prohibition on disseminating 'false' information. A better-framed bill would exclude from the definition of 'misinformation' any serious intellectual, academic, or analytical inquiry or discussion.

## What is 'Misleading'?

The Bill seeks to curtail 'misleading' information. Misleading information *could* be deemed to be 'misinformation' under the Misinformation Bill. The term 'misleading' is undefined. The term 'misleading' has been used in other contexts, such as in Consumer Law. Therefore, courts could impute those definitions. However, the contexts are different and it is uncertain whether similar interpretations will apply. Further, in this context, the notion of information being 'misleading' can enliven value judgments. For example, it is not uncommon for political opponents to accuse each-other of being 'misleading'. Courts would attempt to eschew value judgements. Further, where a matter is open to interpretation of debate, courts are less likely to conclude that a statement is misleading merely because there is an opposing opinion. However, as will become clear, it is sufficient that there is a *risk* of a statement being deemed misleading.

The Misinformation Bill was contemporaneous with a referendum in Australia and this illustrates the problem with curtailing allegedly 'misleading' information. Both supporters and opponents of the referendum accused each-other of spreading misinformation and misleading information. Given that this relates to changing the constitution, misleading information in this context could cause 'serious harm' to Australia's democracy.

We can consider a concrete example. The contemporaneous referendum would create a body ('The Voice') that would make representations on behalf of indigenous Australians to parliament and the executive. There were disputes over the ambit and implications of the Voice. The Attorney General stated that the Voice would make representations on matters that impact 'Aboriginal and Torres Strait Islander peoples *differently* to other members of the Australian community' (emphasis added).[18] However, that statement is factually wrong. The text of the proposed constitutional amendment states that the body could make representations on all matters 'relating' to Indigenous Australians; it does not restrict the Voice's ambit.[19]

Another example is in relation to the argued powers of the Indigenous Voice.[20] Some assert that The Voice body would only be advisory because it can only 'make representations' to the parliament and executive government. Others argue that unless contrary arguments are given the same level of access, funding, and political clout, empowering The Voice is akin to empowering one side of a case in a litigation: the empowered side might 'only' be making representations, but because the other is disempowered, it can drive decision-making and outcomes. Both sides believe the other is misleading. This creates a conundrum under legislation such as the Misinformation Bill.

The problem is then that the Misinformation Bill could be used to suppress 'unpopular' speech based on a value judgment about whether it is misleading. If there is to be a prohibition on 'misleading' content, it must be narrowly defined.

[18] Second Reading Speech: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2223a/23bd080.

[19] For the full amendment text, see: https://www.niaa.gov.au/indigenous-affairs/referendum-aboriginal-and-torres-strait-islander-voice

[20] See the discussion in Peter Swan and Mark Humphery-Jenner, 'Six Reasons to Read the Fine Print on Indigenous Voice' *The Australian* (12 September 2023) <https://www.theaustralian.com.au/commentary/six-reasons-to-read-the-fine-print-on-indigenous-voice/news-story/9358a05572076120ef5030a1bb10201e> accessed 2 October 2023.

### What is 'harmful'?

To fall within the prohibition, the relevant speech must be 'reasonably likely to cause or contribute to serious harm'. However, this could be a relatively low bar to clear. The content need only be 'reasonably likely' to 'contribute' to harm.

Harm means any of the following

(a) *hatred against a group in Australian society on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion or physical or mental disability;*
(b) *disruption of public order or society in Australia;*
(c) *harm to the integrity of Australian democratic processes or of Commonwealth, State, Territory or local government institutions;*
(d) *harm to the health of Australians;*
(e) *harm to the Australian environment;*
(f) *economic or financial harm to Australians, the Australian economy or a sector of the Australian economy.*

There are issues with the definition. The Misinformation Bill deems content to be harmful if it disrupts 'public order' or 'society' in Australia. In so doing, Bill appears to undermine Australians' ability to protest. Some protests might be based on misleading information but nevertheless be 'legitimate' expressions of free speech. Some protests might draw upon multiple groups and ideas, only some of whom espouse misinformation. For example, during the pandemic, protests could jointly reflect concerns about lockdowns and beliefs about vaccines.[21] The former might be a normative consideration; the latter a more scientific one. However, protests often attracted both groups. In this context, the protests about lockdowns might be construed as tacit support for those about vaccines, thereby causing them to 'contribute' to harm. Certainly, governments are right to prevent riots. Governments are also right to ensure that protests are well-ordered. However, a well-ordered, officially sanctioned, protest can start with an unsanctioned protest call. The Bill could therefore preemptively halt legitimate protests.

The Bill could suppress content that harms the 'integrity' of the democratic process. But, this would suppress content that validly questions election integrity even if the concerns are genuine and fact-based (cf. mere supposition) but not yet fully substantiated. This is a problem because fact-based critiques are a precursor to genuine inquiries. The Bill Could suppress those first-step critiques through allegations that they are misleading even if they subsequently emerge to be true. Further, as indicated above, given that the Bill would curtail allegedly 'misleading' speech and that is a normative judgment, this Bill could lead to overbroad suppression of opposing political views.

The definition of 'harm' is also question begging and fails to reflect that knowledge changes over time. For example, the Bill would suppress content that harms the 'health' of Australians. But, our knowledge about what harms 'health' or the 'Australian economy' changes over time. For example, in the financial sphere, our knowledge about corporate governance evolves over time. This includes in relation to matters such as board independence, executive compensation, and board composition. The Bill would suppress content that questions the status quo even if the status quo emerges subsequently to have been ill-informed.

[21] For example, in Australia, these causes were sometimes conflated as indicated in Stephanie Convery, 'Australia Covid Protests: Threats against "Traitorous" Politicians as Thousands Rally in Capital Cities' *The Guardian* (20 November 2021) <https://www.theguardian.com/australia-news/2021/nov/20/australia-covid-protests-threats-against-traitorous-politicians-as-thousands-rally-in-capital-cities> accessed 2 October 2023.

The Misinformation Bill requires only that the content 'contribute to' the specified harm. It does not require that the content be causally linked per se. While the notion of 'contributing to' a harm is known within tort law, it is not guaranteed that that same definition would apply. It appears that repeating controversial comments as part of a genuine critique could 'contribute to' harm merely because the comments are reported or reiterated. Similarly, defending a person's right to have or state controversial beliefs might relevantly 'contribute to' harm even if the defender disagrees with those underlying beliefs. Thus, a misinformation prohibition requires a tighter nexus between the speech and the harm.

Let us take a concrete example: Suppose several pieces of content promote the use of fossil fuels in the short-term because the author believes there is little immediate source of renewable energy. Renewables-proponents might claim that this is misleading, arguing that renewables can be constructed, albeit at a large cost. Some might argue that the aforementioned speech could 'contribute to serious harm' to the environment; and thus, to people. Some of the content providers might be nuanced. Some might lack a solid grasp of how quickly climate change is progressing or of precisely how damaging coal-fired power plants are. In such a large and complex set of content, platforms would lack the tools to parse nuance. Thus, given the perceived reputational risk of being 'named and shamed' platforms would suppress any content on this topic, nuanced or otherwise.

Tightening the 'harm' requirement is important when framing legislation such as this. This includes a narrower, less value-laden, definition of harm and requiring a clear causal nexus between the relevant harm and the offending speech.

## ENTRENCHING THE GOVERNMENT AND MEDIA: WHO IS EXCLUDED FROM THE MISINFORMATION BILL?

When governments attempt to curtail misinformation, they must be careful about whose speech is, or is not, exempt from its provisions. The Bill excludes from consideration any content from the government, professional news media, and educational institutions (inter alia). The bill does not justify why some bodies are excluded from the bill. If the Bill progresses through parliament, the Government could elaborate upon this in the Second Reading Speech. This is especially a concern since the government exempts itself. It also exempts well-resourced entities that have the resources to ensure their information is accurate, and that people rely on. Ironically, the organizations' whose misinformation could cause the most 'harm' are exempt from this bill.

The Bill is an example of an 'agency conflict'. Agency conflicts arise when a principal hires an agent to perform a task. The paradigm example is when a shareholder hires a CEO to run the company. In this case, the CEO might have different goals, objectives, and incentives from the shareholder. The CEO might then act self-interestedly. Thus, as the CEO owns less equity, they might become less efficient and act more self-interestedly.[22] Therefore, it is important for shareholders to be able to discipline managers if they underperform.

Excluding professional news organizations is curious. The bill defines those organizations as ones with 'rules or internal editorial standards' either covered within or analogous to, those in professional bodies. However, professional news organizations should arguably be held to a *higher* standard given that they purport to follow editorial standards and can use such standards as a symbol of authority. The potential harm caused by a news outlet spreading false information—given its imprimatur of authority—is presumably greater than that of a lone YouTuber.

Excluding the government is curious. This appears to give the government license to spread misinformation. This sends the wrong signal to the Australian public and the international community. It implies that government communications are *less* trustworthy than independent communications. This exclusion also evinces a legislative intent to allow the government to

[22] James S Ang, Rebel A Cole and James Wuh Lin, 'Agency Costs and Ownership Structure', 55 J Finan (2000) 81.

communicate false or misleading information. This is odd given that the government is better resourced than ordinary citizens; and thus, should be more able to ensure that it is accurate. In turn, enables an unscrupulous government to spread misinformation while—as is discussed elsewhere—defining truthful rebuttals as misleading.

The overall effect of the 'exclusions' is to exempt arguably trusted authorities from misinformation prohibitions. These institutions are better funded, purport to be trusted and accurate, and have significantly greater institutional power. Ironically, this would undermine trust in institutions in which individuals should be able to rely.

The corporate governance literature highlights that implicitly entrenching government from voter scrutiny, or the media from independent competition can be dangerous. As indicated, it is important that shareholders can discipline managers. This often occurs via shareholders voting at shareholder meetings,[23] and can include voting against compensation packages,[24] especially when shareholders believe that the CEO acted self-interestedly and destroyed value.[25] It can also include the 'market for corporate control' whereby acquirers take over underperforming firms and replace the management team. Therefore, the literature shows that 'entrenched' managers, who are insulated from such discipline, reduce firm value,[26] are more likely to shirk,[27] make worse investment decisions,[28] direct money to personal causes,[29] and undertake ill-disciplined, and self-interested acquisitions.[30] Thus, entrenchment enables managers to act self-interestedly and at the expense of shareholders.

Entrenchment can come from controlling information that is seen as negative. Disciplinary action is difficult without reliable information from, and about, a leadership figure. Therefore, in the corporate context, stock exchanges and regulators impose continuous disclosure requirements. This enables shareholders to make fully informed decisions and cast fully informed voters. Therefore, officers and directors suffer career penalties when they are found to have violated their disclosure obligations.[31] However, if the expectation that officers and directors are truthful is not enforced, it can create a counter-productive panacea: In the corporate context, this can worsen trading dynamics.[32] By parity of reasoning, voters are disadvantaged and cannot make fully informed votes if politicians are implicitly allowed to issue 'misinformation' while another speech is chilled. This exacerbates agency conflicts at the political level.

The impact of the misinformation laws is to entrench politicians, especially the Australian Labor Party that proposed the Bill. As indicated, the Bill would deem the government's communications to *not* be misinformation. In Australia, this includes both politicians, who form the leadership group of the executive government, and the administrative state, including bureaucrats. The ruling party changes across elections. However, the bureaucracy, on average, supports the Labor Party.[33] Thus, a short-term-focused Labor government gains from 'entrenching' the bureaucracy.

[23] Joseph McCahery, Zacharias Sautner and Laura Starks, 'Behind the Scenes: The Corporate Governance Preferences of Institutional Investors', 71 J Finan (2016) 2905.
[24] Peter Iliev and Svetla Vitanova, 'The Effect of the Say-on-Pay Vote in the United States', 65 Manage Sci (2019) 4451.
[25] Jie Cai and Ralph A Walkling, 'Shareholders' Say on Pay: Does It Create Value?', 49 J Finan Quant Anal (2011) 299.
[26] Bebchuk, Cohen and Ferrell (n 16); Gompers, Ishii and Metrick (n 16).
[27] Marianne Bertrand and Sendhil Mullainathan, 'Enjoying the Quiet Life? Corporate Governance and Managerial Preferences', 111 J Polit Econ (2003) 1043.
[28] Masulis, Wang and Xie (n 16).
[29] Ronald W Masulis and Syed Walid Reza, 'Agency Problems of Corporate Philanthropy', 28 Rev Finan Stu (2015) 592.
[30] Harford, Humphery-Jenner and Powell (n 16).
[31] Mark Humphery-Jenner, 'Internal and External Discipline Following Securities Class Actions', 21 J Finan Intermed (2012) 151.
[32] Mark Humphery-Jenner, 'Strong Financial Laws Without Strong Enforcement: Is Good Law Always Better than No Law?', 10 J Empirical Legal Stud (2013) 288.
[33] This is evident from the Canberra and Australian Capital Territory voting data. Canberra is Australia's capital city and is where the core bureaucracy lives. For example, at state level, the Labor party and similarly aligned parties command significant

## CORPORATE INCENTIVES: WHAT ABOUT OVERREACH? IS IT NOT REPORTED?

Legislation and regulation should consider the type of incentives it creates on the impacts. Therefore, legislation should seek to deter and prevent wrongful conduct without penalizing 'legitimate' conduct. In this context, suppose we accept the premise that governments have a role in relation to 'misinformation', then any such measures should be calibrated so as to avoid restricting 'innocuous' speech. Given that the legislation pushes media companies to suppress 'misinformation', how the legislation influences corporate behavior is important. However, here too, Australia's approach is a cautionary tale.

The starting point is that the definition of 'misinformation' is broad and open to interpretation. As indicated previously, this is due to the definition of 'misinformation' being over-broad. This in turn is because it defines misinformation as being content that is 'false' or 'misleading' and that 'reasonably likely' to cause 'harm'. All aspects are vague and media companies must define them. Therefore, there is a risk of misclassifying speech: it might either be wrongly classified as misinformation when it is not, or it might be wrongly classified as 'acceptable' when it is misinformation. Media companies are penalized for failing to suppress misinformation. However, they are not penalized for erroneously suppressing 'true' information. The regulator is empowered to 'shame' platforms if it deems them to be inadequately strict. Therefore, there is an incentive to overclassify speech as 'misinformation' as there is no penalty for doing so.

These incentive effects dovetail with managerial risk aversion. If the regulator shames a company for allowing 'misinformation', then it undermines the company's credibility and earnings. In so doing, it could harm managers. It could harm them financially by reducing the value of their stock holdings or jeopardizing bonuses. It could also harm them by risking their job given that managers are often disciplined for allowing their companies to violate regulations.[34] Given that managers' wealth and career prospects are directly tied to their companies' fortunes, they often tend to be risk-averse and sensitive to any increase in risk.[35] This causes managers to adopt actions that are 'less risky' for them even when those actions have other unintended negative consequences.[36] In this context, it incentivizes managers to reduce the risk of misclassifying speech if there are penalties for that misclassification. Given the uncertainty surrounding how 'misinformation' is defined, this incentivizes overclassification.

The Misinformation Bill does not have steps to address the overreach that it incentivizes. The Misinformation Bill enables the regulator to request reports into 'the prevalence of' misinformation (other than that by exempted bodies) and the measures taken to 'prevent' or 'respond to' misinformation and the 'effectiveness' thereof. However, this is targeted at the effectiveness of suppressing 'misinformation', which is broadly defined. It does not explicitly pertain to whether the measures—while effective—have the unintended consequence of suppressing 'innocent' content that is not misinformation. It also does not require any reporting of misinformation by the 'exempt' bodies, thereby allowing the 'exempt' bodies to spread misinformation unchecked.

voter support and have done so for multiple state elections, and federal elections, regardless of whether the Federal government ultimately is either from the Labor party of the Coalition. See for example state election results: Elections ACT, '2020 Results by Electorate and by Party' (2020) <https://www.elections.act.gov.au/elections_and_voting/past_act_legislative_assembly_elections/2020-election/2020-election-results> accessed 7 March 2024. This is similarly clear from the Federal election results for successive elections, see for example: Australian Electoral Commission, 'Tally Room: 2022 Federal Election' (*Australian Electoral Commission*, 2022) <https://results.aec.gov.au/27966/Website/HouseDivisionalResults-27966.htm> accessed 7 March 2024.

[34] Humphery-Jenner, 'Internal and External Discipline Following Securities Class Actions' (n 32); Brian C McTier and John K Wald, 'The Causes and Consequences of Securities Class Action Litigation', 17 J Corporate Finan (2011) 649.

[35] Randall A Heron and Erik Lie, 'Do Stock Options Overcome Managerial Risk Aversion? Evidence from Exercises of Executive Stock Options', 63 Manage Sci (2017) 2773.

[36] See for example how risk aversion influences debt-related decisions: Katharina Lewellen, 'Financing Decisions When Managers Are Risk Averse', 82 J Finan Econ (2006) 551.

Governments could partially address this issue by penalizing overreach. For example, if the regulator is to deputize tech companies to police 'misinformation', then the regulator should be compelled to audit the companies' activities. This includes analyzing how much speech the companies erroneously suppressed in addition to how much speech they failed to suppress. This would reduce incentives to engage in broad suppression models and better align with enabling free speech.

## DOES THE CONSTITUTION PROTECT PEOPLE?

Australia's constitution provides limited free speech protections but they are likely insufficient to prevent the Bill from chilling free speech. The constitution contains an implied freedom of speech in relation to political matters.[37] This arises due to the constitution establishing a democracy, which courts have determined requires freedom of political expression. This prevents the government from unduly restricting political speech. It does not prevent private organizations—such as social media companies—from doing so. The Constitution limits the Bill's power: if a statute purports to do something unconstitutional, the court will read down and limit its powers accordingly.[38] Therefore, legislation could not erase the implied freedom of political communication. Further, The Misinformation Bill states that it is to be read subject to implied freedoms of political communication.[39] However, free speech protections might be ineffective in this context.

Constitutional speech protections afford only limited protections. Constitutional protections *only* apply to political communications. Prima facie, would *not* apply to non-political communications, such as those in relation to health or financial matters. The operation is clear in 'easy' cases: crypto scams would likely be relevant misinformation whereas commentary on a specific piece of legislation or an election would likely not fall within the Act. However, in 'grey' areas, the operation is more complex: is commentary on lockdowns political, medical, financial, or all of the above? Is commentary on vaccine mandates medical commentary or is it political commentary about the appropriate role of government? The result depends on the facts of the case and there is no one-size-fits-all answer. This creates uncertainty and requires case-by-case nuance.

The legislation does not grapple with the required nuance. The regulator cannot require media platforms to suppress political information or create misinformation codes that would do so. The Communications Minister could not effectively procure the regulator to penalize 'political' misinformation. However, the Minister may be able to procure an investigation to which the alleged 'wrongdoer' may need to respond.[40] In so doing, the regulator and the communications minister can *allege* that communication is non-political, whereupon the platform must defend itself from allegations. The regulator can further take a narrow interpretation of what constitutes 'political' communication when identifying misinformation, enlivening disputes

[37] This is outlined in several cases. See for example: Nationwide News Pty Ltd v Wills (1992) 177 CLR 1, Australian Capital Television Pty Ltd v the Commonwealth (1992) 177 CLR 106, Unions NSW v New South Wales [2013] HCA 58. The precise ambit of those protections are beyond the scope of this article. However, the courts have focused on *political communication* as being intrinsic to the functioning of a democracy; and thus, limited protections being implicit in the mere fact of the constitution establishing a democracy.

[38] See *Acts Interpretation Act 1901* (Cth) s 15A.

[39] Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 s 60.

[40] Note: the Minister's ability to procure an investigation appears implicit. The Communications Minister Michelle Rowland has stated that the Bill would enable her to direct the regulator to investigate misinformation instances: https://www.theaustralian.com.au/nation/minister-for-misinformations-secret-powers-prompt-free-speech-fears/news-story/efad79484ef4fc9d9c7d9d252353d1a5. Investigative powers are not explicitly stated in the focal Misinformation Bill. However, the minister can deem a media platform to be a relevant digital platform. Further, The minister can direct an investigation on "any matter with respect to which the Parliament is given power to make laws by paragraph 51(v) of the Constitution" (*Broadcasting Services Act 1992* (Cth) s 171). This includes, but is not limited to "any matter relating to the future regulation or operation of a carriage service or a content service." The minister can also direct the regulator about the exercise of its powers (s 61CZD).

with media companies. The minister can refer communications to the regulator for investigation even if those communications might have both political and non-political components.

The legislation thus can indirectly chill free political communication. First, the 'process is the punishment'. Generating codes of conduct and responding to regulatory investigations requires time and resources. For smaller platforms, it can also impose psychological stress. This is the case even if the individual or organization is vindicated. For large, well-resourced, platforms it is commonplace to engage with regulators. However, the minister can deem media services to be platforms for the purposes of the bill.[41] Small platforms foreseeably lack the resources to challenge the regulator in court. The platform might be correct on the law, but unable to challenge government authority. Second, as a result, media platforms have an incentive to take an overbroad interpretation of 'misinformation' and to overclassify speech rather than risk underclassifying. This would *not* violate such constitutional protections as it would involve the *media* company taking an overbroad approach to suppressing speech rather than the government *per se*. This applies even if the media companies are incentivized by wanting to avoid the risk of regulatory intervention. The net result is that the Misinformation Bill can suppress political communication by creating implicit incentives for media platforms to do so.

## CONCLUSIONS: WHAT CAN WE LEARN FROM THIS BILL

Australia's Misinformation Bill is a cautionary tale. It gives insight into the pitfalls of using legislation to suppress misinformation and it has lessons for governments should they legislate in this space. Any government attempting to legislate against misinformation must take care when it defines misinformation. Any exclusions must be narrow and must not be self-serving. Any prohibitions should attempt to avoid suppressing 'innocuous' speech and treating free speech as collateral damage in a crusade against 'misinformation'.

Australia's Bill does not strike a reasonable balance between free speech and reducing 'misinformation'. It defines misinformation broadly. It exempts the government from prohibitions on misinformation, seemingly allowing the government to spread false information unchecked. It incentivizes over-broad speech suppression. It is a cautionary tale for other governments attempting to enter this space.

The corporate governance literature highlights that legislation such as Australia's Misinformation Bill would have significant negative consequences. It would exacerbate agency conflicts between voters and the government. It would also incentivize corporations to overclassify speech as misinformation as they are penalized for failing to suppress speech when they should have but are not penalized for erroneously suppressing too much speech. The net result is that legislation undermines democratic institutions and chill speech.

Governments that wish to legislate against misinformation must consider precisely how broadly they define 'misinformation' and 'disinformation'. This includes careful restrictions on what types of information run afoul of the law, and whether they restrict the prohibition to specific types and topics of 'information'. Legislators should also be careful to avoid vague language, especially when the legislation also creates incentives for the relevant media companies—who would be tasked with monitoring for misinformation—to construe the language as broadly as possible as is the with Australia's misinformation Bill. It is also important to avoid legislation that would further entrench political entities by deeming the government's speech to not be misinformation but allowing scrutiny of speech that questions prevailing government narratives.

[41] Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 s 4(6).