

Submission on The Digital Industry Group Inc's Draft Australian Code of Practice on Disinformation

30 November 2020

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The NSW Young Lawyers Communications, Entertainment and Technology Committee (Committee) makes the following submission in response to the Draft Australian Code of Practice on Disinformation (the Code).

NSW Young Lawyers

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The NSW Young Lawyers Communications, Entertainment and Technology Law (CET) Committee of NSW Young Lawyers aims to serve the interests of lawyers, law students and other members of the community concerned with areas of law relating to information and communication technology (including technology affecting legal practice), intellectual property, advertising and consumer protection, confidential information and privacy, entertainment, and the media. As innovation inevitably challenges custom, the CET Committee promotes forward thinking, particularly about the shape of the law and the legal profession.

Summary of Recommendations

1. The Committee submits that, with relation to **Objectives 1 and 4** of the Code, Digital Platforms should adopt a pro-active approach to monitoring content posted on their sites which relates to, or seeks to influence democratic processes;
2. The Committee submits that the Code should stipulate that fact checking tools should augment content created by users with a large audience base on a Digital Platform which relates to, or seeks to influence democratic processes with disinformation;
3. The Code should stipulate principles of fact checking including that it is non-partisan, fair, and explain its sources, methods, and funding, and have a commitment to open and honest corrections (Poynter's International Fact-Checking Network fact-checkers' code of principles);
4. The Code should require all Digital Platforms to have detailed and effective policies outlining the consequences of misuse of their platforms to spread disinformation.
5. That the implied right of freedom of political communication should be a central consideration when implementing any strategy to limit disinformation;
6. The Committee submits that in relation to **Objective 6** of the Code, that a format be adopted for the substantive components of the annual reports provided by signatory Digital Platforms, that would allow for analysis of the efficacy of the measures taken, and to allow for future benchmarking.
7. Digital Platforms should outline in their annual report their efforts in managing potential disinformation in 'echo chambers' relevant to that Digital Platform; and,
8. The Committee submits that there may be unintended consequences from the interaction of the Code and the Draft New Media Bargaining Code.

Objectives 1 and 4: Safeguards against Disinformation, and Empower consumers to make better informed choices of digital content.

1. The Committee submits that Digital Platforms should have a pro-active approach to monitoring key subject areas of content where they enable user content to be published on their platforms, most importantly, content which engages with democratic processes.
2. In the ACCC's Final Report on Digital Platforms, it was acknowledged that the use of AI algorithms posed the risk of spreading misinformation online.¹ For instance, in the European Union (EU), under the obligations set out by the EU's 2018 Code of Practice on Online Disinformation (EU Code),² Facebook and Twitter deleted hundreds of 'fake' accounts linked to campaigns which sought to influence elections in the United States and the United Kingdom, and subsequently made changes to their policies or algorithms. For example, Facebook simplified the process to report fake news articles and ranked British news organisations using a 'trust score'.³
3. The Committee acknowledges the importance of commerciality, and that it may be unfeasible for Digital Platforms to assess every single entry, post, or search result, particularly where review is to be carried out by humans,⁴ as this undermines the efficiency and competitiveness of platforms where users seek to share content instantaneously. Further, reliance on AI or algorithmic systems may not be a sufficient substitute, for example, Facebook's algorithm to determine 'Trending News' with no human input struggled to distinguish between accurate and inaccurate news stories.⁵ Due to the immediacy and reach of publication, however, platforms such as Facebook and Twitter are relied on by political campaigners to disseminate information to voters.⁶ Therefore the Committee supports the Code's suggested policy of including verification tools for posts about democratic processes.
4. The Committee submits that fact checking tools should augment the publication of posts that reach large audiences during the course of democratic processes. The meaning of a "large audience" may vary with each platform, but for example, follower counts may be relevant. During significant global or domestic political events, social media platforms see a spike in users engaging in discussions around contentious topics and sharing political information.⁷ Users posting to large audiences should expect their posts to be monitored and augmented with fact checking tools due to their larger audience pool and the likelihood that any after-the fact corrections or removals will not impede the spread of their original misinformation, which may have a serious impact on their audience's democratic engagement.
5. The Code should stipulate principles of fact checking including that it is non-partisan, fair, that the fact checker explains its sources, methods, and funding, and have a stated commitment to open and honest

¹ Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, 26 July 2019) 524-5.

² European Commission, 'Statement by Commissioner Gabriel on the Code of Practice on Online Disinformation' (Statement 18/5914, 26 September 2018)

<https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_5914>.

³ Katrina Baxter, 'Ad & Tech Giants step up to tackle the problem of Fake News', *mediawrites.law* (Web page) <<https://mediawrites.law/ad-tech-giants-step-up-to-tackle-the-problem-of-fake-news/>>.

⁴ DIGI, 'Australian Code of Practice on Disinformation', (Web page) <<https://digi.org.au/wp-content/uploads/2020/10/Disinformation-Code-draft-for-public-consultation-.pdf>> [5.9] ('Disinformation Code').

⁵ Ibid; Timothy B. Lee, 'Facebook's Fake News Problem, Explained', *Vox* (online, 16 November 2016) <<https://www.vox.com/new-money/2016/11/16/13637310/facebook-fake-news-explained>>.

⁶ Garrett RK, 'Social media's contribution to political misperceptions in U.S. Presidential elections', *PLoS ONE* 14(3) (online) 27 March 2019 <<https://doi.org/10.1371/journal.pone.0213500>>

⁷ Garrett RK, 'Social media's contribution to political misperceptions in U.S. Presidential elections', *PLoS ONE* 14(3) (online) 27 March 2019 <<https://doi.org/10.1371/journal.pone.0213500>>

corrections. These principles are outlined in Poynter's International Fact-Checking Network fact-checkers' code of principles.⁸

6. The Committee acknowledges that implementation of a fact checking system for posts with large audiences especially during democratic processes would import various levels of complexity from platform-to-platform. The Code should require all Digital Platforms to have detailed and effective policies outlining the consequences of misuse of their platforms to spread disinformation.
7. One of the companies operating in this area is Twitter, which already has a policy aiming to combat 'Synthetic and Manipulative' media.⁹ This policy bans users who "deceptively promote synthetic or manipulated media that are likely to cause harm."¹⁰ Further, under this policy, Twitter will label or remove Tweets they have reason to believe "that media, or the context in which media are presented, are significantly and deceptively altered or manipulated."¹¹

Implied Freedom of Political Communication

8. The Committee acknowledges that the above proposals in relation to disinformation should be balanced with the implied right of political communication ('right').¹² Whilst the Code is to be a voluntary undertaking by private companies, the Committee considers the right to be a central aim of the Code. Any attempts to limit disinformation through an appropriate model of redress should not unduly impinge the right.¹³
9. It is necessary to balance concerns around the potential limitation of the right with the unique speed of distribution of content in a digital context.¹⁴ A retraction or correction of a statement which contained disinformation, may receive far less attention than the initial statement, leaving people with the erroneous impression that a statement was accurate.¹⁵ The Code should consider the use and efficacy of slowing down the cycle of distribution of disinformation, to allow for balanced engagement and critical appraisal before the disinformation is shared or viewed widely, or 'goes viral.'
10. False accounts, including 'bots,' or 'troll farms'¹⁶ are used to overwhelm and shift political points of view. These actors directly hinder genuine political communication through manipulation of the chosen digital platform. The Committee submits that accounts which are identified by user complaint and or algorithm

⁸ Poynter, 'International Fact-Checking Network fact-checkers' code of principles' (Web page) <<https://www.poynter.org/ifcn-fact-checkers-code-of-principles>>.

⁹ Twitter, 'Synthetic and Manipulated Media Policy' *Help Centre* (Web page) <<https://help.twitter.com/en/rules-and-policies/manipulated-media>>.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report on the Conduct of the 2016 Federal Election and Matters Related Thereto* (Report, November 2018) [7.35]; *Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 45, [15],[17] (Brennan J).

¹³ Joint Standing Committee on Electoral Matters n 12, 11.3

¹⁴ ACCC, UTS Centre for Media Transition, Derek Wilding et al, *The Impact of Digital Platforms on News and Journalistic Content* (Report, 2018)

<<https://www.accc.gov.au/system/files/ACCC%20commissioned%20report%20-%20The%20impact%20of%20digital%20platforms%20on%20news%20and%20journalistic%20content%2C%20Centre%20for%20Media%20Transition%20%282%29.pdf>> 75, 59.

¹⁵ *Ibid* 37, 96-97; Seumas Miller, 'Freedom of Political Communication, Propaganda and the Role of Epistemic Institutions in Cyberspace' in Markus Christen et al (ed), *The Ethics of Cybersecurity* (Springer Open, 2020), 11.2.

¹⁶ Digital Industry Group Inc. (DIGI), UTS Centre for Media Transition, *Discussion Paper on An Australian Voluntary Code of Practice for Disinformation* (Discussion Paper, October 2020) <<https://digi.org.au/wp-content/uploads/2020/10/Discussion-Paper-Final.pdf>> 17 ('*Discussion Paper*'); Joint Standing Committee on Electoral Matters n 12, 7.39.

as 'bot' or 'troll farm' accounts should be suspended pending recovery processes requiring basic verification that the user is a real human person. In this case, suspension does not adversely impact on the rights of a person to freely communicate their political views,¹⁷ rather it will dampen the ability of false accounts to repetitively and rapidly post disinformation on a digital platform to influence the appearance of public opinion and fact.¹⁸

11. Where a post is augmented by the digital platform with a note about its factual inaccuracy (or accuracy as the case may be), it is not the proposal of the Committee that information be censored entirely, but that, as close to the time of publication as possible, it be presented in a framework which allows for greater critical appraisal, and which does not favour the earliest speaker.¹⁹

Objective 6: Signatories will publicise the measures they take to combat Disinformation

12. The Committee submits that overseas examples of voluntary codes of this kind, and particularly the comparatively similar EU Code²⁰ have had varied impacts.²¹ Whilst the Committee acknowledges that, with respect to Digital Platforms, some level of international consistency may be beneficial for the purposes of obtaining cooperation from Digital Platforms, efficacy is also a central concern, particularly where adapting to the peculiarities of the Australian media landscape.²² Potential criticisms of the EU Code include the lack of key performance indicators for Digital Platforms, limiting interpretation of their published measures.
13. The Committee submits that a format be adopted for the substantive components of the annual reports provided by signatory Digital Platforms, that would allow for analysis of the efficacy of the measures taken, and to allow for future benchmarking.

Inauthentic Behaviour

14. The Committee submits that it is essential that annual reports include measures of 'Inauthentic Behaviour' as defined by the Code, meaning 'including spam and other forms of deceptive behaviours (including via automated systems) which encourages users of Digital Platforms to propagate content which may cause harm'.²³ However, the Committee notes that this definition should be clarified with respect to limited or private groups on a platform.
15. For example, content shared through groups on Facebook may be open (where users can add themselves to the group), closed (where a user must be approved to join), and secret (where users need to be invited by someone else already in the group). Where disinformation is shared in a closed group, it should be clarified whether it would be captured under the definition of 'Inauthentic Behaviour' due to the requirement that such behaviour 'encourages users of Digital Platforms to propagate content which may cause harm.' In the example of a smaller private or secret group, it may not be the case that users generally are being 'encouraged' to engage in disinformation, rather to the contrary, a limited group is,

¹⁷ *Discussion Paper* n 16, 17, 19.

¹⁸ *Discussion Paper* n 16, 17-19.

¹⁹ *Ibid* 75.

²⁰ European Commission n 2.

²¹ Gilbert+Tobin, 'Code of Practice on Disinformation: Stemming the tide of fake news', *Gilbert+Tobin Digital Domain* (Web Page, 15 September 2020) <<https://www.gtlaw.com.au/insights/code-practice-disinformation-stemming-tide-fake-news>>.

²² Amanda Meade, 'Facebook threatens to block Australians from sharing news in battle over landmark media law', *The Guardian* (online, 1 September 2020) <<https://www.theguardian.com/media/2020/sep/01/facebook-instagram-threatens-block-australians-sharing-news-landmark-acc-media-law>>.

²³ *Disinformation Code* n 4, [3.4].

on one view, engaging in a semi-private exercise. However, it should be noted that Digital Platforms create 'echo chambers'²⁴ which may disproportionately influence their members to propagate content which may cause harm.

16. Digital Platforms should outline in their annual report their efforts in managing potential disinformation in 'echo chambers' relevant to that Digital Platform (e.g. Groups for Facebook, Retweets for Twitter, Reels for Instagram, etc). This may be addressed by requiring signatory Digital Platforms to report and outline the nature and kind of 'Inauthentic Behaviour' in their platform and provide case studies of Inauthentic Behaviour that has been addressed. Imposing this requirement on signatory Digital Platforms may provide the public with a more comprehensive understanding of the measures taken by Digital Platforms and will better satisfy Objective 6 of the Code.

Prioritising Credible and Trusted News Sources

17. The Committee is concerned about unintended consequences on the voluntary Code in the context of the compulsory Draft New Media Bargaining Code (**Media Bargaining Code**) announced in early April.²⁵ It is noted that the Media Bargaining Code is opposed by Digital Platforms such as Google.²⁶
18. Digital Platforms Google, Facebook, and YouTube already account for more than 80% of Australian digital advertising.²⁷ Australian news media is known to be amongst the most concentrated in the world in terms of ownership.²⁸ The University of Canberra's 2020 Digital News Report²⁹ which delivers comprehensive data on media usage in 40 countries, shows that for Gen Y and Z local social media or online groups are the most popular way to access news about their area. Almost one-quarter (24%) of Gen Z use local social media or online groups, followed by television (22%). Thirty percent of Gen Y say they use local newspapers and 30% say they use social media or online groups to access local news. Older generations being Gen X (40%), Baby Boomers (50%) and those aged 74 and older (69%) prefer local newspapers or newspaper websites.³⁰
19. A comparative attempt to redistribute monetisation, and ensure the accuracy of news media sources on Facebook and Google in France and Spain has resulted in Google News closing in Spain and a

²⁴ NSWYL Communication, Entertainment and Technology Committee, Submission to Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (April 2018) 15.

²⁵ Australian Competition and Consumer Commission, 'News media bargaining code', *Draft Legislation* (Web page) <<https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/draft-legislation>>.

²⁶ Google, 'Update to your open letter to Australians', *Open letter – The way Aussies search with Google is at risk – Google* (Web Page) <https://about.google/intl/ALL_au/google-in-australia/an-open-letter/>.

²⁷ Amanda Meade, 'Google, Facebook and YouTube found to make up more than 80% of Australian digital advertising', *The Guardian* (online, 23 October 2020) <<https://www.theguardian.com/media/2020/oct/23/google-facebook-and-youtube-found-to-make-up-more-than-80-of-australian-digital-advertising>>.

²⁸ Nick Evershed, 'Australia's newspaper ownership is among the most concentrated in the world', *The Guardian* (online, 14 November 2020) <<https://www.theguardian.com/news/datablog/2020/nov/13/australia-newspaper-ownership-is-among-the-most-concentrated-in-the-world>>; Tim Dwyer and Dennis Muller, 'FactCheck: is Australia's level of media ownership concentration one of the highest in the world?', *The Conversation AU* (12 December 2016) <<https://theconversation.com/factcheck-is-australias-level-of-media-ownership-concentration-one-of-the-highest-in-the-world-68437>>.

²⁹ Sora Park et al, *Digital News Report: Australia 2020* (2020, University of Canberra) <<https://www.canberra.edu.au/research/faculty-research-centres/nmrc/digital-news-report-australia-2020>>.

³⁰ Ibid.

reduction of between 6-14% of news traffic.³¹ In France, this led to Google removing previews from searches.³²

20. Domestically, Facebook has indicated a preference to block Australians from sharing news content altogether, citing the commercial non-viability of compliance with the Media Bargaining Code.³³ Presently, Australians are considered to be one of the 'lightest' consumers of news across the developed nations.
21. If the Media Bargaining Code results in less access to news content on social media, this may have an impact on national engagement with news media.³⁴ It may become more complex to manage disinformation if there is also a reduction of news content on Digital Platforms.
22. The Committee acknowledges the potential limitations of a voluntary code, requiring Digital Platforms to opt-in.³⁵ However, the Committee also recognises that regulation of disinformation is a complex process, especially where content can be shared instantaneously, and where individual private accounts may make posts which only reach friends and family, or rapidly reach the world at large.³⁶ This is further complicated by the Digital Platform model of monetisation, which can, if not managed well, lead to brands finding their advertising featured on content containing disinformation. This may then lead those brands to subsequently withdraw from advertising on a particular Digital Platform.³⁷
23. The Committee recognises that the Code is a significant first step to addressing disinformation. Given the rapid advancement of technology and its uses, further steps may be required.

³¹ Dominic Rushe, 'Google News Spain to close in response to story links "tax"', *The Guardian* (online, 11 December 2014) <<https://www.theguardian.com/technology/2014/dec/11/google-news-spain-to-close-in-response-to-tax-on-story-links>>; Joe Mullin, 'New study shows Spain's "Google tax" has been a disaster for publishers', *Ars Technica* (online, 31 July 2015) <<https://arstechnica.com/tech-policy/2015/07/new-study-shows-spains-google-tax-has-been-a-disaster-for-publishers/>>.

³² Kim Willsher, 'France accuses Google of flouting EU copyright law meant to help news publishers', *Los Angeles Times* (online, 17 October 2019) <<https://www.latimes.com/business/story/2019-10-17/france-accuses-google-ignoring-copyright-law>>.

³³ Hannah Blackiston, 'Facebook threatens to block Australians from sharing news over ACCC bargaining code', *Mumbrella* (online, 1 September 2020) <<https://mumbrella.com.au/facebook-threatens-to-block-australians-from-sharing-news-over-accc-bargaining-code-641429>>.

³⁴ Caroline Fisher et al, 'Australians are less interested in news and consume less of it compared to other countries, survey finds', *The Conversation AU* (online, 12 June 2019) <<https://theconversation.com/australians-are-less-interested-in-news-and-consume-less-of-it-compared-to-other-countries-survey-finds-118333>>.

³⁵ Zoe Samios and Lisa Visentin, 'ACMA: Tech giants' code to handle fake news fails to meet expectations', *Sydney Morning Herald* (online, 26 October 2020) <<https://www.smh.com.au/politics/federal/acma-tech-giants-code-to-handle-fake-news-fails-to-meet-expectations-20201026-p568oq.html>>.

³⁶ Ben Collins, 'In secret chats, trolls struggle to get Twitter disinformation campaigns off the ground', *NBC News* (online, 6 November 2018) <<https://www.nbcnews.com/tech/tech-news/secret-chats-trolls-struggle-get-twitter-disinformation-campaigns-ground-n931756>>.

³⁷ Denise Chow, 'YouTube ran ads for major brands, environmental nonprofits on climate misinformation videos', *NBC News* (online, 17 January 2020) <<https://www.nbcnews.com/tech/tech-news/youtube-ran-ads-major-brands-environmental-nonprofits-against-climate-misinformation-n1117491>>.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

Contact:



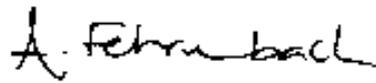
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