



**CENTRE FOR MEDIA TRANSITION**

# **Review of the Australian Code of Practice on Disinformation and Misinformation**

**Submission to DIGI**

18 July 2022

## About the Centre for Media Transition

The Centre (CMT) was established in 2017 as an applied research unit based at the University of Technology Sydney (UTS). It is an interdisciplinary initiative of the Faculty of Arts and Social Sciences and the Faculty of Law, sitting at the intersection of media, journalism, technology, ethics, regulation, and business.

Working with industry, academia, government and others, the CMT aims to understand media transition and digital disruption, with a view to recommending legal reform and other measures that promote the public interest. In addition, the CMT aims to assist news media to adapt for a digital environment, including by identifying potentially sustainable business models, develop suitable ethical and regulatory frameworks for a fast-changing digital ecosystem, foster quality journalism, and develop a diverse media environment that embraces local/regional, international and transnational issues and debate.

The CMT is also home to the APAC bureau of the global verification organisation First Draft, which aims to combat misinformation.

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# Executive Summary

- The Australian code takes the right approach with its focus on outcomes and the encouragement of proportionate responses to the risk of harm; however, some aspects of the current code undermine this approach and could be improved as part of this review.
- The EU's *Strengthened Code of Practice on Disinformation 2022* offers guidance on a number of issues, including its more expansive embrace of information disorder, using 'disinformation' as an umbrella term. It also makes such improvements as dropping the qualifier 'verifiably' from the concept of 'false and misleading'.
- Some matters currently sitting outside the scope of the code could be brought within it. Excluding some matters altogether leaves platforms to respond under their own terms of use, outside an agreed industry approach and without the transparency that comes with inclusion in the code. This does not mean that all matters should be treated the same, or that high end responses such as prohibitions on content should apply universally.
- The general limitation of the code's application to user-generated content and search results could be amended to better reflect the code's application to some forms of advertising as well as some professional content.
- The code could cover a broader scope of signatories, including smaller platforms, and a broader range of services.
- While there is not necessarily a need to shift from opt-in to opt-out, platforms that become signatories should explain their decisions not to opt in to one or more of the commitments; if a relevant service is provided then signatories should report on that service annually.
- The concept of imminence should be removed from the threshold of 'serious and imminent threat' and consideration given to lowering the threshold to 'potentially harmful'. Risk assessment frameworks or guidelines could help signatories address 'chronic harms' (such as the gradual degradation of democratic discourse) which are excluded by the high threshold of 'serious and imminent harm'.
- The exemption for professional news could be reconsidered on the basis that platforms do indeed take action against news services (as seen in Google's action against the Sky News content on YouTube) but do so under their own terms of service rather than under industry agreed principles.
- In seeking to define professional news, DIGI could have regard to ACMA's recent position paper, *What Audiences Want*, and should avoid the mistake of the News Media Bargaining Code in equating internal codes with independent industry-based standards and complaints schemes. News aggregation services should be included in the code.
- The code could be extended to include private messaging with the application of suitable strategies (such as limits on forwarding messages) that do not involve monitoring content.
- Issues-based advertising, 'general advocacy' ads outside of election campaigns, political ads, and sponsored content should all be included in the code. As for professional news services, it is reasonable for political ads to be treated differently from user-generated content, but bringing them within the scope of the code would mean that platforms make decisions under industry agreed principles rather than under their own terms of service.
- The need to balance protection from harm with protection of freedom of speech does not require the exclusion of misinformation which is an element that platforms (and others) need to address.
- The code could encourage platforms to implement complaint-handling procedures in cases where disputes extend beyond the initial flagging of content by users.

# Introduction

Thank you for the opportunity to make this submission to the review of the Australian Code of Practice on Disinformation and Misinformation (the code). Our submission begins with some general points on the code and its approach in combatting harms arising from online misinformation and disinformation, particularly in comparison with the revised EU Code of Practice on Disinformation (EU code). We then consider the consultation questions DIGI has raised in the discussion paper. Finally, we address several issues that DIGI has not raised in the paper, but which we believe merit consideration during the code review.

## Addressing disinformation and misinformation

As noted in DIGI's review paper, CMT and First Draft identified a number of key challenges for regulating mis- and disinformation in their discussion paper released during consultation on the draft code in 2020. These include:

- a) the choices that must be made in defining disinformation – including the type of 'harms' which are included within that concept;<sup>1</sup>
- b) the risks to freedom of speech, including political communication, that may arise in the course of taking action in relation to content;
- c) the difficulties of setting regulatory initiatives at a national level for issues that affect a range of industry participants and consumers across multiple jurisdictions;
- d) the need to combine regulatory approaches with other initiatives to raise awareness and media literacy or to encourage factual accuracy in news reporting; and
- e) how regulation can encourage a sense of shared responsibility.<sup>2</sup>

These are not small challenges. Indeed they are among the difficulties that have led some to identify disinformation as a 'wicked problem'.<sup>3</sup> A wicked problem is one in which the complexity of underlying causes and conflicting stakeholder demands means that it has no clear or simple solution. Instead, as Molly Montgomery at the Brookings Institution notes, we must seek to mitigate or manage the problem by 'building an architecture to promote collaboration and build trust among stakeholders,' to 'facilitate knowledge- and information sharing, identify and stress-test potential policy interventions, and develop industry standards and best practices'.<sup>4</sup> In particular, we need to recognise that mis- and disinformation do not occur in isolation but must be considered as part of a broader web of online problems, each of which is unlikely to be solved alone.

The Australian code takes the right approach, with a focus on outcomes and the encouragement of proportionate responses to the risk of harm. It also encourages signatories to support research and better publicise their activities relating to mis- and disinformation.

However, in assessing the code at the 12 month mark, we think several key aspects undermine this overall approach and limit the code's potential effectiveness. In particular, as noted by the ACMA, the scope of the code is unnecessarily narrow, setting a high threshold of serious and imminent harm for platform intervention to address misinformation,

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<sup>1</sup> At that stage misinformation had not yet been included in the code; however, the same definitional challenges apply to that term.

<sup>2</sup> UTS Centre for Media Transition (2020) *Discussion Paper on an Australian Code of Practice on Disinformation*, <https://digi.org.au/wp-content/uploads/2020/10/Discussion-Paper-Final.pdf>

<sup>3</sup> Montgomery, M. (2020). *Disinformation as a Wicked Problem: Why We Need Co-Regulatory Frameworks*, Brookings Institution, [https://www.brookings.edu/wp-content/uploads/2020/08/Montgomery\\_Disinformation-Regulation\\_PDF.pdf](https://www.brookings.edu/wp-content/uploads/2020/08/Montgomery_Disinformation-Regulation_PDF.pdf); see also Claire Wardle cited in Legg, H. and J. Kerwin, *The Fight Against Disinformation in the US: A Landscape Analysis*, Shorenstein Center on Media, Politics and Public Policy, Harvard Kennedy School, p. 16.

<sup>4</sup> Montgomery, M. (2020). *Disinformation as a Wicked Problem: Why We Need Co-Regulatory Frameworks*, Brookings Institution.

and excluding relevant services (messaging) and content (professional news and political advertising).<sup>5</sup> The rationale for this is to avoid unnecessarily impinging on the freedom of expression, freedom of the press and the freedom of political communication, as well as, perhaps, serving to limit what platforms take themselves to be responsible for and in what areas it is appropriate for them to act.

In our view, however, these freedoms would be better protected from within the code. The reason is that the scope of the code is too narrow to encompass a wide range of actions that platforms actually take to address misinformation. *These actions are therefore not subject to the transparency and accountability requirements of the code.*

A clear case of this is Google's decision to remove Sky News videos from YouTube for violating its misinformation policies.<sup>6</sup> Approve of the decision or not, Google is not accountable for the decision under the code because professional news is excluded from the operation of the code.

Less dramatically, measures which typically operate below the threshold of serious and imminent harm, such as demoting borderline or 'pre-viral' content, are not covered by the code and therefore not subject to its transparency or accountability requirements.

As the ACMA recently noted, 'a successful self- or co-regulation scheme is predicated on industry's ability to demonstrate that it is accountable for its activities'.<sup>7</sup> But signatories cannot genuinely be held accountable for actions outside the scope of the code. A complaint about Google's actions or policies with respect to professional news, for example, could not be addressed through the code's complaints mechanism.

In our view, these difficulties with the code could be addressed by avoiding complex exclusions, definitions and thresholds and instead taking an inclusive approach to mis- and disinformation. This would increase transparency and accountability across the full range of actions platforms take to address misinformation and disinformation. Importantly, because it would sit within the *outcomes-focused framework* and the *risk-based, proportionate approach to intervention*, this broader scope would not place undue responsibility on platforms for solving shared problems or impinge on democratic freedoms by requiring platforms to take strong action at an unreasonably low threshold of harm. Instead, it would strengthen the outcomes-focused and risk-based approach to the code by providing a broader scope for scalable decision-making and a stronger framework for robust and effective collaboration, while increasing transparency and accountability.

We recognise that in its discussion paper DIGI has suggested strengthening some aspects of the Australian code. In addition, in the Annual Report DIGI published the guidelines developed by the independent reviewer, Hal Crawford, that include recommendations such as standardising reporting periods, use of standardised definitions, use of service level indicators (SLIs) and providing context for decisions and data included in the transparency reports.<sup>8</sup>

Before we look in more detail at how the strengthening of the Australian code could be encouraged within the parameters of the consultation questions, we think it would be valuable to look at how the recently strengthened EU code takes a more inclusive approach to the problem of mis- and disinformation of the kind suggested here.

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<sup>5</sup> See findings 24–30, Australian Communications and Media Authority (2021), *A Report to Government on the Adequacy of Digital Platforms' Disinformation and News Quality Measures*, p. 87.

<sup>6</sup> Doyle, M., (2021), 'Sky News Australia Given 1-week YouTube Suspension after Breaching COVID-19 Misinformation Policy', 1 Aug 2021, <https://www.abc.net.au/news/2021-08-01/sky-news-suspended-youtube-for-one-week-covid-19-misinformation/100341386>

<sup>7</sup> Australian Communications and Media Authority (2022), *What Audiences want – Audience Expectations for Content Safeguards: A Position Paper for Professional Content Providers*, p.35.

<sup>8</sup> DIGI (2022), *Australian Code of Practice on Misinformation and Disinformation: Annual Report* (June 2022). Pp 30-33.

## The strengthened EU code

The clearest point of comparison for the Australian code is the EU Code of Practice on Disinformation. When it was released in 2021, the Australian code was in many ways broader in scope than the EU code (released in 2018) particularly in the inclusion of misinformation. Following the release of the *European Commission Guidance on Strengthening the Code of Practice on Disinformation* (EC guidance) in May 2021, the EU code was revised, resulting in the *Strengthened Code of Practice on Disinformation 2022*, released on 16 June (after the release of DIGI's discussion paper). This strengthened EU code sets a much higher benchmark for comprehensiveness, accountability and transparency, going well beyond the Australian code.

The strengthened EU code includes several changes relevant to the current consultation. Most notably, it has a much broader scope, covering misinformation, disinformation, information influence operations and foreign interference in the information space. It uses 'disinformation' as an umbrella term to capture these phenomena.<sup>9</sup> Crucially, while the definitions for disinformation and misinformation refer to the potential for harm ('can be harmful', 'may cause public harm') there is no explicit threshold of harm that serves as a limit on the scope of the code. In addition, where the 2018 code required disinformation to be 'verifiably false or misleading', in the strengthened code the requirement for verifiability has been removed. This follows recommendations in the EC guidance for a broadened scope and increased participation.<sup>10</sup>

Within this broadened scope there is a recognition of the need for a proportionality in platform responses that responds to the risk of harm. Most of the measures require platforms to respond appropriately to risk (eg, s 18.2), and explicit provision is made for smaller platforms to identify and report on measures that are proportionate and appropriate to their services and to achieve full implementation over time.

The broader code scope is also seen in the expansion of measures to address disinformation and misinformation risks in political and issues-based advertising and in the inclusion of messaging services, which were excluded from the 2018 code. While there is recognition of existing frameworks including those that address news media (eg, Directive 2010/13/EU) the code does not exclude professional news or other types of online content from its scope.

This broadened scope allows the code to provide a set of meaningful commitments across the full range of mis- and disinformation-related phenomena (often collectively known as information disorder<sup>11</sup>), taking full account of the need for scalable measures and proportionality in response, and the need to balance interventions with democratic rights and freedoms. Commitments are tailored where appropriate to specific types of service.

The wording of the code commitments is much more detailed and precise than in both the 2018 code and the Australian code, with each commitment comprising several measures clearly expressed as outcomes. Each measure specifies qualitative reporting elements (QREs) and, where appropriate, quantitative service level indicators (SLIs) to improve consistency and comparability of platform reporting. Where appropriate SLIs are yet to be determined, the code requires signatories to form working groups to develop additional SLIs and define key terms (eg, section 4.1 on political and issue advertising).

Responding to the EC guidance, the strengthened code requires signatories to form formal working groups, advisory bodies and other collaborative partnerships with experts, related industries and other stakeholders to develop best-practice measures, share information and increase transparency and accountability. It also requires platforms to increase their

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<sup>9</sup> *Strengthened Code of Practice on Disinformation 2022*, section 1(a).

<sup>10</sup> European Commission (2021) *European Commission Guidance on Strengthening the Code of Practice on Disinformation*, pp. 5–6.

<sup>11</sup> See: Wardle, C. & H. Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policymaking*, Council of Europe, 2017.

monitoring and research efforts and to provide robust data to allow greater scrutiny of the effectiveness of platform measures. These requirements are specified in detail against specific code commitments, and include:

- the formation of a permanent disinformation taskforce comprising code signatories and representatives from the European Digital Media Observatory (EDMO) and the European Regulators Group for Audiovisual Media (ERGA) (s 37)
- publishing results from research on the effectiveness of measures to improve users' identification and comprehension of labels on political advertising (s 6.3)
- constructively assisting, as appropriate, in the creation, implementation and improvement of political or issue advertising policies and practices (s 12) and working to research, monitor and report on the use of online political or issue advertising across EU member states (s 12.1)
- producing tools, dashboards and other data to ensure proper scrutiny of political or issue advertising, particularly during election periods (s 12.2)
- sharing research and findings publicly and with the taskforce for discussion and potential follow-up actions (QRE 12.1.1)
- working individually and together through the taskforce to identify novel and evolving disinformation risks in the uses of political or issue advertising and discussing options for addressing those risks (s 13.1)
- operating channels of exchange between their signatories to proactively share information about cross-platform influence operations (s 16)
- partnering or consult with media literacy experts in the EU to enhance media literacy measures (s 17.3)
- developing and enforcing publicly documented, proportionate policies to limit the spread of harmful false or misleading information (as depends on the service, such as prohibiting, downranking, or not recommending harmful false or misleading information, adapted to the severity of the impacts and with due regard to freedom of expression and information) (s 18.2)
- investing and/or participating in research efforts on harmful disinformation online and related safe design practices, disclosing and discussing findings within the taskforce, and explaining how they intend to use these findings to improve existing safe design practices and features or develop new ones (18.3)
- providing access to indicators of trustworthiness developed by independent third-parties, in collaboration with the news media, including associations of journalists and media freedom organisations, as well as fact-checkers and other relevant entities (s 22.1)
- applying fully disclosed trustworthiness criteria equally to all sources and allowing independent audits by independent regulatory authorities or other competent bodies (s 22.4)
- providing researchers with access to data necessary to undertake research on disinformation by developing, funding, and cooperating with an independent, third-party body that can vet researchers and research proposals (s 27)
- establishing a framework for transparent, structured, open, financially sustainable, and non-discriminatory cooperation between them and the EU fact-checking community regarding resources and support made available to fact-checkers (s 30).

In conclusion, where the 2018 code was legitimately criticised for failing to drive accountability and transparency of platform activities, the strengthened EU code provides a much more robust model of self-regulation. It represents another important step towards



addressing mis- and disinformation, with a broad scope that demands accountability and transparency across a broad range of platform activities, calls for the development of formal, consistent decision-making and information-sharing frameworks with independent oversight, and provides sufficient flexibility to accommodate both self-regulatory and co-regulatory compliance mechanisms. While the strengthened EU code was published after DIGI released the consultation paper for this review, it would be a missed opportunity if the many improvements in the European model were not taken into account in the revisions of the Australian code. It would also be advantageous to consider how the recent passage of the Digital Services Act will affect the efforts of platforms to counter disinformation under the Strengthened Code, given that paragraph 1(i) of the Strengthened Code explains the intention that it operate as a 'Code of Conduct under Article 35 of the DSA'.



# Responses to discussion questions

## 1. Should the code cover a broader scope of signatories?

We recommend the code cover a broader scope of signatories, including smaller platforms with fewer than 1 million active monthly users, as well as a broader range of industry sectors. This is consistent with our view that a collaborative and ecumenical approach is required to effectively address online mis- and disinformation. It is also consistent with the voluntary, outcomes-based approach that provides a great deal of flexibility to signatories in how they implement the code.

The scope of the code set out in section 4.1 limits its application to user-generated (including sponsored and shared) content and search results. Current signatories provide some services that do not fit the criteria of social media platforms or search engines. These include the Microsoft Start service (which provides news to Microsoft customers and syndication partners), Apple News, and Adobe who have acknowledged that their services fall outside the scope of the code but recognised that their services can be used to produce disinformation. This should be further encouraged by broadening the range of services covered by the code.

Consideration should be given to broadening the scope to companies that provide other services within the online information ecosystem, including ad-tech companies, messaging services, and online marketplaces, as is seen in the wide range of signatories to the EU code.

## 2. Should the code take an opt-out rather than an opt-in approach to the optional commitments under the code?

As the code is voluntary, the consequence of more-stringent requirements may be a reluctance on the part of some platforms to sign up. This may be affected by whether the government continues with the plan to grant ACMA powers to register codes and make standards on mis- and disinformation.

More important than whether the provisions are opt-in or opt-out is that platforms should be required to justify their decision either not to opt in or to opt out on the basis that the provision is not applicable to the platform, for example because a relevant service is not provided.

If a relevant service is provided then signatories should be required to report on that service annually, even if only to demonstrate that the risk of harm on that service is negligible.

The strengthened EU Code continues with an 'opt-in' model. Signatories can choose not to opt in to services that are not relevant or pertinent to their services (s 1(f)). All signatories agree to explain their decisions and to regularly review their commitments and measures, taking into account input from the code taskforce. In addition, the revised code will operate with a co-regulatory backstop provided by the forthcoming Digital Services Act (s 1(h)). This will provide increased oversight and enforcement of code compliance for 'very large online platforms'. Smaller platforms will have the ability to specify measures proportionate and appropriate to their services that they will implement to achieve their code commitments.

### 3. Should the definition of harm be amended to deal with concerns about the narrowness of ‘serious and imminent threat’ language?

To better align the code with the outcomes-focused, risk-based approach, consideration could be given to both removing the reference to ‘imminent’ and lowering the threshold to ‘potentially harmful’. This is the approach taken in the revised EU code and recommended in the ACMA position paper (if not the ACMA report to government, which recommended only that ‘imminent’ be removed).

If this recommendation is not pursued then we agree that at the least, the narrowness of ‘imminent threat’ should be addressed.

#### **Inconsistency of a high threshold with the outcomes-based approach**

In our view, a high threshold, such as ‘serious and imminent threat’, would be appropriate for a rules-based code which required signatories to take a particular type of action for content or behaviour which reaches a certain level of actual or potential harmfulness.<sup>12</sup> However, the code is designed to address a wider range of harms and provide for a wide range of platform measures that do not meet this threshold.

This is reflected in the wide range of example measures set out under outcome 1(a) as well as the other code outcomes. All of the measures listed in section 5.9 of the code as examples of measures to reduce the risk of harm from disinformation and misinformation commonly operate well below the threshold of serious and imminent harm.

A high threshold would also be appropriate for more stringent platform measures within an outcomes-based model, especially those that run up against the freedom of expression such as content removal or account suspension. In its current form, however, the code extends a high threshold appropriate to the most stringent measures to the full range of measures available. In this sense, the threshold is inconsistent with, and indeed undermines, the outcomes-focused, risk-based code model. It reduces transparency and accountability by leaving a whole range of existing platform measures outside the purview of the code, even though the fundamental purpose of these measures is to reduce the propagation and impact of disinformation and misinformation.

If platforms are, of their own accord, implementing a wide range of measures to address disinformation and misinformation that are not in the scope of the code, then the consequence is that those measures are not subject to the scrutiny of the code. The fact that signatories are free to implement measures or report ‘above and beyond’ the code does not overcome this deficiency in the code itself.

For the outcomes-focused, risk-based model to function effectively, all measures aimed at reducing disinformation and misinformation should be within the scope of the code.

#### **Developing a risk assessment framework**

Rather than operating with a threshold that does not reflect platform policies or operations, the code could require signatories to develop a risk assessment framework or set of guidelines that can guide policy formation and decision making by individual signatories. For example, it could require signatories to establish a set of best practice guidelines for proportionate, risk-based decision making. This is the approach taken by the strengthened EU code, and was recommended by the ACMA in its report to government (Finding 30).<sup>13</sup> These guidelines could set out a range of appropriate interventions according to the level of

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<sup>12</sup> It is perhaps worth noting in this context that the ACCC’s original recommendation for a high threshold of serious public harm was made in the context of a mandatory code to be enforced via a complaints mechanism administered by the ACMA.

<sup>13</sup> Australian Communications and Media Authority (2021), *A Report to Government on the Adequacy of Digital Platforms’ Disinformation and News Quality Measures*, p. 60.

risk. That is, they could include graduated thresholds that culminate, rather than commence, with a high threshold for content removal and account banning. The current code incorporates elements of this proportionate approach, but it is effectively stymied by the narrow code scope.

Requiring signatories to develop a formal risk assessment framework would drive reflection on and improvement in industry practices, with insights into best practice shared amongst signatories and, being publicly available, subject to external scrutiny. It would also provide greater accountability within the code governance framework, as it would provide a reference point for complaints about signatory code compliance. As it currently stands, the code objectives, outcomes and example measures are so broad and flexible that complaints about code compliance have no ‘tethering points’ in the code itself. A set of guidelines for policy formation and decision making would provide the opportunity for complaints to be lodged about a signatory’s failure to act in accordance with those guidelines (or consistent failure—the terms would be set by the code’s governance framework).

Such an approach may also alleviate concerns that it is extremely difficult for platforms to assess what the ACMA calls ‘chronic harms’, which are excluded by the high threshold of ‘serious and imminent harm’. We agree that this is difficult, but this is not a reason to exclude chronic harms from the code. Chronic harms, such as the gradual degradation of democratic discourse, are at the foundation of global concern about mis- and disinformation, informing, for example the EU’s Democracy Action Plan and, in Australia, the Digital Platforms Inquiry. Reducing such harm should be a principal objective of the code. Collaborating on an appropriate and evolving decision-making framework would help platforms take account of such harms.

#### 4. Should the exemption for professional news content be revised so that it is clearer? Should the code be extended to cover news aggregation services?

In our view the exemption for professional news should be reconsidered, not revised.

It is true that professional news is subject to its own codes, and thus it is reasonable for DIGI to assert that ‘Platforms that distribute professional news should generally be able to rely on the news provider to ensure the accuracy and editorial integrity of news content.’ However, news is a critical element of the online information ecosystem. As well as its normal offline functions, online it acts as an important counterweight to misinformation, fake news and other unreliable information. At the same time, false or misleading narratives that may have originally developed online are greatly amplified when taken up or reported on by mainstream news sources. This is due to the high viewership and the high trust placed in professional news

Perhaps most importantly, some code signatories have publicly taken strong action against some professional news services for violating their misinformation policies, including suspending accounts of news services and removing news content. Excluding professional news from the code only serves to make such actions unaccountable. This goes against the spirit and purpose of the code.

Aside from such drastic actions, news content is also subject as a matter of course to promotion or demotion via content-delivery algorithms.

It is appropriate for professional news to be subject to different policies and thresholds from other types of content. But rather than excluding it – which gives platforms unlimited discretion on how they deal with it – the code could require signatories to develop a formal framework to guide how they deal with professional news. This could include, for example, guidelines developed with news organisations on how platforms treat professional news content, including how factchecking will operate, the interaction with press and

broadcasting codes, and the use of news as sources of authoritative information. Further, in the event that platforms take action that amounts to removing or otherwise downgrading news content: the news media organisation should be given a reasonable time to amend content or provide an explanation as to why it should be maintained; there should be a review mechanism available to the news organisation; and the reasons and extent of the action should be explained and made public.

In our view, an approach such as this provides a more flexible and adaptable framework that recognises shared responsibility, increases transparency and accountability, and promotes a collaborative approach to addressing mis- and disinformation.

While we favour the inclusive approach described above, if the code is to retain the exclusion of professional news, it should be clarified that the exclusion applies only to assessing whether particular items of news content include or constitute misinformation. It could also make provision to ensure that there is a mechanism to tackle situations where bad actors have misappropriated legitimate news items to enhance disinformation narratives – for example when a legitimate news item is reposted with misleading context. Other measures for improving the online news and information environment should remain within the scope of the code, and consideration could be given to expanding the requirements on signatories in this area, such as building collaborative partnerships with news media, fact checkers and other related industries, enhancing transparency of news-quality measures, better equipping users to make sound judgements about news and information quality, and increasing accountability and transparency for content-recommendation algorithms.

### **Defining professional news**

Rather than adopt the approach proposed in the discussion paper, we urge DIGI to consider the more developed approach put forward by ACMA in its recent position paper on the content of the broadcasting codes.<sup>14</sup> As this paper was only released last week, we are yet to fully consider the approach, but it appears to be well suited to the contemporary digital news environment. Key aspects are noted below.

*Definition of 'content provider' and 'professional content' p.7:*

- Content providers refers to entities that have a role in selecting, acquiring or commissioning content or otherwise deciding what content is provided on the service. Editorial control would generally indicate that an entity is a content provider, however, this is not always the case, and its relevance should be considered on a case-by-case basis. Professional content refers to any professionally produced content, including audio, audio-visual or print content that is produced in-house, commissioned or acquired for a fee, and is made available to audiences in Australia. Accordingly, it does not include user-generated content.<sup>15</sup>

*Extended definition of 'journalistic content' and how 'opinion and commentary' is differentiated from this:*

- In this paper, journalistic content refers to informative content that provides audiences with a deeper understanding of topical issues or events and matters in the public interest. It is content that is often (but not always) produced and presented by journalists, and may contain a mix of factual reporting, additional contextual information and analysis. Journalistic content is broader than just 'the news' and can appear within a range of differing content formats, from long-form investigative reporting pieces and documentaries, to 'lighter' infotainment pieces and panel

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<sup>14</sup> Australian Communications and Media Authority (2022), *What Audiences want – Audience Expectations for Content Safeguards: A Position Paper for Professional Content Providers*.

<sup>15</sup> Australian Communications and Media Authority (2022), *What Audiences want – Audience Expectations for Content Safeguards: A Position Paper for Professional Content Providers*, p.7.

programming. Audiences expect journalistic content to adhere to principles of journalistic objectivity, making it distinguishable from opinion and commentary.<sup>16</sup>

- Opinion and commentary: Subjective, often personal viewpoints that are distinct from facts and factual analysis. It generally includes advocating a particular perspective or position on a matter that is intended to persuade or influence others to adopt a similar stance.<sup>17</sup>

## News source

We have serious reservations about the definition of news source. We understand it is modelled on the approach adopted for the Professional Standards Test in the News Media Bargaining Code.<sup>18</sup> As we said at the time and more recently in a submission to Treasury in relation to the review of the NMBC:

The s 52P professional standards test should be amended so that news businesses are only able to register under the code if they are subject to external standards schemes and complaints processes. Internal schemes should not suffice.<sup>19</sup>

In our view, certain benefits and exemptions should indeed flow to news producers under various regulatory schemes but such mechanisms should not:

- Equate internal rules with those adopted at an industry level
- Propose independent complaint handling as an optional extra.

DIGI's Proposal 3 has both these undesirable features. It also reproduces the uncertainty inherent in the element of 'editorial independence from the subjects of its news coverage'.

## News aggregation services

We agree that news aggregation services should be included in the code. These can be both a vector for and counterweight to mis- and disinformation. In addition, several signatories have nominated their news aggregation services under the code (Apple, Microsoft).

## 5. Should the code be extended to include private messaging?

With precautionary measures as explained below, the code should be extended to include private messaging.

The argument for excluding private messaging assumes that surveillance and monitoring are required to address misinformation via private messaging. We agree that the content of private-messaging services should not be subject to monitoring under the code. But there are many tools already used by private-messaging services to reduce the spread of misinformation which do not involve monitoring of personal communications. Product-design features such as [restrictions on the number of recipients for forwarding potentially viral content](#) can introduce friction into the information-sharing ecosystem without requiring content to be monitored,<sup>20</sup> and can be developed by working with [anonymised data](#).<sup>21</sup> Other tools include user-reporting mechanisms, labelling and user prompts.

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<sup>16</sup> Australian Communications and Media Authority (2022), *What Audiences want – Audience Expectations for Content Safeguards: A Position Paper for Professional Content Providers*, p.10.

<sup>17</sup> Australian Communications and Media Authority (2022), *What Audiences want – Audience Expectations for Content Safeguards: A Position Paper for Professional Content Providers*, p.47.

<sup>18</sup> s 52P of the *Competition and Consumer Act (Cth)* 2010.

<sup>19</sup> Centre for Media Transition, *Review of the News Media and Digital Platforms Mandatory Bargaining Code*, Treasury (Submission, April 2022) 3.

<sup>20</sup> 'More Changes to Forwarding', *Whatsapp* (Blog Post, 21 January 2019) <https://blog.whatsapp.com/more-changes-to-forwarding>.

<sup>21</sup> Rianna Pfefferkorn, 'Content-Oblivious Trust and Safety Techniques: Results from a Survey of Online Service Providers' (2022) 1(2) *Journal of Online Trust & Safety* 1,10.

As with professional news, leaving private messaging services outside the scope of the code ensures only that platform policies and actions remain unaccountable.

The strengthened EU code includes commitments to address the dissemination of mis- and disinformation on private messaging services. Commitment 25 requires signatories that provide messaging applications to build and implement features or initiatives that empower users to think critically about information they receive and help them to determine whether it is accurate, without any weakening of encryption and with due regard to the protection of privacy. These include implementing features to facilitate users' access to authoritative information, to help users identify disinformation, and to limit viral propagation on their services (such as by increasing friction), without any weakening of encryption and with due regard for the protection of privacy.

## 6. Should the approach to issues-based advertising be clarified?

Yes, the approach to issues-based advertising should be clarified.

Section 3.7 of the code is a definition of 'political advertising'. 3.7(c) is the relevant part of the definition of political advertising that deals with issue-based advertising: '[paid for advertisements] that advocate for the outcome of a political campaign concerning a social issue of public concern in Australia'. Section 4.4. excludes political advertising from the scope of the code, except to the extent that 5.21 and 5.22 encourage greater transparency in the source of political advertisements (while reiterating that they are not in themselves to be treated as misinformation or disinformation).

In the consultation paper DIGI clarifies that 3.7(c) is intended to cover 'paid for advertising that promotes an outcome of a political campaign overseen by a state or federal body such as an electoral management body,' and is not intended to cover 'issues-based advertising that is for general advocacy purposes not associated with a clear proposal by a parliament for policy change via a democratic process such as via an election, referendum, or postal vote.'

Given this interpretation of 3.7(c), issues-based advertising is already covered by 3.7(d) as it is regulated as political advertising under Australian law (even though this regulation, for the most part, does not relate to false information). Accordingly, there is no apparent basis for the distinction between issues-based and political advertising and it may be preferable to delete 3.7(c) and instead rely on a clear definition of political advertising. Deleting 3.7(c) would also help to avoid the potential confusion with general advocacy advertising.

If 3.7(c) is retained then we agree that it should be amended. However, the amendment should not be to clarify that it 'does not apply to general advocacy' as this is too vague and would itself require further clarification. Rather, it should be amended to clarify exactly what it includes.

In addition, the phrase 'concerning a social issue of public concern' should be deleted from 3.7(c) to avoid confusion with general advocacy issues.

### **The importance of including general advocacy advertising**

DIGI raises further points concerning the broadness of ACMA's interpretation of issues-based advertising.

We agree with DIGI that the definition of issues-based advertising should not be expanded to include general advocacy, where this would result in the exclusion of general advocacy advertising from the code. Issues-based advertising is recognised as a high-risk conduit for misinformation due to the ability to 'micro-target'. We interpret ACMA's point to be – and we agree – that issues-based advertising in the sense of general advocacy should be within the scope of the code.



The line between this kind of advocacy advertisement and other advertisements may be blurry, but this is a reason to include, not to exclude, general advocacy advertising. Indeed, we recommend, as ACMA did in its position paper, that advertising and sponsored content be addressed explicitly in the code, separately from user-generated content. As well as being a recognised conduit for misinformation, advertising and sponsored content directly benefit platforms financially. They are also generally subject to approval processes before publication. It is therefore only reasonable to place a higher degree of responsibility on platforms for the content of advertisements.

The strengthened EU code explicitly includes both issues-based and political advertising, with consistent measures applied to both issues-based and political advertising. These terms are still to be defined; however, the strengthened code notes that a definition may be provided by the European Commission's proposed regulation on the transparency and targeting of political advertising, or else as the result of negotiation between signatories and the code taskforce. This is to include adequate coverage of issues-based advertising.

Measures to apply to political and issues-based advertising include increased user transparency, identity-verification measures, the development of ad repositories and provision of data.

It is also worth noting that under the broad scope of the strengthened EU code, political advertising is not excluded from the code and is therefore also subject to commitments to reduce the propagation of disinformation via platform advertising systems (s 2.1).

### **Exclusion of political and issue-based advertising**

The consultation paper puts forward some arguments for the continued exclusion of political advertising from the operation of the code, except in clear cases of disinformation. DIGI states that 'the effect of this exemption is that signatories are not required to treat political advertising as misinformation; however, they must take action on disinformation campaigns involving political ads.'

DIGI's reasoning for the exemption is that 'it is not appropriate for signatories to make assessments as to whether political based advertising, including issues-based advertising, constitute misinformation.' While we agree that it is reasonable for platforms to take this view, we would argue again that this is best clarified by a framework or set of guidelines internal to the code rather than an exemption.

As with other exemptions, the effect of excluding political and issue-based advertising is to render relevant platform policies and actions unaccountable under the code. Transparency reports show that many platforms' advertising policies include provisions banning ads which contain false information (e.g. Covid misinformation), and include extra precautions for political and issue-based advertising. For example, Facebook restricts political ads in some jurisdictions such as the US, Germany and France and has banned ads which have the 'potential to delegitimise an election'. Google only permits election ads which go through its verification process based on regional requirements.

As with professional news, it is perfectly reasonable for political advertising to be dealt with differently from other content. However, our view is that this should be done from within the code. The code could set out a framework for platforms that carry political advertising that is designed to ensure that platform policies and actions do not impinge on the freedom of political communication. In addition, a set of guidelines that clarified the varied laws and regulatory requirements operating in Australian jurisdictions would be very useful for signatories in making appropriate assessments of advertisements.

Again we would point to the EU code for an appropriate model of how sensitive content such as political advertising can be treated within an outcomes-based code framework in a way that balances those sensitivities with interventions designed to promote accountability and transparency.



DIGI also states in this context that the combined code commitments addressing advertising mean that ‘platforms subject to the ACPDM voluntarily commit to do more to address concerns about misleading and deceptive advertising and transparency of political advertising than other providers of political advertising, online and offline.’ We consider this to be appropriate given the risk of harm from misinformation propagated through micro-targeted online advertisements.

## 7. Should the code define sponsored content?

Yes, the code should define sponsored content as it is referred to in provisions that set the scope of the code. We support the proposed definition to the extent that its restriction to social media does not unduly limit this scope.

The main concern here is the interaction with section 4.1, which defines the scope of the code as user-generated (including sponsored and shared) content, and search results. It is not clear, for example, whether other forms of advertising (eg, on Google search) would be within the scope of the code if sponsored content were limited to social media.

In addition, we recommend that sponsored content and advertising be dealt with under separate provisions from user-generated content.

## 8. Is the code meeting community and industry needs to balance concerns about mis- and disinformation with freedom of expression?

DIGI appears to raise the question of whether the code should cover misinformation, noting that:

- the DPI Final Report recommended the code cover only disinformation;
- the research conducted by Resolve Strategic found that ‘the public appreciates the difficulty of policing misinformation, and is mainly concerned with false information that is deliberately disseminated on a coordinated basis or for political purposes’.<sup>22</sup>

The consultation paper neglects to give the full context to the ACCC recommendation. The ACCC recommended that the code exclude misinformation because ‘any intervention directly aimed at affecting individuals’ access to information must carefully balance the public interest with the case for free speech and the right of individuals to choose. In particular, it should avoid the Government directly determining the trustworthiness, quality and value of news and journalism sources.’<sup>23</sup>

Importantly, the ACCC’s recommendation was for a mandatory, complaints-driven code to be overseen by the ACMA. This also underlies their recommendation for a high threshold of ‘serious public detriment’. The ACCC recommended that this threshold be higher than that in the EU code because it ‘would include more significant enforcement and penalty provisions than the largely self-regulatory EU code.’<sup>24</sup>

The mode of regulation was clearly important to the ACCC’s thinking. In the end, the government asked for a voluntary code, meaning that at least some of the ACCC’s worries about government impingement on freedom of expression are no longer pertinent. We agree that the mode of regulation should be taken into account in developing a code that appropriately balances interventions with freedom of expression, and careful consideration should be applied to the wording of any legislative framework. In our view, however, the approach taken to these issues within the code is critical.

<sup>22</sup> DIGI (2022), *Australian Code of Practice on Misinformation and Disinformation: 2022 Review Discussion Paper*, p. 14.

<sup>23</sup> Australian Competition and Consumer Authority, *Digital Platforms Inquiry Final Report*, 2019, p. 370 (our emphasis).

<sup>24</sup> Australian Competition and Consumer Authority, *Digital Platforms Inquiry Final Report*, 2019, p. 371.

Clearly, the current code does not require or involve in any other way government determining the trustworthiness, quality and value of news and journalism sources, *despite the inclusion of misinformation*. Rather, the guiding principle on protection of freedom of expression (s 2.1) explicitly states that signatories ‘should not be compelled by Governments or other parties to remove content solely on the basis of its alleged falsity if the content would not otherwise be unlawful.’

In our view, the inclusion of this principle, and the avoidance of any requirement to remove content because of its alleged falsity, is evidence that the code strikes an appropriate balance between intervention and protection of freedom of expression.

It is perhaps important to note again that an advantage of the risk-based, outcomes-focused code model is that it does not mandate particular platform actions. Rather, it requires only that platforms be transparent about and accountable for their actions, which in turn drives industry improvement and consistency. Including misinformation in the code means that where platforms do act to address harmful misinformation on their services, their actions are accountable under the code. Conversely, excluding misinformation from the code would only serve to make their actions unaccountable.

As discussed in the introduction, we believe the code could be strengthened by requiring signatories to develop, in collaboration with an expert advisory group, a set of best-practice guidelines for proportionate, risk-based decision-making. This would promote consistency and accountability and reduce arbitrariness in decision-making, and would help ensure an appropriate balance between intervention and freedom of expression is achieved in practice as well as in principle. The guidelines should be referred to in the code to provide a reference point for assessing signatory performance and compliance.

## 9. Additional issues: complaint handling and code promotion

### Complaint handling

We note that the discussion paper excludes code governance arrangements from the scope of this review as the current arrangements have been in operation for less than 12 months. It is expected this point will be addressed in a review in 2024 following a further report from ACMA in 2023. The governance aspects include the ways in which complaints are made about possible breaches of the code, with DIGI establishing a Complaints Subcommittee to deal with such complaints.<sup>25</sup>

Acknowledging the exclusion of this aspect from the review, we nevertheless wish to raise a different aspect of complaint handling related to Objective 1 of the Code (‘Provide safeguards against harms that may arise from disinformation and misinformation’) and, under this, Objective 1c (‘Users can report content or behaviours to signatories that violate their policies ... through publicly available and accessible reporting tools’).

CMT has recently completed research on options for an external dispute resolutions scheme for digital platforms.<sup>26</sup> This work arises out of the ACCC’s recommendations in the Digital Platforms Inquiry for improving the way platforms handle complaints from customers.<sup>27</sup> Recommendation 22 proposed that the ACMA develop standards that would apply to internal dispute resolution (IDR), while Recommendation 23 proposed the establishment of an ombudsman scheme to deal with escalated complaints under external dispute resolution (EDR). The ACCC suggested the Telecommunications Industry Ombudsman (TIO) be considered for the role, or if that were not feasible, then a standalone ombudsman be established.

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<sup>25</sup> For transparency, we note that this committee includes Dr Anne Kruger from CMT as well as two members of our Advisory Board.

<sup>26</sup> Holly Raiche, Derek Wilding, Karen Lee and Anita Stuhmcke, *Digital Platform Complaint Handling: Options for an External Dispute Resolution Scheme* (UTS Centre for Media Transition, 2022).

<sup>27</sup> ACCC, *Digital Platforms Inquiry: Final Report* (June 2019) 37-38.

The report from this research will be published soon. It focuses on social media services and, specifically, at how users of Facebook can make complaints and how these are treated.

In the course of this research we acknowledge that it is reasonable for platforms to treat initial reports from users as something other than a complaint, provided that any subsequent contact from the user expressing concern or dissatisfaction triggers the categorisation of the matter as a complaint.<sup>28</sup> However, the provisions that form part of Objective 1 under the code do not recognise the need for processes to deal with matters that are not resolved by the initial flagging of an item of content, while the governance arrangements do not permit complaints to the DIGI sub-committee about a platform's response to any specific incident or piece of content.

In our view, there is a gap in the code that will, at some point, need to be addressed. While it is reasonable that this be approached at an industry level, the failure to include such efforts as part of the disinformation code may provide support to calls for the ACMA or the eSafety Commissioner to create an industry standard for IDR, as recommended by the ACCC. Similarly, reluctance to provide some facility for the external resolution of complaints where IDR fails may lead to direct regulation of some kind. In our report we mention that DIGI is one body that might be considered for establishing a clearing house for complaints about digital platforms, channelling matters to the appropriate EDR scheme. As noted, at present there is no EDR scheme for complaints about mis- and disinformation. It may be that this aspect could be part of a co-regulatory arrangement that builds on the current code in the way that the *Digital Services Act* in the EU builds on the Strengthened Code of Practice on Disinformation 2022.

### **Code promotion and public education**

Clause 7 of the code deals with code administration, including aspects such as opt-in arrangements, withdrawal from the code and complaint handling. While the code requires signatories to provide reports on measures taken to advance the objectives of the code, it does not impose any obligation to promote awareness of the code among users and stakeholder groups. Experience in other areas of the communications sector has shown that awareness is likely to be very low where service providers do not promote the existence of a code. Low awareness can lead to a low number of complaints and this, in turn, can lead to questions over the legitimacy of the code. It will certainly mean that low numbers of complaints cannot be taken as an indication of compliance or of community acceptance of the code. We encourage DIGI to consider including public education obligations within the code and to itself develop a public education program in partnership with a consumer organisation such as ACCAN.

## **Conclusion**

In our view, the Australian code of practice constitutes an important and valuable first step towards addressing harms arising from online mis- and disinformation. It takes the right overall approach, with a focus on outcomes and the encouragement of proportionate responses to the risk of harm. However, it contains several elements which work against this overall approach and limit the code's potential success. We encourage DIGI and code signatories to draw on the strengthened EU code in particular, as a model for an outcomes-based code that recognises and encourages shared responsibility and the need to balance interventions with democratic freedoms.

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<sup>28</sup> Holly Raiche, Derek Wilding, Karen Lee and Anita Stuhmcke, *Digital Platform Complaint Handling: Options for an External Dispute Resolution Scheme* (UTS Centre for Media Transition, 2022) 16.