Misinformation and Disinformation Will Not Be Combatted With Industry Codes

Parliament needs to mandate the provision of platform data and protect public interest organisations from legal attacks

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Reset.Tech Australia

Prepared with assistance from legal counsel

Summary

This briefing has been prepared in anticipation for the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024*. **Reset.Tech Australia supports enhanced regulatory powers for misinformation and disinformation, but is deeply concerned the process outlined is captive to an ineffective and hostile 'industry codes' process that lets Big Tech off easy and stymies public accountability.**

Reset.Tech Australia has undertaken extensive work on testing various large platforms' policies and responses to misinformation and disinformation in Australia, which this briefing builds on. Our most recent research—*Functioning or Failing? An evaluation of the efficacy of the Australian Code of Practice on Disinformation and Misinformation*[1]—draws upon experimental research conducted in 2023 that shows severe shortcomings in the outcomes of industry's Australian Code of Practice on Misinformation and Disinformation (the 'Code'). **That report concludes that the Code is not working, and mechanisms for public accountability are effectively non-existent.**

This briefing goes a step further and considers the Code in a legal context. It concludes:

1. The 'transparency' mechanisms under the Code, which require platforms to self-publish 'Transparency Reports' each year, are worryingly poor. **A Transparency Report may comply with the requirements of the Code while simultaneously breaching misleading and deceptive conduct for the purposes of *Australian Consumer Law.***

2. The 'accountability' mechanisms under the Code, namely an Independent Review Process and a 'public' Complaints Model, are defective:

    a. The Independent Review Process simply cannot incentivise best practice and compliance in reporting, as its scope is confined to publicly verifiable claims. **This means platforms' claims cannot be independently scrutinised. In other words, platforms can freely mislead the public in their reports without the same fact-checking their users are subjected to on their services.**

    b. The Complaints Model severely disincentivises public complaints against Code signatories:
        i. There being no mandated access to platform data about representations contained in Transparency Reports,
        ii. A burden on complainants to satisfy a 'materially false' threshold, which arguably imposes a higher threshold of accuracy on complainants than the standard required to be adhered to by signatories when composing Transparency Reports,
        iii. A perilous environment in general for organisations collecting evidence on misinformation and disinformation risks on platforms. Routine social media research techniques can lead to massive platform legal action.

    Combined, this represents a hostile environment for public accountability.

[1] Reset.Tech 2024 *Functioning or Failing?* https://au.reset.tech/news/report-functioning-or-failing/

Our key recommendations for the Bill mirror our 2023 feedback on the Exposure Draft, namely:

1. **ACMA should be immediately empowered to bypass industry codes and set a standard**. The Bill anticipates as a primary route that the ACMA supervises an industry codemaking process. Evidence and experience shows this will replicate the mistakes of the past. Put simply, industry has had several years to get the code making right and have failed, despite persistent feedback from both ACMA and civil society. **The Bill currently considers regulator standards-setting as a 'last resort', but it is evident that the threshold for 'last resort' has already been crossed.**

2. An example for a standard could include a **digital platform public transparency framework**, as proposed in *Achieving Digital Platform Public Transparency*.[2]

3. The Bill also envisages future 'digital platform rules' to be set by ACMA with parliamentary oversight. It would be prudent for parliament to provide an **indication of intent** at the Bill stage, such as a commitment to *public* accountability and *public* transparency, which includes access to platform data to actually permit independent scrutiny. 'Transparency' will not be achieved by platforms simply narrating their policies, and 'risk assessment reports' need data access in order to be verified.

4. **Legislated protections for accredited researchers and research organisations to platform data**, in order to tackle the existing public accountability challenges with the industry code, and insulate public interest research from severe risks.

[2]Reset.Tech Australia 2024 *Achieving digital platform transparency*
https://au.reset.tech/news/achieving-digital-platform-public-transparency-in-australia/

Contents

Introduction

The Australian Code of Practice on Disinformation and Misinformation (the Code) was developed in response to the Australian Government's request for major digital platforms to develop a voluntary code of conduct.

The industry made Code was launched in 2021 by the Digital Industry Group Inc (DIGI), a non-profit industry association composed of and funded by the platforms. The latest iteration of the Code commenced in December 2022, following its first formal review. The Australian Communications and Media Authority (ACMA) has an ongoing oversight role over the Code.

All signatories to the Code commit to:

- Providing safeguards to reduce the risk of harm caused by disinformation and misinformation on digital platforms.
- Releasing annual transparency reports to DIGI. The reports are meant to set out their progress towards achieving the outcomes contained in the Code. The transparency reports use a similar template and are published on the DIGI website.

This document considers two legal questions:[3]

1. Are the contents of transparency reports capable of being misleading or deceptive under the Australian Consumer Law, while still being compliant with the Code?
2. Does the standard of "materially false" in the definitions of a "material breach" of the Code reflect a distortion of the more conventional standard of "materially false or misleading" as appears in legislation such as the *Corporations Act 2001* (Cth)?

Transparency Reports and Material Breaches of the Code

> *"It is arguable that information in a transparency report might satisfy the definition of 'misleading or deceptive' under the ACL, but not constitute a material breach of the Code"*

Representations in transparency reports that induce or are capable of inducing error would satisfy the concept of conduct that is "misleading or deceptive or likely to mislead or deceive" under s 18 of the ACL. While there should be no difference in standards between information that satisfies the concepts of "misleading or deceptive" / "false and deceptive" under the ACL when applied to the concept of "materially false" in the Terms of Reference, it is arguable from the outcome of a complaint made by Reset.Tech Australia about a representation contained in a particular transparency report, that a higher threshold is required to be met in order for false information contained in a transparency report to constitute a material breach of the Code. It follows, that it is arguable that information in a transparency report might satisfy the definition of "misleading or deceptive" under the ACL, but not constitute a material breach of the Code.

[3]Importantly, the legal analysis in this document should not be treated as an assessment of whether the conduct of signatories constitutes a breach of any of the general or specific provisions of the ACL. Rather, it presents an assessment of particular concepts from consumer law and other legislation and the application of those concepts to a voluntary code and the complaints process associated with that code.

Misleading or deceptive under s 18 of the ACL

The Australian Consumer Law (ACL) is a national law set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). The ACL is the principal consumer protection law in Australia and includes general and specific protection provisions. Part 2-1 of Chapter 2 of the ACL contains a general prohibition against misleading or deceptive conduct in trade or commerce (ACL, s 18).

Section 18 of the ACL is in the following terms:

> *18 Misleading or deceptive conduct*
> *(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

It has been observed that the power of s 18 of the ACL is that it does not purport to create liability, rather it establishes a norm of conduct or moral standard which is left to the courts to uphold. A failure to observe that norm of conduct may lead to the recovery of compensation by anyone who suffers loss or damage as a result and injunctive relief is available to restrain conduct that does not live up the standard.

A company will be in breach of s 18 of the ACL if its conduct is "misleading or deceptive". There have been a number of court decisions that have considered the meaning of "misleading or deceptive" conduct. In summary, conduct will be misleading or deceptive <u>if it induces or is capable of inducing error</u>.

In *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2020) 278 FCR 450[4], the Full Court of the Federal Court (Wigney, O'Bryan and Jackson JJ) said at [22]:

> "The central question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error (that is, to form an erroneous assumption or conclusion about some fact or matter)."

See also: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, [39] (French CJ, Crennan, Bell and Keane JJ); *Campbell Backoffice Investments Pty Ltd* (2009) 238 CLR 304 (Campbell Backoffice), [24]-[25] (French CJ); *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 (Campomar), [98]; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 (Parkdale) at 198 (Gibbs CJ).

The words "mislead' or "deceive" have been regarded as tautologous as they can both mean "to lead into error": *Parkdale* at 198; *Australian Competition and Consumer Commission v SMS Global Pty Ltd* [2011] FCA 855, [31]-[32] (Murphy J).

A number of subsidiary principles relating to the central question of whether the conduct in question has a sufficient tendency to lead someone into error include (relevantly):

a. The conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so: *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* [1984] FCA

[4]Most recently cited with approval in *Australian Securities and Investments Commission v Mercer Superannuation (Australia) Limited* [2024] FCA 850, [59] (Horan J).

180. [8]

b. It is not necessary to prove an intention to mislead or deceive: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216, 228 (Stephen J); *Parkdale* at 197

c. It is unnecessary to prove that the relevant conduct actually deceived or misled anyone: *Taco Company of Australia v Taco Bell Pty Ltd* (1982) 43 ALR 1777 (Taco Bell) at 202 (Deane and Fitzgerald JJ); *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 (Google), [6]. The question whether conduct is misleading or deceptive is objective: *Taco Bell* at 202; *Parkdale* at 198.

d. The question of whether conduct is misleading or deceptive is one of fact to be resolved by a consideration of the whole of the impugned conduct in the circumstances in which it occurred: *Campbell Backoffice*, [39].

e. It is not sufficient if the relevant conduct merely causes confusion or wonderment: *Campomar*, [106]; *Google*, [8].

Transparency Reports under the Code

As referred to above, under outcome 7 of the Code, signatories with more than one million monthly active Australian end-users must provide an annual report to DIGI setting out their progress towards achieving the outcomes of the Code. Signatories with fewer Australian users can also elect to provide transparency reports.

Before publication on the DIGI website, transparency reports are reviewed by an independent assessor who fact checks the information provided and makes recommendations. This process is discussed further below. The latest (fourth) set out transparency reports were published in May 2024 and cover the 2023 calendar year. The DIGI website states that "these reports provide new insights into the management and scale of mis- and disinformation in Australia".[5]

Transparency reports are based on the form of a template report in Appendix 2 to the Code. The template provides for (a) a summary of the overall features of the reporting period and analysis of the general environment relevant to dis/misinformation, (b) a summary of the commitments under the Code and the relevant platforms they apply to, (c) reporting against each commitment, including, in summary, information about trends and changes that have been observed, steps taken to further the relevant outcomes and achieve objectives and the outcome of steps taken or changes made and (d) concluding remarks.

In summary, transparency reports are an important public record of the steps taken by signatories to further their commitments under the Code to combat misinformation and disinformation. The reports also provide information and insights into the challenges faced in combatting misinformation and disinformation over time. As stated on the DIGI website: "if we can increase understanding of these complex challenges over time, then industry, government, civil society and academics can all continuously improve their policies and approaches".

Given the function and prescribed content of transparency reports, they are capable of being misleading or deceptive as that expression is understood under s 18 of the ACL if the content induces or is capable of inducing error.

[5]DIGI 2024 *Transparency reports* https://digi.org.au/disinformation-code/transparency/

Analysed simply against the expressed intention of transparency reports, a report that induces or is capable of inducing error could not be compliant with the Code - in particular, if such a report contained erroneous statements about the steps taken by a signatory to combat misinformation and disinformation or information communicated/made available to users. However, that is not where the analysis ends.

Material breach of the Code

The Code also establishes a complaints facility, as well as an independent committee to consider "eligible" Code complaints. Using this facility, members of the public or organisations can lodge complaints through the DIGI website about a breach of the Code by a signatory. The DIGI website states that: "DIGI only accepts complaints from the Australian public where they believe a signatory has *materially* breached the code's commitments" (emphasis added). The reference to a qualitative threshold for the handling of complaints reflects the language used in the Terms of Reference, which explain the types of complaints that DIGI can handle under the complaints facility.

Paragraph (f) of the Glossary to the Terms of Reference defines "eligible complaints" as those comprising complaints made by the public about either (a) a material breach of the Code; and (b) other types of eligible complaints.[6]

A "material breach" of the Code is defined in paragraph (j) and includes (relevantly) where: "a Signatory has, without reasonable excuse, provided materially false information in its transparency report about the measures that it has or will implement to comply with the Code commitments." An example is provided of such a material breach: "For example, a false statement in a transparency report (express or implied) that a policy or product has been implemented in Australia or had particular characteristics would likely be within scope".[7]

Materially false

In circumstances where the Terms of Reference introduce a qualitative threshold that must be met in order for the content of a transparency report to constitute a material breach of the Code (i.e. materially false information), a question arises as to whether the content of a report can be misleading or deceptive as that term is understood under s 18 of the ACL, but nevertheless remain compliant with the Code (or put another way, not be in breach of the Code because the content does not constitute "materially false" information).

The expression "false or misleading" appears in the ACL, including in the specific protections for unfair practices set out in Part 3-1. Section 29 of the ACL prohibits the making of false or misleading representations about goods or services. Section 29(1) sets out a list of instances concerning representations about goods or services, each of which turns on whether or not the relevant representation is "false or misleading".

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[6]Other types of eligible complaints are defined as complaints about a possible breach of the Code that is not a material breach, usually in relation to a signatory's opt-in commitments under the Code: see clause (i) of the Terms of Reference.
[7]Digi 2021 *Terms of reference for Complaints Facility and Complaints Sub-committee* https://digi.org.au/wp-content/uploads/2021/10/DIGI-TOR-for-Complaints-Facility-and-Complaints-Sub-committee-_-ACPDM-_-FINAL-NE-1.pdf p 3.

Although attempts have been made to draw a distinction between that phrase under s 29 of the ACL and the phrase "misleading and deceptive" under s 18 of the ACL, the Courts treat the two as synonymous.

In *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682, Gordon J said at [14]:

> "In relation to the first element, s 53(e) [now s 29(1)(i) of the ACL] requires the representation to be "false or misleading" as opposed to "misleading or deceptive" (in s 52). I was not taken to, and I have not found, any authority which attributes a meaningful difference to this dichotomy for the purposes of the TPA (For a discussion of the phrase "false and misleading under a different Act, see Construction, Forestry, Mining and Energy Union v Hadkiss (2007) 160 FCA 151). Indeed, the vast majority of cases that discuss an alleged breach of s 53(e) couple it with a breach of s 52 and deal with the "false or misleading" and "misleading or deceptive" aspect of the conduct mutatis mutandis: see Foxtel Management Pty Ltd (2005) 214 ALR 554, [94]; ACCC v Target Australia Pty Ltd (2001) ATPR 41-840; ACCC v Harbin Pty Ltd [2008] FCA 1792; ACCC v Prouds Jewellers Pty Ltd [2008] FCAFC 199, [42]."

See also: *Australian Competition and Consumer Commission v Bloomex Pty Ltd* [2024] FCA 243, [83]; *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2023] FCA 1150, [39].

Consistent with the above, the term "false" in s 29 of the ACL has been interpreted by the courts as not necessarily connoting a deliberate untruth. If a representation is simply "contrary to fact" it will come within the words of the section, even if the person making the representation did not know it was untrue: *Given v CV Holland (Holdings) Pty Ltd* (1977) 15 ALR 439, cited with approval in *Aqua-Marine Marketing Pty Ltd v Pacific Reef Fisheries (Australia) Pty Ltd (No 5)* [2012] FCA 908, [78].

The expressions "materially false" or "false in a material particular" are used in provisions (including provisions creating offences or imposing penalties) relating to representations made to others in various different legislation: see for example s 62 of the *Trade Marks Act 1995* (Cth), ss 234, 245, 268BJ etc of the *Migration Act 1958* (Cth), s 263Cof the *Bankruptcy Act 1966* (Cth) and s 1308 of the *Corporations Act 2002* (Cth) (Corporations Act) (concerning the making or authorising of materially false or misleading statements in certain documents required by the Corporations Act to be kept by a company).

There does not appear to be a single definition of the expressions "materially false" or "false in a material particular" as they are used in s 1308(6) of the Corporations Act[8] or elsewhere, in the criminal law, a statement will be considered false or misleading in a *material particular* if it is capable of "being of moment or significance" or influencing the mind of the person to whom it is directed, and is not merely trivial or inconsequential: *R v Clogher* [1999] NCSCCA 397, [17] (citing *R v Maslen and Shaw* (1995) 79 A Crim R 199).

In construing the words "materially false" in the context of the Terms of Reference as a whole, they do not necessarily impose a different or higher standard than the test for misleading or deceptive conduct under s 18 of the ACL. That is so for at least two reasons:

[8]Which was only introduced in February 2020 pursuant to the *Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures) Act 2020* (Cth).

a. First, as referred to above, the notion of information being "false" is synonymous with it being "misleading or deceptive", at least as those terms have been considered and applied in relation to the ACL; and

b. Secondly, to the extent that the word "materially" is understood to mean (in substance) significant and not merely trivial or inconsequential, the meaning of the expression "materially false" in the Terms of Reference is arguably no different to "misleading or deceptive" under s 18 of the ACL in that conduct that causes mere confusion or is trivial or has a transitory effect and as a result conveys no misrepresentation or one that is quickly dispelled has been taken not to infringe s 18 of the ACL: *Taco Bell* at 202; *Campomar*, [106]; *Knight v Beyond Properties Pty Ltd* [2007] FCAFC 170, [58]. In other words, both concepts include a threshold that excludes trivial or transitory conduct that does not induce error.

Meta's 2023 Transparency Report

Reset.Tech Australia made a complaint to DIGI's Independent Complaints Subcommittee about a statement made in Meta's 2023 Transparency Report and raised concerns that the statement had the capacity to mislead the public.

a. Meta asserted in its 2023 Transparency Report that: "Meta applies a warning label to content found to be false by third-party fact-checking organisations" (Statement).

b. Reset.Tech Australia contended that while Meta claims to label all content found to be false by fact-checkers, in reality they only label all posts found to be false by fact-checkers.

c. Reset.Tech had undertaken qualitative survey research that suggested that the public more often understood the Statement to mean all content found to be false was labelled, not all posts.

d. Reset.Tech Australia's complaint was dismissed by the Independent Complaints Subcommittee on 15 April 2024 because it did not provide evidence that the Statement was materially false.[9]

Reset.Tech Australia's complaint was that the Statement suggested that all content found to be false is labelled when in fact only specific items of content or posts found to be false are labelled, and other content or posts that repeat the substance of the false content may not be labelled. On this basis:

e. It is arguable that the Statement induces or is capable of inducing error in conveying that all content containing fact-checked falsehoods is labelled, thereby constituting conduct that is "misleading or deceptive or is likely to mislead or deceive" or is "false and deceptive", as those concepts have been interpreted under the ACL. This is not to say that a cause of action for breach of s 18 or another section of the ACL is available to Rest.Tech Australia, but rather that it is arguable that the conduct in publishing the Statement satisfies the concept of misleading or deceptive conduct under the ACL;

f. It is arguable that the concept of "materially false information" comprising a material breach of the Code under clause (j) of the Terms of Reference, imposes a higher threshold

[9]And not because Meta provided a "reasonable excuse" under clause (j)(iii) of the Terms of Reference or for some other reason (See Digi 2021 *Terms of reference for Complaints Facility and Complaints Sub-committee* https://digi.org.au/wp-content/uploads/2021/10/DIGI-TOR-for-Complaints-Facility-and-Complaints-Sub-committee-_-ACPDM-_-FINAL-NE-1.pdf).

than the concepts of “misleading or deceptive” or “false and deceptive” conduct under the ACL, on the basis that the false aspect of the Statement is more than merely trivial, transitory or unlikely to cause confusion;

g. Having regard to (a) and (b), it is arguable that material in a transparency report that would satisfy the definitions of “misleading or deceptive” or “false and misleading” under the ACL, would not constitute a “material breach” of the Code.

Independent Review Process & Complaints Model

Independent Review Process

Transparency reports are viewed by an independent assessor before they are published. The role of the independent assessor is to verify claims made in each signatory’s transparency report and to make recommendations to signatories about best-practice reporting. If an independent assessor is unable to verify a claim, he or she is required to advise the Administration Sub-committee, and the signatory must either amend and resubmit the report to the reviewer for further assessment or provide written reasons as to why they dispute the reviewer’s assessment (which would be published with their transparency reports on the DIGI website).

ACMA expressed in its second report to government in July 2023 (ACMA Report)[10] that the role of the independent assessor is important in improving the quality of the signatory’s transparency reports over time. We agree with the sentiment expressed in the ACMA Report that the process engaged in by independent assessors in considering the adequacy of transparency reports should itself be completely transparent in order to:

a. Ensure public confidence in the process, including by exposing the information available to independent assessors as part of their review of claims made in reports and any limitations on access to information or the ability of an assessor to properly scrutinise a claim; and

b. Inform and assist signatories in preparing transparency reports, including by ensuring uniformity in the form and substance of reports.

It appears that the scope of the independent assessor’s role is limited to confirming certain publicly verifiable claims made by signatories in their transparency reports and that the role of the independent assessor is not to evaluate the quality of a report or compliance with the Code.

If that is correct, these matters would appear to substantially restrict the effective functioning of the independent assessor in scrutinising the accuracy of claims made by signatories in their transparency reports. It is also difficult to see how this limited role can meaningfully incentivise best practice and compliance in reporting. Independent reviewers should have access to the underlying data relied upon by signatories in support of claims made in transparency reports (beyond that which can be publicly verified) and the ability to meaningfully critique the adequacy/quality of reports in accordance with the relevant reporting guidelines.

[10]ACMA 2023 *Digital platforms’ efforts under the Australian Code of Practice on Disinformation and Misinformation Second report to government*
https://www.acma.gov.au/sites/default/files/2023-07/Digital%20platforms%20efforts%20under%20Code%20of%20Practice%20on%20Disinformation%20and%20Misinformation.pdf

Complaints Model

The ACMA Report noted the low volume of complaints and enquiries that had been made under the complaints mechanism in the relevant reporting period. It recorded that the low volume and nature of complaints raised questions "about public awareness of the availability or scope of the complaints facility and the effectiveness of the code complaints mechanism".[11]

While public awareness (of lack of) may be a relevant factor in the low number of complaints made, it does appear that potential complainants are likely to be put off or hindered in engaging with the complaints mechanism in circumstances where:

a. *Firstly*, potential complainants can only complain about the adequacy of a signatory's compliance with the Code based on matters that are publicly available/verifiable or based on their own data or research (for example the polling and other research conducted by Reset.Tech Australia in respect of its complaint about Meta's transparency report);

b. Given the relatively high level information that is required to be set out in a transparency report (based on the template appended to the Code) and the lack of access by the independent assessor to data that is not publicly verifiable, it appears to me that there may be insufficient transparency for a potential complainant to properly articulate a complaint and/or test any response to a complaint from the relevant signatory;

c. While the Terms of Reference provide the complaints sub-committee with powers to request information and documents from relevant signatories, a complaint will only get to that stage in circumstances where a complainant has articulated an "eligible complaint" about a material breach of the Code or other type of eligible complaint. If there is not complete transparency and a potential complainant does not have appropriate access to underlying data, they are unlikely to be able to articulate an eligible complaint for consideration by the sub-committee;

d. The position in Australia in terms of access to relevant data appears to stand in stark contrast to the position in the EU where the Digital Services Act, which commenced on 17 February 2024, introduced a transparency regime that provides public interest researchers with a legal framework to access and study internal data held by major tech platforms.

e. Providing access to the data of large online platforms in this way would create transparency, meaningfully incentivise best practice and compliance with the Code by signatories, and permit researchers and other members of the public to properly scrutinise compliance with the Code and articulate complaints based on material underlying information and representations contained in transparency reports.

f. *Secondly*, the first hurdle for complainants is an assessment by DIGI as to whether the complaint is an "eligible complaint" or an "ineligible complaint".[12] As referred to above,

[11]ACMA 2023 *Digital platforms' efforts under the Australian Code of Practice on Disinformation and Misinformation Second report to government*
https://www.acma.gov.au/sites/default/files/2023-07/Digital%20platforms%20efforts%20under%20Code%20of%20Practice%20on%20Disinformation%20and%20Misinformation.pdf, pg 19.
[12]Digi 2021 *Terms of reference for Complaints Facility and Complaints Sub-committee*
https://digi.org.au/wp-content/uploads/2021/10/DIGI-TOR-for-Complaints-Facility-and-Complaints-Sub-committee-_-ACPDM-_-FINAL-NE-1.pdf, Clause D.13, pg 6.

an “eligible complaint” is a complaint about a “material breach of the Code” or “other types of eligible complaints”. To the extent that a complaint relates to the accuracy of representations in a transparency report, it is likely to be considered as a complaint about a “material breach”.

g. A complaint can therefore fall at the first hurdle by being assessed by DIGI as an in-eligible complaint (a complaint that does not meet the criteria for eligible complaints) including by DIGI determining that a signatory has not provided “materially false information” in its transparency report.

h. This is not only a potential disincentive to would-be complainants who have limited access to information and data about representations contained in transparency reports, but also places a burden on complainants to satisfy the “materially false” threshold which, for the reasons developed above, arguably imposes a higher threshold of accuracy than the standard required to be adhered to by signatories when composing transparency reports.

Conclusion and Recommendations

These challenges and issues suggest the need for amendments to the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill*. Specifically:

1. **ACMA should be immediately empowered to bypass industry codes and set a standard**. The Bill anticipates as a primary route that the ACMA supervises an industry codemaking process. The industry Code is broken and failing, and this will replicate the mistakes of the past. Put simply, industry has had several years to get the codemaking right and have failed, despite persistent feedback from both ACMA and civil society. **The Bill currently considers standards as a ‘last resort’, but it is evident that the threshold for ‘last resorts’ has already been crossed.**

2. An example for a standard could include a digital platform public transparency framework, as proposed in *Achieving Digital Platform Public Transparency*.[13]

3. The Bill also envisages future digital platform rules to be set by ACMA with parliamentary oversight. It would be prudent for parliament to provide an indication of intent at the Bill stage, such as a commitment to *public* accountability and *public* transparency, which includes the provision of platform data to actually permit independent scrutiny. ‘Transparency’ will not be achieved by platforms simply narrating their policies, and ‘risk assessment reports’ need data access in order to be verified.

4. **Legislated protections for accredited researchers and research organisations to access platform data**, in order to tackle the existing public accountability challenges with the industry code.

[13]Reset.Tech Australia 2024 *Achieving digital platform transparency*
https://au.reset.tech/news/achieving-digital-platform-public-transparency-in-australia/