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TRANSCRIPT OF PROCEEDINGS

No. 2024/3798

ADMINISTRATIVE APPEALS TRIBUNAL

SENIOR MEMBER POLJAK

No. 3798 of 2024

CELINE GILLIAN BAUMGARTEN

and

ESAFETY COMMISSIONER

SYDNEY REGISTRY

10.09 AM WEDNESDAY 14 AUGUST 2024

MR D HELVADJIAN appears for the Applicant
MR J MOLONEY appears for the Respondent

SENIOR MEMBER: Good morning, parties. I can see you on my screen now. I apologise if I don't pronounce names correctly from outset, but I'll give it ago. It's Mr - - -

MR D HELVADJIAN: Helvadjian. Yes, Senior Member. I apologise for having a difficult surname.

SENIOR MEMBER: No, that's all right, have trouble with mine as well. You're appearing for the applicant today, and I can see the applicant on the call as well, and I've also got Mr Moloney, counsel appearing for the respondent. I can see you as well.

MR J MOLONEY: Yes. Thank you, Senior Member.

SENIOR MEMBER: I'll just let you know, we have quite a large number of people waiting in the lobby to attend today, so I think what we're going to do is we'll probably just let them in now. My associate is just going to make sure that they turn their cameras and microphones off and then we'll go from there.

UNIDENTIFIED SPEAKER: Thank you.

SENIOR MEMBER: All right. It's gone quiet now. I can still see that some people have their cameras on. Can you please turn them off unless your counsel appearing. Thank you. All right. Look, today was listed just to deal with the summons issue because initially there was a fair bit of dispute amongst the parties about the nature and the relevance of the documents that were being sought. So I thought it was appropriate for us to come together and talk about that issue first, but it now looks like another, sort of, concern has been raised by you, Mr Moloney, saying that the tribunal doesn't even have the power to even issue the summons at this stage until, obviously, the tribunal finds it has jurisdiction and then we go from there.

I still think it's best that we just focus on the summons issue first, and I'll try and get a decision out on that issue very promptly. Probably not today because I need to reconsider this because I don't think it's every been properly looked at, but I'm going to obviously be prompt about it so probably by next week. And then we can go from there depending on what that decision is, whether the summons are issued and we need time to look at the documents and then list for the jurisdiction, or whether we just go straight ahead and list the jurisdiction after that. All right.

MR MOLONEY: Yes.

SENIOR MEMBER: But I might hear from you first, Mr - - -

MR HELVADJIAN: Mr Helvadjian, yes.

SENIOR MEMBER: Yes.

MR HELVADJIAN: Thank you, Senior Member. As you've already mentioned, this is listed for the summons. There were actually two requests to issue summons. I don't press the one to the Department of Education Victoria though, so there is only one that is really relevant for today, and that's the one to the eSafety Commissioner. Can I just check first you have two authorities that, I think, were sent up by the parties that might be referred to today? One is *Telstra v Kotevski*, and the other is *LQTF and NDIA*.

SENIOR MEMBER: I've got the NDIA one. I don't have the Telstra one. It probably just - - -

MR HELVADJIAN: Okay.

SENIOR MEMBER: - - - through to registry and sometimes takes a little while for it to get to me.

MR HELVADJIAN: Yes, that's okay.

SENIOR MEMBER: If you give me the citation quickly, I can write it down and I - - -

MR HELVADJIAN: Yes. It's 2013.

SENIOR MEMBER: Yes.

MR HELVADJIAN: 209 FCR.

SENIOR MEMBER: Yes.

MR HELVADJIAN: And then it's, excuse me, 558.

SENIOR MEMBER: Eight.

MR HELVADJIAN: I may not need to go to it based on what's just fallen from you, Senior Member, but I just wanted to know whether or not they were in front of you.

SENIOR MEMBER: Yes.

MR HELVADJIAN: And can I then also check you have the summons to produce documents that was for the eSafety Commissioner. Excellent.

SENIOR MEMBER: Yes.

MR HELVADJIAN: We say this summons is necessary principally for the jurisdictional issue. It is also necessary for the application, but when the jurisdictional issue was raised, this summons was drafted to assist the tribunal, and therefore the relevance arises from the fact that the jurisdictional issue has arisen. And as I understand the jurisdictional issue, it's that there was no reviewable decision made. What isn't in dispute is a complaint was made to the eSafety Commissioner, and it also isn't in dispute that communication went from the eSafety Commissioner to X Corp, and that was related to the tweet by Ms Baumgarten who's the applicant.

What else isn't in dispute, as I understand it, is the applicant then received a notice from X Corp saying that they'd received a request from the eSafety Commissioner, and that the tweet violated the laws of Australia, and therefore they were geo-blocking the tweet in Australia. That's what isn't in dispute, and I think the area of dispute, with respect to the jurisdictional issue, is what is the nature of the decision made and the communication by the eSafety Commissioner. My submission is these documents sought are directly to that question and are relevant. I was proposing to take you through each category if that works well? Okay. So if I can just - - -

SENIOR MEMBER: Yes. No, of course. It's once I've determined that whether or not if the tribunal can issue summons at this stage of proceedings then, of course, I need to then get into the summons request and actually look at - - -

MR HELVADJIAN: Right. Then maybe on that point I might refer first then to the AAT Act. Section 40A is the power to issue summons, as I'm sure you'll be well aware, and subsection (1) starts with, 'For the purposes of a proceeding, the tribunal may issue a summons'. My submission then on that point is this: an application has been made – a proper application has been made. That enlivens the definition of proceeding in section 3 of the Act, therefore the - - -

SENIOR MEMBER: Is that (audio malfunction) (h)?

MR HELVADJIAN: Sorry, didn't hear that.

SENIOR MEMBER: You're relying on 3(h) as (audio malfunction) proceedings. Is that what you're - - -

MR HELVADJIAN: No, no, no. I'm relying on 3(a) 'an application to the tribunal for review of a decision'.

SENIOR MEMBER: All right.

MR HELVADJIAN: Senior Member, you're absolutely correct there is (h) 'an incidental application'. There is an interesting argument which is

whether or not because the jurisdictional issue has been raised, whether there is now an incidental application, but for the purposes of my submission, I rely on both in the sense that there's an application to review a decision, and whilst a jurisdictional point has been raised, that might give rise to subsection (h). But I still maintain a proper application has been made. If the jurisdictional issue – for example, the Telstra case that I've recently referred to, in that case, Telstra raised a jurisdictional issue at the hearing and that - - -

SENIOR MEMBER: (Audio malfunction.)

MR HELVADJIAN: Sorry, you just cut out.

SENIOR MEMBER: I'm just saying that has happened sometimes where there are some (audio malfunction) that later was - - -

MR HELVADJIAN: Yes. Yes.

SENIOR MEMBER: Yes.

MR HELVADJIAN: And that hasn't happened here, so we've kind of been moving along the path that an application has been lodged. We had a potential timetable for hearing. We're now diverted slightly by a jurisdictional issue that's been raised earlier. In my submission, that doesn't actually change what's actually transpiring, which is a proper application has been made, and a request to issue a summons has been made based on that proceeding. I actually, in my respectful submission, I don't think the tribunal should be diverted from the traditional understanding of what has taken place just because a jurisdictional issue has been raised outside the actual hearing if that makes sense.

I was proposing to go to the grounds, but really in my submission that's all I feel needs to be said with respect to issue the summons. The power's quite clear. Clearly, it's a discretion. The authorities say that the same considerations apply which is legitimate forensic purpose. I was proposing to take you, Senior Member, through the categories to establish that, but it might be more appropriate for Mr Moloney just to share his views on the power point, and then I can say something in reply.

SENIOR MEMBER: Yes. I think that might be best. Mr Moloney, obviously, because you're the one that's raised the point that the summons can't be issued at this stage, what do you say about it?

MR MOLONEY: Your Honour will have seen that in submissions to the tribunal or in correspondence, I should say, with the tribunal leading up to today, we've made reference to two paragraphs of a decision Deputy President Forgie, and that's the decision of LQTF which is 2019

AATA 631, and my learned friend's referred, I think, to that. At paragraph 7 and 8 of that decision, the Deputy President deals with, in effect, this issue, and so I perhaps don't need to go to those paragraphs or to recite them, but in effect what's said is in circumstances where there is no application that's properly been made to the tribunal, there's no power including under section 48 to issue summons to a person to appear before the tribunal to produce documents, because that power is given to the tribunal for the purposes of a proceeding.

But they're not being a proceeding, there can also not be an incidental application because no principal proceeding has been advanced to which that application is incidental. The Deputy President gives the example of, you know, orders for confidentiality, for example, that might be made in the context of an application for review of a decision. Here, there's just not a decision application review of which is sought.

SENIOR MEMBER: But (audio malfunction) that there's no jurisdiction. Obviously, these summons have been sought for the hearing on the jurisdiction question. I can understand the position that you're putting forward - - -

MR MOLONEY: Yes.

SENIOR MEMBER: - - - but in my mind it sounds to me that that's pre-empting that it's not a valid application so there's no power.

MR MOLONEY: Well, I think that's – with respect, I understand the point, and I think that's probably why it might assist for me to preset the position to the tribunal by reference to background facts in the tender bundle, and relevant sections of the AAT Act, and the Online Safety Act. And on the basis of those, I think it can be demonstrated both that there's no decision in this case such that the jurisdiction of the tribunal doesn't arise, but also that even if it does arise, that there's no relevance for – to put it differently, that the proceedings couldn't be meaningfully advanced by the provision of information pursuant to the summons as being issued.

Can I just, perhaps, identify some key aspects of the tender bundle and of the Act in that regard. Obviously, the applicant purports to seek a review of a decision to issue a removal notice which she says is presumably made under section 88 of the Online Safety Act, but the Act provides for the removal notice to be issued to a social media service provider requiring it to take all reasonable steps to remove from its service material, the subject of that notice, and to do so either within 24 hours or longer if provided. Now, the commissioner's power – and we've, I think, made this clear in submissions in response to the application itself, the commissioner's power to issue a removal notice is conditioned by what I've described as jurisdictional facts.

And, relevantly, those are that the commission has to be satisfied that the material was cyber abuse material targeted at an Australian adult, and that it was the subject of a complaint made by the relevant person to the service provider, that the provider hasn't removed it within 48 hours or longer if provided for by the commissioner, and that a complaint was made to the commissioner under section 36 about the material. And if those conditions are met, then the commissioner, of course, has the discretion to issue a removal notice. That removal notice is described as requiring the provider to – and this is at 88(1)(f) of the Online Safety Act, 'take all reasonable steps to ensure the removal of the material from the service', and 88(1)(g) do so within, in short, a prescribed time period.

The next question, I guess, is was the commissioner satisfied in this case that cyber abuse material was produced targeting an Australian adult, and the clear answer to that is, no. In order to be satisfied, the commissioner has to be satisfied, relevantly, and I'm referring here to section 7(1)(b) and (c) of the Online Safety Act, that the material is material that 'an ordinary reasonable person would conclude it's likely was intended to have an effect causing serious harm' to the person who is targeted, and then would also 'regard as being, in all the circumstances, menacing, harassing or offensive'.

Now, I apologise because the format of the pagination's a bit difficult here, but it must be that – well, on page 55 of the materials and following, there are screen shots from the platform used by the Office of the eSafety Commissioner concerning the views that they formed in the material that's the subject of this application, and relevantly, Senior Member, you'll see there the view that there is nothing abusive or threatening within the material which would suggest an intention to cause serious physical or psychological harm to the complainant. The officer goes on to say, 'Defamatory material including statements about a person's history, or criminal history, or character et cetera, is not enough to be considered serious harm'.

The evident view of the office was that this did not meet an essential pre-condition for issuing a removal notice and consistent with that view, the correspondence between the commissioner and X, which appears at page 45 of the respondent's tender bundle which, if you like, is at the centre of this proceeding, has none of the characteristics stipulated by the Online Safety Act for a removal notice. It notes that a complaint was made. It doesn't require X to remove the post. It doesn't indicate that the commissioner is satisfied that the post is cyber abuse material under the Act. It doesn't give X a date by which the post must be removed.

It just points to X's own terms of service and suggests that the material might violate those, and the only thing it asks of X is that they confirm receipt of the correspondence, and that they advise the commissioner if any action is taken. No decision has therefore been made to issue a removal notice. Section 220 of the Online Safety Act which permits decisions of that kind to

be reviewed the AAT therefore isn't engaged. That being so, the respondent respectfully contends that the tribunal doesn't have the power in this instance to issue a summons. The relevant power is provided for the purposes of a proceeding in the language of section 40A of the AAT Act.

SENIOR MEMBER: Sorry to interrupt you. Just for my own understanding, when you notified X of the complaint, is there a requirement for the eSafety Commissioner to do that?

MR MOLONEY: I don't think there is a requirement for the eSafety Commissioner to do that that's provided for expressly in the Online Safety Act, rather - - -

SENIOR MEMBER: It was on their own - - -

MR MOLONEY: - - - the practice of doing so is, from the commissioner's perspective, acting within the purposes of the Act to protect, and improve, and promote the online safety of Australians which is the statutory purpose, of course, the purpose of the office's establishment. In this instance, the commissioner, having received a complaint, notified X, suggested that they appraise their own terms of service, but otherwise left it entirely, of course, up to them to determine if and how they responded to that correspondence.

I should say – perhaps I can also say this: it seems to be the case the applicant's request and what motivates, perhaps, both this application or purported application and the summons – or now I think we're just dealing with the one summons, it seems to be about uncovering what she, or perhaps the Free Speech Union see as a practice of, quote, issuing informal notices, and the contention or implication is that that's beyond the power of the commissioner. Now, of course, for the reasons I've just set out, namely because this was nothing more than the commissioner acting within the purposes of the Act, that's resisted by the respondent.

But even if the applicant did have some basis to complain about that practice, that complaint would seem to have to be grounded in an argument about what the commissioner had the statutory power to do. That is – and it would seem to need to take the form of an application for judicial review of that action. It's not, in my respectful submission, a question to be resolved by this tribunal in a merits review proceeding because there's no decision the merits of which could be reviewed here. It's not at all clear how the tribunal could, looking at the facts that I've just summarised, put itself in the shoes of the commissioner and make the correct and preferable decision.

The material sought isn't relevant, in my submission, to the jurisdiction question, but that aside, the same facts that I've set out, quite apart from going to the issue of jurisdiction, establish that really the matter of jurisdiction is put beyond doubt by the material in the tender bundle, such

that there's nothing in the information sought on the summons by the applicant which could realistically, again, say that position.

SENIOR MEMBER: Just to ventilate some of my concerns, sometimes we do have very complex questions of jurisdiction in the tribunal which the tribunal does then case manage, have telephone directions hearing about, issue directions of filing of submissions, those, sort of, steps leading up to the hearing on the question of jurisdiction. Wouldn't a request for material, in this case it's more of a summons, in preparation for that jurisdictional question, wouldn't that be within the bounds of the power of the tribunal?

MR MOLONEY: Well, it's not – I think probably on the view of LQTF, it's not within the power in terms of the application of 40A.

SENIOR MEMBER: Well, I'm not bound by that decision.

MR MOLONEY: No. Yes, I appreciate that. I think the respondent's position is that that is the reasoning of Deputy President Forgie, and that decision is correct. And whilst, Senior Member, you're, of course, not bound by that, the same logic applies here, namely in the absence of an anterior decision that the tribunal has jurisdiction to hear this matter, that the power to issue a summons doesn't arise, there might be – and I haven't – I mean, I don't think that – I appreciate the tribunal has broad case management powers and that, you know, having regard to the fundamental purposes of the tribunal, it's designed to have a degree of flexibility, and so I wouldn't press an overly technical argument in that respect.

But I do think that the primary issue here is that there's no decision, and therefore there's no prospect of the matter proceeding to have merits review by the tribunal. Now, it may not be ultimately necessary for the tribunal, I suppose, to determine that question of whether, in the circumstances of this case, it has the power to issue the summons in circumstances where it concludes that issuing the summons is unnecessary because the documents sought under the summons are not relevant to the determination of the jurisdictional question.

SENIOR MEMBER: Sure.

MR MOLONEY: That may be, if you like, a shortcut through but I don't know to what extent that assuages your concern, Senior Member.

SENIOR MEMBER: All right. Look, what I might do is I might hear from Mr Helvadjian again about this point, and then he can – we can then start looking at the nature and relevance of the actual documents in the request.

MR HELVADJIAN: Thank you. The first thing I want to say is there's really two reasons why I oppose my friend's submissions, and I'm in a

difficult position in this respect. My instructions are we've been provided a document by X late yesterday that reveals that an online form was used by the eSafety Commissioner which referenced section 7 of the Online Safety Act. Now, I raise that on this point, and I believe my friend said there would have to be a decision made that section 7 was engaged, we didn't prepare an evidence bundle for this hearing, and I don't wish to take the tribunal or my friend by surprise, and I'm sorry that I'm raising this.

My point is this: I believe we may establish through provenance of documents and evidence that actually a decision was made, but we have not come today to meet that case because we were told it was with respect to the summons. Now, I did read my friend's submissions, and I understand their position. I'm not looking for any sympathy in that regard. What I'm simply saying is it's a live issue as to whether or not a decision was made under the Act, and that is the very reason why the summons is required, and the documents are relevant.

My submission would be it's not appropriate for a respondent – and I don't say that my friend has done anything inappropriate, what I mean is, it's not appropriate for a respondent to raise a jurisdictional issue after an application has been lodged to simply avoid any further process of that application which is, in effect, what would happen here. We say we need the documents sought in the summons, and they say there is no power. Well, that is very convenient for a respondent in many cases, and so my point is simply the jurisdictional question should be ventilated in a separate hearing with proper evidence after the summons has been issued.

The second thing is, the real question here and, Senior Member, you will know this well, it's not about the form of any decision made, it's whether a decision was made in substance. I began by explaining what isn't in dispute. We know a communication was made to X, for example. We know a complaint was received by the eSafety Commissioner. Communication was made, that tweet was geo-blocked. My submission will be at any jurisdictional hearing, the authorities are simply that if a decision has been made in substance, then it's reviewable.

It is a reviewable decision, and so whilst the summons absolutely assists with that task on the jurisdictional question, my submission is that actual decision is for another day, and the summons is therefore relevant to that other hearing.

SENIOR MEMBER: All right. Well, do you want to take me to the summons now and the actual format of the documents.

MR HELVADJIAN: Yes.

SENIOR MEMBER: Because I think I saw in correspondence from the respondent that they're saying that some of this has already been produced.

MR HELVADJIAN: Well – yes, sorry.

SENIOR MEMBER: No, so I just think we need to look at it one by one and see - - -

MR HELVADJIAN: No, no, I'm very happy to do that. I'll just say two things about that. If there's nothing to produce then, then that's an easy answer to a category, but secondly, can I just put on the record, my friend took you to LQTF. I just want to also note, paragraph 5 starts by saying it's imperative that the tribunal determine if there's jurisdiction. And so there is actually, in situations like this – and I don't say you are bound by that case, but there are situations where processes have to be put in place where jurisdiction is determined. That's just what I wanted to add, and that's in paragraph 5. Can I take you to category 1.

SENIOR MEMBER: Yes.

MR HELVADJIAN: This category seeks all correspondence with the complainant who made the complaint against Ms Baumgarten under Section 36. Now, the relevance of this is this: without repeating myself, if a complaint is made to the eSafety Commissioner, which it was, pursuant to section 36(2), then if we take section 88 by way of example, if the eSafety Commissioner does not decide or refuses to give a removal notice, then they have to communicate that refusal to the complainant.

And so if there is an absence of communication from the eSafety Commissioner to the complainant complying with the Act, then that is an indicia that in substance a removal notice decision was made because otherwise they haven't complied with the Act in circumstances where they didn't decide to give a removal notice. My respectful submission is that goes directly to the jurisdictional point.

SENIOR MEMBER: What section? Did you say 180?

MR HELVADJIAN: No, no, no. Sorry. If we take section 88, if we say, which is what I think the battleground is in some respects, it hasn't been confirmed, but there's – Senior Member, the Online Safety Act has a number of sections that give rise to a power depending on the type of material that's been complained against. Section 88 is the power for cyber abuse material. Yes, it's under section 88, and it's subsection (3). If the commissioner decides to refuse to give a removal notice, under subsection (1) the commissioner must give written notice of the refusal to the person who made the complaint.

The second category is similar, but it refers to internal correspondence. Again, whether or not a formal notice was given in substance will be based on the directives and directions internally within the eSafety Commissioner. It's, again, clearly relevant to jurisdiction, but it's also relevant to the merit's review of the decision so that we can look at the internal correspondence, with respect to the decision making process to actually test the level of satisfaction. Category 3 is, again, going directly to whether it was a decision in substance. The submissions made by the Free Speech Union highlight the importance of this point in this regard, and my friend has alluded to it.

I don't wish to go down the path of the informal notice regime discussion, but I don't believe it's relevant today, but it's only relevant in this sense: again, determining whether or not a decision's been made in substance will be assisted by material that identifies an informal process within the eSafety Commissioner. If that material highlights a common practice of informal notices, to some respect, and again it's my case to some respect, Senior Member, you might find that that material enables you to find that there is a jurisdictional issue.

Now, my submission would be that that doesn't change whether or not a decision was made in substance, and whether or not there's a separate judicial review conversation separately. That's to one side, but my point is whether there is an internal policy framework as to informal notices, then that will directly assist what was in substance taking place with respect to this complaint. Category 4, now this is all records completing the legal request form on X's website. I've already alluded to a form that was made on X's website, but what this will help us identify, again, is what was actually communicated to X.

There is still some lack of clarity, with respect, as to the communications to X, and therefore the substance of what was communicated. Now, I believe my learned friend has put in submissions, or in some correspondence, sorry, that this category is oppressive. If I can somewhat sneakily head off a comment by my friend that it is oppressive, I would say this: we haven't seen any evidence as to oppressiveness. My instructions are this would probably equate to somewhere in the region of 10 or so requests and associated documents.

My submission would be that clearly there's no evidence as to oppressiveness, but it clearly couldn't go to the level of oppressiveness that the authorities consider which is – I've read discovery cases, for example, where they talk to three to four months of work compiling documents. So that's my - - -

SENIOR MEMBER: Yes. Are you seeking all requests generally to X just in relation to the applicant's case?

MR HELVADJIAN: You raise a very good point, Senior Member. The summons seeks all requests, and I anticipate and appreciate your question. My submission is the tribunal will be assisted by looking at these requests in toto because, again, it will reveal whether or not there are informal notices which would be against me, potentially, on the jurisdictional question, or whether or not in substances there are decisions being made. I can't put my submission any higher than that, but I take your question.

SENIOR MEMBER: Okay.

MR HELVADJIAN: I take the point. Five is the same as four but on the reverse, in some respects. It's a complete copy of the forms used to make requests of X. This could well be the same as four in some respects, but we're unsure. There's a level of uncertainty. The legitimate forensic purpose arises because we, or the tribunal will be assisted in my submission, from seeing the process of providing communication to X, and whether or that had the indicia of a decision, whether it has the indicia in substance of a removal notice, and whether it has, in all circumstances, the effect of a removal notice under the Act.

Lastly, six is any correspondence with X. There is – well, I withdraw that. My submission with respect to six is there have been documents already been provided according to the eSafety Commissioner. If that's the case, then there would be be nothing to produce, but my petition is these documents will assist in determining how the eSafety Commissioner makes a request to X, and that will have a direct bearing on in substance what the communication to X was in this case. Lastly, seven is related to category 3. Perhaps, I repeat the same submission in this regard.

If there is an internal policy and process with respect to informal notices, then that will directly go to the jurisdictional issue. It will not only be indicia with respect to what in substances takes place when these notices are sent out, but it will also assist the tribunal in determining whether or not there's a reviewable decision. And lastly, category 8. My submission with category 8 is this is simply to assist the tribunal with the provenance of documents. If other categories are relevant, then there's no reason why category 8 wouldn't be relevant. It simply seeks the metadata to enable us to prove the documents are legitimate.

Now, there might be other ways to do that but, again, my submission is it's relevant on the basis of the other categories.

SENIOR MEMBER: Right. Okay. Mr Moloney, what do you say about these categories?

MR MOLONEY: Thank you, Senior Member. Can I just firstly – I'll come to them as quickly as I can, I just want to make one point about something

my learned friend said about – which I think was an oblique reference to the decision to which he drew the tribunal's attention a moment ago, which is *Telstra v Kotevski*. Now, we're not in a situation where a decision has, in fact, been made and the question is whether it was lawfully made.

Of course, I accept that in those circumstances the fact that a decision might be affected by jurisdictional error shouldn't preclude the tribunal from assessing the merits of that decision, but here there's just no decision.

Whether there was some other action taken by the commissioner's office, plainly there was, whether that is within power, as I've said, is not a question that can be – with respect, that should be imposed on this tribunal to resolve. But in any event, going to the categories of the summons that remains in issue, as to the first category, the complaint's already been produced in the material. The actions taken – the written records of actions taken in response to that complaint have been produced.

What's decisively relevant here, in my respectful submission, is the nature of the communication with X by the Commissioner, and to the extent that it puts the matter beyond doubt, the office has recorded views about the complaint proceeding that correspondence with X, which make it very clear that they didn't think that this complaint satisfied the pre-conditions for the issuance of a removal notice. I can't see, with respect, that the matter would be usefully advanced by the provision of any other material which may or may not exist in relation to – I mean, I don't know, with respect, what further action needs to be brought before the tribunal for scrutiny.

On the second category, the complete internal correspondence concerning the notice, I've just indicated that the Commissioner's assessment of the complaint has already been provided. Their views as to whether the complaint met the conditions for a removal notice, their unmistakeable position in that material is that they don't think it did and so haven't issued a removal notice. The issuance of a summons to scrutinise any further material in my submission would be fruitless, and wouldn't in any event gain, say, what's already been provided in the tender bundle.

And this isn't, of course, an opportunity for the applicant, in service of a broader agenda of questioning the so-called policy of issuing informal notices, to engage in a fishing expedition or to issue notices on the basis of speculation. On the third point, whether or not there's a policy of issuing informal notices, again, is not something that could be usefully gleaned from any one document or other and precisely what the applicant seeks here isn't clear. Of course, reasonable minds can differ as to whether there's a practice or not, but even if there is, that doesn't bear on whether a decision was made which is reviewable by the tribunal.

It just wasn't in this case, and I think the submission from the applicant that there might be, in reality or in substance, a removal notice, with respect, is conceived given what appears in the tender bundle. There was a decision to communicate, not a removal notice. In fact, there was a view reached that the conditions for the issuance of a removal notice weren't met. On to category 4, again, I don't see what other complaints might reveal that isn't already made clear about the nature and substance of this complaint and what followed from it.

The question really is what happened when the form was used, in this case by the commissioner on X's website, and did what happen constitute the issuance of a removal notice, and to the extent that that question needs to be determined, it can be readily determined based on what's already in the materials.

On to the category 5, I think the form that's used to make complaints of X is a digital form that, as I understand it, one accesses in the course of making a complaint. It's not properly regarded as being in the possession of the commissioner, but in any event, can be easily obtained by the applicant if they wish, I would think by making, if you like, a dummy complaint or commencing the process of making a complaint to see what forms are being used.

If that is intended to refer to an original version of the correspondence actually provided to X, well that, in my submission, is already in the tender bundle. Again, in response to points 6 and 7, 'correspondence with X concerning the proper use of the form or internal guidance as to the proper use of the form', the question here is how was the form used in this particular case, and did it constitute the issuance of a removal notice? And the unmistakable answer based on what's before the tribunal is, no. I'm not sure what could be gained from, again, a speculative request for extraneous material, and I'd say the same in relation to point 8.

SENIOR MEMBER: Was there anything else?

MR MOLONEY: Not unless I can assist you further, Senior Member.

SENIOR MEMBER: That's all right. Was there anything arising from that, Mr Helvadjian, that you wanted to add before we end today?

MR HELVADJIAN: No, Senior Member. No, thank you.

SENIOR MEMBER: All right. Look, as I already stated, I'm going to deal with this as promptly as I can, and then once that decision is made, then we'll look at case managing the jurisdictional question as soon as possible. All right. But I thank you both for your submissions today, and you'll hear from the tribunal shortly.

MEMBER: Thank you, Senior Member.

5 **MATTER ADJOURNED** **[10.53 PM]**