ADMINISTRATIVE REVIEW TRIBUNAL 2024/3798
GUIDANCE AND APPEALS PANEL
MELBOURNE REGISTRY

Celine Baumgarten
Applicant

eSafety Commissioner
Respondent

APPLICANT'S SUBMISSIONS FOR HEARING ON 13 DECEMBER 2024

1. These are the applicant's submissions for the hearing before the Guidance and Review Panel on 13 December 2024. They are structured as follows:

   (a) The history of this proceeding is reviewed, alongside the provisions of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) and *Administrative Review Tribunal Act 2024* (Cth) (**ART Act**) which the Tribunal must apply to resolve the "jurisdictional question."

   (b) The evidence is summarised, including new evidence obtained under the *Freedom of Information Act 1986* (Cth) (**FOI Act**) which the applicant submits is relevant to the jurisdictional question and ought to have been included in the tender bundle.

   (c) The respondent's statutory powers are analysed, with a view to establishing that the ART Act and *Online Safety Act 2021* (**OSA**), properly construed, authorise the Tribunal to review the respondent's decision to seek removal of the applicant's post informally, when the conditions for issuing a removal notice under s 88 of the OSA were not satisfied.

The proceeding before the Tribunal

Commencement of AAT proceeding

2. On 7 June 2024, this proceeding was commenced in the Administrative Appeals Tribunal (**AAT**). Section 25(1) of the AAT Act provided:

> **25 Tribunal may review certain decisions**
>
> *Enactment may provide for applications for review of decisions*
>
> (1) An enactment may provide that applications may be made to the Tribunal:
>
> (a) for review of decisions made in the exercise of powers conferred by that enactment …
>
> …
>
> (3) Where an enactment makes provision in accordance with subsection (1) … that enactment:
>
> (a) shall specify the person or persons to whose decisions the provision applies;
>
> (b) may be expressed to apply to all decisions of a person, or to a class of such decisions; and
>
> (c) may specify conditions subject to which applications may be made.

3. It is well established that on the proper construction of s 25 of the AAT Act, the Tribunal may review a decision in *purported* exercise of the powers conferred by an enactment even if the decision is legally ineffective (ie affected by jurisdictional error): *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*. The Full Court of the Federal Court preferred this construction of the AAT Act to a "subjective" approach which would require the Tribunal to have regard to the decision-maker's state of mind and consider whether the relevant decision was made "in the honest belief that it was in the exercise of powers conferred by the enactment" in determining whether it could review a decision.[1]

4. Smithers J, who concurred with Bowen CJ, stated in *Brian Lawlor*:[2]

> I find it difficult to think that the *Administrative Appeals Tribunal Act* provides for a review of decisions which are invalid because of the non-fulfilment of some condition essential to the exercise of power conditionally residing in the decision maker or of some other error destroying the validity of the decision but not of the decisions made in circumstances where the power to make a decision on the matter decided was completely absent …
>
> … to construe the Act as providing for the review of only … errors [within jurisdiction] would leave untouched those administrative acts which are invalid and legally ineffective for one reason or another, but were performed in the course of action falling within the general purposes of a statute. To my mind such a situation would not be compatible with the objective of the Administrative Appeals Tribunal Act. If administrative decisions are to be subjected to review in the course of good

[1] *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338, 342 – 343.
[2] *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338, 365, 367.

government exclusion from review of decisions made without power would remove from review those decisions most in need of review.

5. The enactment identified in the application dated 7 June 2024 was the OSA, s 220(2) and (3) of which provided:

> **220 Review of decisions by the Administrative Appeals Tribunal**
>
> …
>
> *Removal notice—cyber-bullying, intimate images and cyber-abuse*
>
> (2) An application may be made to the Administrative Appeals Tribunal for a review of a decision of the Commissioner under section 65, 77 or 88 to give a removal notice to the provider of:
>
> (a) a social media service; or
>
> (b) a relevant electronic service; or
>
> (c) a designated internet service.
>
> (3) An application under subsection (2) may only be made by:
>
> (a) the provider of the social media service, relevant electronic service or designated internet service; or
>
> (b) if the material that is the subject of the notice was posted on the service by an end-user of the service—the end-user.

6. The application described the decision as follows:

> The decision was made by the eSafety Commissioner under the *Online Safety Act 2021* (Cth) to give a takedown notice to X, presumably under Section 88. The precise date of the decision cannot have been any earlier than the 29th of May 2024, as this is when the Tweet was posted. We believe it was made on the 3rd of June 2024.

7. The Tribunal could not proceed to review the merits of that decision, or finalise that review by making a "decision on review" pursuant to s 43(1) of AAT Act, until first satisfied that it was one of the "class of decisions" in respect of which the OSA made provision for the purposes of s 25(1) and (3)(b) of the AAT Act.

8. Contrary to the respondent's submissions, however, the Tribunal was seized of jurisdiction to deal with the application, and provisions of the AAT Act which were not

directed to "the purpose of reviewing a decision"[3] or the consequences of having made a "reviewable decision"[4] were engaged. For example:

(a) the person who made "the decision" was required to use his or her best endeavours to "assist the Tribunal to make its decision in relation to the proceeding": s 33(1AA) of the AAT Act,

(b) the person who made the "decision that is the subject of an application for review" was required to lodge with the Tribunal a statement of reasons for the decision and "every other document that is in the person's possession or under the person's control and is relevant to the review of the decision by the Tribunal": s 37(1) of the AAT Act,

(c) the Tribunal had the power to summon a person to produce documents "for the purposes of a proceeding before the Tribunal": s 40A(1) of the AAT Act,

(d) if, as the respondent contended, the Tribunal were "satisfied that the decision is not reviewable by the Tribunal," the Tribunal could "dismiss the application without proceeding to review the decision": s 42A(4) of the AAT Act.

9. As noted by the respondent,[5] Deputy President Forgie held to the contrary in *LQTF and National Disability Insurance Agency*, that is "if an application has not been properly made to the Tribunal" because it concerns a decision which is not reviewable, the Tribunal "does not have power under, for example, s 33 to give directions or s 40A to summon a person to appear before the Tribunal."[6]

10. However, the issue in *LQTF*, which the Tribunal answered in the affirmative, was whether the Tribunal could actually proceed to review the merits of a decision of the NDIA. Accordingly, the Deputy President's statement was *obiter* and in any event, not binding on the Tribunal as presently constituted.

11. If readily satisfied that the decision challenged in the application is not reviewable, there would be no reason for the Tribunal to exercise any power other than the power to dismiss

[3] AAT Act, s 42(1).
[4] AAT Act, s 27A(1). Similarly, s 28(1) of the AAT Act applies only "if a person makes a decision in respect of which an application may be made to the Tribunal for a review."
[5] Transcript 14 August 2024, p 4 – 6, p 9.
[6] *LQTF and National Disability Insurance Agency* [2019] AATA 631 [7] – [8].

in s 42A(4) of the AAT Act. But where there is a genuine dispute about what the respondent did and whether it constituted a reviewable decision, it may be appropriate for the Tribunal to seek the respondent's assistance under s 33(1AA), and potentially summons documents under s 40A(1), of the AAT Act.

12. In those circumstances, consistent with its usual practice,[7] the Tribunal does have "jurisdiction" to conduct the proceeding, with as little formality and technicality as much expedition as the requirements of the relevant Acts and a proper consideration of the matters before the Tribunal permit,[8] unless and until it reaches satisfaction that the decision to which the application relates is not reviewable and exercises the power to dismiss in s 42A(4) of the AAT Act.

Jurisdiction dispute

13. On 11 June 2024, the Tribunal requested that the respondent confirm whether a reviewable decision had been made.[9] On 18 June 2024, the respondent replied:[10]

> No reviewable decision has been made in this matter. eSafety did not make a decision of a kind referred to in section 220 of the *Online Safety Act 2021* (Cth) which sets out the kinds of decisions which are reviewable decisions by the Administrative Appeals Tribunal.
>
> In this matter, eSafety did not do more than informally notify X that a complaint had been received and provide details of the complaint for X's consideration ('complaint alert', details provided below).
>
> Complaint alerts notify online services that material that may breach their terms of service has been reported to eSafety. Complaint alerts do not ask nor require the provider to take any action in response. It is a matter for the service to determine whether material included in a complaint alert breaches their terms and should be removed from the service.
>
> This is not a 'scheme … to issue notices informally, before filling out the paperwork to "formalise" the notice' (per [7] of the applicant's submissions). There is no power to give complaint alerts to online service providers in the *Online Safety Act 2021* (the Act). As such, submitting the complaint alert did not involve making a 'decision', under the Act or otherwise.

[7] Transcript dated 14 August 2024, p 9.
[8] AAT Act, s 33(1)(b).
[9] TB 29 (email from Tribunal officer to respondent dated 11 June 2024).
[10] TB 27 (email from respondent to Tribunal dated 18 June 2024).

14. On 24 June 2024,[11] the Tribunal wrote to the applicant to confirm the respondent's position and invite her to contact the Tribunal within 14 days if she thought the Tribunal could review the respondent's decision.

15. On 26 June 2024, the applicant filed supplementary submissions contending that the respondent's request to X on 3 June 2024 was a purported notice under s 88 of the OSA and requesting relevant documents.

16. On 27 June 2024, the Tribunal listed an interlocutory hearing to determine whether it had jurisdiction.

17. On 22 July 2024, the respondent filed written submissions on jurisdiction and a tender bundle.

Summons dispute

18. On 23 July 2024, the applicant filed a request to issue a summons to the respondent for eight categories of documents which the applicant alleged the respondent had failed to disclose in the tender bundle.

19. On 29 July 2024, the respondent wrote to the Tribunal:

> 4. The Commissioner considers that no reviewable decision has been made. That being so, the obligation under s 37 of the *Administrative Appeals Tribunal Act 1975* (Cth) is not enlivened. Nevertheless, to assist the Tribunal the Commissioner has produced as a tender bundle those documents in her possession relevant to the jurisdictional question.
> 5. The applicant's summons seeks production of various documents or categories of documents. These are either irrelevant to the jurisdictional question or else have already been produced. On that basis the Commissioner objects to the issue of the summons.
> 6. In relation to each of the categories of documents sought:
>   a. Category 1 (Correspondence with the complainant): The documents described are not relevant to the jurisdictional question.
>   b. Category 2 (Internal correspondence concerning the notice which was issued and consideration of the complaint made under s 36 of the Online Safety Act): Records of the Commissioner's assessment of the complaint have already been provided in the Commissioner's Tender

[11] Letter dated 21 June 2024 but sent by email to the applicant on 24 June 2024.

Bundle. The balance of the documents sought in this category are not relevant to the jurisdictional question.

c. Category 3 (All and any records relating to the 'policy' of not issuing formal notices): The documents described are not relevant to the jurisdictional question. (In any event, inasmuch as no removal notice was issued, there was and is no reviewable decision.)

d. Category 4 (Copies of all other records completing the legal request form on X's website, including screenshots and drafts): The complaint alert submitted to X's website has already been provided in the Commissioner's Tender Bundle. To the extent that this request seeks copies of all screenshots and drafts within the past three months, including those not relevant to the complaint the subject of this proceeding, it is irrelevant and oppressive.

e. Category 5 (A blank and complete copy of the form used to make requests of X): This is not a document that the Commissioner has in her possession. We are instructed that a request is made by following a series of webpages in X's online form.

f. Category 6 (Any correspondence with X concerning the proper use of the legal request form and/or portal): The only correspondence between X and the Commissioner's office in respect of this complaint has already been provided. The documents described are otherwise not relevant to the jurisdictional question.

g. Category 7 (Any internal guidance as to completing the form in category 5): The documents described are not relevant to the jurisdictional question.

h. Category 8 (All relevant metadata): This is not relevant to the jurisdictional question.

20. As submitted above, the applicant disputes the respondent's interpretation of s 37 of the AAT Act and maintains that the respondent was required to assist the Tribunal in determining the application by producing all documents relevant to the "jurisdictional question," ie whether the Tribunal should, as the respondent contended, dismiss the application under s 42A(4) of the AAT Act.

21. On 30 July 2024, the applicant filed further submissions in support of her summons application, which relevantly stated:

(a) documents in Category 1 (correspondence with the complainant) were relevant because the respondent was required by s 88(3) of the OSA to give written notice to the complainant if she decided not to issue a removal notice,

(b) documents in Category 3 (records relating to the policy of not issuing formal notices) were relevant because the applicant contended that the respondent's "informal notices are intended to have formal effect," and

(c) documents in Category 4 and 6 (records of completing the legal request form on X's website and any correspondence with X concerning the use of the legal request form) were relevant because there was evidence that the respondent was required to specify a "legal basis" when submitting requests through X's legal requests portal.

22. On 14 August 2024, the Tribunal (Senior Member Poljak) heard the summons application. On 28 August 2024, the Tribunal dismissed the application, finding that the documents which the applicant sought "are either irrelevant to the jurisdictional question or else have already been produced."[12]

23. The Tribunal's reasons for dismissing the summons application did not address the applicant's written submissions dated 30 July 2024, or the applicant's oral submissions on 14 August 2024, as to the relevance of the categories of documents to the jurisdictional question. Rather, the Tribunal reproduced the text of paragraph 6 of the respondent's letter dated 29 July 2024, amending the response to categories 1, 3 and 5 to reflect the respondent's oral submissions.[13] The Tribunal concluded by adopting, without attribution, the following words of the respondent's counsel:[14]

> 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.

24. On 12 September 2024, the Tribunal made directions for the parties to exchange submissions and evidence, and listed the jurisdictional question for hearing on 12 November 2024.

[12] *Baumgarten and eSafety Commissioner* [2024] AATA 3052 [12].
[13] *Baumgarten and eSafety Commissioner* [2024] AATA 3052 [13].
[14] *Baumgarten and eSafety Commissioner* [2024] AATA 3052 [14]; transcript 14 August 2024, p 14.

Commencement of ART

25. On 14 October 2024, the ART Act commenced, as did Schedule 16, items 2 to 30 of the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (**transitional provisions**). Item 24 of the transitional provisions provides:

> **24 AAT proceedings**
>
> (1) This item applies if a proceeding in the AAT is not finalised (however described) before the transition time.
>
> (2) The proceeding must be continued and finalised by the ART in a manner that the ART considers is efficient and fair.
>
> (3) For the purposes of subitem (2), the ART must have regard to the impact of the following on the parties to the proceeding:
>
> (a) the repeal of the old Act;
>
> (b) the enactment of the new Act;
>
> (c) the effect (including the operation) of this Act.
>
> (4) The ART must, as far as possible, continue the proceeding under the new law.
>
> (5) To avoid doubt, subitem (4) has effect subject to subitem (2).
>
> *Effect of things done before the transition time*
>
> (6) Anything done in, or in relation to, the proceeding before the transition time continues to have effect for the purposes of, or in relation to, the proceeding (as the case requires) after the transition time.
>
> (7) Anything done in, or in relation to, the proceeding before the transition time that was valid under, or done in accordance with, the old law is taken to be valid under, or to have been done in accordance with, the new law for the purposes of the proceeding after the transition time.
>
> (8) Anything done in, or in relation to, the proceeding before the transition time by the AAT is taken, after that time, to have been done by the ART.

26. As item 24(4) has the effect of applying the ART Act, as far as possible, to this proceeding commenced under the AAT Act, it is to be noted that s 12 of the ART Act provides:

> **12 Reviewable decisions**
>
> (1) A decision is a *reviewable decision* if an Act or a legislative instrument provides for an application to be made to the Tribunal for review of the decision.
>
> Note: To find out whether a decision is a reviewable decision, start by looking at the Act or legislative instrument under which the decision is made.

27. Relevantly to the orders sought by the respondent, s 97 of the ART Act provides:

> **97 Tribunal must dismiss application if decision is not reviewable decision**
>
> The Tribunal must dismiss an application if:
>
> (a) the application is made for review of a decision; and
>
> (b) the Tribunal is satisfied that the decision is not reviewable by the Tribunal.

28. Despite the change of form, it is submitted that these provisions are not materially different to s 25(1) and s 42A(4) of the AAT Act. It follows that they should be construed in accordance with *Brian Lawlor* and the submissions advanced above in respect of the AAT Act. That is, the Tribunal may review an exercise of power which purports to be a decision in respect of which an Act provides for an application to be made to the Tribunal for review, even if the decision is not authorised by the Act or not subjectively intended by the decision-maker to be a kind of decision which is reviewable.

29. On 17 October 2024, the respondent filed further submissions on jurisdiction, an affidavit of Luke Hannath, and an affidavit of Mary Baras-Miller.

Referral to GAP

30. On 18 October 2024, pursuant to a request which the applicant made under the FOI Act on 19 August 2024, the respondent sent the applicant a bundle of documents to which she had decided to grant access with redactions (**FOI bundle**).

31. On 6 November 2024, the President decided to refer the application for review in this proceeding to the Guidance and Appeals Panel (**GAP**), having found that it raises an issue of significance to administrative decision making, namely:

> Whether, on the facts to be found by the Tribunal, an agency such as the respondent may avoid the jurisdiction of the Tribunal by achieving an outcome by taking steps which may not amount to a formal exercise of a statutory power instead of achieving that outcome by formally exercising a statutory power whose exercise is subject to review by the Tribunal.

32. On 2 December 2024, the applicant filed the FOI bundle in the Tribunal.

Evidence

33. As indicated above, and in the applicant's submissions of 4 October 2024,[15] there is a factual dispute about whether the respondent actually sent the "draft complaint alert" to X. It is necessary for the Tribunal to make findings about what the respondent sent to X in order to decide whether it constituted, as the applicant contends, the purported issue of a removal notice under s 88 of the OSA.

Complaint

34. On 29 May 2024 at 11.30 am, the applicant posted the tweet which led to the complaint, and an accompanying video.[16]

35. On 31 May 2024 at 8.38 pm, the complainant submitted adult cyber abuse complaint ACA-2024-0527633 to the respondent.[17] As required if the complainant "wants the Commissioner to give the provider of the service a removal notice under section 88,"[18] the complaint form sought, and the complainant provided, evidence that the applicant's post was the subject of a complaint that was previously made to X, apparently on 31 May 2024 at 8.32 pm.[19]

36. On 3 June 2024 at 4.57 pm, the respondent sent the complainant an email in the following terms:[20]

> We are sorry to hear that this has happened.
>
> We can see the material is targeting [redacted] and that it may be in violation of Instagram and X policies.
>
> To assist you, we will informally escalated your report to Instagram and X to notify them of the potential violation. Once platforms receive our report, they may take action against the material.

37. On 3 June 2024 at 5.01 pm, the respondent sent the complainant an email in the following terms:[21]

[15] Applicant's submissions dated 4 October 2024 [25] – [27].
[16] TB 19 – 22.
[17] TB 39 – 44.
[18] OSA s 36(3).
[19] TB 42.
[20] FOI bundle, document 18, PDF page 19.
[21] FOI bundle, document 17, PDF page 17.

> We are sorry to hear that this has happened.
>
> We can see the material is targeting [redacted] and that it may be in violation of Instagram policies.
>
> To assist you, we will informally escalated your report to Instagram to notify them of the potential violation. Once platforms receive our report, they may take action against the material.

Respondent's assessment

38. The undated record at TB 57, described as a "record[] of the Commissioner's assessment of the Post,"[22] is a finding that that the applicant's tweet does satisfy the first limb of the definition of "cyber-abuse material targeted at an Australian adult" in s 7(1)(c) of the OSA:

> It is unlikely a reasonable person in the position of the complainant would consider the material to be, in all circumstances menacing. To be considered menacing, the material should threaten to cause harm or injury towards the complainant. The material does not contain threats to cause harm or injury towards the complainant or others with the school. For the material to be considered harassing, the material should trouble or vex a person by repeated attacks or persistently disturb or torment a person. The end-user has only created one post which targets the complainant, the end user has not directly tagged the complainant. It should be noted however, however the end-user has made a point to share the name of the primary school, and all of the complainant's social media information. It is likely that an ordinary reasonable person in the position of the complainant would consider the material to be offensive, as she has been made the subject of the post. The material also contains a compilation of the complainant's online presences, specifically her social media accounts and work location. Whilst this information is publicly available, the post alleges the complainant and school have engaged in "child grooming" behaviours by facilitating the queer club. This is likely to offend an ordinary reasonable person in her position of the complainant. Therefore, the material is likely to offend standards of decency, morality or propriety as generally accepted by a reasonable adult.

39. The undated record at TB 58, which the Commissioner appears to contend is part of the same record as TB 57 (but presumably a different record to the "Additions to assessment of offensive" dated 6 June 2024, which appear at TB 56), contains the following finding that the tweet does not satisfy the second limb of the definition in s 7(1)(b) of the OSA:

> The material appears to have been created by the end-user with the intention to cause reputational harm to the complainant and the school as a whole. Whilst the complainant [sic] is targeted directly, the end-user appears to has taken issue with the facilitation of a queer club in primary schools … There is nothing abusive or

[22] Respondent's submissions dated 22 July 2024 [19].

> threatening within the material which would suggest intention to cause serious physical or serious psychological harm to the complainant. Furthermore, as per the Adult Cyber Abuse Regulatory Guidance which states that defamatory material, including statements about a person's criminal history or character, which causes purely reputational harm or incidental harm, is not enough to be considered serious harm.

Complaint alert – Meta

40. At the time, X's website for "legal request submissions" at legalrequests.twitter.com stated when requiring users to identify themselves:[23]

> Welcome to Twitter's online legal request submission site. You can submit your legal request (e.g., subpoena or court order) for account information or content removal by following the steps below. We also accept emergency disclosure requests from law enforcement through this site. All non-legal requests should be submitted through our Help Center forms …
>
> I affirm that I have any required legal authority to submit this request and the submission is a permitted use of this system.

41. On 3 June 2024 at 5.33 pm, the respondent received an automated email from X providing access to the legal request system and "reserv[ing] the right to pursue legal remedies against unauthorized access to this system."[24]

42. On 3 June 2024 at 5.34 pm, the investigator saved the text of a "Draft complaint alert to Instagram" in the respondent's case management system for complaint ACA-2024-0527633.[25]

43. On 3 June 2024 at 5.38 pm, the respondent received an automated email from Meta (Instagram) granting access to its "Official Requests" system.[26]

44. On 3 June 2024 at 5.59 pm, the investigator created regulatory notice NOT-2024-00678 to Meta in the respondent's case management system. The notice type was "Complaint Alert" and the method sent was "Email."[27]

[23] TB 35.
[24] FOI bundle, document 10, PDF page 5.
[25] FOI bundle, document 41, PDF page 42.
[26] FOI bundle, document 23, PDF page 24.
[27] FOI bundle, document 44, PDF page 45.

45. On 3 June 2024 at 6.00 pm, the respondent received an automated email from Meta acknowledging receipt of a "Content Request."[28]

Complaint alert – X

46. On 3 June 2024 at 6.05 pm, the investigator created regulatory notice NOT-2024-00679 to X in the respondent's case management system. The notice type was "Complaint Alert" and the method sent was "Email."[29]

47. Also at 6.05 pm, the investigator saved the text of a "Draft complaint alert to Twitter" in the respondent's case management system[30] which read (emphasis added):

> **Under the *Online Safety Act 2021*** the eSafety Commissioner is responsible for handling complaints about cyber abuse material concerning Australian adults and ensuring the **rapid removal of such material from social media services**, relevant electronic services, or designated internet services. Please refer to our website for more information on our role.
>
> We wish to alert you to a complaint we have received from [redacted] (the complainant). Our reference number NOT-2024-00679.
>
> We are escalating this complaint to you on the basis that the material may be in violation of your policies. The complainant has reported that an X account 'Celine against The Machine @celinevmachine'
>
> The reported account and material is available at the following URLs:
>
> https://x.com/celinevmachine_/status/1795622025010266347
>
> **The post appears to have been created by an individual end user, seeking to intimidate and harass the complainant, on the basis the complainant run's a Queer Club, for primary school students, which was a student led incitive. We understand the complainant's name, workplace and social media accounts have been public shared in the post, inciting unwanted contact from other users and placing the complainant at risk.**
>
> eSafety has assessed that the complained material may be a violation of X terms of services and polices, specifically,
>
> - inciting others to harass members of a protected category on or off platform
> - **We prohibit inciting behavior that targets individuals** or groups of people belonging to protected categories.
> - **We prohibit targeting others with repeated slurs, tropes or other content that intends to degrade or reinforce negative or harmful stereotypes** about a protected category. In some cases, such as (but not

[28] FOI bundle, document 14, PDF page 9.
[29] FOI bundle, document 45, PDF page 47.
[30] TB 45.

> limited to) severe, repetitive usage of slurs, or racist/sexist tropes where the context is to harass or intimidate others
>
> We would appreciate your immediate confirmation that you have received this report. We ask that you advise us if any action is taken in response to this report.

48. Also at 6.05 pm, the respondent received an automated email from X which read:

> This automated response confirms receipt of your request to Twitter to remove content regarding user(s) @ (first user identified in your request).
>
> Your request has been escalated to the appropriate team and will be reviewed and responded to as soon as possible. Please refrain from submitting duplicate requests as this may slow down the assessment of your original request.
>
> We will contact you at the law enforcement / government email address you have provided should we require more information.

49. The applicant's representative has obtained from lawyers acting for X a document entitled "eSafety request" which is apparently a record of information submitted to X through an "Information Request" form completed by "Ash A" on behalf of the respondent, in relation to the applicant's tweet.[31] The fields of information recorded on the document are consistent with the fields completed by the respondent in a "Removal Request" form, recorded and produced under the FOI Act in another matter referred to in the applicant's original submissions.[32]

50. Such records as may exist in this matter were requested in category 4 of the applicant's unsuccessful summons application. No screenshots or emails have been produced to confirm that the text of the "draft complaint alert" was actually sent to X.

51. The record which X has produced indicates that the request, which contained an affirmation that "I am submitting this request without attachment," did not include any "additional information" field where one might expect to see the text of the draft complaint alert. Consistently with the screenshot from the other matter involving a legal request submitted to X,[33] the request states that its "legal basis" is s 7 of the OSA, which defines cyber-bullying material targeted at an Australian adult and is the definition which the respondent found was <u>not</u> satisfied.

[31] Affidavit of Dr Reuben Kirkham dated 4 October 2024, annexure B.
[32] TB 36.
[33] TB 36.

52. On 3 June 2024 at 7.18 pm, the respondent received an email from X advising that the applicant's "content had been withheld in Australia."[34]

53. On 3 June 2024 at 7.28 pm, the applicant received an email from X advising that:[35]

> In the interest of transparency, we are writing to inform you that X has received a request from the eSafety Commissioner regarding your X account, @celinevmachine_, that claims the following content violates the law(s) of Australia.
>
> https://twitter.com/celinevmachine_/status/1795622025010266347
>
> In order to comply with X's obligations under Australia's local laws, we have withheld this content in Australia.

54. On 3 June 2024 at 7.44 pm, the respondent received an email from Meta advising that:[36]

> Hi, Thank you for your report. We have reviewed this content: https://www.instagram.com/p/C7iHf5bv82q/ However we have found no violations of our policies.

Subsequent conduct

55. On 4 June 2024 at 11.59 am, the applicant posted a screenshot of the email X had sent her stating that "X has received a request from the eSafety Commissioner … that claims the following content violates the law(s) of Australia."[37]

56. On 4 June 2024 at 4.26 pm, the respondent's media team brought the applicant's tweet to the investigator's attention.[38]

57. At an unknown time on 4 June 2024, the investigator brought the complaint to the attention of the respondent's delegate, Luke Hannath, and informed Mr Hannath that they "had sent an informal complaint alert to X via X's online reporting platform … which is the standard way by which the Commissioner's office contacts X."[39]

58. On 4 June 2024 at 4.47 pm, an officer of the respondent replied:[40]

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[34] TB 47.
[35] TB 38.
[36]
[37] FOI bundle, document 16, PDF page 14.
[38] FOI bundle, document 16, PDF page 13.
[39] Affidavit of Luke Hannath dated 17 October 2024 [15.1.2].
[40] FOI bundle, document 16, PDF page 12.

> FYI we (ACA) did receive a complaint about this over the weekend [redacted]. The content was on X and Instagram. We requested both platforms pull the post.
>
> X geoblocked the content – Instagram declined to.

59. On 5 June 2024 at 8.53 am, a different officer of the respondent replied:[41]

> Further to [redacted] email below, we should say that this was only an *informal* escalation, which was deemed to be a potential breach of X's own terms of service.
>
> It was not a formal removal notice.
>
> Happy to jump on a call if you want more detail today.

60. On 5 June 2024 at 12.06 pm, the complainant replied to the respondent in terms which have been entirely redacted on the grounds that they would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency or would involve the unreasonable disclosure of personal information about any person.[42]

61. On 5 June 2024 at 4.45 pm, the respondent advised the complainant that:

> We have received confirmation from X (Twitter) that they have removed the content for violating their policies. We have checked the URL to the material and confirm the material is no longer available …
>
> We have been advised by Instagram that they have found no violation of their policies … We have requested a review of the decision and provided further context to the platform …

62. On 5 June 2024 at 5.48 pm, the investigator recorded on the case management system that a request to review the outcome of the complaint alert had been submitted to Instagram, in terms which have been entirely redacted on the grounds that they would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency or would involve the unreasonable disclosure of personal information about any person.[43]

63. On 5 June 2024 at 5.50 pm, the complainant provided further information which has again been entirely redacted on the same grounds.[44]

[41] FOI bundle, document 16, PDF page 11.
[42] FOI bundle, document 18, PDF page 19.
[43] FOI bundle, document 41, PDF page 41.
[44] FOI bundle, document 18, PDF page 18.

64. As noted above, on 7 June 2024 the applicant commenced this proceeding.

65. On 12 June 2024 at 4.03 pm and 4.05 pm, the respondent apparently received emails from X relevant to this matter with the subject line "Twitter Receipt of Content Removal Request – eSafety Commissioner," however, there is no evidence of the content of these emails.[45]

66. On 16 June 2024 at 9.12 am, Meta emailed the respondent in relation to the Instagram complaint alert to "we have now reviewed the related content and taken appropriate action." That is, the applicant's post was removed from Instagram.

67. There is no evidence that the respondent gave written notice to the complainant that she had decided to refuse to issue a removal notice under s 88(1) of the OSA.[46]

68. By 8 October 2024, X had restored access to the applicant's tweet of 29 May 2024.[47]

Analysis

69. Section 88 of the OSA provides:

> **88 Removal notice given to the provider of a social media service, relevant electronic service or designated internet service**
>
> (1) If:
>
> (a) material is, or has been, provided on:
>
> (i) a social media service; or
>
> (ii) a relevant electronic service; or
>
> (iii) a designated internet service; and
>
> (b) the Commissioner is satisfied that the material is or was cyber-abuse material targeted at an Australian adult; and
>
> (c) the material was the subject of a complaint that was made to the provider of the service; and
>
> (d) if such a complaint was made—the material was not removed from the service within:
>
> (i) 48 hours after the complaint was made; or
>
> (ii) such longer period as the Commissioner allows; and

[45] FOI bundle, document 45, PDF page 47, top right panel.
[46] OSA s 88(3).
[47] Affidavit of Mary Baras-Miller dated 17 October 2024 [2].

(e) a complaint has been made to the Commissioner under section 36 about the material;

the Commissioner may give the provider of the service a written notice, to be known as a ***removal notice***, requiring the provider to:

(f) take all reasonable steps to ensure the removal of the material from the service; and

(g) do so within:

(i) 24 hours after the notice was given to the provider; or

(ii) such longer period as the Commissioner allows.

(2) So far as is reasonably practicable, the material must be identified in the removal notice in a way that is sufficient to enable the provider of the service to comply with the notice.

Notice of refusal to give a removal notice

(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 to the Commissioner under section 36.

70. By 2 June 2024 (48 hours after the complaint was made to Meta and X), subparagraphs (1)(a), (c), (d) and (e) of s 88 had been satisfied and it remained for the respondent to be satisfied (or otherwise) that the tweet constated "cyber-abuse material" in accordance with subparagraph (1)(b).

71. It may be accepted that by the time the investigator notified the complainant that the tweet "may be in violation of Instagram and X policies" and "we will informally escalated your report to Instagram and X" (3 June 2024 at 4.57 pm), he or she had decided that the formal power to issue a s 88 notice should not be used. The undated records of the respondent's assessment suggest that this decision was made because the investigator thought an ordinary reasonable person would not conclude that it is likely that the tweet was intended to have an effect of causing serious harm to a particular Australian adult.

72. Plainly, to the extent that a removal notice was then issued, it was not authorised by the OSA. Yet such a purported decision would plainly be reviewable by the Tribunal in accordance with *Brian Lawlor*, if the respondent incorrectly maintained that s 88 had been enlivened.

73. It is submitted that the issuing of "regulatory notices" described as "complaint alerts," which the respondent herself argued "there is no power to give" under the OSA,[48] is not authorised by the OSA. By limiting the circumstances in which the respondent has the power to burden freedom of expression by issuing a removal notice or service provider notification,[49] and granting merits review as an explicit safeguard against overreach by the respondent,[50] the OSA implicitly provides that the respondent shall not use her status as a "government official" seeking to make a "legal request" analogous to a "subpoena or court order" and affirming "that I have any required legal authority to submit this request" to encourage or direct social media platforms to take action in a way which is not specifically authorised.

74. The general function of "promoting online safety of Australians"[51] does not permit the respondent to establish a non-statutory system of "complaint alerts" and thereby lobby social media platforms in relation to the enforcement of their terms of service, in circumstances where a complaint to the platform has been unsuccessful and the respondent has determined that her own compulsive powers are unavailable. Such a construction of s 27(1)(b) of the OSA would result in legislation which is not suitable, necessary and adequate in its balance[52] having regard to the constitutionally implied freedom of political communication, contrary to the interpretive dictate in s 233 of the OSA itself.

75. Because the OSA implicitly prohibits the issue of "complaint alerts," requires the respondent to deal with a complaint which requests the issue of a removal notice by issuing or refusing to issue such a notice, and provides for an application to be made to the Tribunal for review of such a positive or negative decision, it "provides for an application to be made to the Tribunal for review of the decision" identified by the applicant within the meaning of s 12 of the ART Act.

76. That is because the decision made "presumably under Section 88 … on the 3rd of June 2024" was a decision which purported to be made under s 88. It did not cite s 88 and on

[48] TB 27.
[49] OSA s 79, s 85 and s 93.
[50] Explanatory memorandum to the *Online Safety Bill 2021*, p 57.
[51] Respondent's submissions dated 29 November 2024 [7.4]; OSA s 27(1)(b).
[52] *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1.

the respondent's case, it was accompanied by text which made it "clear" that there was no intention to exercise statutory power.

77. Yet the record obtained from X's lawyers indicates that the respondent submitted a "legal request" concerning the issue of "Harassment, Private information" where the relevant "legal basis" was s 7 of the OSA. Section 7 of the OSA provides:

> **7 Cyber-abuse material targeted at an Australian adult**
>
> (1) For the purposes of this Act, if material satisfies the following conditions:
>
> (a) the material is provided on:
>
> (i) a social media service; or
>
> (ii) a relevant electronic service; or
>
> (iii) a designated internet service;
>
> (b) an ordinary reasonable person would conclude that it is likely that the material was intended to have an effect of causing serious harm to a particular Australian adult;
>
> (c) an ordinary reasonable person in the position of the Australian adult would regard the material as being, in all the circumstances, menacing, harassing or offensive;
>
> (d) such other conditions (if any) as are set out in the legislative rules;
>
> then:
>
> (e) the material is ***cyber-abuse material targeted at the Australian adult***; and
>
> (f) the Australian adult is the ***target*** of the material.
>
> Note: For ***serious harm***, see section 5.
>
> (2) An effect mentioned in paragraph (1)(b) may be:
>
> (a) a direct result of the material being accessed by, or delivered to, the Australian adult; or
>
> (b) an indirect result of the material being accessed by, or delivered to, one or more other persons.

78. The only power which an officer of the respondent is "authorized" to exercise on the "basis" of s 7 of the OSA is a removal notice under s 88, 89 or 90 of the OSA or a service provider notification under s 93 of the OSA. It was reasonable and foreseeable that X, upon receipt of a "complaint alert" which adverted to s 7 and came through a legal requests portal restricted to authorised government users, would treat the respondent's communication as a s 88 removal notice even though the respondent had no power to issue such a notice. It is consistent with *Brian Lawlor* and the purposes of the ART Act

to construe the OSA as providing "that applications may be made to the Tribunal for review" of such a purported decision, rather than requiring the applicant to seek relief in another forum.[53]

79. For these reasons, in the circumstances of this case, the answer to the question raised in the issue of significance to administrative decision making identified by the President is no. The respondent may not issue a "complaint alert" which purports to characterises material as "cyber-abuse material," either by reference to s 7 of the OSA, or by inference from the absence of any other power to issue a mandatory or advisory notice to a social media platform in respect of material that does not target an Australian child or involve intimate images, when the conditions for issuing a removal notice under s 88 are not satisfied. To do so has the effect of avoiding the jurisdiction of the Tribunal, which was intended by the OSA as a safeguard against the capacity of the respondent's statutory powers to burden freedom of expression.

S J YOUNG

Murray Chambers

6 December 2024

[53] Transcript 14 August 2024, p 8.