IN THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN:

Applicant

(1) CELINE BAUMGARTEN ('CELINE AGAINST THE MACHINE')

- and -

Respondents

(2) eSAFETY COMMISSIONER (IN HER OFFICIAL CAPACITY) ('THE COMMISSIONER')

Potential Parties[1]

(3) TRISH 'PATSY' MARMO

(4) X CORPORATION ('X')

(5) GAYS AGAINST GROOMERS

(6) THE VICTORIAN DEPARTMENT OF EDUCATION

NOTICE OF APPEAL

A. Introduction

1. This is an application under Section 220(2) of the *Online Safety Act 2001* (Cth) ('the Act') against the decision to issue a removal notice to X (formerly known as Twitter), which was presumably made under Section 88 of the Act by the eSafety Commissioner. The precise date of the notice is presently unknown to the applicant, but it must be very recent, as the post itself was only published to X on the 29th of May 2024.
2. The 'end user' who wrote and published the post in question was Celine Baumgarten ('the Applicant'), who did so on her handle '@celinevmachine_'.[2] She lives in Australia. This post was authorized and finalized by an organization called Gays Against Groomers, which is a

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[1] Section 21 of the *Administrative Review Tribunal Act 2024* (Cth) expressly suggests that potential parties be notified. Whilst this provision is not yet in force (it is still awaiting proclamation), it would be wholly artificial to pretend it does not exist, especially given this application may well be transferred to the new Tribunal at any point in the next 12 months. We therefore consider it to be responsible to name *potential* parties from the outset on the front of the application, so this matter can progress with due alacrity. Section 30 of the extant *Administrative Appeals Tribunal Act* 1975 naturally contains the power to make people parties upon their own application. There is obviously no barrier to the Tribunal in notifying someone of the proceeding: see e.g. Section 33 of the 1975 Act which sets out the flexibility of the current regime.

[2] The original URL of the post is: https://twitter.com/celinevmachine_/status/1795622025010266347. This remains accessible outside of Australia or by using a Virtual Private Network (VPN) within Australia.

501(c)(4) non-profit organization registered in the United States of America. X informed the Applicant of the posts 'geo-blocking' within Australia by way of an email sent to her on June 3, 2024 at 7:28PM AEST.

3. As stated on her X profile, the Applicant is bisexual. Having conducted some considerable research, she reached the view that 'queer theory' and attempting to 'trans' gay people was a topic of serious public concern.[3] She recently joined Gays Against Groomers with a view towards challenging this activity to protect the public and especially young children. She is currently helping to establish an Australian chapter of this organisation. Being bisexual herself, she certainly has nothing against gay people. In fact, she seeks to protect them. The applicant is bemused by the notice and regards it as censorship of the types of gay people the eSafety Commissioner personally disagrees with.
4. The presumed claim that the Applicant has engaged in creating and disseminating 'cyber-abuse material' is a grave allegation, made without any reference or notification to her, and is entirely misconceived. Given the serious connotations of that term, we argue that she is entitled to vindication. We also contend that the non-profit (and essentially charitable) organization called Gays Against Groomers is similarly entitled to this vindication.
5. In this case, we are presumably dealing with an 'informal notice' ostensibly issued outside of the regime under the *Online Safety Act 2021* (Cth). There are three fundamental issues in this case:
    a. **Issue 1:** The notice – although it might contain some defects – is reviewable and actually in force. The eSafety Commissioner cannot evade challenges to its notices by claiming they are 'informal' and failing to notify the 'end user' of their appeal rights.
    b. **Issue 2:** The material published online by the Applicant is not capable of falling within the relevant cyber abuse scheme. In the alternative, the material could be easily modified as to fall outwith the scheme, by de-identifying the asserted 'target': the Commissioner simply did not have jurisdiction to remove the entire post.
    c. **Issue 3:** The conduct of the eSafety Commissioner was *ultra vires*, as it does not comply with the implied freedom of political communication, and is thus outwith her powers pursuant to Section 233 of the *Online Safety Act 2021* (Cth).
6. Given the wider implications of the 'informal notice' scheme the eSafety Commissioner purports to operate, this case is likely to be the most serious of the claims proceeding in the Administrative Appeals Tribunal against her office.

[3] We understand the applicant's viewpoint is also held by LGB Alliance Australia, which is a human rights NGO that fights for the rights of Lesbian, Gay and Bisexual individuals. See for instance Page 4 of LGB Alliance Australia's April 14th 2024 submission to the New South Wales Parliament concerning the *Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW)* which expresses concern about 'transing the gay away'.

B. Issue 1: Was there a 'notice' under Section 88 of the Online Safety Act 2021 (Cth)

7. The eSafety Commissioner has a scheme where they purport to issue notices informally, before filling out the paperwork to 'formalise' the notice under the Act. This appears to be the format of over 99% of their Section 88 notices.[4]
8. Before the Senate Environment and Communications Committee on the 30th of May 2024, Mr Toby Dagg (the General Manager of the eSafety Commissioner's office) said as follows:

> "We run a complaints-based investigation framework made up of four different investigative schemes. As expressed in the Online Safety Act, three of those schemes, the child cyber-bullying, adult cyber-abuse and image-based abuse schemes all require a complaint from a person who has been targeted by it or directly affected by the particular form of content issued in those schemes before we can begin investigating. Actually, there is a step prior to that, they need to provide evidence that they first complained to the relevant online service and that service has not taken action. Once that fact is satisfied, then then we can consider investigating. In the case of investigating we apply the various statutory criteria that are expressed in the Act, examine the facts and any other relevant circumstances including context. Some of those schemes allow us to take into account all of the circumstances of the particular matter before deciding whether or not the statutory threshold is met. If it is, our first preference is generally to approach the provider informally to request removal. We have found that to be a far faster and more effective way to have harmful material taken down, rather than going through the process of crafting and issuing a formal notice, but we hold that option in cases where we see particularly egregious harms or where there has been no response from the service provider in response to our request for removal. And all this is laid out in our regulatory guidelines for each of the schemes. In case that the service provider does not take voluntary removal action against the terms of service we then consider issuing a removal notice under the act which is a compulsory removal notice backed by civil penalties."[5]

9. All that we have seen so far is the email from X informing the Applicant that the eSafety Commissioner has determined the content was unlawful. We assume that the determination

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[4] For example, in their 2022-23 Annual Report (p202), they claimed to have 'made 601 informal notifications [and] issued 3 removal notices' in respect of 'Adult Cyber Abuse.

[5] This transcript is an unofficial one prepared by the Free Speech Union of Australia, because the Hansard version was not yet available. The underlying video with automatically generated captions is available at https://www.aph.gov.au/News_and_Events/Watch_Read_Listen/ParlView/video/2488638, although this missed some words that were said. Mr Dagg made these comments at about 14:38.

was that it is 'Adult Cyber Abuse' and thus was a notice under Section 88 of the *Online Safety Act 2021* (Cth).[6] This is because the email from X says in a 'notice of withholding' 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. … In order to comply with X's obligations under Australia's local laws, we have withheld this content in Australia; the content remains available elsewhere.'

10. The scheme that Mr Dagg purports to oversee simply does not exist. There is no mechanism under the *Online Safety Act 2021* (Cth) to issue an so-called 'informal' notice made secretly to the social media service that does not have the usual appeal rights or penalties. In the present case, the eSafety Commissioner has decided that the content is illegal (and presumably said it is 'adult cyber abuse') and has written to the social media service. The notice plainly had the intended effect: the Tweet was 'geoblocked' in Australia as a result. Whilst we have not seen the notice from the Commissioner[7], we would observe that:
    a. There is no requirement for the Commissioner to specify the section of the Act relied upon to make a notice *reviewable*.[8] Nor is much formality required for a notice. The only formal requirement is to 'identify' the content that the eSafety Commissioner believes is unlawful and for someone in that office to state the content is unlawful in 'writing' to the social media service.[9]
    b. The practice that Mr Dagg sets out of later perfecting notices if the content is not removed does not mean the original notice does not exist.[10] It might be that the eSafety Commissioner is *estopped* from enforcing such an original notice against the social media service, or the penalty a Court is prepared to impose is considerably reduced. But this does not change the fact that it is – in law – a notice. The Administrative Appeals Tribunal ('AAT') has the power to review a 'decision to give

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[6] It is unclear what other scheme could conceivably be being applied in respect of a 'social media service'. There are no identifiable children in the footage, so the 'Child Cyber Abuse' scheme in Part 5 could not apply. There are no 'intimate images', given the source of the content was the School's website as well as some (then public) social media pages operated by Ms Marmo: this means Part 6 cannot apply. Nor could it conceivably be Class 1 or Class 2 material under the Act, so Part 9 does not apply either.

[7] These submissions will naturally be revised at a later point based on the actual wording of the notice, when it has been disclosed to us.

[8] One tactic we are aware of is to claim that '*the tweets are in violation of Section 7 of the Online Safety Act 2021 as it is cyber abuse material targeted against an Australian adult'*. But citing Section 7 rather than Section 88 does not make it any less a notice under Section 88, even though it might be less enforceable due to the poor quality of the formulation.

[9] Section 88 of the *Online Safety Act 2021* (Cth) is sparse in terms of its requirements.

[10] One should not overlook the possibility of sending out a formal warning where a notice is not complied with. This is expressly provided for under Section 91 of the *Online Safety Act 2021* (Cth). With this in mind, the more formal (or perfected) notices might be better viewed as being formal warnings made under Section 91.

a removal notice'.[11] That power subsists even if the notice is not delivered, if it is in a wholly inappropriate form or is apparently intended to be unenforceable.[12] All that is required is that someone in the Commissioner's office purports to request the removal of content by a social media service.[13]

c. In any event, the AAT (and presumably the Administrative Review Tribunal when brought into existence) has the power to review an 'invalid' decision, or even a decision that is a 'nullity'.[14] The result would be that the AAT sets aside the decision and thus the notice of that decision.

d. The case is even stronger when the notice is effective in blocking the content: in this case, 'X' have taken what they consider to be 'reasonable steps' to implement the Section 88 notice by way of 'geo-blocking'. It plainly 'affects the rights and interests of the [applicant]' and thus is reviewable on that basis.[15]

e. There is also a fundamental jurisdictional error.[16] Quite simply, the concept of an so-called informal notice to a social media platform was in breach of the 'implied freedom of political communication' (and thus the *Online Safety Act 2021* (Cth), due to Section 233). It is intended to completely circumvent the appeal rights of the applicant and the material subject to the notice is plainly political in nature. The alternative of the Federal Court system, with its formality and so forth would be inappropriate and defeat the point of an administrative justice system.[17]

f. For completeness, an informal action (which is **not** a notice) might be where the Commissioner simply notifies the service provider of the complaint, without expressing a view on it, or suggesting the content is illegal in Australia.[18] The

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[11] Section 220 of the *Online Safety Act 2021* (Cth).

[12] As explained by Rares J in *Telstra Corporation Ltd v Kotevski* [2013] FCA 27 at [55], determining jurisdiction 'involves a consideration of what decision, the subject of the review, was made in fact and not its legal effect: Zubair 139 FCR at 353 [29], 354 [32]; *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 116 per Mason J.' This is also consistent with the wording of the *Online Safety Act 2021* (Cth) itself, which is about the 'decision to give…', not what happens after that decision is made.

[13] Notably, a decision **not** to act would be challengeable by the complainant, which is expressly provided for under the *Online Safety Act 2021* (Cth). Given the alacrity expected by the scheme from a complainants perspective, even taking a week is likely to be a reviewable decision by them. There is no good reason for the timeframe to be different depending on whether or not a notice is issued in response to a complaint.

[14] *Zubair v Minister for Immigration* (2004) 139 FCR 344 at 352-354 [28]-[32]; *Telstra Corporation Ltd v Kotevski* [2013] FCA 27 at [54].

[15] *Social Security, Secretary, Department of v Alvaro* (1994) 50 FCR 213, 219 per von Doussa J.

[16] There is a very long line of authority that gives the Tribunal jurisdiction if an error has been made (or the decision was ultra vires), most notably starting *with Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167.

[17] See e.g. *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337 at [20].

[18] There is only one section that references informal actions, namely the provision concerning Annual Reports under Section 183 of the *Online Safety Act 2021* (Cth), which requires the 'number of informal notices given, and informal requests made' to be provided. An informal notice can be made to the social media end user, not just the provider. It is also drafted more widely than the specific powers under the legislation – for example, an informal notice could be sent in relation to classes of content, or the general practice of an organisation, rather being targeted at removing a specific post or material.

problem is the Commissioner has gone a lot further. It has triggered the geo-blocking of the content and prohibited access to it in Australia. X Corp plainly believe it is a notice against them and have responded accordingly.[19]

11. The approach articulated by Mr Dagg is no more than a calculated and cynical approach designed to evade the statutory protections for end users provided under the *Online Safety Act 2021* (Cth). It is an attempt to make the eSafety Commissioner's decisions and notices unappealable by hiding them from the end user. Even if the end user somehow finds out about the notice (which occasionally happens), the next step in their unlawful scheme is wrongly asserting these decisions cannot be challenged by the Tribunal as they are not a 'real notice'.[20]
12. What is so worrying about the process is that there was no effective mechanism for the Applicant to find out about the decision. She simply happened to be told by X. If she hadn't been told, how would she have found out about it? This is of serious concern and is in breach of the eSafety Commissioner's obligations to notify her of his review rights under s.27A of the *Administrative Appeals Tribunal Act 1975* (Cth).[21] We also note with grave concern the wider natural justice failings, especially that the Applicant was never consulted on the removal notice before it was issued.[22]
13. One imagines there might be many notices where there was no notification with review rights to the end user – this appears to be the *modus operandi* of the Commissioner.[23] If this had been done on a social media platform that was less supportive of Free Speech, then it risks someone having their entire account (and thus platform) taken down without the person knowing why.[24] This makes the matter particularly serious. The conduct of the Commissioner in this regard is inimical to the rule of law.

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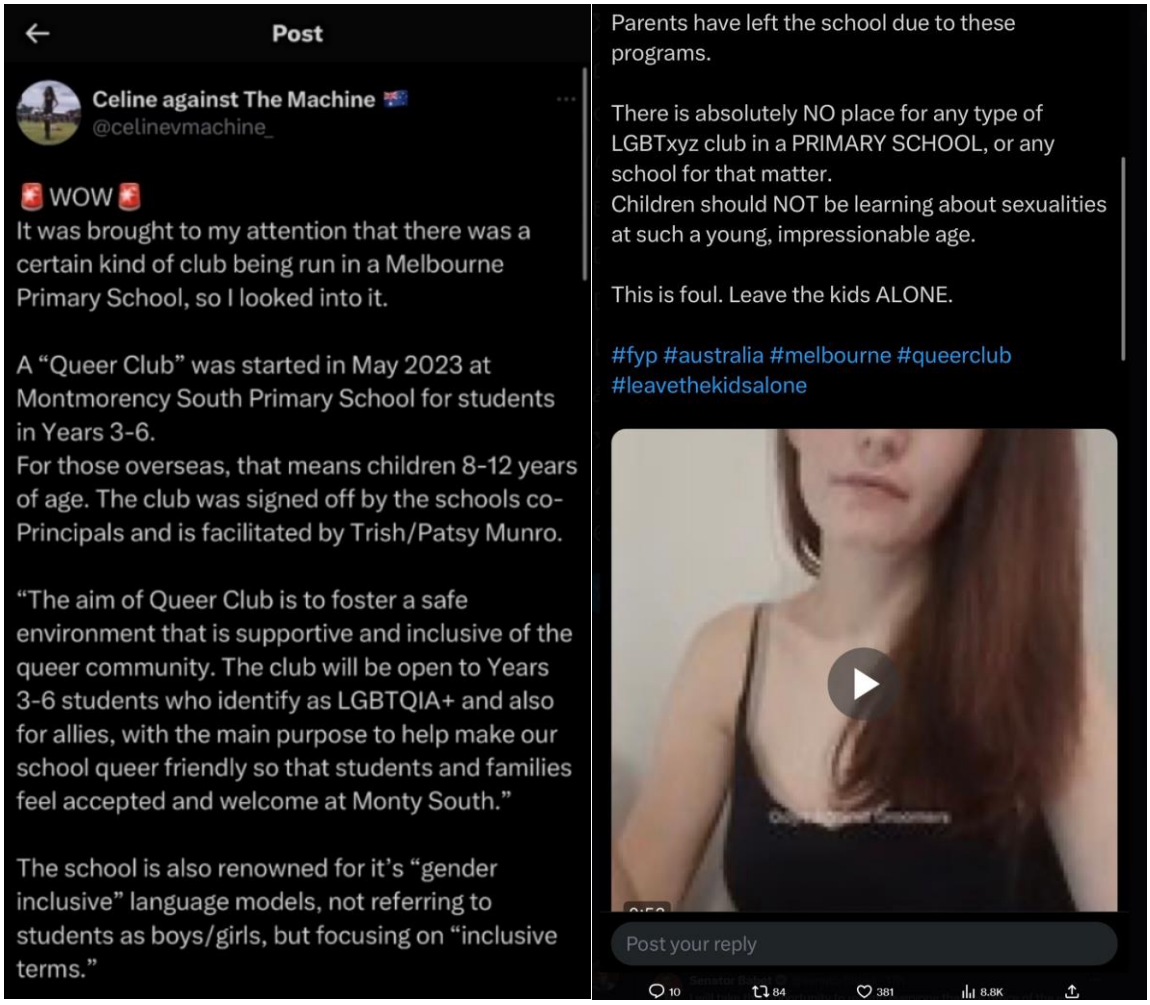
[19] We understand that 'X's process requires the Commissioner to set out the legal basis by which the content should be removed. The Commissioner presumably did just that.
[20] Whilst it has not yet got this far in the present case, we are aware of cases where the eSafety Commissioner has done just that when challenged by an end user.
[21] For completeness there is a parallel obligation under Section 266 of the *Administrative Review Tribunal Act 2024* (Cth). The applicant is not difficult to find or contact. Even if she was, there are powers under Section 194 of the *Online Safety Act 2021* (Cth) that are designed to address such a situation. It is simply that the Commissioner has chosen not to implement this requirement, contrary to the rule of law.
[22] Given the test under Section 88 of the *Online Safety Act 2021* (Cth) requires a consideration of 'all the circumstances' and the Applicant is plainly affected by the decision, this is perhaps especially worrying. It is unclear how an identification of 'all the circumstances' could have been done without having ever consulting her.
[23] We note a particular video in this regard by the Commissioner herself (in a 'Fireside Chat') talking about how her decisions have never been challenged despite all the safeguards (see https://www.youtube.com/watch?v=qz4CxphCMrc at about 18 minutes in). There's a reason for that: she circumvents them by failing to notify people of their appeal rights.
[24] Worse still, in Australia, there is no subject access request mechanism to find out what happened, unlike in Europe.

C. Issue 2: There is a lack of any coherent legal basis for the material to be removed

14. It appears that the Commissioner has attempted to act under Section 88 of the *Online Safety Act 2021* (Cth). The problem is that none of the substantive statutory criteria appear to be met.[25] In particular, a notice requires that the **material** to be removed must meet **all** of the following criteria:
    a. Be targeted (by the end user who posted the material) at an Australian Adult with the likely objective and effect of causing the targeted adult serious harm.[26] Where the 'serious harm' is said to be one's mental health, it 'does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger'.[27] For completeness, it is possible for someone to be targeted indirectly.[28]
    b. Be objectively 'menacing, harassing or offensive' from the perspective of a 'ordinary reasonable person' in the position of the 'target'.[29] In this context the word 'offensive' is a high hurdle, which takes flavor from the associated concepts of 'menacing' and 'harassing'.[30] It also requires consideration of a range of further factors, including the 'educational merit' of the material and the 'standards of morality, decency and propriety generally accepted by reasonable adults'.[31]
    c. **Not** be targeted at material that is protected by the (constitutionally) 'implied freedom of political communication'.[32]
15. The Applicant posted the Tweet on 'X' on the 29th of May 2024 at 11:03AM AEST.
16. The Tweet comprises a caption followed by a short video clip uploaded by the end user.
17. The caption and original form of the 'Tweet' is illustrated below:

[25] We accept the Tweet was published on a 'social media service'. We do not presently know if a complaint was made to both the Commissioner and the social media service about the specific material. We also assume the material was specifically identified in the complaint, but it may not have been.
[26] Section 7 of the *Online Safety Act 2021* (Cth).
[27] Section 5 of the *Online Safety Act 2021* (Cth).
[28] Section 7 of the *Online Safety Act 2021* (Cth).
[29] Section 7 of the *Online Safety Act 2021* (Cth).
[30] *Monis v The Queen* (2013) 249 CLR 92 ('Monis') at [161], [305].
[31] Section 8(1) of the *Online Safety Act 2021* (Cth).
[32] Section 233 of the *Online Safety Act 2021* (Cth).



18. The 53-second video is set out scene-by-scene in the following table. What it says is little different in substance to the written post.

Scene No	**Spoken Content**	**Visuals**
Scene 1	'In today's edition of Melbourne doing Melbourne things…'	- Talking head of the applicant, small caption 'gays against groomers'.
Scene 2	'we have a school in Mont Morency that has its own queer club. A primary school for Years 3 to 6.	- Talking head of the applicant, small font caption 'gays against groomers' - Image of 'Queer Club' on schools website.

Scene 3	'It was signed off the schools' dual Principals and it is facilitated by this lady here, Trish Patsy …'	- Talking head of the applicant, small font caption 'gays against groomers'. - Image of Trish Marmo with student (student's image redacted).
Scene 4	'… Marmo. This is her Facebook page …'	- Talking head of the applicant, small font caption 'gays against groomers'. - Image of Patsy Marmo's Facebook page.
Scene 5	'and this is her Instagram, which looks exactly like I thought it would. But she also has a teaching page.'	- Talking head of the applicant, small font caption 'gays against groomers'. - Image of Trish Marmo's Instagram page.
Scene 6	'Primary school, look at this: we've got the pronouns in the bio, we've got the rainbow lanyard, the rainbow, oh its just so. Primary school.'	- Talking head of the applicant, small font caption 'gays against groomers'. - Image of Trish Marmo's **second** Instagram page.
Scene 7	'Let me make something real clear Trishy, there is no place for an LGBT club in any school, let alone a primary school. Also just have a go at the lanyard, I …'	- Talking head of the applicant, small font caption 'gays against groomers'. - Image of Trish Marmo in a classroom with rainbow attire.

Scene 8	'But yeah, keep telling yourself its only happening in America.'	- Talking head of the applicant, small font caption 'gays against groomers'.

19. Even though we have not been favored with the reasons for the notice, there are numerous flaws. It is simply content that cannot conceivably fall within the scheme, for the following reasons.
    a. The Tweet does not meet the test of being **objectively** likely to cause serious psychological harm to the target as expressed in the legislation. The only person who could be a 'target' is a particular school-teacher and the Applicant is merely stating a relevant, publicly-known set of facts in her political criticism.[33] The objective 'ordinary reasonable' Australian would expect that senior public officials would be used to pungent criticism, let alone the relatively mild nature of the applicants comments. The material relied upon was all public at the time of the post.[34]
    b. The tweet is mild.[35] The idea that it should be blocked **en toto** is worrying, especially given the content of the video, most of which is anondyne. If the name and identity of Trish 'Patsy' Marmo was removed (and possibly the School name to avoid any 'jigsaw identification'), then it could not conceivably fall within the definition in the Act, as it would then not be targeted against anyone. In short, the only power eSafety conceivably had was to require the removal of the identity of the person who complained, not the entire Tweet. Even then, this simply could not be justified by the content.
    c. It overlooks that the purpose of the tweet is focused upon **protecting** vulnerable children - from serious harm and abuse. It was not targeted at the (presumed) complainant, let alone designed to cause them harm. Furthermore, the applicant took responsible steps prior to posting the material, such as redacting the image of children

[33] The applicant views are also gender critical and have been held internationally to be worthy of respect in a democratic society: *Forstater v CGD Europe & Ors* [2021] IRLR 706 at [115]. In that decision at [116], the Judge aptly observed that "just as the legal recognition of Civil Partnerships does not negate the right of a person to believe that marriage should only apply to heterosexual couples, becoming the acquired gender 'for all purposes' … does not negate a person's right to believe … that as a matter of biology a trans person is still their natal sex. Both beliefs may well be profoundly offensive and even distressing to many others, but they are beliefs that are and must be tolerated in a pluralist society".

[34] We note the relevant accounts were subsequently made private when we inspected them on the 6th of June 2024.

[35] Probably the only provocative part was the inclusion of 'gays against groomers' (the organisation the Applicant belongs to) in small font on the video. But if that was the objection, removing the video was entirely disproportionate. It would be easy to redact it.

and having it reviewed by several colleagues in 'Gays against Groomers' prior to publication.

d. The contents of the Tweet comprises a political statement (or series of political statements), which again falls outside of the eSafety Commissioner's powers (see **Issue 3** below).

20. The underlying claims are also misconceived, because they do not reflect the fact an 'ordinary reasonable person' would recognize we live in a democratic society. An ordinary Australian would be particularly concerned about the indoctrination of children with 'queer theory', and the child safeguarding concerns this potentially raises. People who undertake high profile roles, let alone promote dangerous medical treatments, should be held accountable. This was done in a mild manner. We refuse to accept that the view of the Commissioner remotely resembles that of an 'ordinary reasonable [Australian]'.
21. A genuine 'ordinary reasonable [Australian]' would not find the content offensive. They would see the tweet as being in the best tradition of a modern liberal democracy. The 'ordinary reasonable person' that the Commissioner presumably used to construct the legislation is irrational and unreal, belonging more in Orwell's 1984, rather than the real world. The post subject to the removal notice is entirely different from those concerns expressed in the Minister's second reading speech, which was about concerns such as 'malicious actors [using] **anonymous** online accounts to abuse, bully or humiliate others', as well as the dissemination of intimate private images (or deep-fake porn) and the material shared out of the Christchurch mass-murder. The idea that the post amounts to 'cyber-abuse material' brings the whole concept into disrepute. In this case, the person who tweeted the material is far from anonymous and appears all the way through the video. The video was based on material that either the school or Ms Marmo had themselves published. The tweet was no more than mildly worded political commentary. It is miles away from what Parliament had contemplated as being subject to any action from the Commissioner.

D Issue 3: Implied Freedom of Political Communication.

22. Section 233 of the *Online Safety Act 2021* (Cth) disapplies the Act to the 'extent … it would infringe any constitutional doctrine of implied freedom of political communication'. Any attempt by the eSafety Commissioner or her office to do just that is *ultra vires*, including through purported 'informal' action.[36]
23. The tweet was a political statement about the conduct of a public official in a position of considerable responsibility and the wider issue of promoting 'queer theory' in schools to young children. It thus falls within the implied freedom. The Tweet is so mildly expressed that

[36] The eSafety Commissioner is a legal entity that only exists and operates within the *Online Safety Act 2021* (Cth).

it is difficult to see how it could be reformulated without simply not expressing the political view in question. It follows that the Commissioner's complaint was not really against the manner by which the political viewpoint was expressed, but the political view *itself*.

24. The core legal test is found in *Lange* as modified by *Coleman v Power*.[37] It involves considering:
    a. Whether the requirement of 'freedom of political communication' is 'effectively burdened'?
    b. If so, is the 'purpose of the law and the means adopted to achieve that purpose legitimate'?
    c. If so, is the law 'reasonably appropriate and adapted to serve that legitimate end'?
25. The implied freedom of political communication has been heavily burdened on this occasion. The applicant made a political statement on something important that is of legislative concern internationally and within Australia. The Commissioner ordered it to be removed and hidden from the Australian people, presumably by claiming (wrongly) that the post was 'cyber-abuse material'.[38] Any insults are of no moment: they are constitutionally protected as part of political discourse.[39] The implied freedom prohibits any 'restriction which substantially impairs the opportunity for the Australian people to form the necessary political judgments'. Censoring facts (and any political viewpoints) must be incompatible with the implied freedom of political communication.[40]
26. Somehow, the Commissioner has presumably reached the conclusion this (rather mild-mannered) Tweet is offensive. Causing offence is part and parcel of political communication.[41] Eliminating offence is not an acceptable legislative aim, rather the concept of offence should be narrowed to read in line with 'menacing and harassing' (the same words that appear in the present legislation).[42] Given the 'nature of Australian political debate and communications, reasonable persons would accept that unreasonable, strident, hurtful and highly offensive communications fall within the range of what occurs in what is sometimes euphemistically termed "robust" debate'.[43] The Applicant's (mild) post is unquestionably within what is protected under any reasonable construction of the law.[44]

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[37] *McCloy v New South Wales* (2005) 257 CLR 178 at [2].
[38] The reason we say notionally is because of what happened, namely an effort to redistribute it and its being reported across the press, with it having obtained far wider distribution than it otherwise might. Nevertheless, the Applicant is plainly entitled to the vindication of a finding from this Tribunal that he did not distribute 'cyber-abuse material'. The same point applies to those with similar views as the Applicant.
[39] *Coleman v Power* (2004) 220 CLR 1 at [105], [237]-[239]; *Monis* at [295], [300].
[40] *Monis* at [352]; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50-51.
[41] *Monis* at [209].
[42] *Monis* at [161], [220]-[222], [305].
[43] *Monis* at [67].
[44] See also the quote from *Forstater* in note 33 above.

27. The resulting Streisand Effect also starkly illustrates how wholly inappropriate the decision was. As with other existing cases (Billboard Chris and the Wakeley Bishop stabbing case), it has arguably made the Commissioner (and her office) an international laughing stock and damaged Australia's global reputation.[45] Together with the fact that the legislation in question does not seem to exist in any other country (it is apparently a 'world first'), there is more than enough to show it is not 'reasonably appropriate and adapted', nor is the end 'legitimate'. It simply cannot satisfy the *Lange* test, especially considering the tacit modifications made in *Coleman v Power*.
28. Even if this power could in the abstract be necessary, the type of power exercised in this case should never be exercised by an anonymous and unaccountable administrator cloaked in secrecy, let alone one within an office that is pursuing a particular political crusade against Free Speech and on particular issues of concern to the LGB community. Nor should it be done in a secret manner which is calculated to evade an end users statutory review rights. At the least, such decision-making should have been reserved for a judicial process which fully respects natural justice.[46] This makes the law maladapted to any legitimate purpose and grossly disproportionate.

E. Other Matters

29. Until there is full disclosure by the eSafety Commissioner, the Applicant reserves the right to add further claims or grounds. This case reflects a fast-moving situation, where the full information remains to be disclosed. We have not even seen the original notice at this point, but happen to be aware of its existence in some form from X.
30. The widespread publicity would make it inappropriate for an internal review to be conducted.[47] The Commissioner's apparent lack of clarity on the legal provisions in question is also a compelling reason for this case to be resolved directly by a Tribunal.
31. We ask for a prompt directions hearing in order to bring this important matter to trial. Given the nature of this case, we expect there be considerable disclosure required.

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[45] The Commissioner has apparently not learned from what happened in respect of Teddy Cook, where a Tweet that was largely forgotten about went viral after the Commissioner's formal notice. All we can say is that the Commissioner has a remarkably short memory, given this only happened a few weeks ago. In the present case, examples of reposts include that by Senator Ralph Babet with 143.8K views on the 5th of June (https://x.com/senatorbabet/status/1797866242788966808) and one by Billboard Chris which has 205.7K views on the 5th of June (https://x.com/BillboardChris/status/1797861986203816306). We would not be surprised if there were millions of views in total, for a Tweet next to no-one had previously noticed (and most had forgotten about) with under 10K impressions (see the screenshot above) before the eSafety Commissioner banned it in Australia. The failures of the Commissioner in this regard are also a serious breach of her data governance obligations towards people who file complaints (e.g. under Section 36 of the *Online Safety Act 2021* (Cth)).
[46] We note that New Zealand's equivalent provision leaves the making of orders to the District Court: see the *Harmful Digital Communications Act 2015* (NZ).
[47] See note 43 above.

32. We ask the Tribunal shorten the time required to provide the 'T-documents' to the Applicant's representative to a seven-day period.
33. We also seek full disclosure on the 'informal notice' scheme and how this process operates, including copies of other 'informal' notices. This matter is of considerable public concern.
34. The Free Speech Union of Australia Pty Ltd is the Applicant's representative in this matter. [48]

Free Speech Union of Australia

On behalf of the Applicant

DATED this 7th DAY of JUNE 2024

[48] As a corporation, the Free Speech Union of Australia Pty Ltd is a 'person' who can be a representative in the Tribunal under Section 32 of the *Administrative Appeals Tribunal Act 1975* (Cth). See Section 2C(1) of the *Acts Interpretation Act 1901* (Cth) which includes a corporation in the definition of a 'person'.