

CELINE GILLIAN BAUMGARTEN

Applicant

ESAFETY COMMISSIONER

Respondent

RESPONDENT'S OUTLINE OF SUBMISSIONS ON JURISDICTION

PART I INTRODUCTION

1. On 7 June 2024, the Applicant lodged an application for review with this Tribunal.
2. The application was based on the Respondent (**Commissioner**) having purportedly exercised (through a delegate) her power under s 88 of the *Online Safety Act 2021* (Cth) (**Online Safety Act**) to give a removal notice to X Corp (**X**), a social media service, in respect of a post made by the Applicant to X on 29 May 2024 (**Post**). The decision to give a removal notice to X was said to be a reviewable decision (so as to enliven the Tribunal's jurisdiction) by virtue of s 220(2) of the Online Safety Act.¹
3. In written submissions dated 22 July 2024, the Commissioner maintained that she had not given a removal notice to X, so that no reviewable decision had been made.
4. The Applicant subsequently requested that the Tribunal issue summonses to produce documents to the Commissioner.² The Tribunal decided to refuse that request on 28 August 2024.³ It issued directions on 12 September 2024 providing for the parties to exchange submissions and evidence, and listed the matter for hearing on 12 November 2024.
5. These submissions are made pursuant to those directions. They respond to the Applicant's outline of submissions on jurisdiction dated 4 October 2024. These

¹ This section provides that '(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.'

² The Applicant also requested that a summons be issued to the Department of Education, but subsequently withdrew that request.

³ *Baumgarten and eSafety Commissioner* [2024] AATA 3052.

submissions also restate and expand upon the Commissioner's earlier submissions filed on 22 July 2024 and, for that reason, can be regarded as replacing those earlier submissions.

6. The Commissioner respectfully maintains that no reviewable decision has been made, so that the Tribunal does not have jurisdiction to hear and determine this application. Accordingly, the application must be dismissed pursuant to s 97 of the *Administrative Review Tribunal Act 2024* (Cth) (**ART Act**).

PART II LEGISLATIVE FRAMEWORK

7. Section 12(1) of the ART Act in effect provides that an Act may allow for the Tribunal to review decisions made under that Act.⁴
8. Section 220 of the Online Safety Act does just this, exhaustively setting out decisions under the Act in respect of which review applications may be made to the Tribunal. As noted, s 220(2) relevantly provides for the Tribunal to review decisions under s 88 of the Online Safety Act to issue removal notices to social media service providers. The Applicant contends that such a decision was made in this instance.
9. The Commissioner's discretion to issue a removal notice is enlivened by the satisfaction of subjective and objective jurisdictional facts, which are set out in s 88 of the Online Safety Act; additionally, that section defines a removal notice. It provides as follows:

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:

⁴ See, e.g., *Re Cro Travel Pty Ltd and Decision-maker* [2020] AATA 1888 at [14].

- (i) 48 hours after the complaint was made; or*
- (ii) such longer period as the Commissioner allows; and*

(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.*

10. Section 7 of the Online Safety Act relevantly defines 'cyber-abuse material targeted at an Australian adult' as follows:

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;⁵ ...*

(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.

⁵ Again, the other service types here are not presently relevant.

PART III RELEVANT CIRCUMSTANCES

11. On 29 May 2024, the applicant made the Post to X's platform.⁶
12. On 31 May 2024, the Commissioner's office received a complaint from a member of the public about the Post.⁷
13. An investigator of the Commissioner's office assessed the complaint. Records from the Commissioner's office show that the investigator formed the view that the Post did not constitute cyber-abuse material targeted at an Australian adult, because it failed to satisfy s 7(1)(b) of the Online Safety Act.⁸
14. On 3 June 2024, the investigator of the Adult Cyber Abuse Team from the Commissioner's office submitted a 'complaint alert' about the Post via X's legal requests portal.⁹ The complaint alert relevantly:
 - 14.1. advised X of the complaint, including describing and characterising it;
 - 14.2. advised that the Commissioner was alerting X to the complaint because it 'may be in violation of [X's] policies' or 'terms of service'. Specific terms of service and policies were identified as those the Post 'may be a violation' of, viz.:
 - 14.2.1. 'inciting others to harass members of a protected category on or off platform';
 - 14.2.2. 'inciting behaviour that targets individuals or groups of people belonging to protected categories'; and
 - 14.2.3. 'targeting others with repeated slurs, tropes or other content that intends to degrade or reinforce negative or harmful stereotypes about a protected category';
 - 14.3. sought confirmation that X had received the report, and asked that the Commissioner be informed if X took action in response to the report.
15. On the same day, X advised the Commissioner that the Post had been withheld in Australia.¹⁰
16. On 7 June 2024, the applicant lodged the review application.¹¹ In accompanying submissions, the Applicant made clear that it sought review of 'the decision to issue a

⁶ Commissioner's Tender Bundle (TB) 23.

⁷ TB 42.

⁸ TB 55-57.

⁹ TB 48.

¹⁰ TB 50.

¹¹ TB 4.

removal notice to X..., which was presumably made under Section 88 of the [*Online Safety Act 2021* (Cth) (**Online Safety Act**)] by the eSafety Commissioner'.¹²

17. On or about 10 August 2024, X advised the Applicant that the Post 'was withheld in Australia in error, at the request of the eSafety Commissioner' and that it 'was no longer withholding access to the [Post]'.¹³

PART IV SUBMISSIONS

18. It is plain that no reviewable decision has been made by the Commissioner in this instance.
19. So much is clear from the terms of the 'complaint alert' the Commissioner submitted to X.¹⁴ The transparent purpose of that communication is to notify X that a complaint has been received by the Commissioner, and ask X to consider the possibility that the post complained of breaches X's terms of service or policies. Critically, the author:
 - 19.1. does not indicate that the Commissioner is satisfied that the Post constitutes cyber-abuse material under the Act.
 - 19.2. does not indicate that the Commissioner is exercising its discretion to issue a removal notice under the Act.
 - 19.3. does not require X to remove the Post, or provide a date by which the Post must be removed.
20. Instead, the author points to X's own terms of service and policies, and suggests that the material *may* violate these. The only thing X is asked to do is confirm receipt of the Commissioner's correspondence, and advise the Commissioner if X decides to take any action.
21. Accordingly, the correspondence does not meet the statutory description of a 'removal notice' set out above, nor indicate that the preconditions for the exercise of a discretion to give X a removal notice have been satisfied.
22. If any further evidence is required, it is provided by the Commissioner's internal records of the delegate's assessment of the Post. Specifically, under 'Assessment of material' are two prompts that correspond with 7(1)(b) and (c) of the Online Safety Act: '*Material intending to cause serious harm?*' and '*Material is menacing, harassing or offensive*'.¹⁵ (Both 'limbs' must, of course, be satisfied if material is to amount to cyber-abuse material targeted at an Australian adult; and material must meet that definition if

¹² TB 16.

¹³ Affidavit of Mary Baras-Miller of 17 October 2024.

¹⁴ TB 45.

¹⁵ TB 55.

the Commissioner is to exercise her discretion as to whether to issue a removal notice.)

23. In answer to the first prompt, the delegate has selected 'No'; and has gone on to provide reasons as to why this criterion is not satisfied, which include that '[t]here is nothing abusive or threatening within the material which would suggest intention to cause serious physical or serious psychological harm to the complainant'.¹⁶
24. Yet further certainty is provided by contrasting the terms of the 'complaint alert' in this case with the standard terms of a 'removal notice'.¹⁷
25. Finally, since this proceeding has commenced X, recognising that it removed the Post in error, has restored it. In itself this (and the absence of any legal consequences) indicates that X was not, and understands that it was not, sent a removal notice.
26. Against all of this, the Applicant in essence relies upon:
 - 26.1. a document the Applicant's representative received from a solicitor, Mr Justin Quill, from which it says the Tribunal should draw the inference that a removal notice was issued;
 - 26.2. the submission that despite its terms, the complaint alert nonetheless amounted to a removal notice; and
 - 26.3. the submission that the Commissioner did not tell the person who made the complaint that it had decided not to issue a removal notice, and that this suggests it decided to issue a removal notice.
27. As to 26.1: the Commissioner is unable to identify the document in question. It did not create it, or provide it to X. The only explanation of the document's provenance comes from Dr Reuben Kirkham's deposed recollection of the effect of a conversation that he had with a solicitor who told Dr Kirkham that he was acting for X, and that the form was 'the reason X took down the post'. The Applicant has not provided any evidence from that solicitor, nor from X. Accordingly, it is unknown:
 - 27.1. who (at X) instructed the solicitor who provided this document to Dr Kirkham;
 - 27.2. whether their instructions corroborate or align with Dr Kirkham's recollection of what the solicitor told him; and
 - 27.3. if they do, on what basis did they give those instructions (i.e., what knowledge do they have of the provenance of this form, or the 'reason X took down the post').

¹⁶ Ibid.

¹⁷ Affidavit of Luke Hannath of 17 October 2024.

28. In the circumstances, the Respondent respectfully submits that it would be procedurally unfair and unreasonable for the Tribunal to place weight on this document in support of the Applicant's position.
29. In any event, the document appears to be in the nature of a template or automatically generated form. Whatever might be made of certain words and phrases that appear on the form, this simply cannot gainsay the unequivocal terms of the complaint alert, or the record of the investigator's assessment. Nor does the form resemble the ordinary form of a removal notice.
30. As to 26.2: there is simply nothing in the transparent language and intention of the complaint alert provided to X that indicates that it was a removal notice. Its express terms—including its invitation to X to consider its own terms and conditions, and its request only that X confirm receipt of the alert and tell it if further action is taken—displace any inference that it amounts to a notice that X 'take all reasonable steps to ensure the removal of ... material' within a specified period.¹⁸
31. As to 26.3: The investigator in fact did correspond with the complainant, on 5 June 2025, to advise that X had removed the Post. Accordingly, the inference the Applicant seeks to draw is without foundation. (In any event, the Commissioner was not obliged to correspond with the complainant because properly understood, no decision under s 88(3) 'to refuse to give a removal notice' had been made; rather, the discretion was not enlivened.

PART V DECISION SOUGHT

32. The review application has not identified a reviewable decision and should be dismissed pursuant to s 97 of the ART Act.
33. Should the Tribunal find, against the Commissioner's submissions, that a reviewable decision has been made, the Commissioner would move to have the application dismissed pursuant to s 101 of the Act. For the reasons given in [24], this proceeding has been rendered inutile by intervening events.

Date: 17 October 2024

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¹⁸ Cf. Online Safety Act, s 88(1)(f)-(g).

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RESPONDENT'S OUTLINE OF ORAL ARGUMENT

1. This is an outline of the argument the Respondent will seek to advance at the hearing before the Guidance and Appeals Panel (**GAP**) on 13 December 2024, addressing the following issue, identified in the Tribunal's notice of 6 November 2024: ¹

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.

2. This outline is additional to the outline of submissions filed by the Respondent on 17 October 2024.
3. The Respondent's primary position is that the factual premise for the issue identified by the Tribunal does not arise in this case.
4. The question before the Tribunal is whether, in this matter, the Respondent made a decision under s 88 of the *Online Safety Act 2021* (Cth), so as to enliven a right to merits review under s 220(2) of that Act. The outcome of a decision under s 88 is an obligation on the recipient of the notice to comply with a removal notice, enforceable under the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).²
5. The respective submissions on jurisdiction focus on what occurred as a matter of fact on 3 June 2024. In particular, there is a dispute as to the content of the communication sent to X by the Respondent. As the Respondent understands it, the Applicant's contention is that what was sent by the Respondent is contained in the

¹ *Notice of President's Decision – Guidance and Appeals Panel*, 6 November 2024.

² *Online Safety Act 2021* (Cth) ss 91, 161-165.

'web form' annexed to Dr Kirkham's affidavit of 3 October 2024, and that this form was a 'removal notice' issued under s 88 of the Act.

6. The Respondent disputes that and contends that what was sent to X was the 'complaint alert', described in paragraph 14 of the Respondent's October submissions.³ Briefly: by the alert, an investigator at the Commissioner's office notified X that the Commissioner's office had received a complaint about the Post and had assessed that it may violate X's terms of service and policies. The investigator noted that they would appreciate immediate confirmation of receipt of the complaint alert, and requested that X advise the Commissioner's office if X took any action in response to the alert. The complaint alert did not require X to do anything. It did not even urge it to do anything, aside from informing the Commissioner if it decided to take action. Of course, X might reasonably have concluded that the Cyber Abuse Team hoped that X would consider the Post in light of its internal terms and policies. However, it was not put to X that it *must* do so; nor that if X concluded the Post did *not* violate its terms and policies, the Commissioner would nonetheless compel X to remove the Post. Indeed, the Post – while taken down in Australia on 3 June 2024 – was put back on or about 10 August 2024.⁴
7. In the Respondent's submission:
 - 7.1. The Respondent did not purport to request, let alone require, X to remove the Post.
 - 7.2. Even if what occurred could be characterised as a request to remove the Post, the decision to make the request was not a decision to issue a notice under s 88 and did not lead to the same outcome as the issue of a notice: In particular, the complaint alert did not give rise to any obligation to remove the Post.
 - 7.3. It is not improper for regulators such as the Respondent to use voluntary and cooperative mechanisms to fulfill their functions rather than resorting first to their coercive powers. To the contrary, it is often regarded as desirable for regulators to proceed informally and seek to exhaust cooperative options before having recourse to coercive powers.⁵ Indeed, s 88 proceeds on the premise that a voluntary solution as between complainant and provider has been attempted: s 88(1)(c), (d). If a provider voluntarily removes material in response to a complaint then there will likewise be no occasion for the exercise of the power under s 88 and no reviewable decision.
 - 7.4. The Commissioner's functions listed in s 27 expressly include, in addition to specific functions conferred by the Act, 'promot[ing] the online safety of Australians';⁶ 'support[ing] and encourag[ing] the implementation of measures to

³ Affidavit of Luke Hannath made on 17 October 2024, paragraph 17.

⁴ Affidavit of Mary Baras-Miller, 17 October 2024.

⁵ See, eg, *Citibank Ltd v Commissioner of Taxation (Cth)* (1988) 19 ATR 1479 at 1490 (Lockhart J); *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22; [2006] VSCA 85 [136]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; [2002] HCA 54, [185].

⁶ Section 27(1)(b).

improve online safety for Australians’;⁷ and ‘consult[ing] and cooperat[ing] with other persons, organisations and governments on online safety for Australians’.⁸

7.5. There is no basis disclosed in the materials for the suggestion – if that very serious suggestion is put – that what was done was done with a view to avoiding merits review.⁹ Nor would it be fair to put such an allegation without proper particulars. While the issue was raised in the Applicant’s ‘notice of appeal’ dated 7 June 2024,¹⁰ it was not taken up in later submissions filed by the Applicant. The 7 June submissions largely and impermissibly¹¹ relied on proceedings in Parliament to make an argument about an asserted general practice, as well as on a number of incorrect assumptions about what occurred as a matter of fact in this case.

8. For the reasons given above, the factual premise of issue identified by the Tribunal does not arise in this case, which in any event is immediately concerned with whether there was a reviewable decision for the purpose of s 220.

Date: 29 November 2024

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⁷ Section 27(1)(c).

⁸ Section 27(1)(l).

⁹ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

¹⁰ Paragraphs 8, 10 (the first sentence), 10(b) (the first sentence) and 11 (the first 6 words). The Commissioner notes that paragraph 7 (including footnote 4) may also be contrary to s 16(3) of the *Parliamentary Privileges Act 1987* (Cth) as annual reports are prepared and given to the Minister pursuant to s 183(1) of the *Online Safety Act 2021* for presentation to the Parliament.

¹¹ *Parliamentary Privileges Act 1987* (Cth), s 16(3).