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No. VID 390 of 2025

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL**

On appeal from the Administrative Review Tribunal

ESAFETY COMMISSIONER

Applicant

and

CELINE GILLIAN BAUMGARTEN

Respondent

RESPONDENT'S OUTLINE OF SUBMISSIONS

Question before the Tribunal

1. On 29 May 2024, the Respondent made a **Post** to the social media platform **X**. On 31 May 2024, the Appellant (**Commissioner**) received a complaint made under s 36 of the *Online Safety Act 2021* (Cth) (the **OS Act**) about the Post (**Complaint**). On 3 June 2024, an employee in the Commissioner’s office formed the view that the Post did not constitute “cyber abuse material targeted at an Australian adult” within the meaning of s 7 of the OS Act, but nevertheless decided to submit information relating to the Complaint into X’s online Legal Requests Portal (the **Composite Alert**).¹
2. The Commissioner received an email from X confirming receipt of “your request to Twitter to remove content”. Shortly after, the Commissioner received another email from X which stated that the Post had “been withheld in Australia”. X also sent an email to the Respondent which stated “that X [had] received a request from the eSafety Commissioner regarding your X account ... that claims the following content violates the law(s) of Australia” and that “to comply with X’s obligations under Australia’s local laws, we have withheld this content in Australia”.
3. On or about 10 August 2024, X emailed the Respondent advising that access to 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].” The Post was subsequently reinstated in Australia, and remains available on X.
4. This appeal raises the question whether the provision of the Composite Alert to X constituted a decision by the Commissioner to give a removal notice under s 88 of the

¹ This was the term used by Kyrou P to describe the communication from the Commissioner to X via its Legal Requests Portal: see Jurisdiction Reasons 5 February 2025 (Annexure B to the Notice of Appeal) (T) [101]–[116]; see also Manetta SM agreeing at [247] and at [195]–[197] per O’Donovan DP. Screenshots of X’s Legal Requests Portal used by the Commissioner to submit the information were provided to the Tribunal on 14 January 2025.

OS Act. The Commissioner’s position before the Tribunal was that no reviewable decision had been made, because all the Commissioner had done was to send X a “complaint alert” which did not ask or require it to take any action in response.

5. The Tribunal concluded that (having regard to its objective features) the Composite Alert was “a decision of the Commissioner, under [s] 88 to give a removal notice” within the meaning of s 220(2) of the OS Act and a reviewable “decision” within the meaning of s 25(1) of the *Administrative Review Tribunal Act 2024* (Cth).² The Tribunal concluded that its jurisdiction is not confined to review of decisions which are legally valid, and the question whether a reviewable decision has been made is required to be assessed objectively. The Tribunal determined to set aside the Commissioner’s decision to give a removal notice under s 88, and remitted the matter to the Commissioner for reconsideration of what action (if any) is required of her under the OS Act in relation to the Complaint, including whether a written notice under s 88(3) must be issued to the person who made the Complaint.³

Ground 1: Jurisdiction

6. The Tribunal correctly identified that it has jurisdiction to review “a decision of the Commissioner under [s 88] to give a removal notice”: s 220(2).⁴ The Tribunal applied

² The Tribunal proceeded on the basis that the relevant provision was s 25(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), but observed that its conclusion regarding jurisdiction would have been the same if the provisions of the *Administrative Review Tribunal Act 2024* (Cth) (**ART Act**) had applied given the similarity in (a) the definition of “decision” in the ART Act s 4 and the AAT Act s 3(3); and (b) the provisions which set out what is a reviewable decision in the ART Act s 12 and the AAT Act s 25: T [15], fn 7.

³ Tribunal decision 26 February 2025 (Annexure A to the Notice of Appeal). The Tribunal noted (at [10]) that there were “complex issues” in respect of the question whether s 88(3) requires the Commissioner to give written notice to a complainant in respect of a refusal to give a removal notice only if that refusal involves the exercise of the discretion provided for in s 88(1), rather than because the statutory threshold for the issue of a removal notice has not been met. While this question has subsequently been answered in *Kirkham and eSafety Commissioner* [2025] ARTA 1231 at [75] (Britten-Jones DP) adopting the broader construction, the Respondent understands that no such written notice has been given to the maker of the Complaint which is relevant in this appeal.

⁴ T [13] (Kyrou P); [182] (O’Donovan DP); [248] (Manetta SM).

Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd (1979) 41 FLR 338,⁵ in which Bowen CJ held that an interpretation of the scope of the Tribunal’s jurisdiction which included “purported” exercises of power was consistent with the purpose of the legislation to “give a person whose interests are affected by an administrative decision an effective appeal free of technicalities.”⁶ Bowen CJ eschewed as inappropriate those interpretations that would make the Tribunal’s jurisdiction dependent upon the state of mind of the decision-maker.⁷

7. The Commissioner denied that the Tribunal had jurisdiction on the basis that the decision-maker in the office of the Commissioner did not intend that the Composite Alert would be a decision to give a removal notice under s 88. But the Tribunal (correctly) held that the word “purported” did not confine the principles in *Lawlor* to situations where the decision-maker’s subjective intention was to make a particular decision falling within the AAT’s jurisdiction.⁸ The Tribunal considered that, “[i]n the present case” it was *sufficient* to meet the jurisdictional preconditions of s 220(2) where: (1) the Commissioner had in fact made a decision to give the Composite Alert to X; and (2), having regard to its objective features, that Composite Alert amounted, as a matter of fact, to a removal notice under s 88.⁹
8. The Commissioner’s contention that the Tribunal concluded that it could not take into account the Investigator’s intention¹⁰ misunderstands the Tribunal’s reasons. The Tribunal went no further than to observe that it would be an unusual outcome if, faced

⁵ T [19]–[38] (Kyrou P); [216]–[217], [224]–[239] (O’Donovan DP); [251]–[254] (Manetta SM).

⁶ T [25]–[26] (Kyrou P); [228]–[229], [233] (O’Donovan DP); *Lawlor* at 342, 343–4, 346 (Bowen CJ).

⁷ T [25] (Kyrou P); [231] (O’Donovan DP); [254]–[255] (Manetta SM); *Lawlor* at 343–4 (Bowen CJ). The reasoning of Smithers J was similar: *Lawlor* at 368, 370, 372. See also *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; (2018) 264 CLR 217 at [39]–[43] and [52] (Gageler, Keane and Nettle JJ).

⁸ T [36] (Kyrou P).

⁹ T [37], [164] (Kyrou P); [243], [244] (O’Donovan DP); [259]–[262], [267]–[269] (Manetta SM).

¹⁰ Applicant’s Submission (AS) at [11(a)], [14].

with a decision which had the objective features of a decision under an enactment, the decision-maker's state of mind was determinative of the Tribunal's jurisdiction.

9. The Tribunal found that, objectively ascertained, the decision to issue the Composite Alert was a decision in fact made to give a removal notice under s 88 within the meaning of s 220(2).¹¹ Against this backdrop, a fair reading of the Tribunal's reasons supports the conclusion that when it said that the Commissioner's intention "does not matter," and that "[a]ll that is required" is a decision amounting as a matter of fact to a s 88 notice,¹² it was saying no more than that the Tribunal's jurisdiction could not be excluded on the basis of the Commissioner's subjective intention.¹³ The Tribunal did not treat the Commissioner's intention as irrelevant, but rather concluded only that the subjective state of mind of the decision-maker could neither negative the objective facts found by the Tribunal, nor oust its jurisdiction.¹⁴ Indeed, were the absence of an intention on the part of the Commissioner to make a particular decision to be treated as determinative of jurisdiction, the introduction of an automated complaint-handling process would render the Commissioner's decisions wholly immune from review.¹⁵
10. The Tribunal found that the Composite Alert possessed a number of objective features which as a matter of fact communicated to X that it was legally required to remove the Post. The Composite Alert was communicated to X via its Legal Requests Portal (rather than the General Portal) in circumstances where that portal was reserved for legal enforcement actions.¹⁶ The Composite Alert identified the legal basis for the request as

¹¹ T [146]–[147] (Kyrou P); [244] (O'Donovan DP); [268]–[269] (Manetta SM).

¹² T [146] (Kyrou P).

¹³ T [148], [150] (Kyrou P) (and cf AS [23](a) and (b)).

¹⁴ T [143], [145]–[148], [150] (Kyrou P); [239]–[240] (O'Donovan), [253]–[255] (Manetta SM).

¹⁵ There was evidence before the Tribunal that certain aspects of the Composite Alert were pre-populated: **Transcript** of the hearing before the ART (13 December 2024) at 43.27–.36; 44.16–.19; 44.30–45.05.

¹⁶ T [88], [103], [107], [116], [117], [140] (Kyrou P); [193], [195], [242] (O'Donovan DP). See Hannath XXN at Transcript 28.38–.40; 29.16–.21, 29.36–.39.

being s 7 of the OS Act.¹⁷ The Composite Alert contained no statement to the effect that the Commissioner was not exercising a statutory power, or that X was not legally required to remove the Post.¹⁸ The Tribunal found that the Composite Alert communicated to X the substantive content of a removal notice.¹⁹ It was in light of these findings that the Tribunal concluded that the Commissioner had made the decision to give the Composite Alert to X, and that having regard to its objective features, the Composite Alert amounted as a matter of fact to a decision to give a removal notice.²⁰

11. The Court should reject the Commissioner’s invitation at AS [16(c)] to treat a removal notice as required to contain a “clear statement” that the relevant decision has been made; the OS Act does not prescribe any particular content for a removal notice.
12. The four observations with respect to “statutory context and purpose” for which the Commissioner contends (AS [19]–[22]) misunderstand the Tribunal’s reasons. Once it is understood that the Tribunal found that (objectively assessed) the Commissioner in fact gave X a removal notice under s 88,²¹ the *first* and *second* contentions fall away. The Tribunal neither assumed the existence of or created a “further class” of constructive decision, nor enlarged the scope of decisions which are amenable to merits review.
13. The Commissioner’s *third* proposition (AS [21]) is that it will introduce “undesirable uncertainty” if a decision to “simply” alert a social media platform to a complaint may be taken to constitute a removal notice. The evidence was that: (a) the Commissioner regards her role as including being an advocate for complainants to assist them to achieve

¹⁷ T [106] (Kyrou P); [196], [242(e)] (O’Donovan DP). See Hannath XXN at Transcript 51.6–51.24 and cf the evidence of Caruana XXN at Transcript 72.4–44.

¹⁸ T [88], [139]–[142] (Kyrou P). See Hannath XXN at Transcript 55.41–44.

¹⁹ T [145]–[147] (Kyrou P); [217], [243]–[244] (O’Donovan DP); [259]–[260] (Manetta SM).

²⁰ T [131], [133]–[134], [135]–[143] (Kyrou P); [240]–[244] (O’Donovan DP); [259]–[260], [267]–[269] (Manetta SM).

²¹ T [139], [146] (Kyrou P).

the removal of material from social media platforms; and (b) while the Commissioner issues “a few hundred complaint alerts every year in respect of adult cyber-abuse material,” she had issued only three or four removal notices in the preceding year.²² Thus, it is the Commissioner’s practice of issuing ‘complaint alerts’ (which find no explicit support in the statutory scheme) in order to achieve what she regards as a desired regulatory result²³ which has introduced the uncertainty about which she now complains.

14. The *fourth* proposition (AS [22]) is a complaint by the Commissioner that in conducting its review, the Tribunal was unable to address (and the Commissioner was unable to “defend”) whether the Composite Alert constituted the correct or preferable removal notice, because (on the Commissioner’s case) no decision to give a removal notice had been made. But as the Tribunal observed, this was the result of the Commissioner’s practices:²⁴

There are no clear, objective criteria for determining when a complaint alert can be given. It appears that whether a complaint alert is given depends on the view taken by an individual investigator as to the seriousness of a potential breach of an online service provider’s terms of service. This approach carries with it the risk of the rights and interests of end users or persons who are the subject of online material being affected by inconsistent action based on the subjective and potentially undocumented views of individual investigators.

15. The giving of the Composite Alert had a real and practical impact on the Respondent’s rights, because it resulted in X withholding her Post in Australia. If such decisions by the

²² T [85], [169(a)] (Kyrou P). See also the evidence concerning the fact that social media platform providers will “more likely” take notice of “something coming from the Commissioner” than a complainant: Hannath XXN at Transcript 34.19–39.

²³ Mr Hannath accepted in cross examination that the “desired regulatory result” was the removal of the Post from Twitter and Instagram: T [86] (Kyrou P). See also Hannath XXN at Transcript 23.5–15; 26.25–36; 32.18–24; 34.29–34; 53.2–16. See the Commissioner’s *Adult Cyber Abuse Scheme Regulatory Guidance* (eSC RG 3) dated December 2023, which refers to both material that does *not* meet the threshold for adult cyber abuse (at 6) and approaches to enforcement with respect to material which *does* constitute adult cyber abuse material (at 8). As to the former, the Guidance states that eSafety will “try to help the person who made the complaint” by doing things including “informally requesting removal”. As to the latter, eSafety “will often approach online service providers informally to ask them to remove adult cyber abuse material” and that “we have found that this generally results in faster removal of material compared to formal action.” See also the Commissioner’s *Compliance and Enforcement Policy* (eSC CEP) dated December 2021 at 9–10.

²⁴ T [170(b)] (Kyrou P, Appendix to Reasons).

Commissioner were not reviewable, it would “render immune from merits review the types of decisions for which merits review is particularly warranted in order to provide transparency and accountability in administrative decision-making.”²⁵

Factual findings: principles in relation to grounds 2 to 5

16. The Commissioner attacks two factual findings made by the Tribunal. To succeed on these grounds, the Commissioner must establish either²⁶ that the findings of fact upon which the Tribunal based its decision are unsupported by any probative material (grounds 2 and 4), or that inferences of fact upon which the decision was based cannot reasonably be drawn from those findings of fact (grounds 3 and 5).
17. In finding facts relevant to the issue to be determined, the Tribunal may take into account any material which tends logically to show their existence or nonexistence; the weight to be attached to it is a matter for the Tribunal.²⁷ The Court may not legitimately inquire into the sufficiency of evidence to support such a finding.²⁸ So long as there is *some* basis for an inference drawn by the Tribunal (in the sense that it is reasonably open) there is no place for judicial review.²⁹ To succeed on appeal, the Commissioner must demonstrate that the Tribunal’s decision is one “which no rational or logical decision maker could arrive on the same evidence”³⁰ or “extreme” illogicality or irrationality.³¹

²⁵ T [152] (Kyrou P), cf AS [22].

²⁶ *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 367 (Deane J); *Minister for Immigration and Multicultural Affairs v Rajamanikkam* [2002] HCA 32; (2002) 210 CLR 222 at [25] (Gleeson CJ).

²⁷ *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 492 (Brennan J); *GTE (Aust) Pty Ltd v Brown* (1986) 14 FCR 309 at 336–7 (Burchett J).

²⁸ *Bond* at 356–7 (Mason CJ); *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156 (Glass JA, Samuels JA concurring at 157); *Skiwing Pty Ltd v Trust Co of Australia (t/as Stockland Property Management)* [2006] NSWCA 276 at [53] (Spigelman CJ, Hodgson and Bryson JJA agreeing).

²⁹ *Bond* at 356 (Mason CJ) (original emphasis); *Wecker v Secretary of Department of Education Science & Training* [2008] FCAFC 108; (2008) 168 FCR 272 [98]–[99] (Greenwood J, French J agreeing).

³⁰ *Minister for Immigration & Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 at [130]–[131] (Crennan and Bell JJ); *Singh v Minister for Home Affairs* [2019] FCAFC 3; (2019) 267 FCR 200 at 215 [57].

³¹ *ARG15 v Minister for Immigration & Border Protection* [2016] FCAFC 174; 250 FCR 109 at [47] (Griffiths, Perry and Bromwich JJ).

Composite Alert Finding (grounds 2–3)

18. The Respondent’s position before the Tribunal was that Ms Caruana entered into X’s Legal Request Portal the information in Annexure B (a document which had been obtained from a lawyer for X).³² The Commissioner contended that Ms Caruana entered into X’s Legal Requests Portal the text of the Draft Complaint Alert, but not the contents of Annexure B.³³ The Commissioner’s internal records contained the text of the Draft Complaint Alert,³⁴ and Mr Hannath’s evidence was that the text of a complaint alert would be inserted into the ‘Removal request form.’³⁵
19. Before the Tribunal the Commissioner had (while eschewing any suggestion that Annexure B was a fabrication, and not requiring Dr Kirkham for cross examination) asserted that it was unreliable, due to its provenance being uncertain.³⁶ The Commissioner now asserts that Annexure B was “no evidence at all” (AS [25]).
20. The Tribunal considered the evidence and concluded that: (a) Ms Caruana had pasted the text of the Draft Complaint Alert into the free-text field of the ‘Removal request form’;³⁷ and (b) X received what the President called “the Composite Alert.”³⁸ The Composite Alert contained information which was common to both Annexure B and the ‘Removal request form’.³⁹ In reaching this conclusion, the Tribunal adopted an orthodox approach

³² T [99] (Kyrou J); and see Affidavit of Reuben Kirkham.

³³ T [93(c)–(d)], [95]–[96], [98], [100]; Caruana XXN at Transcript 70.28–.37, 73.30; Affidavit of Samantha Caruana dated 11 December 2024 (**Caruana Affidavit**) at [12].

³⁴ T [79]–[80] (Kyrou P). See also the text of the Draft Complaint Alert dated 3 June 2024 and Ms Baumgarten’s Bundle of Documents at 43.

³⁵ Hannath XXN at Transcript 51.22–.43.

³⁶ T [100] (Kyrou P).

³⁷ T [114], [116] (Kyrou P).

³⁸ T [106]–[110] (Kyrou P).

³⁹ T [77]–[78], [81(d)], [90]–[92], [93(e)], [98], [103]–[110] (Kyrou P); Caruana Affidavit at [20]; Affidavit of Luke Hannath dated 17 October 2024 at [24]; Hannath XXN at Transcript at 42.17; 49.18–50.23, 71.8–73.30.

of treating Annexure B as capable of being relied upon to the extent that it was consistent with other corroborating evidence.⁴⁰

21. Even if the Commissioner could demonstrate the errors alleged in grounds 2 and 3, it would not amount to an appealable error. The impugned finding was not critical to the Tribunal's ultimate decision.⁴¹ The Tribunal's conclusion that the result would have been the same even if it had found that Ms Caruana had only given the Draft Complaint Alert to X⁴² is unchallenged.

X's State of Mind Finding (grounds 4–5)

22. Whilst the Tribunal treated as *relevant* evidence concerning whether X understood the Composite Alert to be a removal notice,⁴³ it did not treat X's subjective understanding of the Composite Alert as a "determinative" consideration.⁴⁴ In any event, it was reasonably open to the Tribunal to conclude that X withdrew the Post because it interpreted the communication as a removal notice.⁴⁵ The Post was withheld in Australia shortly after X acknowledged receipt of the communication from the Commissioner⁴⁶ and an email from X to the Respondent said that X had received a request claiming that the Post "violates the law(s) of Australia".⁴⁷
23. The Court should decline the Applicant's invitation (AS [27]) to embark upon speculation in relation to the "possibility" that the Post was removed by X as the result

⁴⁰ T [106], [109]–[110] (Kyrou P). See by way of analogy *Minister for Immigration and Citizenship SZNSP* [2010] FCAFC 50; (2010) 184 FCR 485 at [38] (North and Lander JJ); *BXK15 v Minister for Immigration and Border Protection* [2018] FCAFC 76; (2018) 261 FCR 515 at [8] (North and Charlesworth JJ).

⁴¹ *Luu v Renevier* (1989) 91 ALR 39 at 47.

⁴² T [118], [155] (Kyrou P), [247] (Manetta SM).

⁴³ T [144]–[145(e)], [165] (Kyrou P); [245] (O'Donovan DP).

⁴⁴ cf AS [11(b)].

⁴⁵ T [144] (Kyrou P); [201] (O'Donovan DP); [247] and [264] (Manetta SM); Caruana Affidavit at [8]; Ms Baumgarten's Tender Bundle at 3–4, 38. Transcript at 7.19–8.7.

⁴⁶ T [64], [144(e)] (Kyrou P); [198] (O'Donovan DP). Email at 6.05pm on 3 June 2024 (Automated correspondence from X to the Commissioner). Email at 7.18pm on 3 June 2024 (Correspondence from X to the Commissioner).

⁴⁷ T [66], [144(a)] (Kyrou P), [200] (O'Donovan DP), [264] (Manetta SM).

of an automated system. There was no evidence before the Tribunal of such a system used by X, or the basis upon which it might operate.⁴⁸ Similarly, there was no evidence of a spontaneous change of heart by X in respect of the question whether the Post violated its own policies (cf AS [27]).

24. Even if the Commissioner could demonstrate the errors alleged in grounds 4 and 5, it would not amount to an appealable error. The findings in relation to X's reasons for removing the Post was not critical to the Tribunal's ultimate decision.⁴⁹ The structure of the Tribunal's reasons demonstrates that, after first having concluded that the Composite Alert (objectively construed) communicated to X the substantive content of a removal notice, evidence of X's state of mind served only to fortify its conclusions about that objective construction.⁵⁰ That second finding was separate, and not treated by the Tribunal as dispositive of the question before it.

Orders sought

25. The application should be dismissed.⁵¹ The parties agree that there should be no order as to costs.

DATED: 7 November 2025

Rachel Doyle

Patrick O'Bryan-Gusah

⁴⁸ This topic was ventilated before the Tribunal, but there no evidence that X withheld the Post as a result of an automated process. Indeed, to the contrary, the evidence was that use of X's Legal Request Portal enabled the Commissioner to avoid any automation used by social media companies and "get to people" in moderation teams: Hannath RXN at Transcript 65.35–.39.

⁴⁹ *Luu v Renevier* (1989) 91 ALR 39 at 47.

⁵⁰ T [143], [144]–[145(e)], [147], [165] (Kyrou P); [240]–[245] (O'Donovan DP); [267] (Manetta SM).

⁵¹ This will result in the matter reverting to the circumstance of having been remitted to the Commissioner for reconsideration. As is noted above at fn 3, as far as the Respondent is aware, no written notice pursuant to s 88(3) has been given by the Commissioner to the maker of the Complaint.