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IN THE FEDERAL COURT OF AUSTRALIA

DISTRICT REGISTRY: VICTORIA

DIVISION: GENERAL

File No: VID390/2025

On appeal from the Administrative Review Tribunal

ESAFETY COMMISSIONER

Applicant

And

CELINE GILLIAN BAUMGARTEN

Respondent

APPLICANT'S SUBMISSIONS IN REPLY

1. These submissions adopt references and terms as defined in the applicant’s submissions of 31 October 2025 (AS) and the respondent’s submissions of 7 November 2025 (RS).

Ground 1 – the Tribunal did not have jurisdiction (RS [6]-[15])

2. **The decision in *Lawlor* (RS [6]-[7]):** In *Lawlor*¹ Bowen CJ held that s 25(1) of the AAT Act did not require that it must be shown that a decision was made “in the honest belief that it was in the exercise of powers conferred by the enactment”,² and that it was “undesirable to make proof of intention the test”.³ Smithers J reached the same conclusion.⁴ To the extent that is the submission about *Lawlor* at RS [6]-[7], the Commissioner agrees.
3. However, to the extent the respondent’s submission goes further and says that *Lawlor* stands for the approach taken by the Tribunal, that cannot be accepted. In particular, it does not logically follow, and *Lawlor* does not hold, that a decision-maker’s intention, as revealed by the objective facts, is irrelevant to identifying the decision that was in fact made, and irrelevant to whether that decision was made purportedly in the exercise of power conferred by an enactment. In this case the actual conclusion of the decision-maker is relevant to the question whether there was a “decision under [s] 88 to give a removal notice”: see generally AS [15]-[18]. This does not mean (and it is not the Commissioner’s submission) that the decision-maker’s subjective state of mind is determinative of whether there is a reviewable decision. However, it does mean that the inquiry is informed by objective facts that show whether the decision-maker purported to act, or assumed they were acting, pursuant to the statutory power. So much is consistent with the reasoning in *Lawlor*,⁵ and with subsequent cases which explain that a decision includes a mental process of reaching a conclusion.⁶

¹ (1979) 41 FLR 338.

² *Lawlor* at 342, 343 (Bowen CJ), this being option (b) in the three alternatives considered by his Honour.

³ *Lawlor* at 344 (Bowen CJ).

⁴ *Lawlor* at 372 (Smithers J).

⁵ Eg, Bowen CJ acknowledged at 344 that a “decision made in the intended exercise of powers will generally constitute a purported exercise of those powers”; Smithers J repeated and adopted the reasons of Brennan J below, which had regard to what the decision-maker intended (see at 370); Smithers J also concluded that a decision would be reviewable where it was made by the decision-maker “in purported or assumed pursuance of the relevant statutory provision” (see at 373).

⁶ See eg *Pintarich v Federal Commissioner of Taxation* (2018) 262 FCR 41 at [140]-[143] (Moshinsky and Derrington JJ) and *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533 at [11] (Spender J), [55] (Higgins J), [101] (Madgwick J).

4. **The Tribunal’s treatment of the facts about the decision (RS [8]-[10]):** The Commissioner says (AS [11] and [14]) that the Tribunal misunderstood *Lawlor* and erroneously treated as irrelevant the objective facts going to the question of the Investigator’s intention and conclusion. The respondent does not appear to argue that the Tribunal was right to disregard such matters but says instead that, when its reasons are properly understood, the Tribunal did not in fact do so: see RS [8]-[9]. That submission cannot be reconciled with the expressed reasoning of the Tribunal.
5. The Tribunal treated *Lawlor* as having held that whether a decision was reviewable was not affected by the decision-maker’s intention; accordingly, the Tribunal expressly disregarded as irrelevant the objective facts about the Investigator’s actual conclusion.⁷ It cannot be said that this was to go “no further than to observe that it would be an unusual outcome if, faced 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”: RS [8].
6. The respondent emphasises (at RS [10]) the Tribunal’s conclusions as to various objective features of what it called the “Composite Alert”. However, the contents of that communication simply do not amount to something that could come within the description of a removal notice given under s 88 of the OS Act: see AS [23](c). As such, the objective facts about the Investigator’s intention (which the Tribunal disregarded) did not stand in opposition to objective facts about the form of the communication she made. Considered together, as they should have been, the objective facts demonstrated that there had not been a “decision under [s] 88 to give a removal notice”: see AS [23]-[24].
7. **Statutory text (RS [11]):** It is not correct to say that “the OS Act does not prescribe any particular content for a removal notice”: cf RS [11]. Section 88(1) sets out the content by stating that a removal notice is a written 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.

⁷ T at [36]-[37], [131], [147]-[149] (Kyrou P); [186]-[187], [220], [239]-[240] (O’Donovan DP); and [255]-[256] (Manetta SM).

8. The communication to X did not require this or, for that matter, anything at all. It stood in contrast to what would have been done following a decision to give a “notice” under s 88.
9. **Statutory context and purpose (RS [12]-[15]):** The respondent says that the first two matters of context and purpose identified by the Commissioner (at AS [19]-[20]) “fall away” once it is understood that the Tribunal found that the Commissioner in fact gave a removal notice under s 88: RS [12]. However this inverts the analysis and assumes the answer to the statutory construction question. Statutory context and purpose inform the meaning of the phrase “a decision ... under s 88 to give a removal notice” in s 220(2) of the OS Act. That phrase must be construed *before* it can be determined whether the communication amounted to a decision under s 88 for the purposes of s 220(2). For the reasons given at AS [15]-[22], it is not sufficient to merely identify a communication that was, or might have been, understood by its recipient to be a removal notice under s 88.
10. At RS [13]-[14], the respondent seeks to answer statutory construction arguments by describing and criticising the Commissioner’s practices. Again, this does not assist in ascertaining the intended meaning of the statutory phrase “a decision ... under s 88 to give a removal notice”. As the characterisation of the Commissioner’s practices in RS [13]-[14] is not relevant to the present appeal, it is otherwise unnecessary to respond to those matters.

Grounds 2 to 5 (RS [16]-[24])

11. **Principles (RS [16]-[17]):** While the respondent expresses and emphasises the principles in ways that differ from the Commissioner, it is unnecessary to address those differences; it appears to be accepted that Grounds 2 to 5 fall to be considered against the basic principles in *Pochi* and *Bond*, as explained and applied in later cases.⁸ Put simply, the Tribunal was under a duty to act judicially, and it will have failed to do this if it made important findings in the absence of any probative evidence, or on the basis of guesswork rather than reasonably available inference.

⁸ See *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41 and *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321. See also the discussion of those principles in *Wecker v Secretary of Department of Education Science & Training* (2008) 168 FCR 272 at [95]-[99] (Greenwood J, French J [3] and Weinberg J [41] agreeing); *Rawson Finances Pty Ltd v Federal Commissioner of Taxation* (2013) 296 ALR 307 at [62] (Jessup J) and [83]-[87] (Jagot J); and *Assistant Minister for Immigration and Border Protection v Splendido* (2019) 271 FCR 595 at [107]-[108] (Mortimer J).

12. **The “Composite Alert” finding (RS [18]-[21]):** Annexure B was an incomplete and inaccurate document of unknown and untestable provenance. That is why it could not rationally affect the assessment of the probability of the content of the Investigator’s decision; it was therefore, in law, no evidence at all: AS [25]; cf RS [19]. And in at least one respect that the Tribunal felt to be of significance, Annexure B was not “consistent with other corroborating evidence” cf RS [20]. The completed field ‘Legal Basis’ which was said to include ‘Section 7 Online Safety Act 2021’ was not corroborated by any positive evidence at all.⁹
13. The respondent says that the finding was not critical to the Tribunal’s decision and so any error would not be appealable: RS [21]. As to this, identifying any decision in fact made by the Investigator was critical to determining whether the Tribunal had jurisdiction.¹⁰ However the Tribunal’s reasons are less than clear as to what it held to have constituted the decision in fact made. The President said that it was the decision to give X the Composite Alert that was the decision under s 88 to give a removal notice.¹¹ Yet he also said that his conclusion on jurisdiction would have been the same if he had found the Investigator had given X only the complaint alert.¹² O’Donovan DP based his decision on conclusions equivalent to the Composite Alert finding, and did not suggest he would have reached the same conclusion based simply on the complaint alert.¹³ Manetta SM simply based his decision on the complaint alert.¹⁴ Ultimately, if the Court concludes that the Complaint Alert finding was not critical to the Tribunal’s conclusion as to what constituted the decision, and thus not critical to its conclusion on jurisdiction, the Commissioner accepts that error as to that finding would not be appealable error in itself. That error would however remain relevant to Ground 1.
14. **X’s state of mind (RS [22]-[24]):** It appears to be common ground that there was no actual evidence of X’s state of mind, with that question (if relevant at all) to be determined as a matter of inference from other evidence. However, the inferential reasoning explained at

⁹ In that respect, the Investigator’s inability to positively exclude that possibility from memory is simply not corroborative: cf eg T [97] (Kyrou P).

¹⁰ *Church v Secretary, Department of Education* (1987) 73 ALR 69 at 80 (Sheppard J).

¹¹ T [131], [139] (Kyrou P).

¹² T [118], [155] (Kyrou P).

¹³ T [195]-[196] (O’Donovan DP).

¹⁴ T [247] (Manetta SM).

RS [22] does not, without impermissible guesswork, provide a basis for the Tribunal's conclusion. Contrary to RS [23], the Commissioner does not invite the Court to engage in such speculation itself; the submission at AS [27] simply identifies inferences of at least "equal degrees of probability" to highlight that any inference as to why X removed the Post was mere speculation on the part of the Tribunal.

15. The parties disagree about whether the Tribunal treated X's subjective understanding of the Composite Alert as a determinative consideration (AS [11(b)], cf RS [22]). The Commissioner maintains that a fair reading of the Tribunal's reasons indicates that it was. However the Commissioner accepts that, if the Court concludes otherwise, the error as to X's state of mind would not be appealable error in itself. It would however remain relevant to Ground 1.

DATED: 14 November 2025

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