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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 OUTLINE OF SUBMISSIONS

INTRODUCTION AND SUMMARY

1. In mid-2024, the eSafety **Commissioner** received a **complaint** about material posted by the respondent on the social media platform **X**, which criticised a primary school teacher and publicised the teacher's name, social media accounts and workplace (the **Post**). An **Investigator** considered that complaint and formed the view that the preconditions for giving a removal notice to X under s 88(1) of the *Online Safety Act 2021* (Cth) (**OS Act**) were not met. The Investigator sent a communication about the complaint to X, which did not in terms direct or request X to remove the Post (**3 June communication**). X then temporarily withheld the Post in Australia.

2. The Respondent applied to the Administrative Appeals Tribunal for a review of the decision to give the 3 June communication. Following a hearing before the Guidance and Appeals Panel, the Administrative Review **Tribunal** determined that it had jurisdiction because the 3 June communication amounted to a removal notice under s 88 of the OS Act.[1] On this appeal, the Commissioner says that the Tribunal erred in two ways.

3. **First**, by Ground 1, the Commissioner says the Tribunal erred in deciding that it had jurisdiction, because the making of the 3 June communication was not "a decision of the Commissioner, under [s] 88 to give a removal notice" to X within the meaning of s 220(2) of the OS Act. The Tribunal misconstrued that provision. This led the Tribunal to exclude from its analysis relevant facts, which demonstrated that there was never any decision to give a removal notice and, instead, to focus on X's systems and state of mind. When s 220(2) is properly understood and applied, there was no decision under s 88 to give a removal notice, even on the facts as found by the Tribunal.

4. **Second**, by Grounds 2 to 5 the Commissioner says that the Tribunal's decision involved important factual findings about what was communicated to X, and how it was understood by X, that were not open as a matter of law. While grounds 2 to 5 reinforce ground 1, it does not depend on them. As such, they may not need to be addressed if ground 1 is upheld for other reasons.

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[1] *Baumgarten and eSafety Commissioner (Guidance and Appeals Panel)* [2025] ARTA 59 (**T**). It thereafter set aside the decision and remitted the matter for reconsideration *Baumgarten and eSafety Commissioner (Guidance and Appeals Panel)* [2025] ARTA 153.

ARGUMENT

Statutory provisions

5. The objects of the OS Act are to improve, and promote, "online safety for Australians" (s 3), namely "the capacity of Australians to use social media services and electronic services in a safe manner": s 5. The functions of the Commissioner include promoting, supporting and encouraging measures on "online safety for Australians", and doing all things necessary or convenient in relation to those functions: ss 27, 28. Under Part 3 of the OS Act, complaints may be made to the Commissioner about different categories of online content. This includes complaints by, or on behalf of, an adult believed to be the target of cyber-abuse material: s 36. The Commissioner may investigate such a complaint: s 37.

6. A complaint of that kind can lead to a removal notice under s 88(1), which provides that the Commissioner may, upon certain preconditions being met, "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 ...; or (ii) such longer period as the Commissioner allows." Relevantly, the Commissioner can only give such a notice if she "is satisfied that the material is or was cyber-abuse material targeted at an Australian adult": s 88(1)(b).[2] A failure to comply with a removal notice can attract a civil penalty of 500 penalty units: s 91.

7. Section 12(1) of the *Administrative Review Tribunal Act 2024* (Cth) provides: "[a] decision is a reviewable decision if an Act or a legislative instrument provides for an application to be made to the Tribunal for review of the decision."[3] Section 220 of the OS Act is such a provision. It provides that a person who posted material on a social media service may apply to the Tribunal "for a review of a decision of the Commissioner under [s] 88 to give a removal notice": s 220(2), and see also (3). A different category of persons, including a person who has made a complaint about adult cyber-abuse material, is able to apply for review of a decision *to refuse* to issue a removal notice: s 220(4) and (5).

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[2] The expression "c*yber-abuse material targeted at an Australian adult*" is defined in s 7 of the OS Act.

[3] The Tribunal proceeded on the basis that the relevant jurisdictional provision in the Tribunal's legislation was s 25(1) of the AAT Act as in force on 7 June 2024 (T[15]). The better view is that the applicable provision is s 12(1) of the *Administrative Review Tribunal Act 2024* (Cth): *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth), Sch 16, Item 24.

Facts

8. On 31 May 2024, the Commissioner received a complaint about the Post, which had been posted on both X and on Instagram (a platform owned by Meta). The Investigator determined that the Post did not meet the definition of "cyber-abuse material targeted at an Australian adult" in s 7, such that the pre-condition in s 88(1)(b) was not met.[4] The Investigator did not have delegated authority to issue a removal notice under s 88(1).[5]

9. On 3 June 2024, the Investigator decided to send a communication to X about the complaint. As communications with X were made through on-line portals, the Investigator prepared the text of a **complaint alert**, which she inserted into a free text field in the "Legal Request" portal. The Tribunal found that the 3 June communication comprised the complaint alert together with particular entries which the Tribunal found had been made in the portal. In particular, it found that the Investigator ticked the box affirming "any required legal authority" to "submit [the] request" and completed five fields, one of which was a "Legal Basis" field, in which the Tribunal found she had written "Section 7, Online Safety Act 2021".[6]

10. Shortly after the 3 June communication was made, X sent an email to the Commissioner to say that the Post had been withheld in Australia. By 10 August 2024, X had re-instated the Post. Meta, in response to the same alert sent to it, advised the Commissioner that it had found no violation of its policies.[7]

Ground 1 – the Tribunal did not have jurisdiction

The Tribunal's decision

11. The Tribunal decided[8] that the 3 June communication amounted to a s 88 removal notice. It concluded that there had been, therefore, "a decision of the Commissioner under [s] 88 to give a removal notice" within the meaning of s 220(2). The Tribunal construed that

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4 T [2(b)], [60], [93(b)], (Kyrou P); [178] (O'Donovan DP); [247] (Manetta SM).

5 T [84]. See also Affidavit of Samantha Caruana affirmed 11 December 2024 (**Caruana Affidavit**), at [7]; Affidavit of Luke Hannath affirmed 17 October 2024 (**Hannath Affidavit**), at [14].

6 See T [101]-[116] (Kyrou P); [196]-[197] (O'Donovan DP); and [247] (Manetta SM).

7 T [67]. See also footnote 40 at T [70].

8 Each member wrote separately, but all ultimately to like effect.

phrase as requiring a focus, not on whether the Investigator had intended to give such a notice, but on whether X subjectively did, or might reasonably have, understood the 3 June communication as a legal demand to remove the Post. On that basis, the Tribunal considered that:

a. it could *not* take into account, for example: the Investigator's finding that the definition of 'cyber-abuse material' was not met; the fact that the Investigator did not have delegated authority to give such a notice; and the absence of any intention to give such a notice but merely to alert X to a possible breach of its terms of service);[9] but conversely

b. it *was* relevant and determinative to have regard to whether X would understand, and did in fact understand, the 3 June communication as being a notice requiring it to remove the Post as rapidly as possible (which meant closely examining such things as the fields and guidelines for use of its portals).[10] (Errors in relation to the findings about X's state of mind are addressed later in relation to grounds 4 and 5.)

The Tribunal misunderstood Lawlor

12. The Tribunal approached the question of statutory construction largely by examining and applying what it derived from Bowen CJ's reasoning in *Collector of Customs (NSW) v Brian* ***Lawlor*** *Automotive Pty Ltd.*[11] In *Lawlor*, the Collector had made a decision to revoke a warehouse licence issued to the respondent company under the ***Customs Act*** *1901* (Cth), and had sent a letter which clearly communicated that decision. As there was no express power of revocation, the question was whether there was an implied power to do so in Div 1 of Part V of the Customs Act and, if not, whether the decision was nonetheless a decision made "under" that Division so as to be a reviewable decision.

13. At first instance, Brennan J (President) held that "the criterion of jurisdiction is whether the decision is made in the intended exercise of a power conferred by an enactment, not whether the decision is made in the valid exercise of such a power".[12] On appeal to the Full

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9 T [147]-[149] (Kyrou P); [186]-[187], [220] and [239]-[240] (O'Donovan DP); and [255]-[256] (Manetta SM).

10 T [139]-[146], [160] (Kyrou P); [201], [244]-[245] (O'Donovan DP); and [263]-[265] (Manetta SM).

11 *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338.

12 *Brian Lawlor Automotive Pty Ltd v Collector of Customs (NSW)* (1978) 1 ALD 167 at 179.4.

Court, Bowen CJ and Smithers J agreed with Brennan J that review was available for a "decision in fact made, regardless of whether or not it is a legally effective decision".[13] This central aspect of the decision in *Lawlor* is uncontroversial and has been applied on many occasions.[14] It was not in dispute below and is not in dispute here.

14. However, the Tribunal also relied upon Bowen CJ's conclusion that it was not necessary, in order for a decision to be reviewable, to demonstrate that it was made "in the honest belief that it was in the exercise of powers conferred by the enactment".[15] The Tribunal took the conclusion that proof of intention (in the sense of an honest belief as to the power exercised) was not *necessary* to mean that intention was not *relevant*. It was on this basis that it treated as irrelevant the objective facts which showed that the Investigator had *not* made a decision to issue a removal notice (see [11.a] above) and instead based its decision on how the complaint alert might have appeared to X (see [11.b] above). This was an error.

The Tribunal misunderstood s 220 of the OS Act

15. The correct characterisation of the decision under review ultimately turns on the particular legislation.[16] Once it is accepted that the Tribunal misunderstood and misapplied *Lawlor*, the question becomes whether the proper construction of s 220(2) otherwise supported the Tribunal's approach. Having regard to text, context and purpose, the answer is "no".

16. *Statutory text:* The expression "a decision of the Commissioner under [s] 88 to give a removal notice" contains three important concepts.

    a. There must be, as a matter of fact, a "decision by the Commissioner": "Decision" is used in its ordinary and natural sense to mean "the action of deciding",[17] and requires a mental process of reaching a conclusion on the part of the decision-maker.[18] Regardless of whether the decision which is the product of that conclusion is legally

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13 *Lawlor* at 342 and further at 342-4 (Bowen CJ); see also 370-3 (Smithers J).

14 Eg *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at [39]-[52] (Gageler, Keane and Nettle JJ).

15 T [24]-[25], [36]-[37] (Kyrou P); [228]-[234] (O'Donovan DP); [254] (Manetta SM).

16 See eg ***Shi*** *v Migration Agents Registration Authority* (2008) 235 CLR 286 at [25] (Kirby J); *Inspector-General in Bankruptcy v Rutherford* (2023) 297 FCR 535 at [53], [58] (Rares, Rofe and Downes JJ).

17 *Lawlor* at 369.3 (Smithers J).

18 ***Pintarich*** *v Federal Commissioner of Taxation* (2018) 262 FCR 41 at [140]-[145], [151] and [180] (Moshinksy and Derrington JJ).

effective or not, it must at least be a "decision in fact made" by the person.

b. The relevant decision "is to give a removal notice". Unless the conclusion of the Commissioner is in fact to give that kind of notice (whether it is legally effective or not) it will not be a decision that comes within the statutory text. Section 220(2) does not cover decisions "relating to" removal notices, nor decisions about non-compulsory requests.

c. A "removal notice": In both s 220 and s 88 this is used with the definite or indefinite article – "the removal notice" or "a removal notice".[19] At a minimum, a statutory notice requires a "clear statement" that the relevant decision has been made,[20] and must include such content as required by the statute.[21]

17. While attention can be drawn to these matters separately, the statutory phrase must be read as a whole.[22] As such, if the Commissioner did *not* in fact make a decision to give a s 88 removal notice then it will not be a decision that comes within s 220(2).

18. The Tribunal approached the provision by asking: (a) whether circumstances existed that were, or could be, understood by a recipient (here X) as involving a legal demand; (b) whether there was a reviewable statutory power in the OS Act to make something like that demand (here the s 88 removal notice power); and (c) whether the Investigator had done whatever it was that gave rise to the circumstances in question, in which event she would be taken to have made a "decision to give a s 88 removal notice".[23] This was a search for a constructive decision of the statutory kind, rather than an actual decision in fact made by the Investigator. That is not what the statutory text provides.

19. *Statutory context and purpose:* At least four matters of statutory context and purpose point away from the Tribunal's approach. *First*, s 220 addresses two alternative statutory

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19 Which can be contrasted with expressions like "written notice"(eg in ss 88(3), 89(3), 90(3), 97(2)) and "in writing" (eg in ss 27(1)(p), 163(2), 185(2), 187(2), 209(b)).

20 *Austin v Secretary, Department of Family and Community Services* (1999) 92 FCR 138 at [30], [36] (Drummond J).

21 *Albion Mill FCP Pty Ltd v FKP Commercial Developments Pty Ltd* [2019] 2 Qd R 426 at [35], [45] (Sofronoff P, Philippides and Henry JJA agreeing); *Secretary, Department of Family and Community Services v Rogers* (2000) 104 FCR 272 at [21] (Cooper J).

22 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-7 (the Court). See also *2 Elizabeth Bay Road Pty Ltd v Owners – Strata Plan No 73943* (2014) 88 NSWLR 488 at [81]-[82].

23 See in particular T [133]-[145] Kyrou P. See also [241]-[246] (O'Donovan DP); [259]-[268] (Manetta SM).

decisions: a decision to *give* a removal notice (see ss 88(1), 220(2) and (3)); and a decision to *refuse* to give a removal notice: see ss 88(3) and 220(4) and (5). The Tribunal's approach effectively creates a further class of constructive decision, because even where the Commissioner makes a statutory decision to *refuse* to give a removal notice, subsequent communications with the platform about the complaint may be taken in the circumstances to be a decision to *give* a removal notice. This confounds the express delineation in s 220.

20. *Second*, Parliament deliberately decided to confine the types of "decisions" of the Commissioner amenable to merits review. Not all actions and decisions of the Commissioner are to be reviewable by the Tribunal. In that context provisions should not be construed with an eye to enlarging the scope for merits review.[24]

21. *Third,* non-compliance with a removal notice attracts potential sanctions. If the conditions for issuing a removal notice are met, but the Commissioner decides instead simply to alert a provider to the complaint, on the Tribunal's approach the Commissioner might be taken to have given a constructive "removal notice". The prospect that such a communication from the Commissioner might, as a matter of law, be so understood, would at the very least introduce undesirable uncertainty in relation to a notice recipient's legal obligations.

22. *Fourth*, the need for a "reviewable decision" is a basal requirement in any proceedings before the Tribunal. Take, for example, the Tribunal's obligation under s 105 to affirm, vary or set aside a "reviewable decision". If a decision-maker knows that they lack power to make a particular kind of decision, and does not actually proceed in fact to make a decision purportedly of that kind, the Tribunal's obligation in conducting its review with respect to that (non) decision becomes confounding. Such was the case here. There was no issue about whether the constructive removal notice decision found by the Tribunal was the correct or preferable one, or beyond power, because the Commissioner had never actually decided to give a removal notice and could not defend it. The "decision" was, as a result, set aside and remitted once the Tribunal found it had jurisdiction to review it.

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[24] Cf T [152] Kyrou P.

There was no decision to issue a removal notice under s 88 of the OS Act

23. Approaching the question of the Tribunal's jurisdiction in light of the proper construction of s 220(2), it is plain from the facts as found that there was no "decision under [s] 88 to give a removal notice" to X. In particular:

    a. The Investigator sent the 3 June communication on the basis she did not have authority to give a removal notice and was not exercising the power in s 88(1).[25]

    b. The Investigator had positively determined that the definition of "cyber-abuse material targeted at an Australian adult" was not met, and therefore that the statutory preconditions for giving a removal notice were not satisfied.[26]

    c. The alert was not a "removal notice". The alert did not require X to take any steps to ensure the removal of the Post, or of any other kind, and it did not specify any timeframe by which X was required to do anything; rather it asked "that you advise us if any action is taken in response to this report". It did not advert to any consequences should X decide not to do anything. And it did not state that the Post was in breach of the OS Act, but rather that it "may be in violation of your policies".

24. Even if one accepts the Tribunal's findings about X's portal guidelines and (notwithstanding grounds 2 to 5) its findings about entries in the portal fields and X's state of mind, the result is the same. These do not answer the question whether the Investigator made an actual decision to give a removal notice. The decision to send the complaint alert – self-evidently *not* a decision to give a removal notice – did not become a different decision at the point when she went on X's "Legal Request" Portal, or at the point when she completed some or other mandatory field, or at the point it was received by X, or even, if it be the case, at the point when it was misunderstood by X.[27]

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25 T [84] (Kyrou P); [179], [186] (O'Donovan DP); [247] (Manetta SM).

26 T [2(b)], [60], [93(b)] (Kyrou P); [178]-[179] (O'Donovan DP); [247] (Manetta SM). See also Tender Bundle 58-60.

27 See generally *Pintarich*. See also *Azzi v State of New South Wales* [2024] NSWCA 169 at [101], [116] (Kirk JA), as to the distinction between making and communicating a decision.

Grounds 2 and 3: "Composite Alert" finding[28]

25. While the Tribunal is not a court, and is not bound by the rules of evidence, it must proceed by reference to "rationally probative evidence".[29] Here, there was no rationally probative evidence to support the finding that the Investigator had decided to send the "composite alert", and, therefore, it was an error of law to make it.[30] The composite alert was a construct of the Tribunal, derived from parts of "Annexure B"[31] and from the Investigator's evidence about sending the complaint alert, a record of which had been saved in the Commissioner's systems. Annexure B was not rationally probative of the fact in issue, and therefore was no evidence at all.[32] Moreover, having rejected "Annexure B" as incomplete and inaccurate, it was irrational or legally unreasonable to rely on a part or parts of it;[33] to the extent that it was explained at all, Annexure B was presented by the applicant below as the whole of the 3 June communication.[34]

Grounds 4 and 5

26. The conclusion that X withdrew the Post because it interpreted the 3 June communication as requiring its removal was not based on any evidence of X's state of mind. It was essentially a leap from the observation that X had withdrawn the post, together with the contents of an email sent by X to the respondent, to a speculative conclusion as to why it had done so.[35] The fact that X had withdrawn the Post was not, in the circumstances as found, rationally probative of why it had done so.

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28 The label 'Composite Alert' was used by Kyrou P to describe, collectively, what his Honour found to have been communicated through the portal: see T [106]-[107]. O'Donovan DP reached the same conclusions (see [196]-[197]) but referred to what was communicated as "a notice" or "the notice". And Manetta SM agreed with Kyrou P's factual findings on these matters, but confined his reasoning to the complaint alert: [247].

29 *Minister for Immigration and Ethnic Affairs v* ***Pochi*** (1980) 44 FLR 41 at 62 (Deane J); ***Rawson*** *v Commissioner of Taxation* (2013) 296 ALR 307 at [62] (Jessup J), [83]-[87] (Jagot J).

30 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 359-60 (Mason CJ), 366, 367 (Deane J); *Rawson* at [83]-[84] (Jagot J).

31 Or one part, in the case of O'Donovan DP: T [196].

32 *Bruce v Cole* (1998) 45 NSWLR 163 at 188-9 (Spigelman CJ, Mason P, Sheller and Powell JJA agreeing); *Wang v Australian Securities and Investments Commission* [2019] FCA 1178 at [68] (Bromwich J); *Rawson* at [62] (Jessup J).

33 See *CQG15 v Minister for Immigration and Border Protection* (2016) 253 FCR 496 at [38] (the Court) and, more generally, at [36]-[67].

34 T [99].

35 T [144] (Kyrou P); [201] (O'Donovan DP); [264] (Manetta SM).

27. Further, it is an error of law to draw an inference that is a matter of mere speculation[36] which would include cases of "conflicting inferences of equal degrees of probability".[37] Here, inferences of at least "equal degrees of probability" were available. For example, noting that the email responses to the Commissioner appear to have come from the same email address, that one of them was expressly stated to have been automated, and that they were sent very soon after the communication was first made to X, it is equally possible that the Post was removed as the result of an automated system based process. Alternatively, to take another example, it is equally possible that X removed the Post because X initially agreed that it violated X's terms of service and policies, a decision which X later saw as being "in error". Either the inference drawn by the Tribunal was not reasonably open or it "sound[s] a warning note to put one on inquiry whether there was indeed any basis for the inference drawn".[38]

ORDERS

28. The Court should make orders that the appeal be allowed and the decision of the Tribunal of 26 February 2025 be set aside on the basis that it did not have jurisdiction to hear or determine the respondent's merits review application dated 7 June 2024. The parties agree that there should be no order as to costs.

DATED: 31 October 2025

Tim Begbie
Frances Gordon
Fiona Batten
Counsel for the Applicant

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36 *Pochi* at 62, 67 (Deane J).

37 See *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 280 CLR 442 at [60] (Kiefel CJ, Gageler and Jagot JJ) citing *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5; *Rawson* at [88] (Jagot J).

38 *Giudice v Legal Profession Complaints Committee* [2014] WASCA 115 at [158] (Edelman J) referring, among other things, to *Wecker v Secretary, Department of Education, Science and Training* (2008) 168 FCR 272 at 295-6 [99] (Greenwood J, French and Weinberg JJ agreeing).