

**Interlocutory Decision and  
Reasons for Interlocutory Decision**

Constituted as the Guidance  
and Appeals Panel

**Baumgarten and eSafety Commissioner (Guidance and Appeals Panel)  
[2025] ARTA 59 (5 February 2025)**

**Applicant/s:** Celine Baumgarten

**Respondent:** eSafety Commissioner

**Tribunal Number:** 2024/3798

**GAP Reference Number:** 2024-001-028

**Tribunal:** Justice Kyrou, President, Deputy President O'Donovan,  
Senior Member Manetta

**Place:** Melbourne

**Date:** 5 February 2025

**Decision:** The respondent made a reviewable decision in respect  
of which the Tribunal has jurisdiction.

.....[sgd].....

**Justice Kyrou, President**

.....[sgd].....

**Deputy President O'Donovan**

.....[sgd].....

**Senior Member Manetta**

## **Catchwords**

*PRACTICE AND PROCEDURE – Tribunal’s jurisdiction – respondent has power to give a removal notice to a social media service provider requiring removal of online material – Tribunal has jurisdiction to review a decision to give a removal notice – statutory preconditions for giving a removal notice relating to applicant’s online material not satisfied – respondent gave a social media service provider a written communication described as a complaint alert regarding the applicant’s online material – service provider withheld the material from its social media platform within Australia less than two hours after receiving the alert – whether action taken by respondent was an exercise of powers conferred by the relevant enactment for the purposes of the Tribunal’s jurisdiction – whether a decision to give a removal notice was in fact made even though it was not legally effective – whether decision reviewable by the Tribunal – found Tribunal has jurisdiction to review action taken by respondent in accordance with the principles in Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd (1979) 41 FLR 338*

*PRACTICE AND PROCEDURE – referral of a proceeding to the Guidance and Appeals Panel – issue of significance to administrative decision-making – the identified issue of significance to administrative decision-making is a gateway and does not define the matters to be determined by the Panel*

*PRACTICE AND PROCEDURE – application for review lodged with the Administrative Appeals Tribunal but not determined at the time that Tribunal was replaced by the Administrative Review Tribunal – jurisdiction to be determined by reference to the provisions of the Administrative Appeals Tribunal Act 1975 as in force at the time the application for review was lodged*

## **Legislation**

*Administrative Appeals Tribunal Act 1975*

*Administrative Review Tribunal Act 2024*

*Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024*

*Online Safety Act 2021*

## **Cases**

*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321

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

*Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217

## Table of Contents

Statement of Reasons .....	5
<b>KYROU P .....</b>	<b>5</b>
INTRODUCTION AND SUMMARY .....	5
RELEVANT STATUTORY PROVISIONS .....	7
Online Safety Act.....	7
Administrative Appeals Tribunal Act .....	10
PRINCIPLES RELATING TO THE TRIBUNAL'S JURISDICTION .....	11
EVIDENCE .....	17
UNCONTESTED FACTS .....	18
X's terms of service .....	19
Action taken by the Commissioner in relation to the applicant's post on X .....	27
Procedural background .....	31
CONTESTED FACTS .....	31
Evidence on contested facts .....	31
Mr Hannath's evidence.....	34
Ms Caruana's evidence.....	38
Parties' submissions on contested facts .....	40
Conclusion on contested facts .....	41
PARTIES' SUBMISSIONS ON THE TRIBUNAL'S JURISDICTION .....	45
DECISION ON THE TRIBUNAL'S JURISDICTION .....	49
Was the Commissioner's communication to X a requirement to remove the Post? .....	51
The Commissioner's decision to give the Composite Alert is a reviewable decision .....	57
Alternative factual analysis and observations on the Commissioner's submissions .....	60
CONCLUSION AND FUTURE CONDUCT OF THE PROCEEDING .....	65
APPENDIX TO THE REASONS OF KYROU P .....	65
<b>O'DONOVAN DP .....</b>	<b>69</b>
FACTS.....	70
STATUTORY FRAMEWORK.....	75
LEGAL PRINCIPLES .....	77
APPLICATION TO THE FACTS .....	83
<b>MANETTA SM .....</b>	<b>85</b>
INTERPRETATION OF S 220(2) .....	86
OBJECTIVE CONSTRUCTION OF THE ALERT .....	88
IS THE ALERT REFERABLE TO AN EXERCISE OF THE POWER UNDER S 88? .....	89

# Statement of Reasons

## KYROU P

### INTRODUCTION AND SUMMARY

1. On 6 November 2024, I referred this proceeding to the Guidance and Appeals Panel ('GAP') pursuant to s 122(1) of the *Administrative Review Tribunal Act 2024* ('ART Act') on the basis that it raises the following issue of significance to administrative decision-making:

*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. In broad terms, I have found that the events giving rise to the proceeding are as follows:
  - (a) On 29 May 2024, the applicant posted a tweet on the social media service X (previously known as Twitter), the contents of which are not presently relevant ('Post').
  - (b) The eSafety Commissioner ('Commissioner')<sup>1</sup> did not make a decision which was expressed to be the giving of a removal notice under s 88(1) of the *Online Safety Act 2021* ('OSA')<sup>2</sup> in respect of the Post. That is because the Commissioner determined that not all of the statutory preconditions for the giving of such a notice were satisfied. It is not in dispute that, had a decision been made to give such a notice, it would have been a reviewable decision under s 220(2) of the OSA.<sup>3</sup>
  - (c) However, the Commissioner made a decision to send to X a written communication (described by the Commissioner as a 'complaint alert'<sup>4</sup>) which, having regard to its objective features, amounts as a matter of fact to a removal

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<sup>1</sup> Unless the context indicates otherwise, references to the Commissioner in these reasons include the Commissioner acting through her authorised delegates and other staff.

<sup>2</sup> Section 88 of the OSA is set out at [11] below.

<sup>3</sup> Section 220 of the OSA is set out at [13] below.

<sup>4</sup> See [74] below.

notice requiring X to remove the Post even though it was not a legally effective removal notice under s 88(1) of the OSA.

- (d) X interpreted the Commissioner's communication as a legal requirement to remove the Post, and withheld it within Australia.
  - (e) The applicant made an application to the predecessor of the Administrative Review Tribunal ('ART' or 'Tribunal'), namely the Administrative Appeals Tribunal ('AAT'), for review of the Commissioner's action on the basis that it constitutes a reviewable decision under s 220(2) of the OSA, namely, 'a decision of the Commissioner under section ... 88 to give a removal notice'.
  - (f) The Commissioner has contended that the AAT did not have jurisdiction to review her action.
3. Following the abolition of the AAT, all issues relating to the applicant's application for review fall to be determined by the ART. The initial task for the ART is to determine whether the AAT had jurisdiction to review the Commissioner's action on the basis that it constituted the making of a reviewable decision under s 220(2) of the OSA, read together with s 25(1) of the *Administrative Appeals Tribunal Act 1975* ('AAT Act').<sup>5</sup>
4. In undertaking that task, the Tribunal is entitled to consider all matters relevant to the jurisdictional issue and is not confined to addressing the issue set out at [1] above. That is because, although s 122(1) of the ART Act requires as one of the preconditions for a referral to the GAP that the President is satisfied that a proceeding raises an issue of significance to administrative decision-making, once a proceeding is referred to the GAP, all issues in the proceeding are before the GAP and not just the issue of significance to administrative decision-making. Put another way, a finding that a proceeding raises an issue of significance to administrative decision-making is a gateway for the proceeding to be heard by the GAP, and does not delimit or alter the issues in the proceeding to be determined by the GAP. The sole question currently before the Tribunal is whether the Commissioner made a reviewable decision in respect of which the Tribunal has jurisdiction.

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<sup>5</sup> Section 25 of the AAT Act is set out at [16] below.

5. For the reasons set out below, I have concluded that that question should be answered in the affirmative.

## RELEVANT STATUTORY PROVISIONS

### Online Safety Act

6. The OSA commenced on 23 January 2022. Section 3 of the OSA states that the objects of the Act are ‘to improve online safety for Australians’ and ‘to promote online safety for Australians’. Section 26 establishes the office of the Commissioner. Under s 27(1), the functions of the Commissioner include the following:

- (b) to promote online safety for Australians;*
- (c) to support and encourage the implementation of measures to improve online safety for Australians;*
- ...
- (l) to consult and cooperate with other persons, organisations and governments on online safety for Australians ...*
- ...
- (s) to do anything incidental to or conducive to the performance of any of the above functions.*

7. Under s 28 of the OSA, the Commissioner ‘has power to do all things necessary or convenient to be done for or in connection with the performance of the Commissioner’s functions.’

8. One of the types of online harms which the OSA addresses is ‘cyber-abuse material targeted at an Australian adult’. Section 7(1) defines this relevantly 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; or*
    - (ii) a relevant electronic service; or*
    - (iii) a designated internet service;*
  - (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.*

...

9. It can be seen that s 7(1) of the OSA contains a number of preconditions for material to constitute 'cyber-abuse material targeted at [an] Australian adult'. For convenience, I will refer to the requirement in s 7(1)(b) as the 'intention to cause serious harm' requirement and to the requirement in s 7(1)(c) as the 'menacing, harassing or offensive material' requirement.
10. Section 36 of the OSA relevantly enables an Australian adult to complain to the Commissioner that they are the target of cyber-abuse material that has been provided on a social media service, or to authorise another person to make a complaint. Section 37(1) provides that the Commissioner may investigate a complaint made under s 36.
11. Section 88 of the OSA confers power on the Commissioner to give what is described as a 'removal notice' to a provider of a social media service, a relevant electronic service or a designated internet service. It is common ground that X is a social media service. Section 88 relevantly provides as follows:

**88 Removal notice given to the provider of a social media 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:*
    - (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.*

- (2) *So far as is reasonably practicable, the material must be identified in the removal notice in a way that is sufficient to enable the provider of the service to comply with the notice.*

*Notice of refusal to give a removal notice*

- (3) *If the Commissioner decides to refuse to give a removal notice under subsection (1), the Commissioner must give written notice of the refusal to the person who made the complaint to the Commissioner under section 36.*

12. Section 91 of the OSA provides that a civil penalty of 500 penalty units may be imposed for failure to comply with a removal notice under s 88.

13. Section 220 of the OSA sets out the merits review jurisdiction of the ART from 14 October 2024 (until 13 October 2024, it set out in identical terms the jurisdiction of the AAT) in respect of decisions made by the Commissioner. It relevantly provides as follows:

**220 Review of decisions by the ... Tribunal**

...

*Removal notice—cyber-bullying, intimate images and cyber-abuse*

- (2) *An application may be made to the ... 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.*
- (3) *An application under subsection (2) may only be made by:*
- (a) *the provider of the social media service, relevant electronic service or designated internet service; or*
  - (b) *if the material that is the subject of the notice was posted on the service by an end-user of the service—the end-user.*
- (4) *An application may be made to the ... Tribunal for a review of a decision of the Commissioner to refuse to give the provider of:*
- (a) *a social media service; or*
  - (b) *a relevant electronic service; or*
  - (c) *a designated internet service;*
- a section 65, 77 or 88 removal notice that relates to material provided on the service.*
- (5) *An application under subsection (4) may only be made:*
- (a) *by a person who made a section 30, 32 or 36 complaint about the material provided on the service; or*
  - (b) *in the case of a refusal to give a section 65 or 88 removal notice—by, or with the consent of, the person who was the target of the material provided on the service; ...*

...

14. The Bill for the OSA in the form in which it was initially introduced into the Parliament did not refer to 'informal notices' or 'informal requests'. Section 183 deals with the annual

reports of the Commissioner. Section 183(2) was inserted during the parliamentary process to add a large list of items to be included in the annual reports,<sup>6</sup> including new paragraph (zi) of s 183(2) which is in the following terms: ‘the number of informal notices given, and informal requests made, by the Commissioner to a person in relation to cyber-abuse material targeted at an Australian adult during that year’. The OSA does not define ‘informal notices’ or ‘informal requests’, and these terms only appear in s 183(2) of the Act.

### **Administrative Appeals Tribunal Act**

15. Upon the commencement of the ART Act on 14 October 2024, the ART replaced the AAT. In broad terms, item 24 in schedule 16 of the *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (‘Transitional Act’) provides that any proceeding commenced in the AAT which is not determined by 14 October 2024 continues in the ART and is to be determined by the application of the provisions of the ART Act. This proceeding was commenced on 7 June 2024. It was not determined by 14 October 2024. If the AAT had jurisdiction in respect of the proceeding, it now falls to be determined by the ART in accordance with the provisions of the ART Act. The question whether the AAT had jurisdiction in respect of the proceeding – and whether it is now properly before the ART – must be determined in accordance with the AAT Act as in force on 7 June 2024.<sup>7</sup>
16. Section 25(1) of the AAT Act, as in force on 7 June 2024, provided as follows:

#### ***25 Tribunal may review certain decisions***

*Enactment may provide for applications for review of decisions*

- (1) *An enactment may provide that applications may be made to the Tribunal:*
- (a) *for review of decisions made in the exercise of powers conferred by that enactment; or*
  - (b) *for the review of decisions made in the exercise of powers conferred, or that may be conferred, by another enactment having effect under that enactment.*

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<sup>6</sup> See: *Online Safety Bill 2021* (4 February 2021), s 183, p. 148; *Online Safety Bill 2021 Schedule of the amendments made by the Senate* (22 June 2021), item 8, pp. 3-5.

<sup>7</sup> Because the definition of ‘decision’ in s 4 of the ART Act is similar to the definition of that term in s 3(3) of the AAT Act and the provisions of the ART Act and the AAT Act which set out what is a reviewable decision (s 12 of the ART Act and s 25 of the AAT Act) are also similar, my analysis and conclusion regarding jurisdiction would have been the same if the provisions of the ART Act had applied.

17. The definition of ‘decision’ in s 3(3) of the AAT Act, as in force on 7 June 2024, was expressed to include the following:

- (a) *making, suspending, revoking or refusing to make an order or determination;*
- (b) *giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;*
- (c) *issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;*
- (d) *imposing a condition or restriction;*
- (e) *making a declaration, demand or requirement;*
- (f) *retaining, or refusing to deliver up, an article;*
- (g) *doing or refusing to do any other act or thing.*

### **PRINCIPLES RELATING TO THE TRIBUNAL’S JURISDICTION**

18. The AAT (as is the case with its successor, the ART) did not have a general review jurisdiction. As s 25 of the AAT Act makes clear, the AAT’s jurisdiction was largely conferred by other enactments. The starting point for assessing whether the AAT had jurisdiction to review a decision was the legislative instrument which provided for an application to be made to the AAT for review of a decision made under the instrument.

19. The most relevant authority for present purposes is the 1979 decision of the Full Court of the Federal Court in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*.<sup>8</sup>

20. In that case, an officer of the Collector of Customs (‘Collector’) revoked a private warehouse licence held by Brian Lawlor Automotive Pty Ltd (‘licensee’), which was previously granted to the licensee by the Collector under Division 1 of Part V of the *Customs Act 1901*. The document setting out the revocation was a letter dated 31 October 1977 from the Collector to the licensee. The letter referred to the licence, set out a finding that the licensee was not a fit and proper person to hold the licence and then relevantly stated, ‘Accordingly, you are advised that [the licence] is revoked, the revocation to take effect from 21 November 1977.’<sup>9</sup> The letter did not refer to the source of power for the revocation of the licence and, in particular, did not state that the revocation was pursuant to Division 1 of Part V of the *Customs Act*.

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<sup>8</sup> (1979) 41 FLR 338 (‘*Lawlor*’).

<sup>9</sup> *Lawlor* (1979) 41 FLR 338, 347.

21. In *Lawlor*, it was common ground that the revocation of the licensee's licence was not authorised by any provision in Division 1 of Part V of the *Customs Act*. The issue was whether the AAT had jurisdiction to review the revocation of the licence in circumstances where the revocation was invalid because it was made without legislative power to do so. The Full Court (Bowen CJ and Smithers J, Deane J dissenting) held that the AAT had jurisdiction.
22. In 1979, s 25(1) of the AAT Act was in the terms set out at [16] above and s 3(3) was in the terms set out at [17] above. Section 25(4) provided that the AAT had 'power to review any decision in respect of which application is made to it under any enactment.' Section s 26(1) stated that the provisions of the schedule to the AAT Act had effect according to their tenor. Section 26(2) stated that a reference in s 25(4) of the AAT Act to an enactment included a reference to the schedule. Item 12(2) of the schedule provided that applications may be made to the AAT for review of 'a decision ... under Division 1 of Part V of the Customs Act'.
23. In *Lawlor*, Bowen CJ and Smithers J, in separate judgments, described the Collector's action as a 'purported' revocation of the licensee's license because it was a purported exercise of the power in Division 1 of Part V of the *Customs Act* to revoke the licence. They held that the AAT had jurisdiction to review the purported revocation of the licensee's licence.
24. Bowen CJ held that the word 'decision' in s 25(1) of the AAT Act 'simply refers to a decision in fact made, regardless of whether or not it is a legally effective decision.'<sup>10</sup> He then considered the meaning of the words 'made in the exercise of powers conferred by that enactment' in s 25(1). He stated that these words had three possible meanings, namely that it must be shown that there was a decision made (a) in pursuance of a legally effective exercise of powers conferred by the enactment; or (b) in the honest belief that it was in the exercise of powers conferred by the enactment; or (c) in purported exercise of powers conferred by the enactment. He elaborated that the words 'purported exercise' in (c) were used 'as including the notion that the official may be making his decision on the

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<sup>10</sup> *Lawlor* (1979) 41 FLR 338, 342.

basis that he is exercising powers conferred by the enactment whether or not on a proper interpretation of the enactment such powers are conferred.’<sup>11</sup>

25. In rejecting interpretation (a), Bowen CJ said that the AAT Act ‘is clearly intended to give a person whose interests are affected by an administrative decision an effective appeal free of technicalities, against that decision on questions of fact and of law.’<sup>12</sup> He stated that, if it were held in accordance with interpretation (a) that the AAT lacked jurisdiction in respect of unlawful decisions, such an interpretation would render useless many applications for review to the AAT. He rejected interpretation (b) because it would be inappropriate to interpret s 25(1) of the AAT Act so as to make its operation dependent upon the state of mind of an official.<sup>13</sup>

26. Bowen CJ adopted interpretation (c) because it was consistent with the context in the AAT Act. He stated that if there had to be a valid decision or a lawful exercise of powers conferred by an enactment in order for the AAT to have jurisdiction, the number of matters falling outside the AAT’s jurisdiction would be very large. He elaborated as follows:

*[[I]n my opinion an applicant to the Tribunal has standing and the Tribunal has jurisdiction provided there is a decision in fact and provided further that the decision purports to have been made in exercise of powers conferred by an enactment whether or not as a matter of law it was validly made and whether or not action on the basis there was power to make the decision was right or wrong.*<sup>14</sup>

27. Bowen CJ stated that he had difficulty in drawing a distinction between a case where it is said that there is no decision because there is no relevant power at all in the relevant enactment, and cases where it is said there is no decision because the official, in one of a number of ways, has travelled outside the confines of the power conferred so the decision was *ultra vires*. He stated that, in most cases, it would be ‘reasonably clear from the objective facts under which enactment or in the exercise of which statutory powers an official purported to act’<sup>15</sup> and that the AAT would have jurisdiction to entertain an appeal from a decision in fact made which purported to be made in the exercise of power under

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<sup>11</sup> *Lawlor* (1979) 41 FLR 338, 342.

<sup>12</sup> *Lawlor* (1979) 41 FLR 338, 342.

<sup>13</sup> *Lawlor* (1979) 41 FLR 338, 343-4.

<sup>14</sup> *Lawlor* (1979) 41 FLR 338, 346.

<sup>15</sup> *Lawlor* (1979) 41 FLR 338, 344.

an enactment. The AAT could then proceed to determine whether the decision was properly made in fact and in law.

28. Bowen CJ held that, in the case before the Court, the AAT had jurisdiction because the licensee had established that there was a decision in fact which purported to be under an enactment or in the exercise of powers conferred by an enactment.
29. Smithers J stated that it is reasonable to construe the word 'decision' in its natural meaning, namely, 'the action of deciding'.<sup>16</sup> He held that that 'Parliament intended the word "decision" to refer not only to decisions made but also to action taken to implement those decisions.'<sup>17</sup> He stated that a document setting out a decision (such as a letter communicating a revocation of a licence) may be a 'decision', but so too may the preceding act of making that decision (such as a decision to revoke a licence).
30. Smithers J rejected the proposition that ss 25-26 of the AAT Act and the schedule to that Act should be interpreted as empowering the AAT to review only decisions which are legally effective. He stated that, to construe the AAT Act in this manner 'would leave untouched those administrative acts which are invalid and legally ineffective for one reason or another, but were performed in the course of action falling within the general purposes of a statute.'<sup>18</sup> He stated that such a situation 'would not be compatible with the objective of the [AAT Act]' and 'would remove from review those decisions most in need of review'.<sup>19</sup>
31. On the basis of authorities that he examined, Smithers J stated that phrases such as 'pursuant to', 'by virtue of' and 'under' that describe the source of a statutory power for an administrative decision are capable of extending to acts not authorised by the relevant statute. Accordingly, he held that this provided compelling reason to accord the expression 'made in the exercise of powers conferred by that enactment' in s 25(1) of the AAT Act and the expression 'under Division 1 of Part V of the Customs Act' in item 12(2)

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<sup>16</sup> *Lawlor* (1979) 41 FLR 338, 369.

<sup>17</sup> *Lawlor* (1979) 41 FLR 338, 370.

<sup>18</sup> *Lawlor* (1979) 41 FLR 338, 367.

<sup>19</sup> *Lawlor* (1979) 41 FLR 338, 367.

of the schedule to the AAT Act a 'liberal meaning appropriate to the purposes of the Act as appearing therein.'<sup>20</sup>

32. Smithers J then stated:

*In my opinion, adopting what I have called a liberal construction of the relevant expressions in ss 25 and 26 and the Schedule to the [AAT Act] which is appropriate to the nature and object of that Act, the necessary conclusion is that those decisions are reviewable which are made by an administrator in purported or assumed pursuance of the relevant statutory provision.*<sup>21</sup>

33. Smithers J stated that, '[i]f an administrator makes a particular decision in the course of government administration, then whether or not he is authorized to do so, there is in fact a decision made. The fact that that decision cannot affect legal rights or liabilities is irrelevant to that fact.'<sup>22</sup> He restated this preposition as follows: 'the fact that a decision is made by an administrator to take action which he has no power to take in a legally effective way does not exclude that decision from review by the Tribunal.'<sup>23</sup>

34. Smithers J concluded that the AAT had jurisdiction to review the purported revocation of the licensee's licence for the following reasons:

*The decision to revoke the [licensee's] licence was obviously made by the Collector in purported or assumed pursuance of Divn 1 of Part V of the Customs Act. Accordingly it was a decision made under that provision and reviewable by the [AAT].*<sup>24</sup>

35. *Lawlor* has been consistently applied by the courts to the predecessors of the ART, namely, the AAT,<sup>25</sup> the Refugee Review Tribunal,<sup>26</sup> the Migration Review Tribunal<sup>27</sup> and the Social Security Appeals Tribunal.<sup>28</sup>

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<sup>20</sup> *Lawlor* (1979) 41 FLR 338, 372.

<sup>21</sup> *Lawlor* (1979) 41 FLR 338, 373.

<sup>22</sup> *Lawlor* (1979) 41 FLR 338, 368.

<sup>23</sup> *Lawlor* (1979) 41 FLR 338, 370.

<sup>24</sup> *Lawlor* (1979) 41 FLR 338, 373.

<sup>25</sup> *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217, 232-7 [39]-[52] ('*Plaintiff M174/2016*')

<sup>26</sup> *Yilmaz v Minister for Immigration and Multicultural Affairs* (2000) 100 FCR 495, 500 [25]-[26], 514-15 [88].

<sup>27</sup> *Zubair v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 344, 353-4 [29]-[32].

<sup>28</sup> *Secretary, Department of Social Security v Alvaro* (1994) 50 FCR 213, 219-21.

36. Decisions that have referred to *Lawlor* often cite it for the proposition that the AAT had jurisdiction to review purported decisions in the sense that the decisions purported to exercise a particular power in circumstances where that power was not available and therefore the decision was legally ineffective. Such a description reflects the facts in *Lawlor*. However, Bowen CJ made it clear that the AAT's jurisdiction did not depend upon the state of mind of the decision-maker. Accordingly, the word 'purported' does not confine the principles in *Lawlor* to situations where the decision-maker's subjective intention or purpose is to make a particular decision falling within the AAT's jurisdiction. Rather, whether a reviewable decision has been made must be assessed objectively. One must look at the objective features of the decision or action that the relevant enactment specifies is a reviewable decision and compare them to the objective features of the decision made or the action taken by the decision-maker in a particular case, and then objectively determine whether the latter decision or action amounts, as a matter of fact, to a reviewable decision. A determination of whether a decision-maker's decision or action is a reviewable decision is not affected by whether:

- (a) the decision-maker intended it to be a reviewable decision; or
- (b) the decision was legally ineffective because the decision-maker lacked the power to make a reviewable decision.

37. It follows that, in the present case, the expression 'a decision of the Commissioner under section ... 88 to give a removal notice' in s 220(2) of the OSA does not require a search for a legally valid decision to give a removal notice under s 88. To meet the jurisdictional preconditions of s 220(2), in the present case it is sufficient that the following requirements are met. First, the Commissioner has in fact made a decision to give a notice to X. Secondly, having regard to its objective features, the notice amounts, as a matter of fact, to a removal notice under s 88 regardless of what was subjectively intended by the Commissioner in relation to the notice or whether the notice was legally effective under s 88.

38. The above analysis is consistent with *Plaintiff M174/2016 v Minister for Immigration and Border Protection*.<sup>29</sup> One of the issues in that case was whether the jurisdiction of the Immigration Assessment Authority ('IAA') to review a 'fast track reviewable decision' of the Minister or their delegate made under Part 7AA of the *Migration Act 1958* was confined to a validly made, legally effective decision. The High Court applied *Lawlor* in finding that the IAA's jurisdiction was not so confined. The plurality (Gageler, Keane and Nettle JJ) referred to the *Lawlor* 'construction' of s 25 of the AAT Act. Their Honours stated that the Full Court of the Federal Court in *Lawlor* 'construed the reference in s 25 of the [AAT Act] to a "decision" in respect of which an enactment might provide for review by [the AAT] as a reference to nothing more than "a decision in fact made, regardless of whether or not it is a legally effective decision."' <sup>30</sup> Gordon and Edelman JJ delivered short concurring judgments which broadly agreed with the plurality.

## EVIDENCE

39. The applicant relied upon an affidavit sworn by Reuben Kirkham on 4 October 2024. Dr Kirkham is a director of Free Speech Union of Australia Pty Ltd, which represented the applicant in this proceeding together with Scott Young of Counsel. Dr Kirkham is not a lawyer. He was not cross-examined on his affidavit. I will refer to the affidavit further below.

40. The applicant also relied upon the following categories of documents:

- (a) some documents in a bundle of 57 pages lodged by the Commissioner on the basis that they may be relevant to the jurisdictional issue to be determined by the Tribunal ('Bundle Documents'); and
- (b) some documents in a bundle of 48 pages lodged by the applicant, being documents obtained on her behalf from the Commissioner under the *Freedom of Information Act 1982* ('FOI Documents').

41. The Commissioner relied upon three affidavits. The first affidavit was affirmed by a solicitor acting for the Commissioner, which is not presently relevant. The second affidavit

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<sup>29</sup> (2018) 264 CLR 217, 232-3 [39], 236-7 [52].

<sup>30</sup> *Plaintiff M174/2016* (2018) 264 CLR 217, 232-3 [39].

was affirmed by Luke Hannath on 17 October 2024. He is a lawyer and, in June 2024, he was the acting manager of the adult cyber abuse team ('ACA team') in the Commissioner's office. The third affidavit was affirmed by Samantha Caruana on 11 December 2024. In June 2024, she was an investigator in the ACA team, and reported to Mr Hannath. Both Mr Hannath and Ms Caruana were cross-examined.

42. The Commissioner also relied upon some documents in the Bundle Documents and the FOI Documents.
43. In the course of the cross-examination of Mr Hannath, reference was made to two policy documents of the Commissioner, namely, 'Compliance and Enforcement Policy eSC CEP December 2021', and 'Adult Cyber Abuse Scheme Regulatory Guidance eSC RG 3 December 2023'. Also, two emails forming part of the FOI Documents which had redactions in relation to the names of the sender and recipients were supplemented by versions of the emails without those redactions. These policy documents and unredacted emails form part of the material before the Tribunal on the jurisdictional issue, in addition to the documents referred to at [39] to [42] above.
44. The online portal that Ms Caruana used to communicate with X in relation to the Post does not provide a copy of the information entered into the portal. Accordingly, the Tribunal did not have before it the fields of the portal that Ms Caruana populated in the present case. Prior to the conclusion of the hearing, the Tribunal enquired of counsel for the Commissioner whether it would be possible for the Commissioner to now utilise X's portal for the purpose of taking screenshots of the pages and fields that the Commissioner would need to populate in lodging a complaint alert. The Tribunal was informed that the Commissioner was willing to attempt this exercise. The Tribunal requested the Commissioner to do so and to lodge with the Tribunal the screenshots obtained by her, provided that the applicant agreed to that course. On 14 January 2025, the Commissioner lodged with the Tribunal five screenshots, and advised that the applicant did not object to their lodgement. I will refer to these screenshots below.

### **UNCONTESTED FACTS**

45. The facts summarised at [46] to [71] below are based upon the documents referred to at [39] to [44] above and matters that were common ground between the parties.

## **X's terms of service**

46. The parties did not file with the Tribunal all of the provisions of X's terms of service and policies to which reference is made in other documents. It can be inferred from those references that X had policies which prohibited the posting of material which:
- (a) incited others to harass members of a protected category;
  - (b) incited behaviour that targeted individuals or groups of people belonging to protected categories;
  - (c) targeted others with repeated slurs, tropes or other content that intended to degrade or reinforce negative or harmful stereotypes about a protected category, including severe repetitive usage of slurs or racist/sexist tropes where the context is to harass or intimidate others.
47. It can also be inferred that, where X formed the view that a post violated its policies, its terms of service authorised it to remove the post from its platform or withhold access to it in a particular country.
48. The parties provided to the Tribunal X's 'Platform Use Guidelines'. In those guidelines, X explained 'country withheld content' relevantly as follows:

### ***Why might content be withheld?***

*Many countries, including the United States, have laws that may apply to posts and/or X account content. In our continuing effort to make our services available to people everywhere, if we receive a valid and properly scoped request from an authorized entity, it may be necessary to withhold access to certain content in a particular country from time to time. Such withholdings will be limited to the specific jurisdiction that has issued the valid legal demand or where the content has been found to violate local law(s)...*

...

### ***Withheld posts***

*If you see the above message, it means X was compelled to withhold the original post in response to a valid legal demand, such as a court order.*

*If you see the above message, it means X withheld content based on local law(s) in response to a report filed through specific support intake channels.*

...

***How can I submit a legal request to have content withheld?***

*If you are a law enforcement agent, government official, or other third-party intending to submit a valid legal request and would like to have potentially illegal content or accounts removed from X, we ask that you first review the X Rules and, if applicable, submit a request to have the content reviewed for possible violations of X's Terms of Service, here: <https://help.twitter.com/forms>.*

*If you have already submitted a request and have received a response from X indicating that the content in question does not currently violate X's Terms of Service, you can submit a request for content to be withheld through our legal request submission site: <https://legalrequests.twitter.com>. You will then receive an automated response confirming that your request has been received by our support system. We will send another email once we've had a chance to evaluate your request.*<sup>31</sup>

49. It appears from the text at [48] above under the heading 'How can I submit a legal request to have content withheld?' that there are two pathways for a law enforcement agent, government official or other third-party to follow in relation to requesting that content be withheld:

- (a) In the first instance, if the entity is intending to submit a valid legal request, it should submit a request to have the content reviewed for possible violation of X's Terms of Service using the appropriate form ('General Portal');
- (b) If a request has already been lodged using the General Portal in (a) above and X has responded stating that the content does not violate its terms of service, a request can then be submitted using X's legal requests submission site ('Legal Requests Portal').

50. The first screenshot of X's Legal Requests Portal that the Commissioner lodged with the Tribunal on 14 January 2025 ('Commissioner's first screenshot') relevantly states the following:

*Legal Requests*

***Legal request submissions***

*Please confirm your identity*

*Welcome to Twitter's online legal request submission site. You can submit your legal request (e.g., subpoena or court order) for account information or content*

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<sup>31</sup> Underlining added for emphasis.

removal by following the steps below. We also accept emergency disclosure requests from law enforcement through this site. All non-legal requests should be submitted through our Help Center forms.

If you are a law enforcement agent, government official, or other third-party intending to submit a valid legal request, please enter your full name, official email address, and confirm your authority by checking the box below. No other uses of this form are permitted.

...

I affirm that I have any required legal authority to submit this request and the submission is a permitted use of this system.<sup>32</sup>

51. The second screenshot of X's Legal Requests Portal that the Commissioner lodged with the Tribunal on 14 January 2025 ('Commissioner's second screenshot') is very similar to the Commissioner's first screenshot and need not be reproduced.
52. The third screenshot of X's Legal Requests Portal that the Commissioner lodged with the Tribunal on 14 January 2025 ('Commissioner's third screenshot') was headed 'Twitter Legal Request Submissions' and gave the user of the portal a choice of four types of request to submit. They were 'Emergency disclosure request', 'Preservation request', 'Information request' and 'Removal request'. The note under the heading 'Information request' stated 'Submit a request for Twitter/Periscope account information based on valid, properly scoped legal process (e.g., subpoena, warrant).' The note under the heading 'Removal request' stated 'Submit a request for Twitter to withhold content based on a valid, properly scoped legal request.'
53. The fourth and fifth screenshots were blank forms for a 'Removal request' ('Removal request form' or 'Commissioner's fourth screenshot') and an 'Information request' ('Information request form' or 'Commissioner's fifth screenshot'), respectively.
54. The Commissioner's fourth screenshot (being the 'Removal request form') relevantly contains the following fields:

Removal Request

We may remove certain content in response to a valid and properly scoped request. Please fill-in the required details below to assist us in processing your content removal request.

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<sup>32</sup> Underlining added for emphasis.

More information is available in our *Guidelines for Law Enforcement and CWC Help Center Article*.

#### Contact Information

*Full name\**

*Title\**

*Organization\**

*E-mail\**

*Phone\**

*Fax*

*Street\**

*City\**

*Country\**

*ZIP code*

*Authorizing jurisdiction\* (Select a jurisdiction)*

*Jurisdiction authorizing your request. If the request is authorized by a U.S. Federal agency, please select "United States (Federal)".*

#### Reported Content

*Please add the account(s) and/or reported posting(s) (e.g., Tweets, Broadcasts) that are the subject of your investigation. Please select at least one option (Twitter username(s), or Periscope username(s), or Account ID(s), or reported link(s)).*

*Reporting\* Please fill out all the relevant sections and leave sections that do not apply blank. For instructions on how to find the account user ID, please refer to our law enforcement guidelines.*

*Reported link(s)*

*Link(s) of the Tweet or Periscope broadcast. For instructions on how to find a Tweet URL, please refer to this page.*

*Twitter account ID(s)*

*Reported account IDs of the subject account(s).*

*Twitter username(s), for example, @TwitterSafety*

*Reported @usernames of the subject account(s). Please check the username of the account on Twitter prior to reporting and also note that account holders can change their username from time to time.*

...

#### Required Information

Please upload a dated and signed copy of your valid legal process or report.

*Matter type\**

- Civil*
- Criminal*

*Issue type\**

- Child sexual exploitation*
- Copyright infringement*
- Trademark infringement*
- Violent threats or incitement*
- Harassment*
- Private information*
- Impersonation*
- Graphic Content*
- Defamation*
- Sensitive information*
- Infringement of privacy rights*
- Hateful conduct*
- Illegal content*
- Other*

*Quick review*

- This request can be processed by external vendors.  
Twitter can give access to external vendors for processing without facing any civil or criminal liability.*

*Court order\**

- I have a court order regarding this matter.*
- I don't have a court order regarding this matter*

*Legal basis\**

*Statute or other legal basis supporting your request for content removal (e.g., Article 24 bis of the Law on the Freedom of the Press).*

*Please provide any additional details*

*All other available details or context regarding the particular circumstances to help us better understand the situation.*

*User and Lumen Notice*

*As outlined in our Guidelines for Law Enforcement and Legal Request FAQ article, unless the reported content violates Twitter's Terms of Service, and unless we are prohibited from doing so, our policy is to notify users of legal requests to withhold content, and to provide them with a copy of the request. When certain content has been withheld, a "Tweet withheld" or "Account withheld" banner will be visible to users in lieu of the reported content. For a visualization, please see our Country withheld content page here. Twitter also partners with Lumen to publish legal requests to remove content unless, similar to our practice of notifying users, the reported content violates Twitter's Terms of Service and/or if we are prohibited from doing so.*

*Please acknowledge that you understand Twitter's user and Lumen notice policy:*

*Acknowledgement\**

- *I acknowledge and understand Twitter may notify the reported user(s) and Lumen of my request and will provide a copy of all attachments. Unless instructed otherwise, Twitter will not redact any of the information included in the attachment(s).*
- *Providing notice to the user and to Lumen is not appropriate at this time.*

*Attachments*

*File attachments Please upload a court order or other legal process you have obtained, if applicable.*

...

*Please note: Reports submitted through this form are reviewed and responded to as quickly as possible. Questions about submissions and follow-ups will be directed to the email address provided above.*

*Submit*<sup>33</sup>

55. The Commissioner's fifth screenshot (being the 'Information request form') contains a broad range of fields, similar to the Commissioner's fourth screenshot above. The extract that follows omits some of the fields under the heading 'Contact Information' and some other irrelevant information.

*Information Request*

*In line with our Privacy Policy and in compliance with applicable law, we may disclose account information to law enforcement or to authorized legal representatives in response to valid legal process.*

*More information is available in our Guidelines for Law Enforcement.*

*Contact Information*

...

*Organization\**

...

*Country\* (Select a country )*

*ZIP code*

*Authorizing jurisdiction\* (Select a jurisdiction )*

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<sup>33</sup> Underlining added for emphasis.

*Jurisdiction authorizing your request. If the request is authorized by a U.S. Federal agency, please select "United States (Federal)".*

**Subject of the Information Request**

**Reporting\*** *Please fill out all the relevant sections and leave sections that do not apply blank. For instructions on how to find the Twitter account user ID, please refer to our law enforcement guidelines.*

*Twitter account ID(s)*

*Reported account IDs of the subject account(s).*

*Twitter username(s), for example, @TwitterSafety*

*Reported @usernames of the subject account(s). Please check the username of the account on Twitter prior to reporting and also note that account holders can change their username from time to time.*

...

*Email address(es) and Phone number(s)*

*Email address or phone number you believe to be associated with a Twitter account.*

**Required Information**

**Matter type\***

- Civil*
- Criminal*

**Request type\***

- Court order*
- Formal request*
- Letter rogatory*
- RIPA: Grade 1*
- RIPA: Grade 2/3*
- Subpoena*
- Warrant*
- Other*

**Previous preservation**

- Have you previously issued a preservation associated with the account(s)?*

*If you have not previously submitted a preservation request and would like to, you may submit one through our online submissions site. More information for law enforcement is available in our Guidelines for Law Enforcement.*

**Production date** *YYYY-MM-DD*

*Date by which response is due (i.e. due date).*

*Issue type\**

- Election Related*
- Child sexual exploitation*
- Cybercrime*
- Defamation*
- Explicit content*
- Fraud*
- Harassment*
- Harm to minor (non-CSE)*
- Illegal substances*
- IP infringement*
- Missing persons / kidnapping*
- National security*
- Murder*
- Non-consensual nudity*
- Suicide / self-harm*
- Threats to journalists*
- Violent threats or incitement*
- Violent crime*
- Other*

*Case number\* Your internal case or docket number.*

*Requested information\**

- Basic account information*
- Creation IP\**
- Phone number*
- IP session logs*
- Tweets*
- Direct messages*
- Media*
- Other information*

*Requested dates YYYY-MM-DD to YYYY-MM-DD*  
*Please select an inclusive date range.*

*User Notice*

*As outlined in Twitter's Guidelines for Law Enforcement, our policy is to notify users of requests for their account information and provide them with a copy of the legal process, unless we are prohibited (e.g. non-disclosure order or counterproductive circumstances). Prior to notifying a user, we seek confirmation of this policy as well as any additional information regarding the possible prohibition of user notice from the requesting law enforcement agent.*

*Please acknowledge that you understand Twitter's user notice policy:*

*Acknowledgement\**

- Yes, I acknowledge and understand Twitter's user notice policy.*
- No, providing notice to the user is not appropriate at this time.*

*Attachments*

*File attachments\* Please attach a copy of your official legal request and non-disclosure order.*

...

*Please note: Reports submitted through this form are reviewed and responded to as quickly as possible. Questions about submissions and follow-ups will be directed to the email address provided above.*

*Submit*<sup>34</sup>

56. The Tribunal also had before it a document setting out information that the Commissioner had entered into X's Legal Requests Portal in an unrelated matter. The document was in the following form:

*Confirmation – Removal Request*

*Please confirm following input:*

*Removal Request*

*Required information*

<i>Authority name</i>	<i>Australia</i>
<i>Matter type</i>	<i>Civil</i>
<i>Court order</i>	<i>No</i>
<i>Legal basis</i>	<i>Section 7 of the Online Safety Act 2021</i>
<i>Additional information</i>	<i>[...]</i> <sup>35</sup>

**Action taken by the Commissioner in relation to the applicant's post on X**

57. The applicant made the Post on X on Wednesday 29 May 2024 at 11:03am. The Post was also posted on Instagram, which is operated by Meta.
58. On Friday 31 May 2024 at 8:38pm, the Commissioner received a complaint from a member of the public about the Post ('Complaint'). The Complaint was against X as well as Instagram. In the Complaint, the complainant stated that they were authorised to make

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<sup>34</sup> Underlining added for emphasis.

<sup>35</sup> Use of [...] in these reasons indicates that text has not been reproduced by the Tribunal because it contains personal identifiers or other information, disclosure of which is not necessary for a proper understanding of the Tribunal's reasons.

the Complaint by the person targeted by the Post and that the complainant had reported the Post to X and to Instagram that same day.

59. On 31 May 2024 at 8:38pm an automated email was sent by the Commissioner to the complainant which relevantly stated:

*Thank you for making a complaint to the Office of the eSafety Commissioner.*

...

***What we can do***

- *Give advice on what you can do yourself*
- *Assist you in resolving your concern, which may include approaching social media services to have material removed*
- *Get your consent before acting upon anything ...*

60. On Monday 3 June 2024, Ms Caruana considered the Complaint and concluded that the Post did not satisfy the definition of ‘cyber-abuse material targeted at an Australian adult’ in s 7 of the OSA. Her reasoning was that, although the Post satisfied the ‘menacing, harassing or offensive material’ requirement in s 7(1)(c), it did not satisfy the ‘intention to cause serious harm’ requirement in s 7(1)(b).

61. On 3 June 2024 at 4:57pm, the Commissioner sent an email to the complainant, which relevantly stated:

*We can see that the material is targeting [redacted by Commissioner] and that it may be in violation of Instagram and X policies.*

*To assist you, we will informally [escalate] your report to Instagram and X to notify them of the potential violation. Once platforms receive our report, they may take action against the material.*

62. On 3 June 2024 at 6:05pm, Ms Caruana accessed X’s Legal Requests Portal and entered information relating to the Complaint. Ms Caruana did not take a screenshot of the information she entered. The content of that information is a contentious factual issue which I will discuss in detail below.

63. At approximately the same time, Ms Caruana entered similar information into Meta’s portal.

64. On 3 June 2024 at 6:05pm, the Commissioner received an automated email from X, which relevantly stated:

*This automated response confirms receipt of your request to Twitter to remove content regarding user(s) @ (first user identified in your request).*

*Your request has been escalated to the appropriate team and will be reviewed and responded to as soon as possible. ...*

*We will contact you at the law enforcement/government email address you have provided should we require more information. ...<sup>36</sup>*

65. On 3 June 2024 at 7:18pm, the Commissioner received another email from X which stated that the Post ‘has been withheld in Australia’.

66. On 3 June 2024 at 7:28pm, X sent an email to the applicant which relevantly stated:

*In the interest of transparency, we are writing to inform you that X has received a request from the eSafety Commissioner regarding your X account ... 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. For more information about our Country Withheld Content policy, please see this page:*

*...*

*As X strongly believes in defending and respecting the voice of our users, it is our policy to notify our users if we receive a legal request from an authorized entity (such as law enforcement or a government agency) to remove content from their account. ...*

*We ... want you to have an opportunity to evaluate the request and, if you wish, take appropriate action to protect your interests. This may include seeking legal counsel and challenging the request in court ...<sup>37</sup>*

67. On 3 June 2024 at 7:44pm, Instagram informed the Commissioner by email that Instagram had ‘found no violations of [its] policies’ in relation to the Post. Instagram did not remove the Post at that time.

68. On Tuesday 4 June 2024, the applicant tweeted a screenshot of the email at [66] above and made some comments that were critical of the Commissioner. At 4:26pm on that day, the ACA team was notified by an internal email of the applicant’s tweet. At 4:47pm, Paul

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<sup>36</sup> Underlining added for emphasis.

<sup>37</sup> Underlining added for emphasis.

Kernebone, a senior investigator in the ACA team, responded to the email relevantly as follows:

*... FYI we (ACA) did receive a complaint about this over the weekend ... The content was on X and Instagram. We requested both platforms pull the post.*

*X geoblocked the content – Instagram declined to...*<sup>38</sup>

69. Mr Kernebone's email was copied to a number of individuals, including Mr Hannath. On Wednesday 5 June 2024 at 8:53am, Mr Hannath responded to Mr Kernebone's email as follows:

*Further to [the] email below, we should say that this was only an informal escalation, which was deemed to be a potential breach of X's own terms of service.*

*It was not a formal removal notice.*<sup>39</sup>

70. On 5 June 2024 at 4:24pm, the Commissioner sent an email to the complainant which relevantly stated:

*We have received confirmation from X (Twitter) that they have removed the content for violating their policies.*

*We have checked the URL to the material and confirm the material is no longer available:*

*...*

*We have been advised by Instagram that they have found no violation of their policies in relation to [the Post]...*

*We have requested an additional review of the decision and provided further context.*

*We will update you once we receive a response from Meta.*<sup>40</sup>

71. On or about 10 August 2024, X sent an email to the applicant 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 remains available on X.

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<sup>38</sup> Underlining added for emphasis.

<sup>39</sup> Emphasis in original.

<sup>40</sup> It appears from the Commissioner's internal records that Meta removed the Post from Instagram on 16 June 2024 and that this action was taken by Meta of its own accord without any further communications between it and the Commissioner since 5 June 2024.

## **Procedural background**

72. On Friday 7 June 2024, the applicant lodged an application for review with the AAT. The application described the decision to be reviewed as follows:

*The decision was made by the eSafety Commissioner under the Online Safety Act 2021 (Cth) to give a takedown notice to X, presumably under Section 88. The precise date of the decision cannot have been any earlier than the 29th of May 2024, as this is when the Tweet was posted. We believe it was made on the 3rd of June 2024.*

73. In her 'Notice of Appeal' document, the applicant stated that her review application was made under s 220(2) of the OSA.
74. On 18 June 2024, the Commissioner advised the AAT that, in the Commissioner's opinion, no reviewable decision of a kind referred to in s 220 of the OSA had been made in the present case because all that the Commissioner had done was to send to X a 'complaint alert' which 'informally [notified] X that a complaint had been received and provide[d] details of the complaint for X's consideration.' The Commissioner stated that '[c]omplaint alerts notify online services that material that may breach their terms of service has been reported to eSafety [and] do not ask nor require the provider to take any action in response.' The Commissioner added that '[t]here is no power to give complaint alerts to online service providers in the [OSA].'
75. As I have already stated, on 6 November 2024, I referred the proceeding to the GAP pursuant to s 122(1) of the ART Act. On 13 December 2024, an interlocutory hearing was conducted by the GAP on the question of jurisdiction. Pursuant to leave given by the Tribunal, the parties provided supplementary written submissions in January 2025.

## **CONTESTED FACTS**

### **Evidence on contested facts**

76. The key contested factual matter concerns the precise content of the information that Ms Caruana entered into X's Legal Requests Portal on 3 June 2024.
77. In his affidavit of 4 October 2024, Dr Kirkham stated that X's lawyer telephoned him on 13 August 2024 and said words to the following effect:

*I have been instructed to send you the complaint form that X received from the eSafety Commissioner regarding Celine's post so you can use it in the proceedings. This is the form they submitted through X's Legal request portal and the reason X took down the post.'*

78. Dr Kirkham annexed to his affidavit an email from X's lawyer which simply stated, 'As discussed Reuben' (Annexure A) and the attachment to the email (Annexure B). Annexure B was in the following terms:

*Description: === Contact Information ===*

*Full name: Ash A*

*Title: Senior Investigator*

*Organization: eSafety Commissioner*

*E-mail: [...]*

*Phone: [...]*

*Fax (optional):*

*Street: [...]*

*City: [...]*

*Country: au*

*Zip (optional): [...]*

*State:*

*Authorizing Jurisdiction: Australia*

*=== Required Information ===*

*Authorizing Jurisdiction: au*

*Matter Type: Civil*

*Issue Type: Harassment, Private Information*

*Legal Basis: Section 7, Online Safety Act 2021*

*Format Type: Formal Request*

*Issuing Court:*

*=== Subject of the Information Request ===*

*Reported Twitter account ID(s):*

*Reported Twitter username(s): [...]*

*Reported Periscope usernames(s):*

*Reported Link(s): [...]*

*=== Requested Information ===*

*Requested Information:*

*Other info:*

*=== User and Lumen Notice ===*

*Acknowledgement of user notice policy: Yes*

*Notice redaction info:*

*Notice prohibition legal reason:*

*=== Quick Review ===*

*Quick review: No*

*=== Affirmations ===*

*I confirm that 'I am submitting the request without attachment.'*

*Signed name: Adult Cyber Abuse, eSafety Commissioner*

*I affirm that, to the best of my knowledge, the above information is true and accurate, and that I am authorized to submit this report.*

79. The Commissioner's internal records of the information that the Commissioner contends was sent to X on 3 June 2024 include the following text which is described as a 'draft complaint alert' ('Draft Complaint Alert'):

*Dear X,*

*Under the Online Safety Act 2021, the eSafety Commissioner is responsible for handling complaints about cyber abuse material concerning Australian adults and ensuring the rapid removal of such material from social media services, relevant electronic services, or designated internet services. Please refer to our website for more information on our role.*

*We wish to alert you to a complaint we have received from [redacted by Commissioner] (the complainant). Our reference number [...].*

*We are escalating this complaint to you on the basis that the material may be in violation of your policies.*

*The complainant has reported that an X account [...].*

*The reported account and material is available at the following URLs: [...].*

*The post appears to have been created by an individual end user, seeking to intimidate and harass the complainant, on the basis the complainant [runs] a Queer Club, for primary school students, which was a student led [initiative]. We understand the complainant's name, workplace and social media accounts have been [publicly] shared in the post, inciting unwanted contact from other users and placing the complainant at risk.*

*eSafety has assessed that the complained material may be a violation of X terms of services and policies, specifically:*

- inciting others to harass members of a protected category on or off platform*
- We prohibit inciting behavior that targets individuals or groups of people belonging to protected categories.*
- We prohibit targeting others with repeated slurs, tropes or other content that intends to degrade or reinforce negative or harmful stereotypes about a protected category. In some cases, such as (but not limited to) severe, repetitive usage of slurs, or racist/sexist tropes where the context is to harass or intimidate others*

*We would appreciate your immediate confirmation that you have received this report. We ask that you advise us if any action is taken in response to this report.*

*Regards,*

*Cyber Abuse Team*

*eSafety Commissioner<sup>41</sup>*

80. In relation to the information set out at [79] above, a timestamp '6/06/2024 2:18pm' appears underneath the text box containing the Draft Complaint Alert as well as '03/06/2024 18:05' in the subject line or title above that text box.

***Mr Hannath's evidence***

81. Mr Hannath relevantly stated the following in his affidavit:
- (a) In his role as acting manager of the ACA team in June 2024, he had delegated authority from the Commissioner to make decisions to give or to refuse to give removal notices under s 88 of the OSA. The team comprised up to three senior investigators and up to four investigators. He oversaw all of the ACA team's activities.
  - (b) Where he concluded that material constituted cyber-abuse material, the ACA team would generally send an informal complaint alert to the service provider. This was a report to the service provider which brought the material to their attention and flagged that it may violate particular provisions of their terms of service. If he concluded that the material did not constitute cyber-abuse material, he would assess whether the material potentially violated the service provider's terms of service and, if he considered that there may be a potential violation, the ACA team would send an informal complaint alert to the service provider. Where he concluded that the material constituted cyber-abuse material and the service provider did not remove the material, he would discuss with the relevant investigator the next steps. Those steps could include giving a removal notice to the service provider, issuing a 'service provider notification' under s 93 of the OSA

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<sup>41</sup> Underlining added for emphasis.

or refusing to give a removal notice. These options were only available where material was assessed as cyber-abuse material targeted at an Australian adult.

- (c) The investigator who dealt with the Complaint brought it to his attention '[o]n or about 4 June 2024' and told him what they had done in relation to it.
  - (d) Prior to reading Dr Kirkham's affidavit, he had not seen Annexure B or any document in that form. He recognises that some of the fields in Annexure B match some of the fields within X's online reporting portal. The only field he has not seen within the reporting portal was the one titled 'Format Type'.
82. Mr Hannath's evidence that is summarised at [83] to [92] below was given by him in cross-examination or in response to questions from the Tribunal.
83. In June 2024, the members of the ACA team sat in a very close environment and a lot of their practices were communicated within the team by word of mouth. They worked in very close proximity and did not operate in silos, in the sense of moving ahead without consideration of whether others might have a view. They were 'talking about complaints all day long'. There 'would be a lot of talking and forums ... and a lot of team meetings about things'. The team issued complaint alerts to service providers even though the requirements of s 7 of the OSA were not satisfied when they considered that the material constituted a serious breach of the service provider's terms of service. That would usually be the case where the 'menacing, harassing or offensive material' requirement was met but the 'intention to cause serious harm' requirement was not met, or vice versa.
84. In June 2024, Mr Hannath was the only member of the ACA team who had delegated authority to give or refuse to give a removal notice to a service provider. The power to give or refuse to give a removal notice only arises if the material satisfies the definition of cyber-abuse material targeted at an Australian adult in s 7 of the OSA. If an investigator assessed material as satisfying that definition, they would refer it to him to decide whether to give a removal notice or refuse to give a removal notice. However, if an investigator formed the view that the material did not meet the definition but may constitute a serious breach of a service provider's terms of service, the investigator could give a complaint alert to the service provider without necessarily obtaining approval from him. If an investigator formed the view that the material did not warrant the giving of a complaint

alert, they would inform the complainant that no further action would be taken in relation to their complaint.

85. The Commissioner issues a few hundred complaint alerts to service providers every year in relation to adult cyber-abuse material. In the past 12 months, the Commissioner issued three or four removal notices. Complaint alerts are a much faster mechanism than removal notices to achieve results because the alerts do not require the drafting of a removal notice and a statement of reasons to accompany the notice. The Commissioner sees her role as including being an advocate for complainants to assist them to achieve removal of material from social media platforms, and assisting in the enforcement of, or compliance with, providers' terms of service.

86. Mr Hannath gave the following evidence in relation to the desired regulatory result in the present case:

*Is it correct that eSafety's policy is that taking informal or less intrusive action is preferred if it achieves the Commissioner's desired regulatory results? --- Yes.*

*In the context of this case, the desired regulatory result was that the applicant's post would be removed from Twitter and Instagram? --- Yes.*

*And that was the desired result, even though the investigator had concluded that the material in question was not cyber abuse material targeting an Australian adult? --- Yes.*

...

*But in essence ... in this particular case, the Commissioner through [her] staff concluded that [she] could not legally force the removal, correct me if I misunderstood your evidence, but the staff wanted to bring about the removal and wanted to achieve that result through the informal alert process, is that correct? --- Through the informal alert process.*

*Yes? --- Yes.*

87. Mr Hannath gave the following evidence in response to questions from the Tribunal in relation to the impression that X was likely to have formed upon receiving the information provided by Ms Caruana through X's Legal Requests Portal:

*When I look at the X portal and description of 'legal' ... I form the view ... this is an access point for law enforcement agencies and for regulators who have legal power to demand that I do something?---Yes.*

*Is that a fair characterisation, do you think, of the way that X describes its portal?--- I think that's fair, your Honour. Yes.*

*And so in light of that, when the eSafety Commissioner uses that portal, is it fair to say that, given the way that X describes that portal, that they interpret what they're*

receiving as a legal demand to take down the post?---I think that's probably fair, your Honour. Yes.

...

[Do] you agree that, in this particular case ... that's how X interpreted it initially? i.e. They thought that they were receiving a legal demand to take down from the eSafety Commissioner?---Possibly, but not necessarily if the text of the draft complaint alert that is in the tender bundle... was submitted with it, I wouldn't necessarily assume they would think it was a legal request.

...

If that's what they reserve that portal for, every time a regulator uses it, doesn't it stand to reason that X would treat it as, 'This isn't just a complaint from an ordinary member of the community. This is a regulator with legal power, legal authority, specified and acknowledged that they have legal authority, requiring us, i.e. mandating us, to take the post down'?---Yes, your Honour. I accept that that could be the way they'd interpret it. I would just say that this obviously wasn't the only instance of us referring ... via this portal to X... X would routinely deny requests that we would put in this portal.

So they do not always comply with requests (indistinct) the commissioner uses this portal? ... --- Very rarely would comply with requests that we put through that portal.

Okay. In this case, they did - - -?---Yes.

...

... Out of all the major social media services we would contact, X was by far the least likely to take removal action, and, you know, this was the first time they took removal action for a long period of time that I recall, so I was surprised in that sense.

88. In response to questions from the Tribunal, Mr Hannath accepted that there was absent from the Draft Complaint Alert any statement that the Commissioner was not exercising a statutory power in providing the alert or that X was not legally required to remove the Post. He also accepted that the Commissioner's use of X's Legal Requests Portal could give the impression that it was being asked to do something rather than just having a look at the information provided, due to a combination of the following factors:
- (a) the first paragraph of the Draft Complaint Alert referring to the Commissioner's statutory functions;
  - (b) the statement that the Commissioner 'has assessed that the complaint material may be in violation of X's terms of services and policies'; and
  - (c) the fact that the portal was reserved for legal enforcement actions.

89. Mr Hannath sent an email at 8:53am on 5 June 2024 in response to Mr Kernebone's email of 4 June 2024 in order to confirm that the informal complaint alert mechanism had been used in relation to the Complaint. He clarified the position because Mr Kernebone's email was unclear as to which method had been used and might be misdescribing what had happened.
90. Mr Hannath has personal experience of using X's Legal Requests Portal and seeing pre-populated information there, which was likely retained from previous uses of the portal by the Commissioner's staff. It was therefore likely that some of the information in the portal relating to the Complaint, when Ms Caruana accessed the portal, was pre-populated. In terms of the items in Annexure B, the parts of the portal that he has seen previously being pre-populated were those under the heading 'Description == Contact Information =='. In relation to the item 'Full name: Ash A' in Annexure B, Alex Ash was the manager of the ACA team until around January 2024. He has seen that name pre-populated when accessing X's Legal Requests Portal.
91. Mr Hannath recognises all of the items in Annexure B other than the item 'Format Type'. He recalls that X's portal contained a free-text or 'additional information' field, into which he had previously entered information. Next to the item 'Legal Basis', he would normally specify that he was not making a legal request but an informal terms of service breach report. However, it was possible that some investigators submitted complaint alerts about adult cyber-abuse material which identified the legal basis as s 7 of the OSA.
92. There were two 'mismatches' between Mr Hannath's recollection of X's Legal Requests Portal and Annexure B. The first is the absence of a free-text field in Annexure B. The second is the inclusion in Annexure B of the item 'Format Type', which he does not recognise.

***Ms Caruana's evidence***

93. Ms Caruana relevantly stated the following in her affidavit:
- (a) She was the investigator responsible for handling the Complaint in June 2024. In her role as investigator, she reported to Mr Hannath.

- (b) She assessed the Post as not satisfying the definition of 'cyber-abuse material targeted at an Australian adult' in s 7 of the OSA because, although it satisfied the 'menacing, harassing or offensive material' requirement, it did not satisfy the 'intention to cause serious harm' requirement.
  - (c) On 3 June 2024, she 'alerted each of X and Meta to the complaint'. In the case of X, she used X's Legal Requests Portal, which had fields to be filled out. The substance of the information she provided to X through that portal is set out in the Draft Complaint Alert.
  - (d) Her usual practice is to type and save the main text of a complaint alert in the Commissioner's case management system and then copy and paste that text into the relevant service provider's portal. She would note the date and time at which she had done this in the case management system. She followed her usual practice in relation to the Complaint. She copied and pasted the text of the Draft Complaint Alert into the 'Please provide additional details' field of X's Legal Requests Portal on 3 June 2024 at 6:05pm.
  - (e) Annexure B is not familiar to her. The form of the document does not reflect the form of X's Legal Requests Portal that she used on 3 June 2024. However, she recognises some of the fields in Annexure B as similar to some of the fields in X's Legal Requests Portal.
94. Ms Caruana's evidence that is summarised at [95] to [98] below was given by her in cross-examination or in response to questions from the Tribunal.
95. It is Ms Caruana's usual practice to record a complaint alert in the Commissioner's case management system on the same day that it is sent to a service provider. It is her recollection that she recorded the Draft Complaint Alert in the case management system at 6:05pm on 3 June 2024, but cannot be definitive. A time stamp in the case management system may reflect the time that the system is most recently accessed to amend an entry rather than when the entry was first made. Her usual practice before closing a complaint alert is to go through the notes section of the case management system to see if there are any typographical errors that need to be corrected. She probably followed her usual practice in relation to the Complaint, but cannot recall whether she made any amendments.

96. In relation to the Complaint, Ms Caruana 'had a conversation with [her] manager at the time about submitting a complaint alert in regards to the [Post]'. Nobody other than Mr Hannath and herself was 'involved in [her] decision to send a complaint alert on 3 June'. In submitting the information in the Draft Complaint Alert to X, she was informing X that the material may be in breach of its terms of service, rather than asking X to do anything. She did not request X to 'pull the post'.
97. Ms Caruana does not recall whether there was any occasion upon which she informed X through its Legal Requests Portal that the legal basis for her request was s 7 of the OSA. It is possible that she did. She has no recollection of entering 'Section 7, Online Safety Act 2021' in the portal in relation to the Complaint, but 'it is possible, because [she does not] recall definitively'. If she were to have entered those words, she would have meant that the most relevant provision which dealt with the particular post is s 7 of the OSA rather than that the requirements of s 7 are met.
98. When Ms Caruana was taken through the contents of Annexure B, her evidence was to the effect that some fields looked familiar whereas others did not, that she believed that she recognised some fields whereas she believed she did not recognise others, and that she did not recall some fields. Ultimately, she acknowledged that it was possible that she entered the information appearing in Annexure B into X's Legal Requests Portal and that she entered the Draft Complaint Alert in the additional information component of the portal.

#### **Parties' submissions on contested facts**

99. The applicant submitted that the Tribunal could rely upon Dr Kirkham's affidavit and the information provided to him by X's lawyer, and should conclude that, on 3 June 2024, Ms Caruana entered into X's Legal Requests Portal all of the information in Annexure B. The applicant contended that the Tribunal should also find that, whilst Ms Caruana prepared the Draft Complaint Alert, she did not enter any of its text into X's Legal Requests Portal. That was said to be because the timestamp of 6 June 2024 on the Commissioner's case management system showed that the text of the Draft Complaint Alert was uploaded onto the system on that date, rather than on 3 June 2024. The applicant accepted that Ms Caruana prepared the Draft Complaint Alert on 3 June 2024, but argued that she forgot to enter it into the Commissioner's case management system and X's Legal Requests Portal then, and did not enter it into the case management system until 6 June 2024.

100. The Commissioner submitted that the evidence relating to Annexure B constituted 'hearsay upon hearsay' and the Tribunal could not rationally rely upon it. Whilst the Commissioner eschewed any suggestion that Annexure B was a fabrication, the Commissioner contended that it was unreliable because its provenance was wholly uncertain. The Commissioner argued that, at its highest, the evidence showed that Mr Hannath and Ms Caruana were familiar with some of the fields in Annexure B and unfamiliar with others. Accordingly, so it was said, the Tribunal could not conclude that Ms Caruana entered the information in Annexure B into X's Legal Requests Portal. The Commissioner submitted that the Tribunal should find that Ms Caruana entered into that portal the text of the Draft Complaint Alert but not the contents of Annexure B. The Commissioner contended that there is no evidentiary basis for a finding by the Tribunal that Ms Caruana forgot to include the text of the Draft Complaint Alert in the information she entered into X's Legal Requests Portal.

#### **Conclusion on contested facts**

101. The first factual issue that the Tribunal needs to resolve is whether the information in Annexure B was entered into X's Legal Requests Portal by Ms Caruana on 3 June 2024.
102. Before I address the first factual issue, I note that it appears to be common ground between the parties that, when Ms Caruana used X's Legal Requests Portal, she navigated through the Commissioner's first and second screenshots and made the affirmation that appears at the bottom of both screenshots.<sup>42</sup> There is no direct evidence on whether, when Ms Caruana reached the Commissioner's third screenshot, she selected and used the 'Information request form' in the Commissioner's fifth screenshot or the 'Removal request form' in the Commissioner's fourth screenshot.
103. I am satisfied that Ms Caruana used the 'Removal request form'. It is clear from the Commissioner's third screenshot that information requests are requests for X to provide information pursuant to legal processes such as a subpoena or warrant.<sup>43</sup> There is no evidence in the present case that the Commissioner sought any information held by X. Further, the third screenshot indicates that the 'Removal request form' is to be used for

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<sup>42</sup> See [50]-[51] above.

<sup>43</sup> See [52] above.

requests to withhold content, which is consistent with the evidence of how X treated the communication Ms Caruana made in the present case. Finally, Ms Caruana could not have used the 'Information request form' because, unlike the 'Removal request form', it does not have a field for free text.

104. In the light of my conclusion that Ms Caruana used the 'Removal request form' rather than the 'Information request form', Annexure B cannot be regarded as a complete or entirely accurate record of the information that Ms Caruana entered into X's Legal Requests Portal. That is because a comparison between Annexure B and the Commissioner's fourth and fifth screenshots indicates that Annexure B contains information that is unique to each of them. For example, the field 'Format Type' in Annexure B appears in the 'Information request form' but not in the 'Removal request form'. By way of further example, the field 'Legal Basis' in Annexure B appears in the 'Removal request form' but not in the 'Information request form'.
105. Annexure B appears to be an amalgam of parts of each of the 'Removal request form' and the 'Information request form'. As the Commissioner did not use the 'Information request form', any information sourced from that form in Annexure B does not accurately reflect the information Ms Caruana provided to X. This conclusion is supported by the fact that both Mr Hannath and Ms Caruana did not recognise the field 'Format Type'.
106. However, the above analysis does not mean that Annexure B should be completely disregarded. In my opinion, to the extent that Annexure B contains fields that appear in the 'Removal request form', it can be concluded that the information in Annexure B that relates to those fields was provided by Ms Caruana to X. Of particular relevance in the present case are the following:
  - (a) 'Organization: eSafety Commissioner'
  - (b) 'Authorizing Jurisdiction: Australia'
  - (c) 'Matter Type: Civil'
  - (d) 'Issue Type: Harassment, Private Information'
  - (e) 'Legal Basis: Section 7, Online Safety Act 2021'

107. As appears from [54] above, there was an asterisk next to each of the fields listed at [106] above in the Commissioner's fourth screenshot, which I infer indicates that they were mandatory fields. I find that Ms Caruana entered the information at [106] above next to each field. Her evidence is not inconsistent with such a finding. In particular, as appears from [97] above, she twice said that it was possible that she entered 'Section 7, Online Safety Act 2021' next to the field 'Legal Basis'.
108. I accept that, because X's lawyer was not called to give evidence, his email to Dr Kirkham and the contents of Annexure B, which was attached to the email, are of a hearsay nature. However, the Tribunal is not bound by the rules of evidence. Accordingly, the Tribunal is not precluded from giving weight to Annexure B to the limited extent set out above.
109. The evidence of Mr Hannath and Ms Caruana does not preclude the Tribunal from giving Annexure B the limited weight set out above. As is apparent from my summary of the evidence of Mr Hannath and Ms Caruana, they were familiar with most of the information that is common to Annexure B and the 'Removal request form'.
110. In summary, I am of the opinion that Ms Caruana did not provide to X all of the information in Annexure B, but only those parts of Annexure B that relate to a field that is common to Annexure B and the 'Removal request form', including those set out at [106] above.
111. The second factual issue that the Tribunal needs to resolve is whether Ms Caruana entered the information from the Draft Complaint Alert into the Commissioner's case management system on 3 June 2024 or on 6 June 2024. This question arises because both dates are included in the case management system record of the Complaint.
112. I accept Ms Caruana's evidence that she entered the information into the Commissioner's case management system on 3 June 2024 and that it was possible that the activity in which she engaged on 6 June 2024 was to log on to the system to check the entries and correct any typographical errors prior to closing the Complaint, resulting in the timestamp of that date.
113. The third factual issue that the Tribunal needs to resolve is whether the text of the Draft Complaint Alert was entered into X's Legal Requests Portal on 3 June 2024 after the text was typed and saved in the Commissioner's case management system.

114. In my opinion, the third factual issue should be answered in the affirmative. That is because Ms Caruana was consistent in her evidence that she typed and saved the text of the Draft Complaint Alert in the Commissioner's case management system (which I have found occurred on 3 June 2024) and then cut and pasted the text into X's Legal Requests Portal, in accordance with her usual practice. There was evidence that the portal included a 'free text' field.<sup>44</sup> As appears from [54] above, the Commissioner's fourth screenshot contains the field 'Please provide any additional details' which enables free text to be entered. The most likely explanation, which I adopt, is that Ms Caruana entered the text of the Draft Complaint Alert into the free text field in the 'Removal request form'.
115. The fact that the text of the Draft Complaint Alert was not included in Annexure B is not a sound basis for rejecting Ms Caruana's evidence. That is because, as I have concluded above, Annexure B is not a complete or entirely accurate record of the information that Ms Caruana entered into X's Legal Requests Portal.
116. For the above reasons, I am of the opinion that, on 3 June 2024, Ms Caruana entered the text of the Draft Complaint Alert into the Commissioner's case management system, and then accessed X's Legal Requests Portal. After making the affirmation in the Commissioner's first and second screenshots, Ms Caruana entered into X's Legal Requests Portal the information in Annexure B that relates to the fields that are common to Annexure B and the 'Removal request form'. She then pasted the text of the Draft Complaint Alert from the Commissioner's case management system into the 'Please provide any additional details' field of the 'Removal request form'. All of these actions took place on the same day. Accordingly, on 3 June 2024, X received from the Commissioner a combination of the abovementioned affirmation, the information that relates to the fields that are common to Annexure B and the 'Removal request form' and the Draft Complaint Alert. I will refer to all of this information collectively as 'the Composite Alert'.
117. It follows from the above analysis that I have not accepted in their entirety either party's submissions regarding the information that Ms Caruana entered into X's Legal Requests Portal on 3 June 2024. The bases upon which I have rejected aspects of those submissions are evident from the above reasons. However, for completeness, I make the

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<sup>44</sup> See [54], [91] and [93(d)] above.

following additional comment. I have rejected the applicant's submission that Ms Caruana forgot to enter the text of the Draft Complaint Alert into the Commissioner's case management system and X's Legal Requests Portal on 3 June 2024. That is because this submission lacked evidentiary support and was merely speculative. I am satisfied on the basis of Ms Caruana's evidence that she entered the text of the Draft Complaint Alert into both the case management system and X's portal on 3 June 2024.

118. I wish to stress that, although I have rejected the Commissioner's submission that Ms Caruana gave to X only the Draft Complaint Alert, for the reasons discussed at [155] below, my conclusion on jurisdiction would have been the same if I had found that Ms Caruana did not give to X the Composite Alert but only gave the Draft Complaint Alert. Accordingly, my finding that Ms Caruana gave to X the Composite Alert is not critical to my analysis or conclusion on jurisdiction.

#### **PARTIES' SUBMISSIONS ON THE TRIBUNAL'S JURISDICTION**

119. The applicant submitted that the reference in Annexure B to s 7 of the OSA, which sets out the definition of 'adult cyber-abuse material targeted at an Australian adult', could only be relevant, in the context of the facts of the present case, to the power to issue a removal notice under s 88. Accordingly, the applicant contended that Annexure B purported to be an exercise of the power in s 88 to give a removal notice. That contention was said to be supported by the request being described as a 'Formal Request', by the reference to 'harassment' which is an element of the definition of 'cyber-abuse material targeted at an Australian adult' in s 7 and by the wording of the sign-off, 'Adult Cyber Abuse, eSafety Commissioner'. That contention was also said to be supported by the fact that X's Legal Requests Portal was for making formal legal requests for the removal of content or for account information, and by the fact that the Commissioner did not give to the complainant a 'notice of refusal to give a removal notice' under s 88(3) of the OSA.
120. The applicant argued that, even if the text in the Draft Complaint Alert formed part of the information that was entered into X's Legal Requests Portal, that text had features of a compulsory nature. The applicant relied upon the reference to the OSA in the first paragraph of the Draft Complaint Alert, the affirmation as to legal authority, and the words 'we prohibit'. The inclusion of the words 'we prohibit' was said to constitute not just quoting X's own words from its terms of service, but connoted that the function of the alert was to

exercise compulsory powers. According to the applicant, the Draft Complaint Alert, objectively construed, is a purported decision under s 88 of the OSA to give a removal notice.

121. The applicant submitted that the Tribunal should infer from the fact that X withheld the Post within Australia on 3 June 2024 that, on that day, X was labouring under the belief that it had some obligation to do so. Accordingly, so it was said, the Tribunal could conclude that X withheld the Post within Australia because of the information that the Commissioner entered into X's Legal Requests Portal on 3 June 2024. The applicant contended that the fact that it is unusual for X to remove posts in response to complaint alerts from the Commissioner supports the proposition that X withheld the Post within Australia because it treated the information it received from the Commissioner on 3 June 2024 as a removal notice.
122. The applicant accepted that the present case differed from *Lawlor* because, in *Lawlor*, the Collector asserted that the Collector had power to revoke the licensee's licence whereas, in the present case, the Commissioner accepts that she did not have power to give a removal notice under s 88 of the OSA. Nevertheless, the applicant argued that the action taken by the Commissioner in entering information into X's Legal Requests Portal, viewed objectively, constituted a purported exercise of the power in s 88 to give a removal notice.
123. According to the applicant, the fact that the information that the Commissioner entered into X's Legal Requests Portal did not in terms set out the details in s 88(1)(f) and (g) of the OSA was not determinative because s 88(1) does not prescribe any particular content for a removal notice. In any event, so it was said, what is reviewable by the Tribunal is a decision to *give* a removal notice.
124. Based on the above submissions, the applicant contended that the Tribunal had jurisdiction in relation to her application for review under s 220(2) of the OSA.
125. The Commissioner submitted that, if the Tribunal accepted that the information that Ms Caruana entered into X's Legal Requests Portal included the text of the Draft Complaint Alert but not the text of Annexure B, the Tribunal should find that the Commissioner did not make 'a decision ... under section ... 88 to give a removal notice' within the meaning

of s 220(2) of the OSA and thus did not make a reviewable decision. That was said to be because:

- (a) The person who provided the text of the Draft Complaint Alert to X (Ms Caruana) concluded that the Commissioner did not have power to give a removal notice to X in relation to the Post because the intention to cause serious harm requirement in the definition of cyber-abuse material targeted at an Australian adult in s 7(1) of the OSA was not satisfied. Further, Ms Caruana did not have legal authority to issue removal notices.
- (b) Section 88 of the OSA does not concern complaint alerts. The Draft Complaint Alert did not refer to s 88, did not purport to be a removal notice under that section and did not have any of the required contents of such a notice. In particular, the Draft Complaint Alert did not require X to take all reasonable steps to ensure the removal of the Post or require X to do so within 24 hours. It did not match the form or statutory description of a removal notice.
- (c) The Draft Complaint Alert merely informed X of the possibility that the Post may breach aspects of X's terms of service and did not request X to do anything other than inform the Commissioner of any action X decided to take in response to the alert. The Draft Complaint Alert could not be reasonably construed as an exercise – or even a purported exercise – of power under s 88 of the OSA nor as anything more than an alert and a request for advice as to whether any action is taken.
- (d) Although the text of the Draft Complaint Alert was entered into X's Legal Requests Portal rather than X's General Portal, that did not mean that the nature of the text changed from an alert that the Post may breach X's terms of service to a compulsory legal demand for removal of the Post. Nor did the use of X's Legal Requests Portal imply that the Commissioner was exercising any coercive powers. There was a good reason for Ms Caruana to use X's Legal Requests Portal notwithstanding that the Draft Complaint Alert did not contain a legally binding request. That was because it was more likely that X would take note of information submitted through the Legal Requests Portal but might not consider information submitted through the General Portal because of the sheer volume of material submitted through that portal.

- (e) The principles in *Lawlor* were not engaged in the present case because the Draft Complaint Alert did not purport to be a decision to give a removal notice under s 88 of the OSA. Likewise, the Commissioner did not, by entering the text of the Draft Complaint Alert into X's Legal Requests Portal, purport to exercise the power in s 88 to give a removal notice in circumstances where that exercise was infected by jurisdictional error because the legal preconditions for a lawful exercise of that power were not satisfied. Unlike in *Lawlor*, in the present case there was no decision in fact to give a removal notice in purported pursuance of s 88, which was not operative in law because the requirements of s 88 were not satisfied.
- (f) Having concluded that the power to give a removal notice under s 88 was not enlivened and that there was no legal basis to compel X to remove the Post, the Commissioner did not, by means of the Draft Complaint Alert, seek to achieve indirectly what the Commissioner could not achieve directly, namely, removal of the Post from X. That was because, for the reasons outlined at (c) above, the Draft Complaint Alert did not contain a legally binding request for removal of the Post. There are serious legal consequences for non-compliance with a removal notice whereas there are no legal consequences for not taking any action in response to a complaint alert, which had no effect on any rights or interests. The Draft Complaint Alert did not purport to confer, alter or affect legal rights and obligations, as a removal notice would have.
- (g) There was no evidence that X's decision on 3 June 2024 to withhold the Post within Australia was causally related to the giving of the Draft Complaint Alert. Any conclusion that X's decision resulted from the giving of the Draft Complaint Alert would be speculative.
126. The Commissioner submitted that, even if the Tribunal concluded that the information Ms Caruana entered into X's Legal Requests Portal comprised both the text of Annexure B and the text of the Draft Complaint Alert, the Tribunal should find that the Commissioner did not make 'a decision ... under section ... 88 to give a removal notice' within the meaning of s 220(2) of the OSA and thus did not make a reviewable decision. That was said to be because all of the subparagraphs of [125] above, other than (c), relating to the Draft Complaint Alert also apply to the combined text of the Draft Complaint Alert and Annexure B. In relation to subparagraph (c), the Commissioner contended that the references to 'Formal Request' and s 7 of the OSA in Annexure B did not change the

nature of the complaint alert from a request to consider whether the Post breached X's terms of service to a legally binding request to remove the Post. The Commissioner emphasised that the word 'removal' does not appear in Annexure B, that the phrase 'Information Request' appears, and that neither Mr Hannath nor Ms Caruana remembered 'Format Type' as a field.

127. The Commissioner argued that, even if the information that was entered into X's Legal Requests Portal could be characterised as a request to remove the Post, the decision to make the request was not a decision to issue a removal notice under s 88 of the OSA and did not lead to the same outcome as the issue of a removal notice, particularly since it did not give rise to any obligation to remove the Post. According to the Commissioner, there was no purported exercise of the power conferred by s 88 in the present case because the sending of the Draft Complaint Alert to X was not a 'decision' in the sense of being 'final or operative and determinative' or manifesting a conclusion that precluded the matter being revisited by the Commissioner. The Commissioner relied upon *Australian Broadcasting Tribunal v Bond*<sup>45</sup> for this proposition. The Commissioner submitted that the sending of the Draft Complaint Alert did not preclude her from making further inquiries, considering further information and reconsidering the Post against the definition of 'cyber-abuse material targeted at an Australian adult' in s 7 of the OSA.
128. Based on the above submissions, the Commissioner contended that the Tribunal did not have jurisdiction in relation to the applicant's application for review.

#### **DECISION ON THE TRIBUNAL'S JURISDICTION**

129. Initially, I was of the view that the issue of whether the Commissioner has power under the OSA to give complaint alerts to service providers may be important to the outcome of this proceeding. Accordingly, with the leave of the Tribunal, the parties filed supplementary written submissions on the issue after the hearing concluded. The applicant made detailed submissions in support of the proposition that the Commissioner did not have power to give complaint alerts. At the interlocutory hearing, the applicant invited the Tribunal 'to make findings that the [Commissioner's] policy of issuing informal complaint alerts is

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<sup>45</sup> (1990) 170 CLR 321, 337 ('*Bond*').

contrary to the [OSA].’ The Commissioner made detailed submissions to the opposite effect based on particular provisions of the OSA and the principle in *Clough v Leahy*.<sup>46</sup>

130. Ultimately, it has not been necessary for me to decide whether the Commissioner has power under the OSA to give complaint alerts to service providers. That is because my conclusion that the Tribunal has jurisdiction to review the action of the Commissioner which resulted in the withholding of the Post within Australia would be the same irrespective of whether the Commissioner had such power. What is important for my purposes is that the parties agree – correctly in my opinion – that the Commissioner did not have power under the OSA in the present case to give X any form of communication which compelled X to remove the Post or withhold it within Australia. However, I will make some observations regarding the Commissioner’s practices in relation to complaint alerts in the Appendix to my reasons.

131. In my opinion, the principles in *Lawlor* support a conclusion that the Tribunal has jurisdiction in respect of the Commissioner’s action in relation to the Post. That is so on the following basis. First, the Commissioner in fact made a decision to give to X the Composite Alert. Secondly, having regard to its objective features, the Composite Alert amounts, as a matter of fact, to a removal notice in respect of the Post under the only provision of the OSA pursuant to which such a notice could have been given (namely, s 88). That is so notwithstanding the fact that the Commissioner did not intend for the Composite Alert to be a removal notice under s 88<sup>47</sup> or the fact that the Composite Alert was not a legally effective removal notice under s 88.<sup>48</sup> Accordingly, the Commissioner’s decision was a decision in fact made to give to X a removal notice under s 88 within the meaning of s 220(2) of the OSA.

132. The reasons for the above conclusion are set out in detail below.

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<sup>46</sup> (1904) 2 CLR 139.

<sup>47</sup> See *Lawlor* (1979) 41 FLR 338, 343 discussed at [25] above.

<sup>48</sup> See [118] above.

**Was the Commissioner's communication to X a requirement to remove the Post?**

133. It is common ground that Ms Caruana sent a communication to X using its Legal Requests Portal. As I have already discussed, the parties did not agree on what communication was sent and when it was sent. I have resolved those contested issues by deciding that Ms Caruana sent to X the Composite Alert, and that she did so on 3 June 2024. The analysis that follows proceeds on the basis of those factual findings.<sup>49</sup>
134. It is clear from Ms Caruana's evidence that, prior to giving to X what I have found to be the Composite Alert on 3 June 2024, she made a decision to give it. Mr Hannath gave evidence, which I accept, that, as an investigator, Ms Caruana had authority to give what I have found to be the Composite Alert without obtaining prior approval from him or anybody else.<sup>50</sup> Accordingly, the Commissioner, through Ms Caruana, in fact made a decision to give the Composite Alert to X.
135. I now consider whether the Composite Alert, having regard to its objective features, amounts, as a matter of fact, to a removal notice in respect of the Post. In my opinion, it does so for the following reasons.<sup>51</sup>
136. Under s 88(1) of the OSA, the Commissioner may give the provider of a social media service a removal notice if the following requirements are satisfied:
- (a) material is provided on a social media service;
  - (b) the Commissioner is satisfied that the material was cyber-abuse material targeted at an Australian adult;
  - (c) the material was the subject of a complaint to the provider of the social media service;
  - (d) the material was not removed from the social media service within 48 hours after the complaint was made or such longer period as the Commissioner allows; and

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<sup>49</sup> See [118] above.

<sup>50</sup> See [84] above.

<sup>51</sup> See [118] above.

- (e) a complaint was made to the Commissioner under s 36 of the OSA about the material.
137. In the present case, all of the above requirements were satisfied in relation to the Post, other than requirement (b), which I note is a 'state of mind' requirement that may be necessary for legal validity, but not essential for the making of a decision which amounts to a reviewable decision for the purposes of the Tribunal's jurisdiction.<sup>52</sup>
138. Section 88(1) also states that a removal notice is to require the provider of the social media service to:
- (a) take all reasonable steps to ensure the removal of the material from the service; and
- (b) do so within 24 hours after the notice was given to the provider, or such longer period as the Commissioner allows.
139. In the present case, the Composite Alert was not described as a removal notice and did not expressly require X to take the steps set out at [138] above. It was legally ineffective and could not compel X to remove the Post. However, based upon my factual findings at [101] to [117] above, the Composite Alert had a number of objective features which as a matter of fact communicated to X that it was legally required to take all reasonable steps to remove the Post as rapidly as possible.<sup>53</sup> Those objective features were as follows:
- (a) The Composite Alert stated that the 'Legal Basis' for it was 'Section 7, Online Safety Act 2021'. It described the 'Organization' as 'eSafety Commissioner' and the 'Authorizing Jurisdiction' as 'Australia'. Ms Caruana affirmed that she had any required legal authority to submit the request.<sup>54</sup>
- (b) The Composite Alert stated that '[u]nder the Online Safety Act 2021, the eSafety Commissioner is responsible for handling complaints about cyber abuse material

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<sup>52</sup> See *Lawlor* (1979) 41 FLR 338, 343 discussed at [25] above.

<sup>53</sup> See [118] above.

<sup>54</sup> See [50]-[51], [54] and [106] above.

concerning Australian adults and ensuring the rapid removal of such material from social media services ...<sup>55</sup>

- (c) The Composite Alert stated, 'We are escalating this complaint to you on the basis that the material may be in violation of your policies.'<sup>56</sup>
- (d) By a combination of the content referred to in (b) and (c) above, the Composite Alert communicated to X that the Composite Alert was being made not just by a member of the public, but was being 'escalated' by the Australian statutory officeholder with responsibility and authority for 'ensuring the rapid removal of [cyber-abuse] material'.<sup>57</sup>
- (e) The Composite Alert stated that 'eSafety has assessed that the complained material may be in violation of X's terms of services and policies.'<sup>58</sup> This statement that the Post may violate X's terms of service and policies must be read in the context of the Composite Alert being submitted through a portal whose use was restricted to valid legal requests for the removal of potentially illegal content rather than a violation of X's terms of service and policies.
- (f) The Composite Alert does not state either:
  - (i) that the requirements of the OSA by which the Commissioner can ensure 'the rapid removal of [cyber-abuse] material' are not satisfied, thus implying that the requirements were satisfied; or
  - (ii) that the 'Composite Alert does not constitute a legally binding request for removal of the Post' so as to negate the impression given to X from the mere fact that the authorised Australian regulator is using the 'Removal request form' in the Legal Requests Portal that the regulator was making a legally binding request.

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<sup>55</sup> See [79] above. Underlining added for emphasis.

<sup>56</sup> See [79] above. Underlining added for emphasis.

<sup>57</sup> See [79] above.

<sup>58</sup> See [79] above.

140. I would add to the above objective features the observation that it is not objectively plausible that the Composite Alert was provided to X merely to alert X that the Post may violate X's terms of service. That is so for the following reasons:

- (a) X was already aware that the Post needed to be reviewed against its terms of service because the complainant had complained about the Post on 31 May 2024;<sup>59</sup> and
- (b) if the Commissioner merely wished to convey information to X rather than require that the Post be removed, she was required by X's 'Platform Use Guidelines' to use X's General Portal rather than the Legal Requests Portal.<sup>60</sup>

141. The objective features of the Composite Alert set out at [139] above must be considered in the context of the nature, specific purpose and strict parameters of X's Legal Requests Portal, as reflected in the documents that I have quoted or summarised at [46] to [56] above, especially the parts of the documents that I have underlined.<sup>61</sup> In particular, I note that X's 'Platform Use Guidelines' set out at [48] above made it clear that the use of the Legal Requests Portal was restricted to the following circumstances:

*If you are a law enforcement agent, government official, or other third-party intending to submit a valid legal request and would like to have potentially illegal content or accounts removed from X, we ask that you first review the X Rules and, if applicable, submit a request to have the content reviewed for possible violations of X's Terms of Service, here: <https://help.twitter.com/forms>.*

*If you have already submitted a request and have received a response from X indicating that the content in question does not currently violate X's Terms of Service, you can submit a request for content to be withheld through our legal request submission site: <https://legalrequests.twitter.com>.* You will then receive an automated response confirming that your request has been received by our support system. We will send another email once we've had a chance to evaluate your request.<sup>62</sup>

142. The statement quoted at [141] above makes clear that the Legal Requests Portal was for use by government authorities to submit valid legal requests for the removal from X of

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<sup>59</sup> See [58] above.

<sup>60</sup> See [48] and [49] above.

<sup>61</sup> See [118] above.

<sup>62</sup> Underlining added for emphasis.

potentially illegal content, not for raising concerns about compliance with X's own terms of service; such concerns had to be raised through X's General Portal. The quoted statement and the other parts of X's documents that set out the parameters of its Legal Requests Portal, which I have underlined for emphasis at [46] to [56] above, are important to a proper characterisation of the Composite Alert.

143. The objective features of the Composite Alert, considered in the context of the nature, specific purpose and strict parameters of X's Legal Requests Portal strongly indicate that, objectively construed, it communicated to X as a matter of fact that it was legally required to take all reasonable steps to remove the Post as rapidly as possible. Thus, it communicated to X the substantive content of a removal notice under s 88(1) of the OSA, namely, that X must take all reasonable steps to ensure the removal of the Post within 24 hours. Accordingly, the Composite Alert amounts, as a matter of fact, to a removal notice requiring X to remove the Post within 24 hours.<sup>63</sup>
144. In response to the Composite Alert, X withheld the Post within Australia. Although the communication that Ms Caruana made using X's Legal Requests Portal did not, in terms, state that it constituted a mandatory legal requirement to take all reasonable steps to remove the Post within 24 hours, it is clear on the evidence that X treated it as such. This is evident from the following:
- (a) The statements in X's 'Platform Use Guidelines' which I have underlined for emphasis at [48] above make it clear that the Legal Requests Portal is to be used by regulators and law enforcement authorities to submit legally binding requests. I particularly rely upon the statement that, when X uses the message 'withheld post', it means that X 'was compelled to withhold the original post in response to a valid legal demand, such as a court order'. In the present case, the applicant received a 'withheld post' message, which clearly indicates that X treated the communication made by the Commissioner as constituting a mandatory legal requirement for the removal of the Post.

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<sup>63</sup> See [118] above.

- (b) The statements in the Commissioner’s first screenshot which I have underlined for emphasis at [50] above make it clear that the Legal Requests Portal should only be used to submit legal requests for account information or content removal.
- (c) The statement in the Commissioner’s third screenshot that the ‘Removal request form’ is to be used to ‘[s]ubmit a request for Twitter to withhold content based on a valid, properly scoped legal request.’<sup>64</sup>
- (d) The parts of the Commissioner’s fourth screenshot which I have underlined for emphasis at [54] above. They make it clear that the information to be inserted in the ‘Removal request form’ will be characterised as a ‘content removal request’.
- (e) The complainant in the present case made the Complaint to X regarding the Post on 31 May 2024. X did not withhold the Post prior to Ms Caruana entering information into X’s Legal Requests Portal at 6:05 pm on 3 June 2024. X withheld the Post within Australia at 7:18pm on 3 June 2024, that is, within one hour and 13 minutes of the information being entered. The clear inference, which I draw, is that X withheld the Post within Australia because it received the information and that there is a causal relationship between the receipt of the information and X’s decision to withhold the Post within Australia. The correctness of this conclusion is reinforced by the following:
- (i) In its email of 6:05pm on 3 June 2024 to the Commissioner, X described the information as a ‘request to Twitter to remove content’.<sup>65</sup>
- (ii) In its email of 7:28pm on 3 June 2024 to the applicant, X referred to the request it had received from the Commissioner and stated that it withheld the Post in Australia ‘[i]n order to comply with X’s obligations under Australia’s local laws.’<sup>66</sup>

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<sup>64</sup> See [52] above.

<sup>65</sup> See [64] above.

<sup>66</sup> See [66] above.

- (iii) When X reinstated the Post on about 10 August 2024, X informed the applicant that access to the Post 'was withheld in Australia in error, at the request of the eSafety Commissioner'.<sup>67</sup>

**The Commissioner's decision to give the Composite Alert is a reviewable decision**

145. I have already concluded, for the reasons set out at [133] to [144] above, that:
- (a) the Commissioner in fact made a decision to give the Composite Alert to X;
  - (b) having regard to its objective features, the Composite Alert as a matter of fact communicated to X that it was legally required to take all reasonable steps to remove the Post as rapidly as possible;
  - (c) thus, the Composite Alert communicated to X the substantive content of a removal notice under s 88(1) of the OSA, namely, that X must take all reasonable steps to ensure the removal of the Post within 24 hours;
  - (d) accordingly, the Composite Alert amounts, as a matter of fact, to a removal notice requiring X to remove the Post within 24 hours; and
  - (e) X treated the Composite Alert as a mandatory legal requirement to take all reasonable steps to remove the Post within 24 hours. It withheld the Post within Australia because it received the Composite Alert and therefore there is a causal relationship between receipt of the Composite Alert and X's decision to withhold the Post within Australia.<sup>68</sup>
146. The conclusions set out at [145] above are sufficient to support a finding that the Commissioner made a decision which, viewed objectively and from a factual rather than legal perspective, was a decision made in fact to give to X a removal notice. The only section of the OSA which conferred power on the Commissioner to give X a removal notice in relation to the Post was s 88. Accordingly, the Commissioner's decision was a decision in fact made to give a removal notice under s 88 within the meaning of s 220(2).

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<sup>67</sup> See [71] above.

<sup>68</sup> See [118] above.

Consistent with the principles in *Lawlor*, it was a decision ‘made in the exercise of powers conferred by that enactment’ for purposes of s 25(1) of the AAT Act.<sup>69</sup>

147. My conclusion on jurisdiction is not affected by the fact that the communication that the Commissioner decided to send to X was not a valid removal notice under s 88(1) of the OSA.<sup>70</sup> That was also the case in *Lawlor*, where the action of the Collector was not a valid revocation of the licensee’s licence under Division 1 of Part V of the *Customs Act*. Nor does it matter that the Commissioner subjectively did not intend to give a removal notice under s 88(1).<sup>71</sup> All that is required is that a decision to give a notice of some kind was made, and that, having regard to its objective features, the notice that was given amounts, as a matter of fact, to a removal notice as described in s 88(1).
148. As those requirements have been met in the present case, it does not assist the Commissioner to establish that Ms Caruana subjectively considered that the Post did not satisfy the definition of ‘cyber-abuse targeted at an Australian adult’ in s 7,<sup>72</sup> that there was no power to give X a removal notice under s 88(1), and that Ms Caruana intended to merely alert X to a possible breach of its terms of service rather than give X a removal notice.<sup>73</sup> Equally, it does not matter that Ms Caruana did not have delegated authority to give a removal notice under s 88. Further, it does not matter that the communication the Commissioner sent to X could not legally compel it to remove the Post.
149. The matters referred to at [148] might be relevant to a judicial review application challenging the legality of the Commissioner’s action. However, they are not relevant to determining whether the Commissioner’s communication amounts to a removal notice given under s 88 for the purposes of founding the Tribunal’s jurisdiction pursuant to s 220(2).
150. Consistent with the proposition of Smithers J summarised at [33] above, the fact that the Commissioner’s actions in using the Composite Alert to require X to remove the Post were

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<sup>69</sup> See [118] above.

<sup>70</sup> *Plaintiff M174/2016* (2018) 264 CLR 217, 232-3 [39].

<sup>71</sup> *Lawlor* (1979) 41 FLR 338, 343 discussed at [25] above.

<sup>72</sup> See [60] and [93(b)] above.

<sup>73</sup> See [96] above.

undertaken when the Commissioner had no power to do so in a legally effective way does not exclude the Commissioner's actions from review by the AAT. Further, consistent with the views of Bowen CJ summarised at [25] above, the AAT's jurisdiction is not dependent upon whether the Commissioner subjectively intended that her actions constitute the exercise of the power to give a removal notice under s 88(1).<sup>74</sup>

151. In *Lawlor*, Bowen CJ stated that the AAT Act was intended to give a person whose interests are affected by an administrative decision an effective appeal free of technicalities. Smithers J stated that a 'liberal meaning' was appropriate in interpreting s 25(1) of the AAT Act. Smithers J also stated that phrases such as 'a decision made under' a particular statutory provision are capable of extending to acts not authorised by the relevant statute. Treating the decision to give the Composite Alert as a decision in fact made to give to X a removal notice under s 88 of the OSA for the purposes of s 220(2) in circumstances where s 88 was the only possible valid source of power for the Commissioner to give a removal notice in the present case, is consistent with the beneficial approach to interpretation adopted by both Bowen CJ and Smithers J in *Lawlor*.<sup>75</sup>

152. A conclusion that the applicant in the present case did not have a right of review in respect of the withholding of the Post from X within Australia would undermine the right of review conferred by s 220(2) of the OSA. That is because if an end-user such as the applicant could only exercise that right where the Commissioner acted within her statutory power in requiring that the end-user's post be removed – and was denied that right where the Commissioner acted without power in requiring that the post be removed – the rights of merits review of end-users would be dependent on whether the Commissioner acted within or outside her powers. As both Bowen CJ and Smithers J stated in *Lawlor*, to deprive the AAT of jurisdiction where administrators made decisions without power would put beyond merits review many administrative decisions. I would add that such an outcome 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.

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<sup>74</sup> See [118] above.

<sup>75</sup> See [118] above.

153. In *Lawlor*, the AAT's jurisdiction depended on whether the Collector's decision to revoke the licensee's licence constituted 'a decision ... under Division 1 of Part V of the Customs Act' for the purposes of item 12(2) of the schedule to the *Customs Act*. The Full Court of the Federal Court held that the Collector's action satisfied that description, and was therefore a decision made in the exercise of powers conferred by the *Customs Act* for the purposes of s 25(1) of the AAT Act even though the Collector did not have legal power to make a decision under Division 1 of Part V of that Act to revoke the licensee's licence. In the present case, the AAT's jurisdiction depended on whether the Commissioner's decision to give X the Composite Alert constituted 'a decision...under section 88 to give a removal notice' for the purposes of s 220(2) of the OSA.<sup>76</sup> For the reasons I have given, the Commissioner's action satisfied that description, and was therefore a decision made in the exercise of powers conferred by the OSA for the purposes of s 25(1) of the AAT Act, even though the Commissioner did not have legal power to make a decision under s 88 of the OSA to give a removal notice. As explained by Smithers J in *Lawlor*, phrases such as 'under' that describe the source of a statutory power for an administrative decision are capable of extending to acts not authorised by the relevant statute.

154. I make some observations on the Commissioner's submissions at [156] to [165] below.

#### **Alternative factual analysis and observations on the Commissioner's submissions**

155. The above analysis regarding the AAT's jurisdiction is based upon my factual finding that Ms Caruana gave to X the Composite Alert rather than the Draft Complaint Alert alone. However, my conclusion on jurisdiction would be the same even if I had found that Ms Caruana had given to X only the Draft Complaint Alert, and if all references to the Composite Alert in my discussion of jurisdiction above were to the Draft Complaint Alert instead of the Composite Alert. That is so for the following reasons:

- (a) The only elements of the Composite Alert that were absent from the Draft Complaint Alert are the contents of Annexure B which relate to fields that are common to Annexure B and the 'Removal request form'.

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<sup>76</sup> See [118] above.

- (b) In my discussion of jurisdiction above, the only contents in Annexure B upon which I relied were those set out in subparagraph (a) of [139] above, namely:
- (i) the description of the 'Legal Basis' as 'Section 7 Online Safety Act 2021';
  - (ii) the description of the 'Organization' as 'eSafety Commissioner';
  - (iii) the description of the 'Authorizing Jurisdiction' as Australia; and
  - (iv) Ms Caruana's affirmation that she had any required legal authority to submit the request.
- (c) I do not regard the above four matters, either individually or collectively, as vital to my analysis of jurisdiction. It is common ground that Ms Caruana's made the affirmation referred to in (iv) above when she navigated X's Legal Requests Portal as shown in the Commissioner's first and second screenshots. The contents of fields (ii) and (iii) are expressly included in the Draft Complaint Alert or are implicit either from its text or the use of X's Legal Requests Portal by the Commissioner. As for the content of field (i), I rely on my analysis of the contents of the Draft Complaint Alert in subparagraphs (b) to (f) of [139] above, considered independently of subparagraph (a). That analysis supports the conclusion that, having regard to its objective features, when the Draft Complaint Alert is viewed from a factual rather than legal perspective – particularly in the context of the nature, specific purpose and strict parameters of X's Legal Requests Portal<sup>77</sup> – the Draft Complaint Alert was a notice given by the authorised Australian regulator, relying upon powers under the OSA, requiring X to undertake the rapid removal of the Post. Accordingly, the Draft Complain Alert communicated to X the substantive content of a removal notice under s 88(1) of the OSA, namely, that X must take all reasonable steps to ensure the removal of the Post within 24 hours. It follows that the Draft Complaint Alert amounts, as a matter of fact, to a removal notice requiring X to remove the Post within 24 hours and that the Commissioner's decision to give it to X amounts to 'a decision ... under section ... 88 to give a removal notice.'

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<sup>77</sup> See [141]-[143] above.

156. The reasons I have set out from [129] to [155] above are sufficient to indicate why I have rejected the Commissioner's submissions that the actions taken by her did not constitute a reviewable decision, without the necessity for those submissions to be discussed individually. However, for completeness, I will separately consider six of the Commissioner's submissions.
157. First, I deal with the Commissioner's submissions summarised at [125(b)-(d)] above. In my opinion, those submissions inappropriately focus on form rather than substance. *Lawlor* makes it clear that what is relevant for the purposes of the Tribunal's jurisdiction is the substance of the action in which the Commissioner actually engaged as a matter of fact and the practical consequences of that action for the relevant applicant, rather than the form of that action. It is also clear from *Lawlor* that the absence of legal labels, legal forms and legal authority to take the relevant action are not preconditions to a finding that the action constitutes the making of a reviewable decision. That is particularly so in the present case because s 88 of the OSA does not prescribe any mandatory form of removal notice that must be used by the Commissioner. I have already explained why the communication the Commissioner sent to X in the present case constituted a decision in fact made to give X a removal notice under s 88 within the meaning of s 220(2).
158. The proposition that conclusions regarding the Tribunal's jurisdiction can be reached by reference to the substance and practical outcome of a decision-maker's action rather than the forms and labels adopted by the decision-maker can be illustrated by two examples.
- (a) Assume that all the preconditions for the giving of a removal notice are satisfied and a document labelled 'Removal Notice' which contains all of the information required by s 88 of the OSA is given to a social media service provider but which, through inadvertence, states that it is given under 'section 888' of the OSA instead of s 88. In this example, if the provider removes the end user's online material as a result of receiving the document, it could not be seriously contended that the end user did not have a right of review because the Commissioner did not, in a literal sense, make 'a decision ... under section ... 88 to give a removal notice' for the purposes of s 220(2).
- (b) Assume that the facts are the same as in (a) except that the document is not labelled 'Removal Notice' but 'Important Information Given Pursuant to Section 88 of the Online Safety Act 2021', and that there is no inadvertent reference to any

other section of the OSA. As with the first example, it could not be seriously contended that such a document did not give rise to a right of review under s 220(2).

159. Secondly, I deal with the Commissioner's submissions summarised at [126] above. I have already explained why I have concluded that the communication Ms Caruana sent to X on 3 June 2024 was the Composite Alert and why this did not include the words 'Information Request' or the field 'Format Type' and the accompanying words 'Formal Request'. I have also explained why I have concluded that, having regard to its objective features, the Composite Alert (or, in the alternative, the Draft Complaint Alert) amounts, as a matter of fact, to a removal notice requiring X to remove the Post. Although the word 'removal' does not appear on Annexure B, it is included in the first sentence of the Draft Complaint Alert.
160. Thirdly, I deal with the Commissioner's submissions summarised at [127] above. I reject the Commissioner's contention that even if her actions could be characterised as a request to remove the Post, the decision to make the request was not a decision to issue a removal notice under s 88 of the OSA because it did not give rise to any obligation to remove the Post. For the reasons I have already given, if the Commissioner, as the regulator responsible for online safety in Australia, makes a request to a social media service provider to remove a post and the provider responds by removing the post, that request could constitute a removal notice for jurisdictional purposes in accordance with the principles in *Lawlor*. In such a case, the end user's rights are affected by the actions of the Commissioner even if those actions are undertaken without power and therefore could not give rise to a legally binding obligation to remove the post or any consequences for non-compliance.
161. Furthermore, the Commissioner's reliance on the principle in *Bond* is misplaced. The present case does not involve the issue of whether the Commissioner's actions constitute a final decision as distinct from a 'step along the way in a course of reasoning leading to an ultimate decision.'<sup>78</sup> As I have already stated, *Lawlor* makes it clear that the AAT had jurisdiction to review decisions in fact made even though they were legally ineffective because they were made without power. Based on the principles in *Lawlor*, a purported

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<sup>78</sup> *Bond* (1990) 170 CLR 321, 337.

decision made without power is not in law final, operative or determinative and does not preclude the decision-maker from making a subsequent decision that is within power.

162. In the present case, if the Commissioner had decided to give to X a complaint alert but changed her mind before doing so, it may have been arguable that the applicant could not seek a review of the initial decision to give the alert. A similar argument may also have been available if the Commissioner had withdrawn the alert immediately after giving it to X and X had not taken any action in response to it. But neither of these events occurred in the present case. The giving of the alert (irrespective of whether it was the Composite Alert or the Draft Complaint Alert) had a real and practical impact on the applicant's rights, because it resulted in X withholding the Post within Australia. The giving of the alert constituted a reviewable decision within the principles in *Lawlor* and was not merely a 'step along the way in a course of reasoning leading to an ultimate decision'.
163. Fourthly, I deal with the Commissioner's submissions summarised at [125(e)] above. Those submissions proceed on an unduly narrow and restrictive view of the principles in *Lawlor*. For the reasons I have already given, those principles are sufficiently wide and flexible to apply to the Commissioner's actions in the present case.
164. Fifthly, I deal with the Commissioner's submissions summarised at [125(f)] above. There is no need for me to make a finding on whether the Commissioner sought to achieve a result (removal of the Post) indirectly in circumstances where she could not achieve that result directly. That is because the Commissioner's motives or subjective intentions do not form part of the principles in *Lawlor*. For the reasons I have already given, the Commissioner did in fact achieve removal of the Post from X's platform (in the sense of the Post being withheld within Australia) by means other than a legally effective removal notice under s 88(1) of the OSA. At the risk of repetition, the fact that the Commissioner's actions could not result in the legal consequences associated with a legally binding removal notice is no obstacle to characterising those actions as a decision in fact made to give X a removal notice under s 88 within the meaning of s 220(2).
165. Sixthly, I deal with the Commissioner's submissions summarised at [125(g)] above. I reject the Commissioner's contention that it would be speculative to conclude that X's decision to withhold the Post within Australia resulted from the giving of the Draft Complaint Alert. For the reasons set out at [144] and [155] above, irrespective of whether

the Commissioner sent to X the Composite Alert or the Draft Complaint Alert, there is more than sufficient evidence to support my finding that there was a causal relationship between the Commissioner's actions and X's withholding of the Post within Australia.

**CONCLUSION AND FUTURE CONDUCT OF THE PROCEEDING**

- 166. It follows from the above analysis that the Commissioner made a decision within the meaning of s 3(3) of the AAT Act which constituted a reviewable decision under s 25(1) of the Act and that the applicant's application for review dated 7 June 2024 properly invoked the jurisdiction of the AAT. By virtue of item 24 of schedule 16 to the Transitional Act, the ART has jurisdiction to review the Commissioner's decision.
- 167. The Tribunal, as currently constituted as the GAP, will arrange for a directions hearing to be convened on a date to be advised to the parties for the purpose of making directions for the future conduct of the proceeding.

*I certify that the preceding 167 paragraphs are a true copy of the written reasons for the interlocutory decision of Justice Kyrou, President.*

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Associate:  
Dated: 5 February 2025

**APPENDIX TO THE REASONS OF KYROU P**

- 168. One element of the Tribunal's objective in s 9 of the ART Act is improvement of the transparency and quality of government decision-making. In furtherance of that element, I make the following observations.
- 169. According to the evidence of Mr Hannath:
  - (a) The Commissioner issues a few hundred complaint alerts to service providers every year, but in the past 12 months, the Commissioner issued only three or four

removal notices.<sup>79</sup> It follows that complaint alerts are the predominant regulatory mechanism used by the Commissioner in relation to online material concerning Australian adults that the Commissioner considers may warrant removal.

- (b) Complaint alerts can be issued for the desired regulatory result of a post being removed even though the statutory definition of cyber-abuse material targeted at an Australian adult in s 7 of the OSA is not met and therefore the preconditions for giving a removal notice are not satisfied.<sup>80</sup>
- (c) Complaint alerts are a much faster mechanism than removal notices to achieve results because the alerts do not require the drafting of a removal notice and a statement of reasons to accompany the notice.<sup>81</sup>
- (d) Complaint alerts can be issued by an investigator acting without delegated authority or approval from an authorised delegate.<sup>82</sup>
- (e) The Commissioner sees her role as including being an advocate for complainants to assist them to achieve removal of material from social media platforms ('advocacy role').<sup>83</sup>
- (f) The Commissioner sees her role as including assisting in the enforcement of, or compliance with, online service providers' terms of service ('providers' terms enforcement role').<sup>84</sup>

170. The Commissioner's desired regulatory result of a post being removed from a social media platform can, as a matter of practical reality, be achieved either by the giving of a complaint alert or a removal notice. Yet, notwithstanding that complaint alerts are the Commissioner's predominant regulatory mechanism:

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<sup>79</sup> See [85] above.

<sup>80</sup> See [84] above.

<sup>81</sup> See [85] above.

<sup>82</sup> See [84] above.

<sup>83</sup> See [85] above.

<sup>84</sup> See [85] above.

- (a) There is no express statutory basis in the OSA for the complaint alert mechanism.<sup>85</sup>
  - (b) 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.
  - (c) Complaint alerts are less transparent and involve less accountability than removal notices because a formal written removal notice and a statement of reasons are not given.
  - (d) When the Commissioner resorts to the complaint alert mechanism rather than a removal notice, the Commissioner does not give to the end user who made the post any notice of a right of merits review by the Tribunal because the Commissioner is of the view that no such right exists. If the Commissioner's view were correct, the end user would be deprived of one of the features of the balance that the OSA strikes between the community's right to free speech and its right to be protected from cyber-abuse material targeted at an Australian adult.
171. There is no express statutory provision in the OSA regarding the Commissioner's advocacy role or the providers' terms enforcement role.
172. The Commissioner submitted that it is not improper for regulators such as her to use voluntary and cooperative mechanisms to fulfil their statutory functions rather than resorting first to their coercive powers. She contended that it is often regarded as desirable for regulators to proceed informally and seek to exhaust cooperative options

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<sup>85</sup> The references to 'informal notices' and 'informal requests' in s 183(2)(zi) of the OSA do not apply to a complaint alert of the type used in the present case because such an alert is not 'in relation to cyber-abuse material targeted at an Australian adult'. That is because the requirements of s 7 of the OSA were not satisfied in the present case.

before having recourse to coercive powers.<sup>86</sup> These propositions may be generally accepted. However, there is a difference between informal action by a regulator in relation to a person who is regulated where the action can only affect the rights or interests of the regulated person, and informal action that may directly affect the rights and interests of not only the regulated person but also third parties. That is particularly so where, as in the present case, the relevant legislation confers statutory rights of review on affected third parties where formal action is taken by the regulator and where the third parties might be deprived of those rights of review if the regulator acts informally rather than formally.

173. In my opinion, in the light of the potentially serious consequences for end users of online services resulting from the Commissioner's use of complaint alerts and her advocacy role and providers' terms enforcement role, it is undesirable that there is no express statutory basis in the OSA for such alerts and roles. Accordingly, consideration should be given to these issues being addressed by legislation that takes into account:

- (a) the rights and interests of persons who are the subject of online material;
- (b) the rights and interests of end users; and
- (c) the public interest in the powers of the Commissioner being clearly and unambiguously set out in the OSA, and the actions of the Commissioner being transparent and accountable.

174. The facts of the present case and the submissions of the parties indicate that there is uncertainty about the meaning of the words 'the Commissioner decides to refuse to give a removal notice under subsection (1)' in s 88(3) of the OSA. That meaning is important because it determines whether the Commissioner is obliged to give written notice to the person who made a complaint under s 36, which in turn determines whether that person has a right of review under s 220(4). In the present case, the Commissioner did not give a notice under s 88(3) to the complainant. The applicant relied upon the absence of such a notice in support of her contention that the Commissioner's actions constituted the giving of a removal notice under s 88(1). It has not been necessary for me to form a view on the meaning of the words 'the Commissioner decides to refuse to give a removal notice under

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<sup>86</sup> The Commissioner relied upon number of authorities, including *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 610 [185].

subsection (1)'. However, given the importance of those words, consideration should be given to legislative clarification of their meaning.

## **O'DONOVAN DP**

175. The applicant seeks review of a decision made by a Commonwealth employee working for the eSafety Commissioner. The decision was made on 3 June 2024. It was made in response to a complaint to the eSafety Commissioner about material which the applicant included in a post to the social network 'X'. The employee, Ms Caruana, made a decision to send a notice to X, which resulted in X geo-blocking the post.
176. The eSafety Commissioner ('Commissioner') is a statutory office established by the *Online Safety Act 2021* ('OSA') with functions that include supporting and encouraging the implementation of measures to improve online safety for Australians. Under the OSA, the Commissioner is able to receive complaints about material posted online. If the material meets certain statutory thresholds, and the complaint meets certain process requirements, the Commissioner (or her delegate) has power to issue a notice requiring a social media service to remove material from the service. Decisions to issue such notices are reviewable by the Administrative Review Tribunal ('ART'). The respondent denies that the decision made by Ms Caruana is such a decision.
177. Ms Caruana's decision was made following a complaint being made that the material posted by the applicant constituted 'cyber-abuse material targeted at an Australian adult'. Generally speaking, material answers that description if:
- (a) 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; and
  - (b) 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.
178. When Ms Caruana examined the complaint, she decided that the material met the second threshold, but did not meet the first.

179. Notwithstanding that she was satisfied that the material was not cyber-abuse material targeted at an Australian adult, Ms Caruana decided to send a notice to X. The evidence available makes clear that the decision to send the notice did not and could not legally oblige X to remove the post. There were many reasons for this, including that Ms Caruana did not hold a delegation to issue legally binding removal notices and Ms Caruana was satisfied that the post did not meet the definition of cyber-abuse material targeted at an Australian adult.
180. Despite this latter conclusion, Ms Caruana decided to engage with X in relation to the material. She was not intending to use any compulsory powers available to the Commissioner but she communicated with X about the material. Following the communication from Ms Caruana, the post was geo-blocked in Australia.
181. The applicant contends that Ms Caruana's decision to send a notice through to X at approximately 6.05pm on 3 June 2024 was a decision of a kind that is susceptible to review in the ART. The respondent contends that it is not.
182. The resolution of that issue depends upon the answer to two questions. First, as a factual matter, what were the terms and content of the notice actually sent by Ms Caruana to X? Second, does the decision to send a notice of that kind amount to a 'decision to give a removal notice' within the terms of section 220(2) of the OSA, and thus attract the jurisdiction of the ART? Having regard to my findings in relation to the first question, I am satisfied that the answer to the second question is 'yes'. On that basis, I am satisfied that the ART has jurisdiction in relation to this application.
183. Prior to preparing these reasons I was provided with a set of reasons in draft form by the President. I gratefully adopt the summary of the evidence and submissions set out in his reasons for decision and agree with his conclusion as to the orders that should be made.

## **FACTS**

184. On 29 March 2024, the applicant posted on Instagram and X a video which was critical of a schoolteacher in a primary school who had sponsored the establishment of a 'Queer Club' for students in Grades 3 to 6 at her school ('the post').

185. On Friday 31 May 2024 at 8.38 pm, the Commissioner received a complaint about the post from a friend of the teacher concerned.
186. On Monday 3 June 2024, Ms Caruana, considered the complaint. As noted above, Ms Caruana did not hold any delegation which allowed her to issue statutory notices which could legally compel a social media service to take down posts.
187. Notwithstanding that on her analysis the material did not amount to cyber-abuse material targeted at an Australian adult, Ms Caruana decided that action ought to be taken to draw the post to X's attention as potentially in breach of the platform's terms of service.
188. The OSA deals expressly with how material that is both:
- (a) cyber-abuse material targeted at an Australian adult; and
  - (b) which contravenes a social media service's terms of use;
- should be dealt with.<sup>87</sup>
189. It is, however, silent on how material that is affirmatively judged not to amount to cyber-abuse material targeted at an Australian adult, but which may breach a social media service's terms of service, should be dealt with. The Commissioner contends that she has ample powers to take informal action in relation to such material. The applicant contends that she has no power to take action of any kind in relation to such material. For the purposes of this application, it is unnecessary to determine that issue.
190. Having decided to take action in relation to the post, Ms Caruana decided to inform X about the post using X's Legal Request Portal.
191. At this point it is necessary to explain that X provides two methods for communicating concerns about material posted on the platform. The first is available to all members of the public, as well as law enforcement and regulatory agencies. According to X's guidelines, this method should be used to seek a review of possible violations of X's Terms of Service.

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<sup>87</sup> OSA s 93.

It can be accessed using the link <https://help.twitter.com/forms>. I will refer to this as ‘the General Portal’. The second communication pathway is more restricted. X’s Platform Use Guidelines indicate that this pathway should be used when:

- (a) a request has been made to remove content using the General Portal; and
- (b) X has notified that the content does not currently violate X’s Terms of Service.

If those conditions are met, a request for content to be withheld through X’s legal request submission site can be made at <https://legalrequests.twitter.com>. I will refer to this as the ‘Legal Request Portal’.

192. When the Legal Request Portal is used, the first page states as follows:

***Legal request submissions***

*Please confirm your identity*

*Welcome to Twitter’s online legal request submission site. You can submit your legal request (e.g., subpoena or court order) for account information or content removal by following the steps below. We also accept emergency disclosure requests from law enforcement through this site. All non-legal requests should be submitted through our Help Center forms.*

*If you are a law enforcement agent, government official, or other third-party intending to submit a valid legal request, please enter your full name, official email address, and confirm your authority by checking the box below. No other uses of this form are permitted.*

- I confirm that I have any required legal authority to submit this request and the submission is a permitted use of this system.*

193. Both parties accept that Ms Caruana decided to use the Legal Request Portal and not the General Portal when taking steps to action the complaint. It is important to emphasise that the portal and X’s Platform Use Guidelines make clear that requests for X to consider whether a post conforms with its terms of service, even when that request is made by a government official, should be made through the General Portal. The forms in the Legal Requests Portal are reserved for a ‘law enforcement agent, government official, or other third-party intending to submit a valid legal request’. No other uses of the form are permitted.

194. There is a dispute about the precise content of what was submitted by Ms Caruana to X and not all of the evidence on the issue is consistent.

195. However, I am satisfied that Ms Caruana communicated with X using the Legal Request Portal. When she entered the Legal Request Portal, she confirmed that she had the required legal authority to submit the request and that the submission was a permitted use of the Legal Request Portal.
196. I am also satisfied that Ms Caruana filled out compulsory fields required to submit material through that portal, along with additional free text. The compulsory fields are marked with an asterisk. Among the compulsory fields which the user was required to fill out was the 'Legal basis' field. Ms Caruana does not remember what she put in this field. The Tribunal has hearsay evidence communicated from X that the notice it received included in the Legal basis field the words 'Section 7, Online Safety Act 2021'. In the absence of any other evidence as to what was included in the field, and in light of the compulsory nature of the field, I am satisfied that those words were included.
197. I am also satisfied that Ms Caruana entered text in the 'Please provide any additional details' field. The free text consisted of the following:

*Dear X,*

*Under the Online Safety Act 2021, the eSafety Commissioner is responsible for handling complaints about cyber abuse material concerning Australian adults and ensuring the rapid removal of such material from social media services, relevant electronic services, or designated internet services. Please refer to our website for more information on our role.*

*We wish to alert you to a complaint we have received from [redacted by Commissioner] (the complainant). Our reference number [...].*

*We are escalating this complaint to you on the basis that the material may be in violation of your policies.*

*The complainant has reported that an X account [...].*

*The reported account and material is available at the following URLs: [...].*

*The post appears to have been created by an individual end user, seeking to intimidate and harass the complainant, on the basis the complainant [runs] a Queer Club, for primary school students, which was a student led [initiative]. We understand the complainant's name, workplace and social media accounts have been [publicly] shared in the post, inciting unwanted contact from other users and placing the complainant at risk.*

*eSafety has assessed that the complained material may be a violation of X terms of services and polices, specifically:*

- *inciting others to harass members of a protected category on or off platform*
- *We prohibit inciting behavior that targets individuals or groups of people belonging to protected categories.*
- *We prohibit targeting others with repeated slurs, tropes or other content that intends to degrade or reinforce negative or harmful stereotypes about a protected category. In some cases, such as (but not limited to) severe, repetitive usage of slurs, or racist/sexist tropes where the context is to harass or intimidate others*

*We would appreciate your immediate confirmation that you have received this report. We ask that you advise us if any action is taken in response to this report.*

*Regards,*

*Cyber Abuse Team*

*eSafety Commissioner*

198. At 6.05 pm, the Commissioner received an automated email from X which confirmed receipt of the request to remove content.

199. At 7.18 pm, the Commissioner received another email from X which stated that the post 'has been withheld in Australia'.

200. On 3 June 2024 at 7.28 pm, X sent an email to the applicant which stated:

*In the interests of transparency, we are writing to inform you that X has received a request from the eSafety Commissioner regarding your X account ... 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. For more information about our Country Withheld Content policy, please see this page:*

...

*As X strongly believes in defending and respecting the voice of our users, it is our policy to notify users if we receive a legal request from an authorized entity (such as law enforcement or a government agency) to remove content from their account*

...

*We ... want you to have an opportunity to evaluate the request and, if you wish, take appropriate action to protect your interests. This may include seeking legal counsel and challenging the request in court...*

201. I am satisfied that X took down the post because it believed that it was legally obliged to do so, following the contact from Ms Caruana.

202. On Friday 7 June 2024, the applicant lodged an application for review with the predecessor of the ART, the Administrative Appeals Tribunal ('AAT').
203. On or about 10 August 2024, X sent an email to the applicant stating 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.
204. In the context of the ART's hearing in relation to its jurisdiction, the ART received evidence about the subjective state of mind of the respondent's employees. That evidence was to the effect that prior to the action taken on 3 June 2024, Ms Caruana had formed the view that the post did not constitute cyber abuse targeted at an Australian adult (as that phrase is defined) and could not for that reason be the subject of a compulsory notice issued under the OSA. For reasons that will become apparent, it is unnecessary for me to canvas that evidence in any detail.

## **STATUTORY FRAMEWORK**

205. The ART, like the AAT before it, is a creature of statute. For it to have jurisdiction to review a decision, that jurisdiction must have been conferred upon it by the Parliament. Whether the ART has jurisdiction in relation to any particular decision requires identification of a statutory provision which confers jurisdiction and a finding that the requirements of that provision have been met.
206. As this application was made when the *Administrative Appeals Tribunal Act 1975* ('AAT Act') was in force, it is necessary to consider whether the AAT had jurisdiction when the original application was made. If the AAT did not, then the transitional provisions which transferred the AAT's jurisdiction to the ART, flexible as they are, will not confer jurisdiction on the ART to hear the matter under the *Administrative Review Tribunal Act 2024* ('ART Act').
207. Section 25 of the AAT Act relevantly provides as follows:

***25 Tribunal may review certain decisions.***

- (1) An enactment may provide that applications may be made to the Tribunal:*  
*(a) for review of decisions made in the exercise of powers conferred by that enactment; or*

*(b) for the review of decisions made in the exercise of powers conferred, or that may be conferred, by another enactment having effect under that enactment.*

208. When this application was made to the AAT, the OSA provided:

***220 Review of decisions by the Administrative Appeals Tribunal***

...

*Removal notice – cyber-bullying, intimate images and cyber-abuse*

*(2) An application may be made to the Administrative Appeals Tribunal for a review of a decision of the Commissioner under section ... 88 to give a removal notice to the provider of:*

*(a) a social media service; ...*

209. In light of these provisions, the critical question is whether the decision Ms Caruana made was a decision of the Commissioner under s 88 of the OSA to give a removal notice to X.

210. Section 88 confers on the Commissioner a power to give a notice which compels a social media service to take down material that meets the statutory definition of cyber-abuse material targeting an Australian adult. The notices are subject to certain procedural requirements, including that the material was the subject of a complaint under s 36 of the OSA.

211. The applicant contends that s 220 confers jurisdiction on the Tribunal to review the decision of Ms Caruana to send the notice she did through the Legal Request Portal on 3 June 2024.

212. The respondent rejects that contention. She contends that, properly analysed, what Ms Caruana did was not grounded in s 88 of the OSA. Not only did Ms Caruana lack a formal delegation to take any action under s 88, but she had affirmatively decided that the statutory threshold for a finding that the post constituted cyber-abuse material targeted at an Australian adult had not been met. Consequently, what was sent could not amount to anything more than an informal request asking X to remove the material if it was found by X to be inconsistent with X's terms of service.

213. The applicant rejects these contentions. She contends that, despite the fact that the decision of Ms Caruana was to communicate a less formal request, the notice she did give had the features necessary to amount to a decision 'under section 88 to give a

removal notice' as that phrase should be understood in the context of s 220. Consequently, the AAT's, and now the ART's, jurisdiction is attracted.

## LEGAL PRINCIPLES

214. At first blush, the respondent's argument has much to commend it. On the material that is now available, there are a number of facts which confirm that what was sent to X could not constitute a valid removal notice under s 88. First, Ms Caruana did not hold a delegation to give a removal notice, so it was impossible for her to make a legally effective decision to give one. Second, Ms Caruana was affirmatively satisfied that the material did not constitute cyber-abuse material targeted at an Australian adult, so the threshold in s 88(1)(c) was not met. Third, Ms Caruana did not intend to give a notice under s 88 – she only ever wished to draw X's attention to the post and alert it to a potential breach of its terms of service. In these circumstances, it is argued, it is impossible to find that what Ms Caruana did on 3 June 2024 amounted to a decision to give a removal notice under s 88. It cannot meet that statutory description, and the ART does not have jurisdiction.
215. It is, however, important to keep in mind that the approach to be taken when interpreting provisions which confer jurisdiction on a tribunal is very different to the approach taken when considering whether a decision met the requirements for a legally valid exercise of the substantive power. There is nothing inconsistent between a finding that a tribunal has jurisdiction to review a decision, and a finding that no legally effective decision was made under the provision identified as grounding the review.
216. So much has been clear since the Full Court of the Federal Court handed down its decision in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd.*<sup>88</sup> The correctness and significance of that decision has been confirmed by the High Court in *Plaintiff M174/2016 and Minister for Immigration, Citizenship and Multicultural Affairs.*<sup>89</sup>
217. Both cases make clear that a legally effective decision is not required to attract jurisdiction. All that is required is:

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<sup>88</sup> (1979) 41 FLR 338 ('*Lawlor*').

<sup>89</sup> (2018) 264 CLR 217 ('*Plaintiff M174/2016*').

... a decision made in fact ... regardless of whether or not that decision is legally effective.<sup>90</sup>

218. The evidence in this case establishes that a decision was made by Ms Caruana to issue the notice she did on 3 July 2024. For two reasons<sup>91</sup> it was not legally effective to require X to remove the material. Those matters do not assist the respondent in establishing that the ART does not have jurisdiction.
219. However, the respondent also contends that because Ms Caruana never intended to issue a notice under s 88, her conduct lacks the required connection to s 88 to engage the jurisdiction conferred by s 220 - particularly when regard is had to the broad functions conferred upon the Commissioner which provide an ample underpinning for her conduct. Proceeding on the basis that there were alternative sources of power to underpin Ms Caruana's conduct apart from s 88,<sup>92</sup> this argument is not easily dismissed.
220. It has been established in this application that Ms Caruana never intended to exercise any power under s 88 and never believed that she was doing so. This raises for determination a question which, although considered in *Lawlor*, was not essential to the disposition of either *Lawlor* or *Plaintiff M174/2016*. The question is whether an intention or belief that the decision is authorised by a provision which has been designated as subject to review, is necessary to found the Tribunal's jurisdiction when no legally effective decision has been made.
221. In *Plaintiff M174/2016* the issue presented was more straightforward. The decision-maker was responding to a protection visa application from what was known as a 'fast track applicant'. If the Minister made a decision to refuse to grant a protection visa to a fast track applicant, the Minister was required to refer the decision to the Immigration Assessment Authority to enable it to 'review a fast track reviewable decision' referred to it. There were doubts about whether the procedural obligations imposed by the statutory process were complied with. There was however no doubt as to the statutory basis that

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<sup>90</sup> *Plaintiff M174/2016* (2018) 264 CLR 217, 236-7 [52].

<sup>91</sup> Identified at [179] and [214] of these reasons.

<sup>92</sup> An issue which I have already noted it is unnecessary for me to decide.

the decision-maker was relying on when the decision the subject of the Authority's review was made.

222. The High Court was satisfied that the Authority had jurisdiction to review the decision because:

*... a fast track reviewable decision is nothing more than a decision to refuse to grant a protection visa to a fast track applicant that is made in fact...*<sup>93</sup>

223. All of the facts connected the decision to the decision identified as reviewable, and in those circumstances, it did not matter whether the decision was legally valid or not. There was no ambiguity as to the statutory power that the decision maker had attempted to exercise. A finding that certain legal requirements were not met, did not mean that the decision to refuse the visa ceased to meet the statutory description of 'a decision to refuse to grant a protection visa to a "fast track applicant"'.

224. The issue in *Lawlor* was less straightforward. The AAT could review decisions made 'under Division 1 of Pt V of the Customs Act'. The Collector of Customs had sought to cancel a licence issued under that Division. The AAT determined that there was no power under Division 1 of Part V to cancel such a licence. A majority of the Full Court agreed. Consequently, there was a definite finding that no effective legal decision could have been made under Division 1 of Part V of the *Customs Act*.

225. However, neither Brennan J, sitting in the AAT, nor Bowen CJ or Smithers J considered that this took the decision that was made outside of the jurisdiction conferred on the AAT. They were all satisfied that notwithstanding that Division 1 of Part V did not make any provision for the cancellation of licences issued under that Division, the decision that was made still met the description of being a 'decision under Division 1 of Part V of the Customs Act'.

226. In reaching his conclusion, Brennan J relied upon the decision-maker's intention to act under that Division as providing the necessary connection between the decision that was

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<sup>93</sup> *Plaintiff M174/2016* (2018) 264 CLR 217, 241 [69].

made and the jurisdiction conferred on the Tribunal.<sup>94</sup> If this approach were adopted in the present matter, a finding of jurisdiction would be impossible. Ms Caruana did not ever decide that she would issue a removal notice under s 88, nor did she ever want to. Her belief was that she had broad powers to take steps in relation to X which were additional to and separate from the Commissioner's powers under s 88. It was pursuant to these more general powers that she decided to take action. If intended exercise of the power specified as reviewable is essential to the ART having jurisdiction, the applicant could not succeed on the evidence in this case.

227. However, the approach of Brennan J was expressly rejected by Bowen CJ when the matter was brought before the Full Court.

228. Bowen CJ gave careful consideration to the statutory phrase used in the Schedule to the AAT Act – ‘decision made “under Division 1 of Part V of the Customs Act”’. He considered the phrase in circumstances where he accepted that Division I of Part V of the *Customs Act*, did not confer power on the Collector of Customs to revoke a licence. The Chief Justice summarised what he regarded as the available options for understanding the scope of the phrase in the following terms:

*This may mean that it must be shown there was a decision made: (a) in pursuance of a legally effective exercise of powers conferred by the enactment; or (b) in the honest belief that it was in the exercise of powers conferred by the enactment; or (c) in purported exercise of powers conferred by the enactment.*<sup>95</sup>

229. In rejecting interpretation (a) the Chief Justice found:

*The Act is clearly intended to give a person whose interests are affected by an administrative decision an effective appeal, free of technicalities, against that decision on questions of fact and law ... The adoption of interpretation (a) would remove the most significant area involving questions of law from the jurisdiction of the Tribunal. It would render the appeal in many cases useless. Whenever it appeared in proceedings before the Tribunal that there was an error of law by reason of which the decision was legally ineffective and that the applicant certainly needed relief, the Tribunal would at that point be obliged to refuse relief on the ground that it had no jurisdiction to entertain the application.*<sup>96</sup>

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<sup>94</sup> *Re Brian Lawlor Automotive Pty Ltd and collector of Customs (NSW)* 1978 1 ALD 167, 179.

<sup>95</sup> *Lawlor* (1979) 41 FLR 338, 312.

<sup>96</sup> *Lawlor* (1979) 41 FLR 338, 342.

230. Those arguments apply with equal force in relation to the ART.

231. The Chief Justice also rejected interpretation (b), the 'honest belief a power under an enactment was being exercised', as sufficient and necessary for establishing jurisdiction. He noted:

*Interpretation (b) ... brings in a subjective element ... Under s 25 it is the jurisdiction of the Tribunal which is in question. It seems inappropriate to interpret s 25 so as to make this dependent upon the state of mind of the official. It would, if adopted appear to introduce a false issue and to impose upon the person aggrieved the burden of proving it. He could well be the very person who was ignorant of that state of mind. Perhaps also it would involve the consequence that if the evidence on an appeal to the Tribunal showed that an official did not honestly believe he was acting in the exercise of powers conferred by the enactment, the appeal would have to be dismissed notwithstanding that the absence of honest belief might not affect the legal standing of the decision.*<sup>97</sup>

232. On that basis interpretation (b) was rejected.

233. The Chief Justice then explained his reasons for adopting interpretation (c) – a purported exercise of power is sufficient to attract jurisdiction:

*Interpretation (c) appears to me to be consistent with the context in the Administrative Appeals Tribunal Act ... in the ordinary course, it would be reasonably clear from the objective facts under which enactment or in the exercise of which statutory powers an official had purported to act. The adoption of this view would mean that the Administrative Appeals Tribunal would have jurisdiction to entertain an appeal from a decision in fact made, which purported to be made in the exercise of powers under the enactment. It could then proceed to determine whether the decision was properly made in fact and in law. There is nothing unusual in holding that an administrative decision which is legally ineffective or void is susceptible of appeal.*<sup>98</sup>

234. In these passages, Bowen CJ sets out an approach to jurisdiction that focusses on objective facts concerning the decision that was made, rather than the subjective state of mind of the decision-maker. If the objective facts support a conclusion that a decision of a certain kind was made, and that decision meets the statutory description of a decision designated as reviewable, the Tribunal is not deprived of jurisdiction by evidence that the decision-maker's view was that they were doing something unrelated to the identified

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<sup>97</sup> *Lawlor* (1979) 41 FLR 338, 343.

<sup>98</sup> *Lawlor* (1979) 41 FLR 338, 343.

statutory power. It is also clear that when Bowen CJ refers to a 'purported decision' under a statutory power, he is not only talking about one which is consciously represented by its maker to have been made under that power. He is also referring to a decision which, when viewed objectively, appears to have been made under that power.<sup>99</sup> Such a decision remains reviewable even if, in the course of the review, it is shown that the decision was not supported by the statute in question or on any lawful basis at all.

235. Smithers J also considered this question, but was less direct in clarifying the role of the subjective intention of the decision-maker when considering whether there is a connection between the decision that was made and the exercise of the statutory power required for jurisdiction. His judgment does provide limited support for the proposition that the test of whether a decision is made under a statutory provision is an objective one.

236. Smithers J confirms that:

*If an administrator makes a particular decision in the course of government administration, then whether or not he is authorized to do so, there is in fact a decision made. The fact that that decision cannot affect legal rights or liabilities is irrelevant to that fact.*<sup>100</sup>

237. He also ruled out the need for a subjective belief to be held by the decision-maker 'that his action was within his statutory power'.<sup>101</sup>

238. Smithers J went on to endorse the proposition that decisions, which are made by an administrator in purported or assumed pursuance of the relevant statutory provision, are reviewable. A careful reading of the reasons of both the Chief Justice and Smithers J, indicate that the word 'purported' is not used in the sense of its most common usage – to claim that something is authorised by the provision – but in the secondary sense of that word – to imply, or convey that it was authorised.<sup>102</sup>

239. The following key principles relevant to determining jurisdiction can be distilled from the majority judgments in *Lawlor*. The first element needed for jurisdiction is a decision in fact.

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<sup>99</sup> So much follows from his rejection of the relevance of the decision-maker's subjective state of mind.

<sup>100</sup> *Lawlor* (1979) 41 FLR 338, 368.

<sup>101</sup> *Lawlor* (1979) 41 FLR 338, 372.

<sup>102</sup> *Macquarie Dictionary* (online at 3 February 2025) 'purport' (def 2).

Second, if a certain kind of decision is identified as reviewable in a statute, it does not affect jurisdiction if the decision actually made did not meet the requirements for a legally valid decision under that provision. Third, it does not (or may not) matter if the decision-maker is mistaken in thinking that the provision authorises the decision they are making. The decision they make can still be reviewable if the statutory formulation conferring jurisdiction is satisfied on the facts. Fourth, in considering whether the statutory formulation conferring jurisdiction is satisfied, the subjective intention of the decision-maker is for the most part irrelevant. It does not matter whether the decision-maker intended to exercise the decision-making power which is subject to review. That is not the test for whether there is an adequate connection between the decision as made and the decision-making power which can be the subject of review. Finally, it is sufficient to attract jurisdiction that the objective features of the decision made, reasonably convey to the person affected by the decision that they have been the subject of the exercise of the relevant statutory power.

#### **APPLICATION TO THE FACTS**

240. Consistent with these principles, the evidence from Ms Caruana about her state of mind when she submitted the notice through the Legal Request Portal is largely irrelevant to the question of jurisdiction. The focus needs to be on what was conveyed by the notice she gave and whether, viewed objectively, a reasonable recipient would have understood that a decision had been made to give a removal notice under s 88 of the OSA.
241. While the facts do not all go one way, I am satisfied that there are enough features of the notice given, to characterise it as conveying to X:
- (a) that the power under s 88 had been exercised; and
  - (b) it was subject to a removal notice.
242. Those features are as follows:
- (a) The fact that the Legal Request Portal was used conveyed to X, consistent with its Platform Use Guidelines, that what was being submitted was a 'valid legal request' to have 'potentially illegal content ... removed from X';

- (b) Ms Caruana, in order to lodge the request had to affirm that she had 'any required legal authority to submit this request and the submission is a permitted use of the system';
- (c) The only permitted use of the system was to submit 'valid legal requests' to have 'potentially illegal content' removed;
- (d) Ms Caruana identified the legal basis for the request as being s 7 of the OSA, the section which defines 'cyber-abuse material targeted at an Australian adult';
- (e) In the opening paragraphs of the free text, Ms Caruana stated 'Under the *Online Safety Act 2021*, the eSafety Commissioner is responsible for handling complaints about cyber abuse material concerning Australian adults and ensuring the rapid removal of such material from social media services ... We wish to alert you to a complaint we have received from [redacted] ...'
- (f) In the free text, the post the subject of complaint was described in the following terms:

*The post appears to have been created by an individual end user, seeking to intimidate and harass the complainant, on the basis the complainant [runs] a Queer Club, for primary school students, which was a student led [initiative]. We understand the complainant's name, workplace and social media accounts have been [publicly] shared in the post, inciting unwanted contact from other users and placing the complainant at risk.*

- 243. When these elements are taken together, despite the other content referring to possible violations of X's terms of service, the notice conveys to the reader that compulsory powers are being used, in response to a complaint, and the complaint concerns cyber-abuse material targeted at an Australian adult. The only possible statutory source for such a decision is s 88 of the OSA.
- 244. On that basis, I am satisfied that viewed objectively, the notice conveyed to X that a decision had been made to give a removal notice under s 88 of the OSA.
- 245. The reasonableness of this conclusion is confirmed by X's response in taking down the post, and the terms in which X described their response to the applicant.

246. I am satisfied that the statutory requirement in s 220(2) that a ‘decision to give a removal notice under section 88’ of the OSA has been met, and the ART has jurisdiction to entertain the application for review. I agree with the terms of the decision formulated by the President. I agree with his observations in the Appendix to his reasons.

*I certify that the preceding paragraphs 175 to 246 are a true copy of the written reasons for the interlocutory decision of Deputy President O’Donovan.*

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Associate:  
Dated: 5 February 2025

## **MANETTA SM**

247. I have had the advantage of reading the learned President’s reasons in draft. I am grateful to him for his painstaking examination of the facts and law in this matter. I agree with his findings of fact and the general thrust of his reasons and conclusions. In recognition of counsel’s very careful submissions and arguments, I have decided to set out a summary of my own reasons. In so doing, I have adopted the acronyms and shorthand expressions used by the President.<sup>103</sup> I am content to base myself on the text of the Draft Complaint Alert that the respondent says was given (which I shall call ‘the alert’), although I accept the findings of fact in this regard as they appear in the President’s reasons.<sup>104</sup>

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<sup>103</sup> For example, ‘OSA’ for the *Online Safety Act, 2021* (Cth); ‘the Post’ for the applicant’s post on X; ‘Draft Complaint Alert’ for the communication the respondent says was given to X by Ms Caruana; ‘AAT’ for the Administrative Appeals Tribunal and ‘X’s Legal Requests Portal’ as described at [46(b)] above.

<sup>104</sup> See [101]-[118] of Kyrou P’s reasons.

248. The critical question before us is whether the AAT had jurisdiction when the application for review was lodged with it.<sup>105</sup> This question requires the Tribunal to ask whether the giving of the alert answers the statutory description in s 220(2) of the OSA of ‘a decision of the Commissioner under s 88 to give a removal notice’.
249. This question poses three discrete, and not altogether straightforward, subsidiary questions. These three questions concern, first, the ambit of s 220(2); secondly, the construction of the alert; and thirdly, the question of whether the alert was referable to an exercise of power under s 88 of the OSA.

### **INTERPRETATION OF S 220(2)**

250. It is convenient to commence with the ambit of the critical expression in s 220(2): ‘a decision of the Commissioner under s 88 to give a removal notice’. In particular, in construing this statutory expression, the Tribunal must decide whether the reasoning in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*<sup>106</sup> is applicable or whether it should be distinguished.
251. I have decided that the reasoning in *Lawlor* should be applied notwithstanding the difference in the terms of conferral of the AAT’s jurisdiction in the case before us. In *Lawlor*, there had merely to be ‘a decision under Division 1 of Part V of the Customs Act’, whereas s 220(2) of the OSA conferred jurisdiction on the AAT (and now confers jurisdiction on the Tribunal) in a more specific way; namely, in respect of a ‘decision... under section 88 to give a removal notice’.
252. That difference notwithstanding, I have concluded that it is appropriate to apply the reasoning in *Lawlor*. I have decided, first, that a legally invalid decision can nevertheless be a ‘decision’ for the purposes of s 220(2). There is nothing arising from the more specific wording of s 220(2), or arising elsewhere in the OSA, to make the reasoning of the majority in *Lawlor* inapplicable in this regard.
253. Furthermore, the expression ‘a decision of the Commissioner under s 88 to give a removal notice’ was not intended, in my view, to confine the AAT’s jurisdiction to those cases

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<sup>105</sup> I accept that if the AAT had jurisdiction, this Tribunal continues to have jurisdiction under the transitional provisions identified by the President at [15] of his reasons; and that if the AAT did not have jurisdiction, this Tribunal has no jurisdiction.

<sup>106</sup> (1979) 41 FLR 338 (*‘Lawlor’*).

where the Commissioner's officers actually intended to invoke s 88 of the OSA as a source of their jurisdiction. Strictly speaking, this issue did not arise in *Lawlor* because the decision-maker there intended to act under Division 1 of Part V of the *Customs Act, 1901* (Cth) even though he or she had no power to do so.

254. Nevertheless, Bowen CJ's observations in *Lawlor* are especially pertinent, even if they are directed to a different statutory context, and I have decided that I should follow them. His Honour specifically held that the actual state of mind of the decision-maker was not the preferred test in deciding whether 'a decision made in the exercise of powers conferred by an enactment' had been taken.<sup>107</sup> He pointed out that a contrary interpretation would impose upon an AAT applicant the burden of proving the decision-maker's state of mind.<sup>108</sup> He further pointed out that it may be difficult to form a conclusion as to the decision-maker's intention in a given case.<sup>109</sup> I would add, in amplification of his Honour's observation, that decision-makers may not reflect upon, or advert to, the exact statutory source of their jurisdiction before acting.
255. On my construction of s 220(2) of the OSA, and in conformity with the reasoning in *Lawlor*, I do not believe that the AAT's jurisdiction was intended to be excluded where the decision-maker acted invalidly or where the decision-maker did not form the intention of issuing a removal notice under s 88.
256. Once it is concluded that the decision-maker's subjective intention is not relevant, the question of a criterion by which to delimit the ambit of s 220(2) of the OSA arises. The answer here, in my opinion, is that s 220(2) applies to those decisions, valid or invalid, that are objectively referable to an exercise of the power to give a removal notice under s 88, whether an exercise of power under s 88 was intended or not. This must follow once the subjective intention of the decision-maker is found to be irrelevant. This is my key

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<sup>107</sup> His Honour was addressing the criterion in s 25(1) of the *Administrative Appeals Tribunal Act 1975* but he had earlier observed that he did 'not think that any relevant distinction arises from the fact that the words "in the exercise of powers conferred by an enactment" are used in s 25(1) of the *Administrative Appeals Tribunal Act* and the words "under Division 1 of Part V of the *Customs Act*" are used in Part XII of the Schedule to the Act and applied by s 26': see *Lawlor* (1979) 41 FLR 338, 342.

<sup>108</sup> *Lawlor* (1979) 41 FLR 338, 343.

<sup>109</sup> *Lawlor* (1979) 41 FLR 338, 344.

conclusion on the question of statutory construction. Bowen CJ refers to a 'purported' exercise of power in this regard.<sup>110</sup>

257. The next task is to construe the alert objectively,<sup>111</sup> and to decide what, if anything, it required in terms, whether validly or invalidly.<sup>112</sup> Finally, having construed the alert objectively, I must then apply s 220(2) to the alert and decide whether it is objectively referable to, or 'purports' to be, an exercise of the power under s 88 to give a removal notice. These two tasks reflect the second and third questions to which I have referred at the outset of these reasons.

### **OBJECTIVE CONSTRUCTION OF THE ALERT**

258. I now turn to the question of what, if anything, the alert required on an objective construction. This question is critical because if the alert, construed objectively, *required* nothing of X, but merely *requested* X to evaluate the Post against its own policies, the alert cannot be objectively referable to an exercise of power under s 88. The essence of s 88 is a direction to remove, not merely a request.

259. I have decided that the alert, objectively construed, did impose a requirement on X to remove the Post, and was not merely a request to X to evaluate the Post against its own policies. That is not the only reading of the alert, I acknowledge, but it is one that is reasonably open, in my opinion.

260. The alert opens by referring to the respondent's responsibility under the OSA of 'ensuring the rapid removal of cyber abuse material concerning Australian adults'. A statutory responsibility is a duty in law. The first paragraph suggests, therefore, that the respondent's purpose in providing the alert was to 'ensure' the removal of the Post in conformity with the respondent's legal duty, because the Post amounted to material in respect of which the respondent had a statutory obligation to act; namely, 'cyber-abuse material targeted at an Australian adult'.<sup>113</sup> This is amplified by the Post being described as one 'seeking to intimidate and harass the complainant'. The alert notes that the complainant's 'name, workplace and social media accounts have been public (sic) shared,

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<sup>110</sup> *Lawlor* (1979) 41 FLR 338, 342.

<sup>111</sup> Since the subjective intention of the decision-maker is irrelevant.

<sup>112</sup> The respondent has contended that it did not require anything, but was merely in the nature of a request.

<sup>113</sup> This is a defined term in s 7 of the OSA.

inciting unwanted contact from other users and placing the complainant at risk'. This part of the alert suggests the Post poses a threat to the complainant's safety. Finally, the alert asks X to advise the respondent if any action is taken in relation to this 'report'. I accept that the word 'direction' is not used at this point; but nor is the word 'request'. The recipient could have reasonably inferred that it was being required by the respondent to remove the Post and also being asked to notify the respondent when it had done so.

261. I would reiterate that the alert mentions the very facts that might have justified the giving of a removal notice under s 88; namely, the Post was the subject of a complaint,<sup>114</sup> the material in the Post sought to intimidate and harass,<sup>115</sup> and the Post exposed a person to the risk of physical harm by inciting unwanted contact from others (as her name and workplace details were known).<sup>116</sup>
262. All in all, one reasonable construction of the alert is that it sought to impose a requirement on X to remove the Post.

#### **IS THE ALERT REFERABLE TO AN EXERCISE OF THE POWER UNDER S 88?**

263. Finally, I turn to the question of whether the alert is objectively referable to an exercise of the power of the Commissioner under s 88 to give a removal notice. I have already decided that the respondent's state of mind when issuing the alert is not relevant. I have decided the alert is objectively referable to an exercise of power under s 88. My reasons for this conclusion are as follows.
264. It is true that the alert is not expressly styled a 'removal notice under s 88 of the OSA' as one might expect it to have been. Nevertheless, it seems clear that X's staff interpreted the alert, filed through X's Legal Requests Portal, as a direction to remove the Post. One can infer that this must have been X's view since the Post was removed so rapidly, but was later reinstated. There is also email correspondence, referred to by the President in his reasons, indicating that X had withheld the Post in order to comply with Australian law. As I have said, the alert implies strongly that the respondent thought the Post was harassing and exhibited features that constituted cyber-abuse targeted at an Australian

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<sup>114</sup> Section 88(1)(c) of the OSA.

<sup>115</sup> Section 7(1)(c) of the definition of 'cyber-abuse material targeted at an Australian adult'.

<sup>116</sup> Section 7(1)(b) of the definition of 'cyber-abuse material targeted at an Australian adult'.

adult. Moreover, there is no prescribed form for a 'notice' under s 88: it did not have to assume a particular format.

265. Given that the alert can reasonably be read as imposing a requirement to remove the Post, and given that it was apparently so interpreted by X's staff on the evidence before us, the statutory justification in the OSA for imposing such a requirement lay in s 88 as a matter of law. Implied statutory, or common-law powers referred to by the respondent in its written submissions may authorise requests to service providers in furtherance of the objects of the OSA; but they do not authorise, self-evidently, the imposition of any requirement to remove a post.
266. I acknowledge that there are matters that favour the respondent's submission. The alert is not labelled a 'removal notice under s 88'; and it might be said that X, as the operator in Australia of a large public platform, should be familiar with the OSA's regulatory parameters. Although there was an ambiguity in the terms of the alert, X's staff ought to have appreciated that there was no intention to exercise the compulsive power under s 88 because the alert did not use explicitly any formal language unequivocally directing a removal of the Post.
267. These are substantial points, and the question is not without some difficulty; but in my opinion, the alert is objectively referable to an exercise of power under s 88 of the OSA. In reaching this conclusion, I have borne in mind that where a communication from the regulator is ambiguous, the recipient's reasonable interpretation of that communication assumes importance for the purpose of s 220(2) of the OSA. A removal notice under s 88 is, after all, a direction from the regulator to a particular person. The evaluation of the respondent's communication must be made in the light of its being a one-on-one communication that either does, or does not, reasonably bear the construction placed upon it by the recipient, X. In my view, it is important that the communication can reasonably be understood as a direction, and not a mere request, and was, as a matter of fact, apparently so understood by X's staff.
268. It follows, in my view, that the giving of the alert through X's Legal Requests Portal by Ms Caruana was objectively referable to an exercise of power under s 88, or 'purported' to be an exercise of power under s 88, to revert to Bowen CJ's language in *Lawlor*.
269. I have concluded, therefore, that the giving of the alert amounted to 'a decision of the Commissioner under s 88 to give a removal notice', whether or not the decision was

legally valid and irrespective of Ms Caruana's actual intention. The AAT had jurisdiction in this matter under s 220(2) of the OSA.

270. I agree with the President's observations in the Appendix to his reasons.

*I certify that the preceding paragraphs 247 to 270 are a true copy of the written reasons for the interlocutory decision of Senior Member Manetta.*

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Associate:

Dated: 5 February 2025

Date of interlocutory hearing: **13 December 2024**

Counsel for the Applicant: **Mr S Young**

Representatives for the Applicant: **Free Speech Union of Australia Pty Ltd**

Counsel for the Respondent: **Ms F Gordon KC with Mr J P W Maloney**

Solicitors for the Respondent: **Australian Government Solicitor**