

## Decision and Reasons for Decision

Administrative  
**Review Tribunal**



Tribunal Guidance Decision

Constituted as the Guidance  
and Appeals Panel

### **Baumgarten and eSafety Commissioner (Guidance and Appeals Panel) [2025] ARTA 153 (26 February 2025)**

**Applicant:** 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:** 26 February 2025

**Decision:** The Tribunal sets aside the reviewable decision and remits the matter to the Commissioner for reconsideration in accordance with the Tribunal's order that the Commissioner consider what action, if any, is required of the Commissioner under the *Online Safety Act 2021* in relation to the complaint lodged with the Commissioner on 31 May 2024, including whether a written notice under s 88(3) must be issued to the person who made the complaint under s 36.

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

**Justice Kyrrou, President, Deputy President O'Donovan, Senior Member Manetta**

**Catchwords**

*TRIBUNAL GUIDANCE DECISION – PRACTICE AND PROCEDURE – Tribunal found it had jurisdiction to review action taken by Commissioner – not in dispute that reviewable decision must be set aside by Tribunal – whether Tribunal should make a decision in substitution for reviewable decision or remit to Commissioner for reconsideration – Tribunal not satisfied appropriate to substitute a decision – matter remitted to Commissioner.*

**Legislation**

*Administrative Review Tribunal Act 2025 (Cth)*

*Online Safety Act 2021 (Cth)*

**Cases**

*Commonwealth v Beale* [1993] FCA 294; (1993) 30 ALD 68

**Statement of Reasons**

1. Following the publication of our decision and reasons in respect of the jurisdictional issue in this matter,<sup>1</sup> the Tribunal heard submissions with respect to the future conduct of the proceeding.<sup>2</sup> Having heard the parties, the Tribunal has decided that it should set aside the reviewable decision and remit the matter for reconsideration under s 105(c)(ii) of the

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<sup>1</sup> See [2025] ARTA 59.

<sup>2</sup> See [2025] ARTA 59, [167] (Kyrrou P). The President, sitting alone, conducted a directions hearing and heard oral submissions on 19 February 2025, but a transcript of the directions hearing was available to the other Tribunal members.

*Administrative Review Tribunal Act 2024* ('ART Act') without further hearing. Our reasons for this decision follow.

2. On the question of jurisdiction, the Tribunal decided that its predecessor, the Administrative Appeals Tribunal ('AAT'), had jurisdiction in this matter and that this Tribunal continues to have jurisdiction under the applicable transitional provisions.<sup>3</sup>
3. Ordinarily, once a preliminary jurisdictional issue is resolved in favour of jurisdiction, the substantive questions in the proceeding remain to be resolved by a hearing involving evidence and legal submissions on what is the correct or preferable decision and, depending on the resolution of those questions, what order should be made under s 105 of the ART Act. Section 105 is in the following terms:

***105 Tribunal decision on review of reviewable decision***

*In relation to the reviewable decision, the Tribunal must make a decision:*

- (a) affirming the reviewable decision; or*
- (b) varying the reviewable decision; or*
- (c) setting aside the reviewable decision and:
  - (i) making a decision in substitution for the reviewable decision; or*
  - (ii) remitting the matter to the decision-maker for reconsideration in accordance with any orders or recommendations of the Tribunal.**

4. In the present case, we have held that the reviewable decision is the Commissioner's decision to give to X a written communication (described by the Commissioner as a 'complaint alert'), which we found answered the statutory description in s 220(2) of the *Online Safety Act 2021* ('OSA') of being a decision to give a removal notice under s 88(1). Having made this finding, ordinarily, the substantive task of the Tribunal would be to decide whether that is the correct or preferable decision in all the circumstances. However, there are two unique features of this case which have led us to conclude that no purpose would be served by a further hearing, and that a final decision can, and should, be made now.
5. The first unique feature is that the parties are in agreement that the statutory preconditions for the making of the reviewable decision (that is, the decision which we have found answered the statutory description of a decision to give a removal notice)

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<sup>3</sup> See [2025] ARTA 59, [15], [166] (Kyrou P).

were not satisfied and that there was no power to make that decision. The second unique feature is that both parties are in agreement that the logical consequence of the Tribunal's reasons on the jurisdictional issue is that the reviewable decision must be set aside under s 105(c) of the ART Act. We agree with the parties' position on both matters.

6. Accordingly, the only remaining issue is whether, consequent upon the setting aside of the reviewable decision, the Tribunal should make a decision in substitution for the reviewable decision under s 105(c)(i) of the ART Act or remit the matter to the Commissioner for reconsideration in accordance with any orders or recommendations of the Tribunal under s 105(c)(ii).
7. The applicant submitted that the Tribunal should adopt the former course, and decide whether to give written notice of a decision to refuse to give a removal notice under s 88(3) of the OSA. The applicant relied upon *Commonwealth v Beale*, in which Neaves J held that the Tribunal should only remit a matter 'where, in order to give effect to the conclusions to which the tribunal has come, it is appropriate to set aside the decision under review but the tribunal is not in a position to formulate a decision in substitution for the decision set aside.'<sup>4</sup>
8. The Commissioner adopted the position that it was a matter for the Tribunal whether to make a decision in substitution for the reviewable decision or to remit the matter to the Commissioner for reconsideration.
9. Section 88(3) of the OSA provides as follows:

***88 Removal notice given to the provider of a social media service ...***

...  
(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.*

10. Section 88(3) raises complex legal issues. In particular, it has been suggested that one possible reading of s 88 is that the Commissioner is only obliged to give written notice to a complainant of a refusal to give a removal notice if the refusal involves the exercise of the discretion provided for in subsection (1), rather than because the statutory thresholds for

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<sup>4</sup> (1993) 30 ALD 68, 70 ('Beale').

the issue of a removal notice have not been met.<sup>5</sup> We were not required to make any findings on this or any other issue relating to the interpretation or application of s 88(3). The evidence suggests that the Commissioner did not turn her mind to whether the obligation in s 88(3) was enlivened in this case and did not make a decision on that issue. Accordingly, if we were to make a decision on whether the obligation in s 88(3) is enlivened, we would not be making a decision by way of review of a decision already made by the Commissioner. More fundamentally, as between the parties to the application for review, a final disposition of this proceeding does not require that a decision be made on whether the obligation in s 88(3) is enlivened.

11. It follows from the above analysis that *Beale* is distinguishable. On the basis of the evidence and analysis in our decision on jurisdiction, it is common ground that there is no basis for the giving of a removal notice to X and therefore the decision that was made should be set aside. The question whether a notice should be given under s 88(3) is an incidental consequential issue which is more appropriately determined by the Commissioner, having regard to all the circumstances of the case and the Tribunal's reasons in its decision on jurisdiction. In our opinion, this is not a case where there is an 'absence of any cogent reason' to remit the matter.<sup>6</sup> In our view, there is value in remitting the matter to the Commissioner with an order that the Commissioner consider what further action the Commissioner needs to take in respect of the complaint made to the Commissioner under s 36 of the OSA.
12. In all the circumstances, we are of the view that it is appropriate that the Tribunal now finalise the proceeding by deciding under s 105(c)(ii) of the ART Act:
  - (a) to set aside the reviewable decision; and
  - (b) to remit the matter to the Commissioner for reconsideration in accordance with an order that the Commissioner consider what action, if any, is required of the Commissioner under the OSA in relation to the complaint lodged with the Commissioner on 31 May 2024, including whether a written notice under s 88(3) must be issued to the person who made the complaint under s 36.

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<sup>5</sup> See [25] of the Commissioner's post-hearing submissions.

<sup>6</sup> See *Beale* (1993) 30 ALD 68, 70.

*I certify that the preceding 12 paragraphs are a true copy of the written reasons for the decision of Justice Kyrrou, President, Deputy President O'Donovan and Senior Member Manetta.*

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

Associate:

Dated: 26 February 2025