



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

BETWEEN:

**THE DIGITAL FREEDOM PROJECT
INCORPORATED (ABN 27 500 105 086)**
Plaintiff

and

THE COMMONWEALTH OF AUSTRALIA
First Defendant

THE ESAFETY COMMISSIONER
Second Defendant

THE MINISTER FOR COMMUNICATIONS
Third Defendant

SUBMISSIONS OF THE FIRST AND THIRD DEFENDANTS

PART I — CERTIFICATION

1 These submissions are in a form suitable for publication on the internet.

PART II — ISSUES

2 The Digital Freedom Project Incorporated (**DFP**) seeks to challenge the validity of Part 4A of the *Online Safety Act 2021* (Cth) (**OS Act**) on the basis that it impermissibly burdens the implied freedom of political communication. DFP does not have standing to maintain its challenge and, in any event, Part 4A of the *OS Act* is not invalid.

3 The First and Third **Defendants** adopt their submissions in the *Reddit* proceeding (S166/2025) (**RDS**), which explain why Part 4A does not impermissibly burden the implied
10 freedom. These submissions are confined to additional points raised in the DFP proceeding.

PART III — SECTION 78B NOTICE

4 Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) has been given: SCB 11.

PART IV — MATERIAL FACTS

5 The material facts are set out in **RDS** [4]-[9].

6 **DFP** [11] refers to a May 2026 preliminary study into the impact of the “social media ban” on young people’s news engagement. DFP states that “[o]f those who reported being significantly affected by the social media restrictions, 51% reported receiving less news”, without explaining that only 26% of the survey respondents reported being significantly affected by the social media restrictions: SC [309.4] (SCB 177). Set in that context, the
20 relevant percentages are: 13.3% of those surveyed reporting receiving less news, 11.7% reporting less opportunity to share views or take action, and 10.4% reporting fewer discussions about news with others.

7 **DFP** [30(b)] does not properly distinguish between age assurance and age estimation: the reference to “performance and suitability depend[ing] on the context and implementation” is a finding in relation to age *estimation* only: SC-48 at [A.27.2], [A.27.4] (SCB 1828-1829). “Age assurance” is an umbrella term for systems and methods used to assess a person’s age: SC-49 at 11 (SCB 2389). “Age estimation” is a particular method of determining a person’s likely age by analysing physical or behavioural characteristics, without the need for formal identity documents: SC-48 at [A.24.1] (SCB 1820). Age estimation is one method of age
30 assurance, not an alternative to it. Limitations of that particular method therefore do not, without more, establish corresponding limitations of age assurance systems generally. The

Age Assurance Technology Trial Report found that there were no substantial technological limitations that would prevent age assurance systems being used in response to age-related eligibility requirements: SC-48 at [A.3.1] (SCB 1761). It is also relevant to note that the eSafety Commissioner’s Regulatory Guidance encourages successive validation — the sequential use of multiple independent methods to establish an age assurance result, beginning with less intrusive measures and progressing where further assurance is required — as opposed to a single method such as age estimation: SC [380.3] (SCB 205); Annexure SC-49 at 15, 31 (SCB 2393, 2409).

PART V — ARGUMENT

10 A DFP DOES NOT HAVE STANDING

8 DFP must establish that it has a “real” or “sufficient” interest in obtaining the relief it seeks: *Unions NSW v NSW [No 3]* (2023) 277 CLR 627 at [16]. Because it seeks a declaration not of personal rights or liabilities, it must establish an interest other than that which any other ordinary member of the public has in upholding the law generally; it must show that success in the action would confer on it a benefit or advantage greater than that conferred upon the ordinary member of the community, or relieve it of a detriment or disadvantage to which it would otherwise have been subject to an extent greater than the ordinary member of the community: *Unions [No 3]* at [22]. It must have “more than a mere intellectual or emotional concern, and more than a belief, however strongly held, that the law or the *Constitution* should be upheld”: *Unions [No 3]* at [22].

9 DFP relies on its objects and its affected membership: DFP [6]-[8], [35]-[38]; SC [7]-[9] (SCB 91). It is admitted that its members include age-restricted users aged 13 to 15: Defence [16.2] (SCB 39). The question, however, is whether the agreed and admitted facts establish a sufficient interest of DFP itself. They identify no activity of DFP impeded by Part 4A, or other practical effect on DFP beyond the frustration of its stated objects. Objects (including to conduct litigation) and affected membership do not themselves supply the missing interest: *People of the Small Town of Hawkesdale Inc v Minister for Planning* (2022) 71 VR 550 at [64]-[69]. The constitutional character of the challenge does not dispense with that requirement: *Unions [No 3]* at [22]. DFP’s reliance on the possibility of an association

30 having standing to challenge constitutional validity (DFP [36]) therefore does not establish standing on these facts. In *Real Estate Institute of NSW v Blair* (1946) 73 CLR 213 at 228, Dixon J distinguished the possible standing of members from the absence of pleaded facts

supporting relief for the corporate association. DFP’s description of this litigation as advocacy for its members does not identify the further practical interest required.

B THE IMPLIED FREEDOM

10 DFP adopts Reddit’s submissions in proceeding S166/2025 (**DFP [32]**) and primarily focuses on the justification stage of the implied freedom analysis.

B.1 Effective burden

11 **DFP [50]-[54]** concern the nature and extent of the burden, although advanced under “adequacy of balance”. The Defendants rely on **RDS [19]-[24]**. Providers’ compliance with s 63D restricts children’s political participation where it depends on an account, including
 10 communication to and from electors and potential electors: Defence [25.3], [25.5]-[25.8] (SCB 46-47). Compliance costs and administrative obligations matter to this inquiry only insofar as they affect political communication. DFP’s reliance on possible age assurance errors and access difficulties does not establish their incidence, duration or practical consequences for eligible users’ political participation. In any event, there are no facts in the Special Case to suggest that platforms are over-blocking eligible users or requiring existing Australian account holders, aged 16 years or over, to prove their age through age verification: cf **DFP [52]**; and see **SC [383]-[384], [386]-[387]** (SCB 205-206). Moreover, any such effects must be assessed in the context of the available methods, statutory safeguards and review mechanisms. The Guidance encourages use of existing data and successive validation,
 20 discourages unnecessary verification of all existing account holders, and calls for accessible review of adverse decisions: **SC [380.1], [380.3]** (SCB 205); Annexure SC-49 at 28, 31, 41-42 (SCB 2406, 2409, 2419-2420). Section 63DB requires reasonable alternative means where the specified identification methods are offered; the possibility that an individual encounters difficulty does not make that safeguard generally ineffective: cf **DFP [53]**.

B.2 Legitimate purpose

12 The Defendants rely on **RDS [25]-[27]** on legitimate purpose. As submitted in **RDS [26]**, s 63D has the purpose of reducing the risk of harm to age-restricted users from the use of accounts on platforms with the kinds of design features identified in the extrinsic materials. Its relevant operation is with s 63C(1)(a)(i)-(iv) and r 4A of the *Online Safety (Age-Restricted Social Media Platforms) Rules 2025* (Cth), noting that DFP appears to accept
 30 the relevance of r 4A: **DFP [40]**. **DFP [44]** accepts the existence of credible risks based on peer-reviewed research, notwithstanding the absence of scientific consensus about causation.

B.3 Justification

13 Because DFP advances its case on justification by reference to structured proportionality, these submissions respond in that form: see **DFP [39]-[55]**. That framework is a tool of analysis, not a necessary formula in every case: *Babet v Cth* (2025) 99 ALJR 883 at [49], [72], [242]. The ultimate question remains whether the law is reasonably appropriate and adapted to its legitimate purpose in a manner compatible with the constitutionally prescribed system of government. The Defendants submit that the agreed risks, the account-related mechanisms addressed and the scheme’s confined operation justify the burden.

10 B.3.1 Suitability

14 A law will be “suitable” if it “exhibits a rational connection to its purpose, and a law exhibits such a connection if the means for which it provides are capable of realising that purpose”: *Comcare v Banerji* (2019) 267 CLR 373 at [33].

15 In targeting account-holding, s 63D in its relevant operation with s 63C(1)(a)(i)-(iv) and r 4A exhibits a rational connection to its compelling purpose of reducing the risk of harm to age-restricted users from the use of accounts on platforms with the kinds of design features identified in the extrinsic materials: cf **DFP [40]**. In particular:

- (a) the additional condition imposed by s 63C(1)(a)(iv) and r 4A identifies services that use account-informed recommendation systems (r 4A(2)) or have features that are
20 dependent upon account access (r 4A(3)-(6));
- (b) those features are designed to sustain engagement and give rise to credible risks of harm to children: **SC [334]-[344]** (SCB 188-194); **[346]-[347]** (SCB 195-196); **[349]**, **[351]-[352]** (SCB 196-198); **[354]**, **[356]** (SCB 198-200); **[361]-[362]** (SCB 200); **[367]**, **[370]** (SCB 201-202); **[372]**, **[374]** (SCB 203);
- (c) account exclusion removes account-dependent posting, feedback and interactions and changes the information available for personalisation. Those practical changes provide a reasonable basis to infer reduced exposure to the identified mechanisms of sustained and repeated engagement: **RDS [35]-[38]**; **SC [64]-[71]** (SCB 102-103); **[102]-[104]** (SCB 110-112); **[267.2]-[267.8]** (SCB 164); **[278]**, **[281]** (SCB 167); **[340]-[342]** (SCB
30 191-193).

16 No constitutional principle requires a legislature always to act in a reactive manner, rather than a proactive, precautionary and preventative one. Parliament may respond to “felt

necessities” including “concerns” that “are more based upon inference than on direct evidence”: *McCloy v NSW* (2015) 257 CLR 178 at [197], [233]. It can act prophylactically upon reasonable inferences supported by an adequate factual foundation: *Spence v Qld* (2019) 268 CLR 355 at [95]-[96]. Here, the seriousness of the agreed risks and children’s developmental vulnerability support preventive action: SC [343]-[344] (SCB 193-194). The Cambridge report cited at **DFP [45]** states that “[t]he need to act to safeguard young people is clear. The question of whether to implement a social media ban ... is one of weighing up risks between adopting an intervention whose evidence base is still poor or waiting to gain more evidence while the potential benefits of this intervention are not experienced (and individual-level harms can still accumulate)”: SC-47 at [8] (SCB 1719). This submission rests on the agreed credible risks of harm and the association between particular account-related mechanisms and those risks that Part 4A interrupts. It does not depend on awaiting a population-wide trial establishing the size of every protective benefit. Nor does it depend on establishing scientific consensus about the answers to the questions in SC [329] (SCB 187).

17 **DFP [46]** refers to the removal of beneficial sources of connection. That does not form part of the justification analysis. It is a choice for Parliament whether the loss of such benefits is justified by the protections obtained. The role of the Court is to decide whether the protection obtained is justified by reference to the burden on the implied freedom, which is not the same as loss of benefits in a general sense. Even if loss of benefits did form part of the justification analysis, the exclusions in r 5 limit the scheme’s reach by preserving access to services with the specified messaging, gaming, education and health purposes: r 5(1)(a), (b), (e)-(h). Public material available without an account and other avenues of political communication also remain available. The benefits identified at **DFP [46]** must be assessed against that confined operation and the credible risks affecting the same age group. The risks of displacement and lost support identified in the cited material do not establish that the protective effects of restricting account-related engagement are negated.

B.3.2 Necessity

18 An alternative ordinarily establishes a lack of necessity only if it is obvious and compelling, equally practicable and available, and would impose a significantly lesser burden on the implied freedom: *Banerji* at [35]. Equal practicability requires equal effectiveness in achieving the legitimate purpose: *Tajjour v NSW* (2014) 254 CLR 508 at [114]-[115];

RDS [45]. The comparison concerns the protection and communicative burden of each measure in its practical operation as a whole.

19 The alternatives advanced at **DFP [47]-[49]** do not establish an equally practicable means of securing equivalent protection with a significantly lesser burden. Their individual operation and proposed combination require attention:

- 10 (a) Permitting account access for 14 to 15-year-olds with parental consent (**DFP [47(a)]**) would restore exposure to the account-related mechanisms from which s 63D protects them. Consent does not itself alter those mechanisms or children's developmental vulnerability: **SC [343]-[344]** (SCB 193-194). The further protection supplied by parental controls (**DFP [47(g)]**) depends on informed, effective and continuing use, subject to the limitations in **SC [435]-[436]** (SCB 217-218). Section 63D places the obligation on providers and extends protection to children whose parents lack the information, capacity or opportunity to maintain effective controls: **RDS [51]**.
- 20 (b) A digital duty of care in broad terms (**DFP [47(b)]**) would require continuing assessment of the measures adopted across differing and evolving services, which would pose enforcement challenges and would not address the full range of risks identified in the Special Case. Absent a requirement to ensure that specified features do not operate for under-16s on social media services (as in the exposure draft of the Online Safety Amendment (Digital Duty of Care) Bill 2026 and in which case there would be no significantly lesser burden on the implied freedom), it is not evident that such an alternative would be equally practicable as account exclusion in preventing the risks of harm to children arising from the identified design features: see Annexure SC-13 at 14 (SCB 1184).
- 30 (c) A damages remedy for breach of a statutory protective duty (**DFP [47(c)]**) supplies a means of enforcing that duty; its protective reach depends on what the duty requires. Further, DFP's proposed tortious remedy appears to require that legal action be taken by an affected child through a legal representative; it would be ad hoc and reactive. The prospect of liability may encourage compliance, but does not establish that a narrower duty would prevent the identified risks as effectively as s 63D. A damages remedy is therefore capable of supplementing preventive obligations, without establishing an equally effective substitute for their substantive protection.

- (d) Requiring effective user controls (**DFP [47(d)]**) would preserve choices already available in some form on some platforms and devices: **SC [338]** (SCB 190-191). To the extent that protection depends on the child choosing or retaining those settings, it remains vulnerable to the very engagement mechanisms and developmental characteristics identified in **SC [343]-[344]** (SCB 193-194). Such an alternative would not be as capable of fulfilling the protective purpose of s 63D. Mandatory disabling of features raises the different comparison addressed next.
- (e) Mandatory disabling of harmful features (**DFP [47(e)]**) would need to extend to all the identified harmful features associated with account-holding to provide protection equivalent to account exclusion. Disabling selected features would leave the risks associated with the remaining features unaddressed: **SC [335]-[343]** (SCB 189-193). Further, the proposed alternative would preserve additional political communication only if providers chose to offer modified services which removed the harmful features while retaining communicative functions. Otherwise, children would remain unable to hold accounts. It cannot be assumed that providers would make that choice, given the commercial importance they attach to maintaining user engagement: **SC [296.2(a)], [297.1], [298.1]** (SCB 170-171).
- (f) In any event, the existing scheme already permits providers to offer modified versions of their platforms as electronic services lacking both a recommender feature and a logged-in feature within r 4A. Such a service would not satisfy s 63C(1)(a)(iv), and s 63D would not prevent children under 16 from holding accounts with it: *OS Act*, s 5 (definitions of “electronic service” and “service”); r 4A(1)-(6). The Special Case records the removal or suspension of children’s accounts (**SC [46]-[49]** (SCB 98-99)), but identifies no modified service retaining the communicative functions while removing all the relevant features. The proposed alternative therefore depends for its asserted lesser burden on providers offering a form of service already permitted under the existing scheme. The existing scheme should not be characterised as imposing a materially greater burden merely because providers have not taken that course.
- (g) Focusing on content regulation (**DFP [47(f)-(g)]**) misses the point that the identified risks underpinning Part 4A include risks arising from the manner and duration of engagement with material, including material that is not inherently harmful. Content restrictions do not address the full range of risks identified in the Special Case and do not advance the same object as Part 4A.

20 DFP appears to accept that the available research does not establish the comparative effectiveness of each alternative: **DFP [49]**. The proposed combination mentioned does not identify how its components would together provide equivalent protection while preserving materially more political communication than the existing scheme permits. Combining content regulation, education and parental controls with a general duty to mitigate risks does not itself establish that the remaining account-related pathways to harm would be addressed, or that protection would cease to depend on effective implementation within individual households. Insofar as the combination depends on mandatory disabling of all relevant harmful features, the considerations identified at [19(e)] and [19(f)] above apply: any
 10 additional political participation depends on providers offering modified services of a kind already permitted under the existing scheme. The proposed combination has therefore not been shown to provide an equally practicable alternative imposing a significantly lesser burden on political communication.

B.3.3 Adequacy of balance

21 Where a law is suitable and necessary, *Banerji* at [38] treats it as adequate in its balance unless the benefit sought is manifestly outweighed by the adverse effect on the implied freedom.

22 Section 63D, operating with s 63C(1)(a)(i)-(iv) and r 4A, is adequate in its balance. The prevention of credible risks of serious harm to children from engagement-promoting features
 20 on social media justifies the tailored restriction on account-holding that addresses those dangers by interrupting account-dependent mechanisms through which sustained and repeated engagement is encouraged. Its effect on political communication is confined by its application to particular services and to a limited period of childhood. Children retain access to public material available without an account and to other avenues of political communication.

C CONCLUSION

23 The questions in the Special Case should be answered in proceeding S163/2025 as follows: (1) No; (2) If necessary, no; (3) If necessary, none; (4) The plaintiff.

PART VI — ESTIMATE OF TIME

24 The Defendants will require 3 hours for oral submissions in respect of both S163/2025 and S166/2025.

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ANNEXURE TO SUBMISSIONS OF THE FIRST AND THIRD DEFENDANTS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1.	<i>Acts Interpretation Act 1901</i> (Cth)	Current	s 15A	Currently in force	All relevant times
2.	<i>Online Safety Act 2021</i> (Cth)	Current	s 5, Part 4A, 233	Currently in force	Since 12 September 2026 (ss 63D, 63DA, 63DB, 63G, 63H, Division 4A of Part 4A); otherwise, all relevant times
3.	<i>Online Safety (Age-Restricted Social Media Platforms) Rules 2025</i> (Cth)	Current	rr 4A, 5	Currently in force	Since 26 March 2026 (r 4A); all relevant times (r 5)
4.	<i>Online Safety (Age-Restricted Social Media Platforms) Amendment Rules 2026</i> (Cth)	As made	Sch 1 cl 1	Amended the 2025 Rules	26 March 2026