



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S163/2025

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

INTERVENER'S SUBMISSIONS

ATTORNEY-GENERAL FOR THE AUSTRALIAN CAPITAL TERRITORY

Part I: CERTIFICATION

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

Parts II & III: INTERVENTION

2. The Attorney-General for the Australian Capital Territory (**ACT**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the position of the Defendants.

Part IV: ARGUMENT

Facts

3. The facts are stated in the Special Case. The ACT reiterates those facts emphasised in the Defendants' Submissions at **DS [6]-[7]** and in the Defendants Submissions in the *Reddit* proceeding (S166/2025) at **RDS [4]-[7]**.
4. The ACT adds the following submissions by way of emphasis.
5. At **PS [20]** the Plaintiff points to the account-based features of ARSMPs that support forms of political communication and activity, and at **PS [25]** asserts that those account-based features of ARSMPs enable forms of participation not provided by the mere viewing of publicly accessible material.
6. However, other online platforms remain available to facilitate most if not all of those forms of communication and activity to children under 16 years of age. Section 5 of the *Online Safety (Age-Restricted Social Media Platforms) Rules 2025* (Cth) (**Rules**) specifies various categories of electronic services for the purposes of paragraph 63C(6)(b) of the *Online Safety Act 2021* (Cth) (**Act**), thereby excluding them from categorisation as ARSMPs and thus from the obligation in s 63D that burdens the freedom.
7. Many of these enable information (including publicly accessible material on a ARSMP platform) to be exchanged, commented on, reacted to, and debated by a child with other individuals or in groups through an online messaging application falling within section 5(1)(a), such as WhatsApp (**SCB 1008, 1035**). As the Minister explained in the Second Reading Speech, while such applications “can be shown to function like social media”, they “do not face the same algorithmic curation of content and psychological manipulation to encourage near-endless engagement” (**SCB 1142**). Such applications are also utilised by children under 16 years of age for accessing news.¹
8. It is true, as the Plaintiff says at **PS [29]**, that section 5 of the Rules does not specify as a class platforms used for content-specific communication relating to

¹ For example, the Western Sydney University report “News and Young Australians in 2023: How Children and Teens Access, Perceive and Are Affected by News Media” reported that, based on a survey of 1064 Australian children aged 8 to 16 years, WhatsApp was used to access news by 21% of those surveyed (well ahead of Reddit at 5%); **SC [308.4]** (**SCB 176**).

political and government matters. But section 5(1)(a) specifies, as a class, services that have the sole or primary purpose of facilitating communication of *unlimited* content via messaging, email, voice or video calls.

9. So while an account may be necessary to engage in the forms of online political communication and activity referred to at **PS [20]** via an ARSMP, it is not necessary to use an ARSMP to engage in those forms of online political communication and activity.
10. This is one factor among others (including those discussed in the ACT's submissions in the *Reddit* proceeding (**ACTS**) at [10]-[12]) for why Part 4A of the Act has only a modest "incremental effect ... on the **real-world ability** of a person or persons to make or to receive communications which are capable of bearing on electoral choice": *Brown v Tasmania* (2017) 261 CLR 328 at 386 [188] (Gageler J) (emphasis added).

Issues

11. The issue is whether Part 4A of the Act is invalid because it impermissibly burdens the implied freedom of political communication and whether the Plaintiff has standing to bring that challenge.
12. The ACT does not seek to be heard on the issue of the Plaintiff's standing.
13. The ACT adopts its submissions in the *Reddit* proceeding as to why Part 4A is not invalid. The ACT also adopts the Defendant's Submissions at **DS [11]-[22]** as to why Part 4A is not invalid.
14. The ACT emphasises the following points on the questions of 'suitability' and 'necessity', noting that the Plaintiff has adopted the tool of structured proportionality to assess whether the law is reasonably appropriate and adapted to a legitimate purpose that is compatible with the constitutionally prescribed system of government.
15. **Suitability:** A law may be regarded as suitable if it has a rational connection to the purpose of the law, and it will have that connection if the means for which it provides are capable of realising the purpose: *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557-558 [50]-[55], 561 [64] (French CJ, Hayne,

Crennan, Kiefel and Bell JJ), 579 [140]-[141] (Keane J); *McCloy v New South Wales* (2015) 257 CLR 178 at [80] (French CJ, Kiefel, Bell and Keane JJ).

16. In its submissions on suitability, the Plaintiff does not squarely engage with either element required for the suitability inquiry: the legitimate purpose pursued by Part 4A and the means it deploys.
17. As to purpose, the Plaintiff acknowledges a credible risk of harm in “social media use” at **PS [44]**, but does not assess the true purpose of the law arrived at through the ordinary process of statutory construction. The legitimate purpose of the law determined in that way is significantly more nuanced than the generalised idea of harms from ‘social media use’: **ACTS [17]-[22]**.
18. As to means, the Plaintiff does not specifically address whether the means are capable of achieving the legitimate purpose. The Plaintiff focuses first on whether some of the means deployed (age assurance mechanisms) might be administratively burdensome or circumvented (**PS [41]-[43]**). But as Hayne J explained in *Tajjour v New South Wales* (2014) 254 CLR 508 at 563 [82], once it is seen that an impugned law has a rational connection to the law’s legitimate purpose in the sense of being capable of achieving that end, further assessment of the *efficacy* of the impugned law is neither possible nor appropriate in this inquiry.
19. The Plaintiff then focuses on the Cambridge report and the limited evidence available to support the benefit of a “complete restriction” on social media or a “complete social media ban” (**PS [45]**). But this does not engage with the actual means deployed by Part 4A to achieve its legitimate purpose, which is *not* by implementing a complete ban on social media for children under 16 years: see **DS [15]**. While the Cambridge report refers to a poor evidence base for the effectiveness of a complete social media ban on adolescent well-being, it notes that there is a better evidence base regarding social media *reduction* – at least in adults – and it supports positive effects associated with reduction (**SCB 1718, 1723**). The means deployed by Part 4A are more properly characterised as *reducing* social media use than banning it completely.
20. Finally, the Plaintiff discusses the ways the law may adversely impact the beneficial aspects of social media: **PS [46]**. But as the Defendants point out at

DS [17], that is not part of the justification analysis. The fact there may be downsides to the law does not alter whether it has a rational connection to its legitimate purpose.

21. **Necessity:** The Plaintiff proffers a number of alternative measures that it submits could achieve the legitimate purpose just as well and with a lesser burden (PS [47]).
22. The task of the Court is not to form a view as to whether one legislative means of achieving a statutory objective is “slightly preferable” to another: *Coleman v Power* (2004) 220 CLR 1 at 53 [100] (McHugh J). Rather, it is confined to determining whether there are other, equally effective, means of achieving the legislative object which have a less restrictive effect on the freedom and which are obvious and compelling: *McCloy* at [81] (French CJ, Kiefel, Bell and Keane JJ).
23. The ACT endorses the Defendants’ analysis at DS [19] of why the alternatives advanced by the Plaintiff do not establish an equally practicable means of securing equivalent protection. The ACT makes two additional short points:
 - (a) *Account access with parental consent* (PS [47(a)]): Once the legitimate purpose of Part 4A is properly understood as directed to reducing a specific risk of harm to the health and safety of children, the inability of a measure that allows account access with parental consent to achieve equivalency of protection becomes plain. Risks to the safety of children are regularly addressed by the legislature without regard to parental choice, including laws regulating the minimum age to consume alcohol or tobacco, gamble, obtain a license to drive, or consent to sexual activity. Protecting the safety of children from harm associated with certain societal activities ought not depend on an individual parent’s willingness to provide it. And it may be unreasonable to expect them to do so, particularly where the design features of ARSMPs which Part 4A targets include those associated with addictive effects on the brain: SC [335], [343] (SCB 189, 193).
 - (b) *Content-focused regulation* (PS [47(g)]): The risk of harm that Part 4A is designed to reduce is not related to the *content* of the information communicated with ARSMP accounts, it is related to the harmful features

associated with the 'logged-in' state *per se*, regardless of the content of communication (**SCB 1112**). In any event, laws which target particular information or ideas or prohibit or regulate the content of communications pose a more direct burden on the freedom and therefore require a more compelling justification: *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 299 (Mason CJ).

Conclusion

24. The questions in the Special Case should be answered as proposed by the Defendants at **DS [23]**.

Part V: ESTIMATE OF TIME

25. The ACT will require 15 minutes for oral submissions in respect of both S163/2025 and S166/2025.

Dated 16 October 2026



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ANNEXURE TO INTERVENER'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	<i>Online Safety Act 2021 (Cth)</i>	Current	Part 4A, including sections 63C and 63D	Act in force	N/A
2	<i>Online Safety (Age-Restricted Social Media Platforms) Rules 2025 (Cth)</i>	Current	Section 5	Rules in force	N/A