



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

REDDIT, INC.
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant

and

MINISTER FOR COMMUNICATIONS
Second Defendant

**SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE NORTHERN
TERRITORY (INTERVENING)**

PART I: CERTIFICATION

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

PART II: BASIS FOR INTERVENTION

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

PART III: ARGUMENT

A. Summary of argument

3. These submissions supplement the Defendants' Submissions (**DS**), and respond to the Plaintiff's submissions (**PS**), on four topics relating to question 2 of the special case:
 - (a) **Burden:** The burden of the impugned law on the **implied freedom** of communication on government and political matters is modest. It has at most an indirect and incidental impact on the implied freedom.
 - (b) **Purpose:** The purpose of Part 4A of the *Online Safety Act 2021* (Cth) (**OS Act**)¹ should be identified having regard to the rules which have been made under it. They form part of an integrated scheme and affect the operation and scope of the *OS Act*. That construction does not implicate the usual principle that a statute ought not be construed by reference to regulations made under it. The *OS Act* expressly provides for delegated legislation which may expand or contract the operation of s 63D.
 - (c) **Alleged under-inclusiveness:** It is for Parliament to choose both the mischief at which an Act is directed and the extent to which that mischief should be ameliorated. The fact that Parliament does not deal with the whole of the mischief to which an Act is directed does not mean that the law is unjustified. Even if under-inclusiveness is present, something more is required before it can assume significance, such as that it exposes that the

¹ It should be noted that provisions in Part 4A, including s 63D, were amended by the *Online Safety Amendment (Strengthening Enforcement for the Social Media Minimum Age) Act 2026* (Cth) which commenced on 12 September 2026. The Attorney-General submits that the amendments are at most of very marginal relevance to the resolution of the questions in the special case.

true purpose of the law is in fact something else, e.g. to discriminate against political communication or a particular viewpoint. That is not so here.

- (d) **Alternatives:** For a proposed alternative law to be demonstrative of invalidity, it must be “obvious and compelling”², it must be as effective at achieving the same purpose, and it must have a substantially lesser burden on the implied freedom. The Plaintiff understates those requirements and its alternatives do not satisfy these of criteria.

4. The Court should make the orders sought by the Defendants in respect of question 2 of the special case: DS [52].

B. Assessing the burden

5. It is common ground that s 63D of the *OS Act* burdens the implied freedom: PS [26]; DS [19]. For the law to be valid, that burden must be justified as being reasonably appropriate and adapted to a legitimate purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of government.³
6. In considering that question, it is “[a]nalytically important from the start” to be clear about the nature and extent of the burden imposed⁴, which is distinct from the inquiry whether there is any burden at all.⁵ Identifying the nature and scope of the burden “serves to focus and to calibrate” the justification inquiry.⁶
7. The freedom of communication on government and political matters can be burdened in different ways. At the most extreme, a law may burden the implied freedom but only in a way which is “insubstantial or adventitious”.⁷ In such a case, the implied freedom will not be truly engaged at all. Further, the fact that a law is directed to essentially non-political or commercial communication, means

² *Babet v Commonwealth* (2025) 99 ALJR 883, [186] (Edelman J).

³ *Hopper v Victoria* (2026) 100 ALJR 582, [27], [49] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ). No party contends in this proceeding that the purpose identified by the Defendants are incompatible with maintenance of the constitutionally prescribed system of government.

⁴ *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, [94] (Gageler J).

⁵ *Tajjour v New South Wales* (2014) 254 CLR 508, [145] (Gageler J), quoting from *Unions NSW v New South Wales* (2013) 252 CLR 530, [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

⁶ *Tajjour* (2014) 254 CLR 508, [147] (Gageler J); *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537, [156] (Gordon J) adopted in *Hopper* (2026) 100 ALJR 582, [28] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

⁷ *Tajjour* (2014) 254 CLR 508, [146] (Gageler J); *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408, [194] (Gleeson J); *Ravbar v Commonwealth* (2025) 99 ALJR 1000, [31] (Gageler CJ).

that it will either not burden, or will only incidentally burden, the implied freedom.⁸ Even where an effective burden is imposed, the nature and extent of the burden will vary greatly. A law which bans political advertising during an electoral period may impose a greater burden than one which operates at less sensitive periods of the electoral cycle.⁹ The organising principle is that the nature and extent of the burden is to be determined functionally by reference to the degree of “risk” which the law poses to “the efficacy of electoral accountability for the exercise of legislative and executive power”.¹⁰

8. The Plaintiff says that s 63D’s burden is “direct and very substantial”: PS [38]. That ignores three important aspects of the law.
9. ***The burden is indirect:*** In *ACTV* (1992) 177 CLR 106, Mason CJ drew a distinction between “restrictions on communication which target ideas or information and those which restrict an activity or mode of communication by which idea or information are transmitted”.¹¹ In the former, “only a compelling justification will warrant the imposition of a burden on free communication”. On the other hand, “restrictions imposed on an activity or mode of communication by which ideas or information are transmitted *are more susceptible of justification*” (emphasis added). Similarly, Deane and Toohey JJ said that “a law whose character is that of a law with respect to the prohibition or restriction of [political] communication... will be *much more difficult to justify*... than will a law whose character is that of a law with respect to some other subject matter and whose effect on such communications is unrelated to their nature as political communications” (emphasis added).¹² McHugh J drew a similar distinction.¹³

⁸ *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, [28]-[29] (Gleeson CJ and Heydon J), [70]-[71] (McHugh J), [216]-[220] (Gummow J), [380]-[382] (Hayne J) and [456]-[457] (Callinan J).

⁹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*ACTV*), 173 (Deane and Toohey JJ).

¹⁰ *Brown v Tasmania* (2017) 261 CLR 328, [164] (Gageler J).

¹¹ *ACTV* (1992) 177 CLR 106, 143 (Mason CJ).

¹² *Ibid*, 169 (Deane and Toohey JJ).

¹³ *Ibid*, 234-235 (McHugh J).

10. That distinction has been repeatedly emphasised.¹⁴ As Jagot J recently said (citations omitted)¹⁵:

There is a manifest difference between (on the one hand) a law the direct and immediate purpose of which is to prohibit or restrict certain political communications which uses direct and immediate means to achieve the prohibition or restriction and (on the other hand) a law the direct and immediate purpose of which is to achieve some legitimate purpose compatible with our system of representative and responsible government which merely incidentally restricts freedom of political communication by some remote and indirect means. No doubt there will be laws between these two extremes but the calibration of the degree of scrutiny to the essential character of the law is an obvious available judicial technique to ensure that the freedom the courts protect is no more than is necessary to enable “the effective operation of that system of representative and responsible government provided for by the Constitution”.

11. Part 4A of the *OS Act*, read with the *Online Safety (Age-Restricted Social Media Platforms Rules 2025* (Cth) is not a law directed at political communication.¹⁶ It is directed to certain platforms (a “mode” of communication), not to “ideas” or “information”. The law is therefore properly characterised as having an “incidental” or “indirect”¹⁷ burden on the implied freedom (cf PS [38]), which is more “susceptible of justification”¹⁸.
12. To the extent the impugned law burdens political communication on an age-restricted social media platform (**ARSMP**), it is entirely neutral as to the views that may be expressed in communications on those platforms or their content. Part 4A may therefore be contrasted with the legislation under challenge in cases such as *Brown* and *Ravbar*. Likewise, it does not seek to discriminate in favour

¹⁴ See also *Cunliffe v Commonwealth* (1994) 182 CLR 272, 299 (Mason CJ) and 337 (Deane J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 76-77 (Deane and Toohey JJ); *Hogan v Hinch* (2011) 243 CLR 506, [95]-[99] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton v Queensland* (2012) 246 CLR 1, [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [46] (French CJ); *Clubb v Edwards* (2019) 267 CLR 171, [180]-[181] (Gageler J); *O’Flaherty v City of Sydney Council* (2014) 221 FCR 382, [17] (the Court).

¹⁵ *Ravbar* (2025) 99 ALJR 1000, [344] (Jagot J), see also [341].

¹⁶ Cf *ACTV* (1992) 177 CLR 106, 144 (Mason CJ).

¹⁷ *Mullholland* (2004) 220 CLR 181, [40] (Gleeson CJ), quoted with approval in *Hogan* (2011) 243 CLR 506, [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

¹⁸ *ACTV* (1992) 177 CLR 106, 143 (Mason CJ).

of established political parties at the expense of new entrants as was the vice identified by Deane and Toohey JJ in *ACTV*.¹⁹

13. ***Political communication as a whole:*** The implied freedom is a limitation on legislative power, not an individual right to communicate in a certain way.²⁰ As such, what must be assessed is the burden of the law on the freedom as a whole, not on a particular preferred method of communication.²¹ Where a restriction is limited to a certain mode of communication “it will not infringe the implied freedom unless it significantly compromises the ability of affected persons to engage in political communication” and “even then, only if and because it has a significant effect on political communication *as a whole*”²² (emphasis added): cf PS [38]. That goes to both whether the implied freedom is implicated and the scope of any burden which falls to be justified.
14. Section 63D, read with the *Rules*, affects only a limited number of modes of communication. It leaves untouched all non-electronic modes of communication and, even within electronic modes, all media which do not constitute ARSMPs. By reason of the *Rules*, those modes which are captured are only those with particular design features, which are not common to all online communication platforms. Further, s 63D does not impact upon a person’s ability to view material where no account is necessary. The law therefore leaves many other modes of communication available for political communication by persons under 16 years.
15. ***The status of the persons affected:*** The implied freedom is an implication in support of the system of representative and responsible government arising, principally, from ss 7, 24, 64 and 128 of the Constitution. The freedom extends only so far as is required to give effect to those sections.²³ It arises because “it is necessary in order to give efficacy to those provisions that the people be free to

¹⁹ Ibid, 172 (Deane and Toohey JJ).

²⁰ *Unions NSW v New South Wales* (2013) 252 CLR 530, [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Monis v The Queen* (2013) 249 CLR 92, [266] (Crennan, Kiefel and Bell JJ); *City of Adelaide* (2013) 249 CLR 1, [166] (Crennan and Kiefel JJ).

²¹ *Comcare v Banerji* (2019) 267 CLR 373, [20] (Kiefel CJ, Bell, Keane and Nettle JJ); *Clubb* (2019) 267 CLR 171, [247] (Nettle J); *Brown* (2017) 261 CLR 328, [90] and [150] (Kiefel CJ, Bell and Keane JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530, [35]-[36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Wotton* (2012) 246 CLR 1, [80] (Kiefel J); *APLA* (2005) 224 CLR 322, [381] (Hayne J).

²² *Clubb* (2019) 267 CLR 171, [247] (Nettle J).

²³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566-567 (the Court).

communicate concerning government and political matters which could affect their choices in federal and State elections and... referenda”²⁴ or “that could throw light on the performance of ministers of state or the executive branch of government”.²⁵

16. In assessing the nature and extent of a burden on the implied freedom, it is relevant to consider who stands to be affected by the law and how. Here, the law is directed to providers of ARSMPs and places a burden on them to take reasonable steps to prevent “age-restricted users” from having accounts with the platform: s 63D. An “age-restricted user” is an “Australian child who has not reached 16 years”: s 5. Such persons will, in the vast majority of cases, not be electors and will therefore not immediately stand to make the choice to which ss 7, 24, 64 and 128 of the Constitution call to be made.
17. That is not to suggest that a law which restricts communication to and from persons who are not electors imposes *no* burden on the implied freedom: cf PS [26]. As the Court declared in *Lange*, “*each member* of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia”.²⁶ It may also be accepted that persons who are under 16 have a role to play in influencing electors and the elected (PS [37])²⁷, and that receiving information while they are ineligible to vote may inform their later electoral choices. However, it remains the case that the impugned law does not affect them *as electors*, and further, that many children aged 13-15 have, by reason of age, insufficient political interest such that they are unlikely to seek to influence other voters or groups. And for those that do have an interest, they remain able to use modes of communication not affected by the law. In combination with the foregoing points concerning the indirect nature of the burden and the availability of other media, this is another way in which the law effects a burden which is indirect, when compared to the processes which the freedom centrally protects.

²⁴ *Clubb* (2019) 267 CLR 171, [247] (Nettle J).

²⁵ *Lange* (1997) 189 CLR 520, 571 (the Court).

²⁶ *Ibid.*

²⁷ *Farmer* (2025) 99 ALJR 1408, [40] (Gageler CJ, Gordon and Beech-Jones JJ).

18. Insofar as the Free Speech Union suggests that the impact of the law goes beyond “age-restricted users”, and may affect others who are unwilling to verify their age (FSU [11]-[24]), that proceeds from a factual premise which is not made out: DS [23]-[24]. Further, to the extent that a person aged 16 or above is unwilling to engage in age verification, and that unwillingness results in an inability to hold an account with an ARSMP, anonymous or pseudonymous (FSU [13]) communications are no more deserving of protection by the implied freedom than communications for which the speaker acknowledges responsibility.²⁸ It is also not correct to proceed from the basis that “participation in the public affairs of the nation must not involve a cost to one’s privacy or other individual interests”.²⁹

C. Identifying the legitimate purpose and the relevance of the *Rules*

19. When identifying the purpose of the law, the Plaintiff says that the Court should disregard the *Rules* because, “[g]enerally speaking, it is impermissible to refer to regulations made under an Act to construe an Act”: PS [40].
20. The “object or purpose of a law is what the law is designed to achieve in fact”.³⁰ That purpose is to be identified “by the ordinary processes of statutory construction”³¹, including considerations of text, context and history.³²
21. Rule 4A of the *Rules* is relevant to that exercise because it is not only contemplated by the Act, but is, by Parliamentary design, given the function of limiting the operation of the central provision in Part 4A. Section 63D obliges a provider of an ARSMP to take reasonable steps to prevent age-restricted users having accounts with the platform. Section 63C(1)(a) defines an ARSMP to be one satisfying all of the conditions there set out including, relevantly, “*such other conditions (if any) as are set out in the legislative rules*”: s 63C(1)(a)(iv). The

²⁸ *Banerji* (2019) 267 CLR 373, [37] (Kiefel CJ, Bell, Keane and Nettle JJ). Indeed, the passages from the reasons of Griffith CJ and from Isaacs J in *Smith v Oldham* (1912) 15 CLR 355, 358-359 cited by their Honours suggest that anonymous political communications may be more likely to mislead or unduly influence a voter.

²⁹ *LibertyWorks* (2021) 274 CLR 1, [75] (Kiefel CJ, Keane and Gleeson JJ).

³⁰ *McCloy v New South Wales* (2015) 257 CLR 178, [132] (Gageler J); *EGH19 v Commonwealth* (2026) 100 ALJR 400, [121] (Gordon J).

³¹ *Monis* (2013) 249 CLR 92, [125] (Hayne J); see also *Hopper* (2026) 100 ALJR 582, [45] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ); *Ravbar* (2025) 99 ALJR 1000, [173] (Edelman J); *Brown* (2017) 261 CLR 328, [96] (Kiefel CJ, Bell and Keane JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530, [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

³² *Brown* (2017) 261 CLR 328, [321] (Gordon J); *McCloy* (2015) 257 CLR 178, [320] (Gordon J).

Minister is then authorised, by s 240(1)(a), to make rules prescribing the matters “required or permitted by this Act to be prescribed by the legislative rules”. As such, a rule made under s 63C(1)(a)(iv) operates as a means of narrowing the target of s 63D via the definition of an ARSMP. That will correspondingly affect the burden created by the law and whether that burden is justified: cf PS [41].

22. In that context, having regard to the *Rules* does not contravene the general principle against construing an Act by reference to its regulations: cf PS [40].³³ Generally, regulations cannot be used to construe, *and thereby alter*, the provisions of the Act which created them.³⁴ As French CJ has explained, that would ordinarily be “a case of the tail wagging the dog”³⁵, because the regulations depend for their force upon the Act and must be consistent with it.
23. However, that principle does not apply where the statute itself authorises regulations which “abrogate, modify or qualify” the provisions of the statute.³⁶ So too where regulations are elevated to the status of a provision of the Act. Such regulations will bear upon the interpretation of the Act in the same way as an amendment made by primary legislation.³⁷
24. Consistent with that, courts have recognised that the principle does not apply where a statutory provision itself permits exceptions to be made to it by regulations.³⁸ Section 63C(1)(a)(iv) is an example of that kind of provision.

D. Alleged under-inclusiveness

25. The Plaintiff says that the law is under-inclusive, because it does not address messaging or gaming services in circumstances where those services may cause the same types of harm as those which are addressed by Part 4A. From that

³³ *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101, [26] (the Court); *Webster v McIntosh* (1980) 32 ALR 603, 606 (Brennan J, Deane and Kelly JJ agreeing); *Hunter Resources Ltd v Melville* (1988) 164 CLR 234, 244 (Mason CJ and Gaudron J).

³⁴ *Wallaby Grip Ltd v QBE Insurance (Australia) Ltd* (2010) 240 CLR 444, [21] (the Court).

³⁵ *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, [56] (French CJ).

³⁶ *Ibid*, [56] (French CJ) and the authorities in fn 140.

³⁷ See P Herzfeld and T Prince, *Interpretation*, 2024, 3rd ed, [8.400], citing (relevantly) *O’Connell v Nixon* (2007) 16 VR 440, [28] (Nettle JA, Chernov and Redlich JJA agreeing); *Dietman v Brennan-Kuss* (2015) 123 SASR 24, [45]-[46] (Kourakis CJ, Bampton J and Muecke DCJ agreeing). See also D Pearce, *Statutory Interpretation in Australia*, 2019, 9th ed, [3.50].

³⁸ *Picher v HB Brady & Co Pty Ltd* [2005] WASCA 159, [30], [32] and [34] (the Court). See also D Pearce, *Statutory Interpretation in Australia*, 2019, 9th ed, [3.49] and P Herzfeld and T Prince, *Interpretation*, 2024, 3rd ed, [8.400].

premise, it says that “the persuasiveness of the justification for the law is considerably undermined when a very large part of the problem that is sought to be addressed is left out of scope without any cogent explanation”: PS [49].

26. That submission should not be accepted.
27. First, it confuses the mischief at which Part 4A is directed (the design features in the ARSMPs) with the harm that may flow from those features (addictive use, changes in brain development, disruption to sleep etc.). The purpose of the impugned legislation is to address the harmful effects of the design features, not to eliminate all causes of the type of harm that may flow from them.
28. For example, it is a purpose of the impugned legislation to address sleep disruption in children that may be caused by, for example, endless feeds informed by recommender systems. However, it is demonstrably not its purpose to address all possible causes of sleep deprivation in that cohort.
29. It is for the legislature to decide the mischief that it wants to address – including the generality at which that mischief is pitched – and its laws cannot be invalidated for infringing the implied freedom on the ground that a party or a court forms the view that it should have addressed a different mischief.
30. Further to this, it is clear from the terms of Part 4A that it is not aimed at the complete *elimination* of the harm that may flow from the design features. Section 63B describes the object of Part 4A as the *reduction* in the risk of harm and, consistent with that, s 63D merely requires an ARSMP to take “reasonable steps” to prevent age-restricted users having an account.
31. Secondly, as Gageler J explained in *Brown* (2017) 261 CLR 328, under-inclusiveness is not *per se* probative of the validity of a law. It may be relevant where it “results in a legislative burden falling *unevenly on political communication*”, particularly where “it occurs *in combination with other factors* which tend to indicate that *the targeting of one of a number of sources of a postulated problem* results in a burden on political communication by a *targeted segment of the population* which is more extensive or more severe than might be expected had a more comprehensive solution been sought” (emphasis added).³⁹

³⁹ *Brown* (2017) 261 CLR 328, [222]-[223] (Gageler J).

However, the implied freedom “does not operate to produce the result that a legislature addressing a mischief needs always to find a solution to the whole of that mischief”.⁴⁰ A law would very rarely be justifiable if it had to eliminate the whole of the mischief to which it was addressed.

32. As Gageler J explained, the legislation in *Brown* was under-inclusive in the relevant sense because the narrow definition of “protestor”⁴¹ would almost always be constituted by someone engaging in political communication and not by others (such as children on excursions or walkers), even though the disruption to logging operations caused by both groups would be the same.⁴² The law’s discrimination against those expressing political opinions, the history of anti-forestry protests in Tasmania, and the availability of existing broad rules of exclusion, were “other factors”⁴³ which, in combination with its under-inclusiveness, suggested that the true purpose of the law was to target a section of the community which engaged in political communication.
33. That is not the case here and the Plaintiff does not identify any ulterior purpose illuminated by the law’s alleged under-inclusiveness. Section 63D is similar to the law considered in *McCloy* (2015) 257 CLR 178, which Gageler J contrasted with the law in *Brown*. The purpose of the law in *McCloy* was to prevent corruption, and to prevent the risk of undue influence, in planning decisions.⁴⁴ The law relevantly furthered that purpose by prohibiting political donations from property developers. The plaintiff in *McCloy* said that the law did not have a rational connection to its purpose, because it “narrowly focussed on a small group” of persons, because it applied only to corporations (not natural persons and firms), and because it was capable of avoidance.⁴⁵ That argument was rejected.⁴⁶ Within its scope, the law advanced its objective and, though it did not deal with that mischief completely, in doing so it did not discriminate against

⁴⁰ Ibid, [222] (Gageler J). See also *McCloy* (2015) 257 CLR 178, [56] (French CJ, Kiefel, Bell and Keane JJ).

⁴¹ *Brown* (2017) 261 CLR 328, [171] (Gageler J).

⁴² Ibid, [220] (Gageler J).

⁴³ Ibid, [223] (Gageler J).

⁴⁴ *McCloy* (2015) 257 CLR 178, [53] (French CJ, Kiefel, Bell and Keane JJ).

⁴⁵ Ibid, [231] (Nettle J), and also [54]-[56] (French CJ, Kiefel, Bell and Keane JJ).

⁴⁶ Ibid, [232] (Nettle J), and also [56] (French CJ, Kiefel, Bell and Keane JJ).

political communication or particular viewpoints so as to suggest some ulterior purpose which was illuminated by that under-inclusivity.

34. In the same way, s 63D does not prohibit all online activities which may pose a risk to children's health and development, but the prohibition in s 63D and the exclusion by r 5 of the *Rules* of the activities relied on by the Plaintiff (messaging and gaming), are content and viewpoint neutral. Their limited scope does not mean that their burden falls "unevenly on political communication" in a way which suggests that one segment of the community has been targeted because of its engagement in, or the content of its, political communication.⁴⁷

E. Alternative schemes

35. The Plaintiff understates the standard which applies to identifying a relevant alternative law for the justification inquiry: PS [66]. It is not accurate to say that a law which does not pass the alternative measures analysis must necessarily be invalid. Rather, the question of justification "*may* involve and be assisted by a consideration of" alternative measures⁴⁸ (emphasis in original): cf PS [66]. That is because, where there are other equally effective means available to achieve the statute's legitimate purpose but which impose a lesser burden on the implied freedom "*it may be difficult* for those arguing for the validity of the legislation to justify the legislative choice as necessary" (emphasis added).⁴⁹
36. However, even where that mode of analysis is useful, it is subject to a number of important limitations. First, to be "equally practicable" the alternative "must achieve the same legislative purpose *to the same degree*, which is to say it *must be possible to conclude that the alternative legislative measure is equally effective*."⁵⁰ The inquiry "does not proceed upon the premise that the legislature would adopt a measure which was not as effective in achieving its purpose".⁵¹
37. Secondly, even where alternative legislation answers that description, the alternative must be "obvious and compelling"⁵² so that the "mere existence of

⁴⁷ Cf *Brown* (2017) 261 CLR 328, [222] (Gageler J).

⁴⁸ *McCloy* (2015) 257 CLR 178, [328] (Gordon J).

⁴⁹ *Brown* (2017) 261 CLR 328, [139] (Kiefel CJ, Bell and Keane JJ). See also *Unions NSW v New South Wales* (2019) 264 CLR 595, [41] (Kiefel CJ, Bell and Keane JJ).

⁵⁰ *Farm Transparency* (2022) 277 CLR 537, [46] (Kiefel CJ and Keane J).

⁵¹ *Tajjour* (2014) 254 CLR 508, [115] (Crennan, Kiefel and Bell JJ).

⁵² See *Babet* (2025) 99 ALJR 883, [186] (Edelman J) and the authorities cited therein.

another measure capable of achieving the same purpose will not be sufficient for a conclusion of lack of justification”.⁵³ That qualification is necessary to ensure that consideration of the alternatives remains a tool of analysis and that courts do not “exceed their constitutional competence by substituting their own legislative judgments for those of parliaments.”⁵⁴ There remains a “wide latitude of choice to Parliament to implement its policy preferences”⁵⁵ and what is “necessary is, to a large extent, within the exclusive purview of the Parliament”.⁵⁶

38. That threshold will be particularly difficult to meet where (as here) there are credible risks that the features are giving rise to serious or long-lasting harm (in this instance, to children) and where the understanding of the causal pathways for that harm is emerging. In those circumstances, Parliament must have even grater latitude to address those emerging harms, and it will often be more difficult for a court to positively conclude that an alternative is obvious and compelling.
39. Thirdly, and because of those matters, a plaintiff cannot invite the Court to engage in “a free-ranging enquiry as to whether the legislature should have made different policy choices”⁵⁷ nor is the inquiry “a prescription to engage in an assessment of the relative merits of competing legislative models”.⁵⁸ The Court cannot be asked to “undertake [a] hypothetical exercise of improved legislative design”.⁵⁹ The assessment is qualitative, not quantitative or scalar.⁶⁰ Aside from the constitutional reasons for those limitations, courts are not well placed to “make comparative judgments on such issues”, particularly where they would “raise questions of administration, enforcement and supervision” which will

⁵³ *Farm Transparency* (2022) 277 CLR 537, [46] (Kiefel CJ and Keane J). See also *Tajjour* (2014) 254 CLR 508, [115] (Crennan, Kiefel and Bell JJ).

⁵⁴ *McCloy* (2015) 257 CLR 178, [58] (French CJ, Kiefel, Bell and Keane JJ). See also *Monis v* (2013) 249 CLR 92, [347] (Crennan, Kiefel and Bell JJ).

⁵⁵ *Babet* (2025) 99 ALJR 883, [186] (Edelman J); *Farm Transparency* (2022) 277 CLR 537, [253] (Edelman J); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, [202] (Edelman J).

⁵⁶ *Brown* (2017) 261 CLR 328, [282] and [286] (Nettle J). See also *Unions NSW v New South Wales* (2019) 264 CLR 595, [47] (Kiefel CJ, Bell and Keane JJ); *McCloy* (2015) 257 CLR 178, [82] (French CJ, Kiefel, Bell and Keane JJ).

⁵⁷ *Brown* (2017) 261 CLR 328, [139] (Kiefel CJ, Bell and Keane JJ).

⁵⁸ *Ibid*, [282] (Nettle J).

⁵⁹ *Murphy v Electoral Commissioner* (2016) 261 CLR 28, [39] (French CJ and Bell J).

⁶⁰ *Babet* (2025) 99 ALJR 883, [186] (Edelman J).

involve “costs and the allocation of resources upon which there may be competing claims”.⁶¹

40. The Plaintiff invites the Court to engage in such a free-ranging inquiry: PS [67]-[73]. It arrays four possible alternative legislative regimes, but does not meaningfully demonstrate how they would be equally effective in achieving its purpose, that the hypothetical law would have a lesser burden on the implied freedom, or that the alternative is obvious and compelling in the requisite sense.
41. In any event, the alternatives are not obvious and compelling. The Attorney-General adopts the Commonwealth’s submissions (DS [45]-[51]), and makes the following additional observations.
 - (a) The first alternative is for the law to be directed to electronic services that can only, or can only substantially, be used with an account: PS [67]. That would not address the mischief selected by Parliament. Under such a law, platforms with some account functionality (and the design features in the *Rules*) could still avoid the law, which would not address the mischief to the same degree selected by Parliament. Further, the criterion that a platform can only “substantially” be used with an account is uncertain and unstable, which means the alternative law is not compelling or obvious.
 - (b) The second proposed alternative is to regulate the *content* of material on platforms: PS [68]-[71]. That would also not be equally effective at addressing the relevant risk. The risk is concerned with the design features of the relevant platforms, not with the content or messages they portray. The proposed law would therefore address a different problem, as is demonstrated by the Plaintiff’s reference to matters such as 18+ content: PS [68]. The Plaintiff points to nothing which shows that these alternatives are equally effective, where they have been implemented elsewhere: cf PS [71].
 - (c) The Plaintiff’s fourth proposed alternative is to mandate parental controls: PS [73]. That would be a fundamentally different scheme. It would shift the burden of compliance from providers to parents. The impugned law is

⁶¹ *City of Adelaide* (2013) 249 CLR 1, [65] (French CJ).

effective to a much higher degree as it controls access to the design features at their source (ARSMPs) rather than at the endpoint (users). The shifting of the burden downstream would also involve questions of administration and enforcement which cannot be well evaluated at the justification stage. Further, the alternative proceeds on the premise (contrary to the scheme's purpose) that access to the design features creating risk should be permissible and a matter for individual evaluation. It therefore does not pursue that purpose to the same degree.

42. For those reasons, it is not possible to positively conclude that the laws posited by the Plaintiff would achieve, to the same extent as the impugned law, the end to which that law is directed, and with a lesser burden on the implied freedom, let alone that such alternatives meet the high constitutional threshold of being "obvious and compelling".⁶² The Plaintiff's alternatives are therefore no reason to conclude that the law's modest burden on the implied freedom is not justified.

Part IV: Estimate of time

43. The Attorney-General estimates that no more than 15 minutes would be required for the presentation of oral argument.

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Nikolai Christrup
Solicitor-General of the Northern Territory
Solicitor-General's Chambers
Tel: (08) 8999 6682
nikolai.christrup@nt.gov.au



Lachlan Spargo-Peattie
Counsel for the Attorney-General
William Forster Chambers
Tel: (08) 8982 4700
lspargo-peattie@williamforster.com

⁶² *Babet* (2025) 99 ALJR 883, [186] (Edelman J); cf *Tajjour* (2014) 254 CLR 508, [90] (Hayne J).

ANNEXURE TO INTERVENER'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1	The Constitution	Current	ss 7, 24, 64, 128	Currently in force	All relevant times
2	<i>Online Safety Act 2021</i> (Cth)	Current	s 5, Part 4A, s 240	Currently in force	12 September 2026 - present
		As in force between 11 December 2024 and 11 September 2026	s 5, Part 4A, s 240	Version in force at the time the Applicant commenced this proceeding	12 December 2025 – 11 September 2026
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)