



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S166 of 2025

BETWEEN:

REDDIT, INC.
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
First Defendant
MINISTER FOR COMMUNICATIONS
Second Defendant

**SUBMISSIONS OF THE ATTORNEY GENERAL FOR THE STATE OF
WESTERN AUSTRALIA (INTERVENING)**

PART I — CERTIFICATION

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

PARTS II & III — INTERVENTION/LEAVE TO INTERVENE

2. The Attorney General for the State of **Western Australia** intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendants.

PART IV — ARGUMENT

A. Introduction

3. These submissions are limited to the second question of law raised by the Special Case, namely: is Pt 4A of the *Online Safety Act 2021* (Cth) invalid (in whole or in part and, if in part, to what extent) because it impermissibly burdens the implied freedom of political communication, contrary to the *Commonwealth Constitution*.
4. This issue will need to be determined by the Court even if the plaintiff in *The Digital Freedom Project Inc v Commonwealth* (S163 of 2025) is found not to have standing because there is no challenge to the standing of the plaintiff in the present proceedings.¹
5. As to this issue, Western Australia generally adopts the submissions of the defendants as to the relevant legal principles, the operation of Pt 4A of the Act and why Pt 4A does not impermissibly infringe the implied freedom of political communication applying the "*Lange-Coleman-McCloy-Browne* test".²
6. Western Australia makes the additional submissions set out below. Specifically, Western Australia submits that the plaintiff's case – both as to the nature and extent of the burden imposed by Pt 4A and whether Pt 4A is reasonably appropriate and adapted to advance its (accepted) legitimate purpose – fails to adequately recognise that Pt 4A

¹ Notwithstanding the plaintiff in these proceedings does not consider itself an "age-restricted social media platform" within the meaning of s 63C of the Act, the position of the eSafety Commissioner and the defendants is that it is such a platform: see Plaintiffs' Submissions (PS) [2] fn 1; Defendants' Submissions (DS) [14]; Special Case (SC) [41]-[42].

² See *Hopper v Victoria* (2026) 100 ALJR 582, [27] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ) for the most recent restatement of the test identified in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561-562 (the Court), as modified and refined in *Coleman v Power* (2004) 220 CLR 1, [93], [95]-[96] (McHugh J, Gummow, Hayne and Kirby JJ agreeing), *McCloy v New South Wales* (2015) 257 CLR 178, [2] (French CJ, Kiefel, Bell and Keane JJ) and *Brown v Tasmania* (2017) 261 CLR 328, [88], [104] (Kiefel CJ, Bell and Keane JJ), [155]-[156] (Gageler J), [236], [271], [277]-[278] (Nettle J), [316]-[325] (Gordon J).

is designed to achieve generational behavioural change and apply in a dynamic context of evolving communications technology.

B. The burden imposed by Pt 4A of the Act on the implied freedom

Identification of the burden

7. A law imposes an "effective burden" on the implied freedom, and therefore requires justification, if it "limits political communication to any extent".³ At this stage of the constitutional analysis, the inquiry is qualitative, not quantitative.⁴
8. Western Australia accepts that s 63D of the Act burdens the implied freedom to the extent that it restricts the ability of Australian children aged 8 to 15 years, in their capacity as non-electors who may seek to influence the outcome of an election⁵, from making or receiving communications on government or political matters, or organising communications (eg, protests) on such matters, via an account on an "age-restricted social media platform" (**ARSMP**) (*cf* PS [26], [37]; Freech Speech Union Submissions (**FSUS**) [23]; NetChoice and Electronic Frontier Foundation Submissions (**NS**) [27]).
9. The terms of use of the identified ARSMPs require users to be at least 13 years of age to create an account (and have done since before the commencement of s 63D),⁶ and the Special Case contains evidence of only a small proportion of children aged 8 to 12 using ARSMPs through their *own accounts* in apparent breach of those terms of use (28.8% of children aged 8 to 12 surveyed in 2024 by eSafety Commissioner).⁷
10. Consequently, there is no evidence that Pt 4A of the Act has any material impact on the real-world ability of an Australian child under the age of 8 years to engage in political communication.⁸

³ *Comcare v Banerji* (2019) 269 CLR 373, [29] (Kiefel CJ, Bell, Keane and Nettle JJ).

⁴ *Unions NSW v New South Wales* (2013) 252 CLR 530, [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Tajjour v New South Wales* (2014) 254 CLR 508, [145] (Gageler J).

⁵ *Unions NSW*, [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408, [40], [43] (Gageler CJ, Gordon and Beech-Jones JJ), [237]-[238] (Jagot J); *Ravbar v Commonwealth* (2025) 99 ALJR 1000, [424] (Beech-Jones J).

⁶ SC [45], [120], [148], [169.1], [184], [203], [220], [235], [252], [269]; Special Case Book (**SCB**) (volume 3) 1109.

⁷ SC [303]. The statistics in [302] relate to children aged 10 to 15 years and simply relate to use (not use through an account belonging to the child), while the statistics in [304]-[305] relate to children aged 14-15 years and also only relate to use (not use through an account belonging to the child).

⁸ *Brown*, [109] (Kiefel CJ, Bell and Keane JJ), [181], [188] (Gageler J), [259] (Nettle J), [304], [357], [393], [411], [419]-[420] (Gordon J), [557]-[563], [565] (Edelman J); *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537, [37] (Kiefel CJ and Keane J), [158] (Gordon J), [223]-[224] (Edelman J).

10. Further, for the reasons set out in DS [23], there is no evidence in the Special Case that Pt 4A has had, or will have, any meaningful or real⁹ deterrent effect on political communication via ARSMP accounts by persons 16 years or older who are unable or unwilling to complete age assurance processes, eg for privacy reasons (*contra* PS [37], FSUS [11], [18], [21]-[23]; NS [28]). Nor is there evidence that it has had, or will have, such an effect in a discriminatory way (*contra* FSUS [20]).
11. The available evidence also does not support the drawing of an inference as to any such effect.¹⁰
- 10 12. It is now widely known that the business of social media platforms is "the collection, storage, analysis, organisation, distribution, deployment and monetisation of information about people and their lives".¹¹ The evidence in the Special Case does not indicate that age assurance processes prevent account holders from communicating anonymously or pseudonymously on ARSMPs (*cf* FSUS [13]-[17]). It does, however, indicate that, irrespective of age assurance processes, the creation and use of an account with an ARSMP already requires the provision of certain identifying information such as an email address, phone number or IP address to the provider of the platform (*cf* FSUS [19], [22]).¹² Further, s 9 of the *Online Safety (Basic Online Safety Expectations) Determination 2022* (Cth) (not challenged in these proceedings) imposes an expectation on providers of social media services that permit the use of
 20 anonymous accounts that they will "take reasonable steps to prevent those accounts being used to deal with material, or for activity, that is unlawful or harmful" and to that end, it provides the following example of a reasonable step that could be taken: "having processes that require verification of identity or ownership of accounts".
13. Additionally, it may reasonably be expected that adults with disabilities or older persons who may experience difficulties in operating age assurance tools without assistance, would need assistance to create accounts on ARSMPs in any event (*cf* FSUS [20]).

⁹ *Monis v The Queen* (2013) 249 CLR 92, [343] (Crennan, Kiefel and Bell JJ); *McCloy*, [127] (Gageler J); *Ravbar*, [31]-[32] (Gageler CJ).

¹⁰ In accordance with the *High Court Rules 2004* (Cth), r 27.08.5.

¹¹ *Facebook Inc v Australian Information Commissioner* (2022) 289 FCR 217, [3], [8]-[9] (Allsop CJ), [30]-[31], [36]-[42], [85], [88]-[89] (Perram J, Yates J agreeing); SC [102], [104], [129], [131], [152], [154], [175], [188], [193], [204], [206], [221], [238], [240], [244], [253], [277]-[278], [282]-[295].

¹² SC [102.1], [102.7], [129.1], [129.9]-[129.10], [152.14], [188.1(a)], [188.2(c)], [204.1], [204.3(d)-(g)], [238.1], [238.2], [253.1], [253.2], [253.8], [277.1(a)-(b)], [296]-[300].

14. While in support of its proposed intervention, the Free Speech Union submits that it does not seek to "reopen the agreed facts" (FSUS [9]), its submissions in support of this alleged additional burden in FSUS [18] are based on facts not included in the Special Case and which are beyond the type of which the Court can take judicial notice.¹³

Nature and extent of the burden

15. The nature and extent of the burden imposed by an impugned law is relevant to the assessment of whether the burden is justified as it focuses and calibrates the inquiry as to whether the law is reasonably appropriate and adapted to serve a legitimate end.¹⁴
- 10 16. Contrary to PS [38] and NS [26]-[27], the burden imposed by Pt 4A is *indirect* rather than direct. It is not, in its terms, directed to communications about governmental or political matters¹⁵ and its practical effect is not limited to communications of that nature. Pt 4A is also content neutral.¹⁶ By requiring providers of ARSMPs to take reasonable steps to prevent children under 16 years of age from having *accounts*, s 63D does not concern itself with the communication of any specific ideas or subject matter, political or otherwise.
- 20 17. With respect to the extent of the burden imposed by Pt 4A of the Act – it is more modest than the plaintiff asserts. The plaintiff's description of it as "very substantial" (PS [38]) is an overstatement. Western Australia contends it is more accurately described as moderate or "not insubstantial", and as one that will reduce over time.
18. Pt 4A primarily restricts the ability of Australian children aged 13¹⁷ to 15 years of age (ie non-electors¹⁸ and a relatively small proportion of all non-electors) to use one set of tools for making, receiving and organising communications, including political communications, for a 3-year period of their life which ends two years before they become entitled to vote. The Special Case records that, as at 30 June 2025, there were approximately 675,858 children aged 14 to 15 years in Australia,¹⁹ and indicates that,

¹³ *Evidence Act 1995* (Cth), s 144.

¹⁴ *Hopper*, [28] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

¹⁵ *Hopper*, [30] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

¹⁶ See *Farmer*, [249]-[250] (Jagot J).

¹⁷ For the reasons set out in [9] above.

¹⁸ Electors are relevantly, those who are 18 years and older: *Commonwealth Electoral Act 1918* (Cth), ss 93(1)(a) or 100.

¹⁹ SC [301].

before Pt 4A was introduced, not all children between 13-15 used an ARSMP, let alone used one through their own account.²⁰

19. The wide range of "electronic services" (as defined in s 5 of the Act) that are not ARSMPs and therefore left unaffected by Pt 4A,²¹ may still be used by children under 16 to make, receive and organise political communications.²² And Pt 4A does not restrict communications via modes that are not "electronic services".
20. The statistics referred to in PS [14], [23] and [35]-[36] do not indicate to what extent ARSMP accounts were used to make or receive *political communication* as distinct from other forms of communication.
- 10 21. While it may be accepted that online platforms are a common source of news and political information for Australians, including young people under the age of 16 (SC [306]),²³ not all online platforms are ARSMPs.
22. Further, even if the statistics relied upon in PS [28]-[29] related only to children aged 13 to 15 years who obtained news via their own account on an ARSMP (which they do not):²⁴
 - (a) not all "news" or "civic engagement" involves "political communication" (*cf* also NS [22]-[23]).²⁵ The Special Case does not reveal anything about what was classified as news for the purposes of the longitudinal study relied upon by the plaintiff, either by the researchers or the survey participants;
 - 20 (b) the survey results reveal nothing about the reliability, authenticity or algorithmic selectivity/censorship of the news the survey participants were engaging with on social media, in a context where social media posters and content creators are not subject to, and the providers of ARSMPs are not able to implement, the same *pre-publication* editorial and broadcasting standards as traditional news

²⁰ SC [302], [303.4], [304], [305]. The statistics referred to in these paragraphs do not isolate the proportion of 13–15-year-olds that used ARSMPs through their own account.

²¹ For example, *Online Safety (Age-Restricted Social Media Platforms) Rules 2025* (Cth), ss 5(1)(a) and (e).

²² *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, [74] (Kiefel CJ, Keane and Gleeson JJ); *McCloy*, [93] (French CJ, Kiefel, Bell and Keane JJ).

²³ SC [306].

²⁴ SC [309].

²⁵ *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, [379]-[380] (Hayne J) (see also [26]-[28] (Gleeson CJ and Heydon J), [217]-[220] (Gummow J), [448]-[453] (Callinan J)); *Clubb v Edwards* (2019) 267 CLR 171, [25]-[31] (Kiefel CJ, Bell and Keane JJ).

publishers,²⁶ generative AI now means that deceptive content can readily be created,²⁷ and ARSMPs use algorithms, automated processes and recommendation or recommender systems to curate the material displayed to logged-in users.²⁸ This is significant to the extent that representative government requires electors (and non-electors who seek to influence the outcomes of elections) to have access to the information, ideas, and arguments necessary to make an *informed* judgment about government and policy;²⁹ and

(c) section 63D will not mean that such children no longer have access to news or the same amount of news.

- 10 23. PS [28]-[29] rely on survey results that record impacts *within a period of less than 6 months after Pt 4A commenced operation* as though they reflect a fixed impact of the introduction of Pt 4A. They do not. The provisions of Pt 4A are intended to achieve *generational* behavioural change and apply in a dynamic context of evolving communications technology.³⁰
24. As a result of the introduction of Pt 4A, it may reasonably be expected that children will adapt over time and start using other convenient and free sources of news, including other online and electronic sources, such as the free news provided by public broadcasters, independent newswire services, news aggregators (which also enable users to check the bias, reliability and ownership of sources read) and other news publishers on their websites, smartphone and tablet applications (**apps**), 24/7 video-on-demand and live-streaming services (available to watch on Smart TVs, computers, tablets and smartphones), radio stations which can be listened to via the internet and through email subscription services, podcasts and public library lending apps.³¹ Many
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²⁶ SCB (volume 2) 536-537, (volume 4) 1492-1495. The *Online Safety (Basic Online Safety Expectations) Determination 2022*, *Online Safety (Relevant Electronic Services – Class 1A and Class 1B Material) Industry Standard 2024* (Cth) and Relevant Electronic Services Online Safety Code (Class 1C and Class 2 Material) are primarily directed to safety issues and content that is unlawful or harmful, rather than inaccurate or unreliable per se.

²⁷ SCB (volume 2) 619, 634, 710, 720, 789, (volume 4) 1347.

²⁸ SC [81], [83]-[84], [102], [104], [109]-[110], [129], [131], [138]-[139], [152], [154], [159], [175]-[176], [188], [193]-[194], [204], [206], [210], [227], [238], [240], [244], [253], [277]-[279].

²⁹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 139 (Mason CJ), 150, 166-167 (Brennan J), 189 (Dawson J), 211-212 (Gaudron J), 231, 234, 239 (McHugh J); *Lange* 560 (the Court).

³⁰ SCB (volume 3) 804, 837, 839, 842-844, 846, 848, 887, 973, 1065-1070, 1111-1113, 1115-1116, 1141, 1144.

³¹ Judicial notice can be taken of the existence of these sources in accordance with the *Evidence Act 1995* (Cth), s 144 (see also the broad definition of "document" in the Dictionary to the Act). See also SCB (volume 3) 1123-1124.

of these sources include youth-focused news channels, programs, websites, radio stations, and podcasts.³²

25. The bundle of screenshots of subreddits dedicated to Australian political matters contained in Attachment SC-32 to the Special Case shows that those subreddits simply comprise a list of links to news articles created and published by mainstream media organisations on their websites and "memes".³³ Similarly, the list of political content on YouTube referred to in [321] of the Special Case is largely a list of YouTube links to content published by "established media organisations" and other institutions (eg the Commonwealth Parliament) which is available elsewhere³⁴ and to logged-out users of YouTube who do not have an account.³⁵

26. Further, it may reasonably be expected that Australian politicians, candidates, political party youth wings and public institutions will adapt to the introduction of Pt 4A and find means of engaging with young Australians about political matters that do not involve the use of ARSMPs (*cf* PS [30]-[31]). There is no reason why Reddit-style "Ask Me Anything sessions" with politicians and candidates³⁶ could not be hosted on websites, radio or Microsoft TEAMS/Zoom. There is also no reason why video content posted on apps such as Tiktok, Instagram and Facebook could not be posted on websites or other online platforms that are not ARSMPs.

27. Undoubtedly, social media has enabled some children under the age of 16 to communicate political messages to a wide audience and assisted them to organise political demonstrations on a broad scale (*cf* PS [32]).³⁷ However, those children are the exception rather than the norm.³⁸ The "audience" of most children on social media is much more limited and, as recognised by the plaintiff (PS [22]), in many cases is limited to people they already know (and can communicate with via other means). Moreover, the breadth of the audience reached by these political demonstrations has

³² See, eg, SC [313.5], [321.2].

³³ SCB (volume 3) 1281-1286.

³⁴ Eg, parliamentary proceedings are available to watch on the Australian Parliament's own website: https://www.aph.gov.au/News_and_Events/Watch_Read_Listen/ParlView; the youth-focused "Behind the News" is available to watch on ABC iView: <https://iview.abc.net.au/show/btn>; the youth run "Channel 6 News" is available to read and watch from its own website: [6 News Australia | Independent & unbiased journalism](https://www.6news.com.au/news); similarly the policy focused material published by the Institute of Public Affairs is available on its own website: <https://ipa.org.au/latest-news>.

³⁵ SC [322].

³⁶ SC [312].

³⁷ SC [313].

³⁸ SCB (volume 5) 1403.

largely been due to the involvement of symbolic and compelling young leaders, eg Greta Thunberg, and the coverage of the demonstrations by *mainstream* media.³⁹

28. As a result of the introduction of Pt 4A, it may reasonably be expected that children will still be able to organise and participate in political demonstrations and other events on a wide scale using direct messaging apps,⁴⁰ existing phone and tablet apps (including youth-focused ones) that are designed to help users discover local rallies, protests and civic actions by date, city and category, physical flyers and letterbox drops, posters (including with QR code links to websites) displayed in public places and facilities and educational institutions, websites, word-of-mouth networks, and affiliations and relationships with organisations and adults with access to accounts on ARSMPs.
29. It may also reasonably be expected that, as a result of the introduction of Pt 4A, news organisations, app developers and technology companies will be both commercially and philanthropically motivated to develop new tools of communication for 13–15-year-olds which will not infringe Pt 4A and/or may be specified in the legislative rules as exempt electronic services that are not ARSMPs under s 5 of the *Online Safety (Age-Restricted Social Media Platforms) Rules 2025* (Cth).
30. The fact that ARSMPs were a "preferred" mode of communication, including political communication, amongst some Australian children aged 8 to 15 years prior to the introduction of Pt 4A does not establish, or enable an inference to be drawn, that they were the most *effective* mode of *political* communication (*contra* PS [38]).⁴¹ Their generally preferred status may equally be explained⁴² by their availability combined with their design features that maximise user engagement, including by employing dopamine-driven reinforcement and creating user FOMO, as set out in DS [5]. Broad statements as to the importance of social media derived from US case law concerning First Amendment rights do not fill that evidential void (*cf* NS [22], [24]–[25]).

³⁹ SCB (volume 5) 1383-1384, 1390, 1392-1393. Such coverage is evidenced by the articles contained in the SCB (volume 5) Attachments SC-37, SC-38, SC-41.

⁴⁰ SCB (volume 5) 1385.

⁴¹ Compare *Clubb*, [81] (Kiefel CJ, Bell and Keane JJ), [376] (Gordon J).

⁴² *Jones v Dunkel* (1958) 101 CLR 298, 304 (Dixon CJ).

C. Pt 4A of the Act is reasonably appropriate and adapted to its legitimate purpose

31. Having regard to the stated object of Pt 4A of the Act in s 63B, the terms of the provisions in Pt 4A, the remainder of the Act and the relevant extrinsic materials,⁴³ the purpose of Pt 4A, stated at an appropriate level of generality, is to reduce the risk of harm to Australian children under the age of 16 from the use of certain kinds of social media platforms. The plaintiff and the Free Speech Union accept that is a legitimate purpose (PS [39], FSU [24], DS [38]).
32. Given the credible risks of harm to the health and well-being of children under the age of 16 associated with the use of social media platforms that offer accounts and have the design features specified in s 63C of the Act and s 4A of the Rules,⁴⁴ the purpose of Pt 4A may be characterised as not only legitimate, but compelling. The purpose of Pt 4A is certainly no less compelling than the purpose of ensuring women have access to premises at which abortion services are lawfully provided in an atmosphere of privacy and dignity considered in *Clubb*.⁴⁵
33. The fact that there are recognised positive aspects of social media use for children under the age of 16 years of age (including learning, self-expression, creativity, socialising, autonomy, agency, connection with peers, the fostering of a sense of community, belonging and supporting positive interactions)⁴⁶ does not alter that characterisation of the purpose of Pt 4A. The positive aspects of social media do not negate the credible risks of harm referred to above. Section 63C(6) enables those social media platforms that have been identified as not posing the credible risks of harm referred to above, or as providing benefits that outweigh those risks, to be specified in the Rules as not being ARSMPs.
34. Similarly, the lack of scientific certainty about causal links between social media use and harm to the health and well-being of children under the age of 16,⁴⁷ does not alter the characterisation of Pt 4A's purpose as compelling (*contra* PS ([57]-[58])). The specific harms in issue (summarised in DS [6]) are ones that may affect a child's ability to learn, their job prospects, their relationships, general sense of well-being and happiness and result in the loss of a young person's life (ie they are **serious** and, in

⁴³ SCB (volume 3) 1107-1152.

⁴⁴ SC [333]-[336], [339]-[347], [349], [351]-[352], [354]-[356], [360]-[363], [366]-[370], [372]-[364].

⁴⁵ At [196]-[198] (Gageler J).

⁴⁶ SCB 599

⁴⁷ SC [329]-[331].

some cases, irreversible).⁴⁸ The US Surgeon General has published an Advisory (which is a public statement that calls attention to an *urgent public health issue* and provides recommendations for how it should be addressed)⁴⁹ about the effects of social media on youth mental health.⁵⁰

35. The complaint made by the plaintiff (and NetChoice) about lack of scientific certainty is more relevant to an assessment of the suitability of Pt 4A.

10 36. However, the "precautionary principle" or "precautionary approach" is a well-recognised strategy for managing serious and irreversible risks of harm when scientific certainty is lacking that requires risk mitigation measures to be taken and not delayed.⁵¹ It is commonly applied by the legislature and executive in complex policy contexts, such as public health risks.⁵² The amelioration of, and safeguarding against, *risk* is central to the legislative function and Parliament may act prophylactically or in response to inferred legislative imperatives.⁵³ The evidence of correlation and credible risk set out in the Special Case is sufficient to establish that Pt 4A has a *rational connection* to its legitimate purpose and is therefore suitable [*cf* PS [57], [65]; NS [15]-[16], [29]-[34]].⁵⁴

20 37. This is particularly so in a context where the providers of such platforms are significantly commercially incentivised to design their platforms in a way that holds users' attention, which maximises the risks of harms to children⁵⁵ and children, as a group, are particularly vulnerable to those risks.⁵⁶

38. While the plaintiff relies on the effectiveness of Pt 4A to portray the extent of its burden on the implied freedom as "very substantial" (PS [29], [35]-[36]), it relies heavily on the "ineffectiveness" of Pt 4A in an attempt to portray it as not "suitable" to realising its purpose (PS [51]-[56]). In particular, it emphasises that the currently available technology to determine the age of users is subject to limitations which

⁴⁸ SCB (volume 2) 607.

⁴⁹ SCB (volume 3) 1082.

⁵⁰ SCB (volume 3) 1079-1104.

⁵¹ SCB (volume 5) 1712, 1714.

⁵² See, eg, *Falconer v Chief Health Officer [No 3]* [2022] WASC 270, [12]-[13] (Allanson J).

⁵³ *Ravbar*, [409] (Jagot J); *Spence v Queensland* (2019) 268 CLR 355, [96] (Kiefel CJ, Bell, Gageler and Keane JJ); *McCloy*, [197] (Gageler J), [233] (Nettle J); *Brown*, [288] (Nettle J), [422] (Gordon J).

⁵⁴ *McCloy*, [2] (French CJ, Kiefel, Bell and Keane JJ); *Banerji*, [33] (Kiefel CJ, Bell, Keane and Nettle JJ).

⁵⁵ See footnotes 11, 28 and 44 above.

⁵⁶ SC [339], [343], SCB (volume 5) 1457.

means that it can be bypassed with the result that, as at *four months after the commencement of Pt 4A*, a substantial number of children under 16 still had, or could create, accounts on ARSMPs (PS [51]-[56]). It also emphasises that Pt 4A does not prevent young people from accessing harmful content on ARSMPs without an account (PS [44]-[45]).

39. However, these submissions do not grapple with the purpose of Pt 4A and how it is sought to be achieved. Pt 4A is not designed to *eliminate* the risk of harm to Australian children under the age of 16 from the use of certain kinds of social media platforms *overnight* or otherwise (PS [51]); nor is it directed to the risk of harm posed by certain content available on ARSMPs (*contra* PS [44]-[45], [48], [68]-[71]; NS [26]-[27]), although reducing risks associated with certain content is an incidental benefit of Pt 4A, including because the design features specified in s 63C of the Act and s 4A of the Rules have the capacity to amplify the effects of harmful content by sustaining a child's engagement with it.⁵⁷
40. Pt 4A is designed to *reduce* the risk of harm to Australian children under the age of 16 from the use of certain kinds of social media platforms (ones that offer accounts and have the design features specified in s 63C of the Act and s 4A of the Rules) through achieving behavioural change *over time* and in a context of evolving communications technology. Pt 4A is not intended to provide, nor could it ever provide, a perfect solution. This has been recognised since Pt 4A's inception.⁵⁸ As the Honourable Robert French AC observed in his September 2024 report to the South Australian Government on a legislative model to give effect to a ban on children's access to social media, "the perfect should not be the enemy of the good."⁵⁹
41. It is not just the definition of ARSMPs in s 63C that is designed to be responsive to changes and evolutions in technology (DS, [11]); the requirement in s 63D for ARSMPs to take "reasonable steps" means that the primary obligation imposed by the legislation is sensitive to the age verification and estimation technology available at any given time. Further, as its reliability inevitably improves over time with technological developments (with s 63D and its increasing enforcement creating the

⁵⁷ SCB (volume 2) 398, 418-423, 584, 587-592, 680, (volume 5) 1456-1457.

⁵⁸ SCB (volume 3) 1111, 1141, (volume 8) 2739.

⁵⁹ SCB (volume 3) 848. See also SCB (volume 8) 2739.

legal norm that will encourage such developments),⁶⁰ the *extent* to which s 63D will operate to reduce the risks of harm it is directed towards will increase over time.

42. It may also reasonably be expected that the legal norm created by s 63D will drive related social norms and together they will mean that future generations of Australian children under the age of 16 will not have accounts on ARSMPs in the first place.⁶¹ Additionally, they will be less likely to attempt to by-pass age verification technology to create an account than the current generation of children under 16, who already had access to ARSMP accounts (or an expectation of access) when Pt 4A was introduced, and have had something (that employs dopamine-driven reinforcement and the creation of FOMO) "taken away" from them.

43. Western Australia otherwise adopts the defendants' submissions as to:

- (a) how Pt 4A is appropriately tailored to the risks of harm posed by social media platforms that offer accounts and have the design features specified in s 63C of the Act and s 4A of the Rules (DS [32]-[44]);
- (b) the cogent explanation for why certain social media platforms have not been included in Pt 4A (DS [39]; *contra* PS [48]-[49]);
- (c) why PS [50] is premised on a false economy given the credible risks of harm associated with use of ARSMPs *through an account* (DS [40]);
- (d) why the plaintiff's proposed alternatives to Pt 4A are not obvious and compelling alternatives that would achieve materially equivalent protection from the identified risks of harm while imposing a significantly lesser burden on the implied freedom (DS [45]-[51]; *contra* PS [66]-[73]) and therefore invite the Court to impermissibly substitute its own legislative judgment for that of the Parliament;⁶² and
- (e) why the benefit sought to be achieved by Pt 4A is not manifestly outweighed by its adverse effect on the implied freedom.

⁶⁰ SCB (volume 3) 1196-1203.

⁶¹ SCB (volume 8) 2740.

⁶² *McCloy*, [58] (French CJ, Kiefel, Bell and Keane JJ), and the authorities cited therein; *Brown*, [139] (Kiefel CJ, Bell and Keane JJ).

44. Western Australia additionally submits in relation to these issues:

- (a) while there is a credible risk that extended use of other screen media such as emails, WhatsApp, video games and the use of computers and mobile phones, can negatively impact children's sleep and increase the likelihood of the development or exacerbation of mental health conditions in children,⁶³ the Special Case does not contain any evidence that emails, WhatsApp, video games, computers and mobile phones have design features built into them that are intended to promote extended use so as to increase the opportunity for advertising to users for the commercial benefit of their providers and manufacturers (*cf* PS [48]);
- (b) an additional flaw in PS [50] and [72]-[73] to the extent that they relate to optional controls (see also NS [35]-[36], [39]-[44]), is that children are less likely to use the account controls without parental intervention, and parental intervention is unpredictable, variable and affected by awareness of the existence of the controls and children's use of relevant social media platforms, access to relevant technology (some of which costs money), technical confidence, inconsistent configuration across devices, and the need for continual monitoring.⁶⁴ The submission by the plaintiff and NetChoice that primary responsibility for guarding against harms be transferred from the providers of ARSMPs, who operate their platforms as lucrative commercial enterprises and understand their technology better than anyone else, to parents and guardians, is unrealistic. And the postulated requirement for parental consent for a child under 16 years of age to have an account with the ARSMP would be no panacea. Many parents do not fully understand the risks of harm or the extent of their child's social media use, and parental consent may mean no more than that children under 16 years of age are exposed to credible risks of harm with the consent of their parents and guardians;⁶⁵
- (c) a number of the alternative approaches taken in US legislation the plaintiff relies upon in PS [72]-[73], have been the subject of constitutional challenges by

⁶³ SC [350], [355]. See also SC [368]-[369].

⁶⁴ SC [407], [412], [414], [418], [423]-[424], [429], [435]-[436]; SCB (volume 2) 363-364, 442, (volume 5) 1712.

⁶⁵ SCB (volume 2) 363-364, 508, 635-636, 657.

NetChoice, with three out of the four United States laws currently enjoined and all decisions subject to appeal;⁶⁶

- (d) under the heading "Availability of reasonably practicable alternatives" NetChoice repeatedly emphasises that Pt 4A does not allow for parental consent to account holding (NS [35]-[36]), yet it "does not accept that a parental-consent exception can salvage" the Act (NS [37]). See also NS [46]-[47] which are similarly equivocal in relation to "regulation of design features". It also points to a number of "less sweeping laws" enacted in the United States (NS [36]-[38] and submits that they should satisfy the Court as to obvious and compelling alternatives to achieve the Act's legitimate purpose, yet it is, or has been, involved in constitutionally challenging most of them (NS [4]). Its submissions fail to clearly identify any legislative alternative (let alone any alternative that would achieve materially equivalent protection from the identified risks of harm) that it says would be constitutionally permissible (other than possibly a legislative requirement for social media platforms to supply parental "oversight tools" as per Nebraska and terminate accounts held by children under 16 at the request of their parent or guardian as per Florida (NS [44])). Contrary to NS [47], an alternative measure obviously needs to be constitutionally permissible to be an "equally practicable and *available* means" of achieving the legitimate purpose of an impugned law;
- (e) the complaint made in relation to the Florida law at the end of NS [48] cannot be made of Pt 4A of the Act for the reasons given in DS [48];
- (f) there is no guarantee that the Online Safety Amendment (Digital Duty of Care) Bill 2026 (as it is named in the "Exposure Draft" released by the Commonwealth Government on 8 September 2026) will be passed by the Commonwealth Parliament, assuming it is introduced into Parliament, and the broader statutory duty of care proposed to be introduced by the Bill is clearly intended to operate alongside the existing provisions of Pt 4A of the Act because the harms of social media "don't simply switch off on a child's 16th birthday".⁶⁷ Similarly, the *Online Safety (Basic Online Safety Expectations) Determination 2022* is intended to operate alongside the provisions of Pt 4A (and in any event, the

⁶⁶ NS [4], [9]-[14].

⁶⁷ SCB (volume 3) 1141, (volume 8) 2739, 2741.

expectations it imposes are not binding or enforceable obligations⁶⁸ and the Statutory Review of the Act in October 2024 indicates that the Expectations have not been able to cope with the scale of problems in the online world).⁶⁹

- 10 45. Finally, PS [9] and [63] confuse deliberation within the parliamentary chambers with the consideration of a policy issue and proposed reform that occurs outside of parliament by individual members and their advisors. It is irrelevant to the constitutional analysis whether Pt 4A was passed quickly by Parliament (*cf* PS [63]) or whether parliamentary committees recommended "a measure like s 63D" (*cf* PS [9]). A "measure like s 63D" was recommended by a former Chief Justice of this Court in a report he prepared for the South Australian Government over a period of 4 months, which was submitted 2 months before the National Cabinet decision announcement on 8 November 2024,⁷⁰ although that too is ultimately irrelevant. What is relevant is that the Commonwealth Parliament enacted Pt 4A of the Act and the answers to the questions posed by the *Lange-Coleman-McCloy-Browne* test.

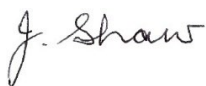
D. Conclusion

46. Question 2 of the Special Case should be answered "no".

PART V — LENGTH OF ORAL ARGUMENT

- 20 47. It is estimated that oral argument for Western Australia will take no more than 10 minutes (jointly in this matter and in *Digital Freedom Project*).

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⁶⁸ Act, s 45(4).

⁶⁹ SCB (volume 8) 2523.

⁷⁰ SC [19]-[24], SCB (Volume 3) 801-1078.

**ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR THE
STATE OF WESTERN AUSTRALIA (INTERVENING)**

Pursuant to Practice Direction No 1 of 2024, Western Australia sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in its submissions.

No.	Description	Version	Provision(s)	Reasons for providing this version	Applicable date(s)
1.	<i>Commonwealth Electoral Act 1918</i> (Cth)	Current	ss 93(1)(a), 100	Currently in force	All relevant times
2.	<i>Evidence Act 1995</i> (Cth)	Current	s 144	Currently in force	All relevant times
3.	<i>High Court Rules 2004</i> (Cth)	Current	r 27.08.5	Currently in force	All relevant times
4.	<i>Online Safety (Age-Restricted Social Media Platforms) Rules 2025</i> (Cth)	Current	ss 4A, 5	Currently in force	Since 26 March 2026 (s 4A); all relevant times (s 5)
5.	<i>Online Safety (Basic Online Safety Expectations) Determination 2022</i> (Cth)	Current	s 9	Currently in force	All relevant times
6.	<i>Online Safety (Relevant Electronic Services – Class 1A and Class 1B Material) Industry Standard 2024</i> (Cth)	Current	All	Currently in force	All relevant times
7.	<i>Online Safety Act 2021</i> (Cth)	Current	ss 5, 45(4), 63B, 63C, 63D; Pt 4A	Currently in force	All relevant times