

**IN THE ADMINISTRATIVE REVIEW TRIBUNAL**

**BETWEEN:**

**Applicant**

(1) FREE SPEECH UNION OF AUSTRALIA PTY LTD

- and -

**Respondent**

(2) eSAFETY COMMISSIONER

**A. Introduction**

1. This is a challenge to a censorship notice that the eSafety Commissioner appears to have issued to X Corp on the 26<sup>th</sup> of September 2025 under Section 109 of the *Online Safety Act 2021* (Cth) ('OSA').
2. This notice required X Corp to remove a range of videos circulating about the murder of Iryna Zarutska in the United States of America. We understand that the video in question is CCTV footage released to the public by the Charlotte Area Transit System, which is a department of the City of Charlotte.<sup>1</sup> The copies of this video targeted by the notice were originally posted by people not based in Australia.<sup>2</sup> X Corp have responded by geo-blocking the specific posts identified in the notice within Australia.
3. The Free Speech Union of Australia ('FSU Australia') became aware of the contents of this notice on the 5<sup>th</sup> of October 2025 by way of a video that circulated online.<sup>3</sup> We reproduce that notice as a PDF file for the Tribunals convenience.<sup>4</sup>
4. FSU Australia makes this application because it opposes government censorship of the news and it wishes to protect the open discussion of political matters within Australia.

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<sup>1</sup> See e.g. the caption of the New York Post article containing stills from the footage (albeit from a different angle): <https://nypost.com/2025/09/09/us-news/ukrainian-refugee-iryna-zarutskas-look-of-horror-after-she-was-fatally-stabbed-on-train-as-her-final-moments-are-revealed/>. Another example from WCNC Charlotte contains both angles: <https://www.wcnc.com/video/news/crime/cats-releases-surveillance-video-of-light-rail-stabbing-of-iryna-zarutska/275-3d2d2cc3-b9ca-47a4-8940-def520e4c08>

<sup>2</sup> The relevant account handles include @imadrienne (from Scotland, UK), @Basil TGMD (from the UK), @DVanLangenhove (from Flanders, Belgium), @EvaVlaar (from Amsterdam, Netherlands), @eclipsehis2003 (from the USA), @Uncensorednews (location unclear), @Yassine\_Ahmad1 (from Paris, France), @GRE8TBLACKSHARK (from the United States), @FLAKO RR (location unclear), @j11zu (location unclear), @HeadlineUSA (from Charlotte, NC, United States), @PatUnleashed (from Dallas, TX, United States), @jersey\_puzzykat (from the United States), @pavyg (from England, UK), @stillgray (from Malaysia), @RealAlexJones (from Austin, TX, United States) and @nicksortor (from the United States). However, some Australians have begun to repost it in protest (see e.g. <https://x.com/NationFirstAust/status/1974766286493397463>).

<sup>3</sup> <https://x.com/DVanLangenhove/status/1974425999166337044>

<sup>4</sup> This was done by taking screenshots of that video.

## **B. Ground 1: Implied Freedom of Political Communication**

5. Section 233 of the OSA means that a purported exercise of the Commissioner's powers is invalid to the extent their exercise would breach the Implied Freedom of Political Communication.
6. The content was plainly political in character, seeking to discuss an event covered in international news and to engage in political commentary on it.<sup>5</sup> The implied freedom is effectively burdened. The relevant question in respect of the implied freedom concerns proportionality and thus whether the measure is 'reasonably appropriate and adapted'.<sup>6</sup>
7. The video content in question has been widely disseminated via a range of news articles and media, in one form or another. This includes CNN<sup>7</sup>, the TikTok account of BBC News<sup>8</sup> (where a photograph appears in the main news article<sup>9</sup>), NBC News (as shown on YouTube)<sup>10</sup>, Fox News (e.g. on YouTube and Tiktok)<sup>11</sup> Megyn Kelly (also shown on YouTube)<sup>12</sup>, CBS Mornings (e.g. on Facebook and Instagram)<sup>13</sup>, New York Post (e.g. on Facebook and YouTube)<sup>14</sup> and so forth. These were all viewed with a VPN set to Australia on the 5<sup>th</sup> of October 2025, indicating the Commissioner has not troubled to issue a notice to the other social media platforms.
8. The eSafety Commissioner has seemingly only focused on the posts of individuals with particular viewpoints. The purpose appears to be to target their commentary on the video, not the video itself, despite the notice purporting to only apply to the underlying video.
9. The use of official Australian government power to censor political speech in a **targeted manner based on ideology** is also in breach of the implied freedom.<sup>15</sup> It is not a 'level playing field'.<sup>16</sup> The Commissioner thus had no jurisdiction to issue the notice.

<sup>5</sup> For example, one such post alleges that CNN is not providing sufficient coverage of the full nature of what happened: <https://x.com/DVanLAngenhove/status/1965498895926263968/>.

<sup>6</sup> This is part of the third factor raised in *McCloy v State of New South Wales* (2015) 257 CLR 178 at [2].

<sup>7</sup> <https://edition.cnn.com/2025/09/08/us/iryna-zarutka-murder-ukraine-refugee>

<sup>8</sup> <https://www.tiktok.com/@bbcnews/video/7547840904250346774>

<sup>9</sup> <https://www.bbc.com/news/articles/cgkxyl77x6o>

<sup>10</sup> <https://www.youtube.com/watch?v=kWi-bUbbq48>

<sup>11</sup> <https://www.youtube.com/watch?v=L2CP9kwFIQM;>

<https://www.tiktok.com/@foxnews/video/7548155986498931999>. The latter includes stills held up by President Trump.

<sup>12</sup> <https://www.youtube.com/watch?v=Ccwaax77THc>

<sup>13</sup> <https://www.facebook.com/watch/?v=1181477904001040;>

<https://www.instagram.com/reel/DOWDuMIDt8J/?hl=en>

<sup>14</sup> [https://www.youtube.com/watch?v=ZxZ\\_9lmW8PM](https://www.youtube.com/watch?v=ZxZ_9lmW8PM) and

<https://www.facebook.com/watch/?v=1463159751402505>.

<sup>15</sup> Whilst being discriminatory is not enough by itself, it does fold into questions of being 'justified or legitimate': see *Brown v Tasmania* [2017] 261 CLR 328, 361-2 (Kiefel CJ, Bell and Keane JJ). See also *Comcare v Banerji* (2019) 267 CLR 373 at [20].

<sup>16</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 131-2, 146 (Mason CJ).

### **C. Ground 2: Disproportionality and Redaction**

10. The entire video with **some redaction** could not amount to Class 1 material under the OSA.
11. The power in question applies only to material that has been Refused Classification (i.e. given a classification of ‘RC’) or would be *likely* to be so classified (Sections 106, 109 of the OSA).
12. A classification of RC for the material means the material as presented to the Classification Board. The RC classification does not directly apply to subsets, or edited versions thereof, despite what the eSafety Commissioner appears to think.
13. For a publication or film to be classified as RC, it must fit into one of the following categories (emphasis added):<sup>17</sup>
  - a. describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or
  - b. describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or
  - c. promote, incite or instruct in matters of crime or violence
14. The only subcategory that would seem to apply is the first one. Given the widespread circulation of the video in question, it is doubtful that the version classified meets the RC standard, despite the eSafety Commissioner apparently having achieved this. The truth is that one can arguably find more shocking and disturbing material on Wikipedia, e.g. we do not see the knife itself in the clip.<sup>18</sup> The widespread dissemination and publication of the material by a range of outlets across the political spectrum also makes it clear that it does not ‘offend against the standards of morality, decency and propriety generally accepted by reasonable adults’. The fact it was released by a US City Department to the general public similarly supports this point. We do not think a reasonable Australian has a markedly different view to a reasonable American.
15. An appropriate subset of the videos content, or a redacted version thereof would not be *‘likely to be classified as RC’*.
16. The eSafety Commissioner failed to identify the elements of the video which should be censored. This would include any clip, any still, and any version that did not have redaction or

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<sup>17</sup> National Classification Code at 3, Table item 1.

<sup>18</sup> For example, Wikipedia has Emmett Till’s mutilated corpse on display: [https://en.wikipedia.org/wiki/Emmett\\_Till](https://en.wikipedia.org/wiki/Emmett_Till) as well pictures of civilians killed by the Nazi’s [https://en.wikipedia.org/wiki/Victims\\_of\\_Nazi\\_Germany](https://en.wikipedia.org/wiki/Victims_of_Nazi_Germany). Wikipedia also includes a still from the footage the Commissioner seeks to ban. The reason this material is published is to hopefully stop something like this happening again. That is the same reason why footage of the murder of Iryna Zarutka has been circulated.

filtering (e.g. her notice could have said that Ms Zarutsky's blood on the seat should be redacted, rather than the video *en toto*).

17. The eSafety Commissioner thus exceeded her jurisdiction in issuing the notice. It was ultra vires in the form it was given.

#### **D. Ground 3: Misuse of discretion**

18. There was no requirement for the Commissioner to issue the notice, even if she had jurisdiction to do so.
19. In the circumstances where the original video remains available for download and upload from a broad range of sources (including international news media), the attempt at censoring the video itself is futile. The only effect has been to censor a subset of lawful online commentary, rather than the video itself.
20. The Tribunal should exercise its discretion to not issue the notice when determining the matter *de-novo*. Censoring the news in this manner is not appropriate. All it has done is advance the Streisand Effect.

#### **E. The Right of the Free Speech Union of Australia to Bring these Proceedings**

21. Section 220(11) OSA allows for any person to apply to the Tribunal for a review.
22. The remaining test is therefore Section 17 of the *Administrative Review Tribunal Act 2024* (Cth) (ART Act).
23. The FSU falls within that due to Section 15 of the ART Act. Our constitution provides that our 'Purpose' is: '(a) protecting and defending the free speech rights of our members; and (b) securing, promoting, and advancing freedom of speech in Australia.'
24. Online censorship of political speech by the Australian eSafety Commissioner (and the associated censorship by the Australian Classification Board) is plainly a 'Free Speech' issue. The problem of the eSafety Commissioner misusing her powers is also an issue which FSU Australia has pursued in other proceedings. At this stage, we need say no more.
25. This application has been filed by a Director of FSU Australia on its behalf.

#### **F. Other matters**

26. The Tribunal should suspend the effect of (or stay) the eSafety Commissioner's notice by making an order pursuant to Section 32 of the ART Act.

Free Speech Union of Australia

DATED this 6<sup>th</sup> DAY of October 2025

