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No. NSD474 of 2024

Federal Court of Australia
District Registry: New South Wales
Division: General

ESAFETY COMMISSIONER
Applicant

X CORP.
Respondent

SUBMISSIONS OF THE ESAFETY COMMISSIONER FOR 10 MAY 2024

[NOTE: Text marked in grey is to be the subject of an application for confidentiality by X Corp.]

Filed on behalf of the Applicant, eSafety Commissioner

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Prepared by: Matthew Garey
AGS lawyer within the meaning of s 55I of the *Judiciary Act 1903*

Address for Service:
The Australian Government Solicitor,
Level 10, 60 Martin Place, Sydney, NSW 2000
Matthew.Garey@ags.gov.au

Telephone: 02 9581 7625
Lawyer's Email:
Matthew.Garey@ags.gov.au
Facsimile: 02 6169 3054

A. INTRODUCTION AND SUMMARY

1. The eSafety Commissioner seeks an interlocutory injunction. Orders are sought in the same form as made by the Court on 24 April 2024. The eSafety Commissioner has a strong case against X Corp for breaches of s 111 of the *Online Safety Act 2021* (Cth), and there is a strong public interest in an interlocutory injunction being in place until that case is heard. That public interest is reinforced, not reduced, by X Corp's ongoing failure to comply with the Court's orders.

2. ***Background:*** The case concerns a confined subject matter. It relates to posts made on the X platform which contain the graphic video and audio of the actual moments when Bishop Mar Mari Emmanuel was repeatedly stabbed while giving a sermon at around 7.15pm on 15 April 2024 (**Stabbing Video**). That stabbing was identified by police as a terrorist attack. The case against X Corp relates to the Stabbing Video only, and does not otherwise constrain the discussion of that alleged terrorist attack.

3. Following the attack, the eSafety Commissioner became aware of social media posts which contained the Stabbing Video. The eSafety Commissioner considered that the Stabbing Video was "class 1 material". This is the most harmful class of material covered by the Online Safety Act. It is assessed by reference to Australia's longstanding film classification system, corresponding with material that is, or if considered by the Classification Board is likely to be, classified as Refused Classification. Accordingly, the eSafety Commissioner engaged with a number of major online service providers, including X Corp, to reduce the availability and prominence of the Stabbing Video in Australia. Following informal requests and removal notices issued under the Online Safety Act, some providers (such as Meta and Reddit) removed identified URLs with the Stabbing Video from their platforms altogether. X Corp took a different approach.

4. ***Prima facie case:*** A removal **Notice** was issued to X Corp on 16 April 2024 in relation to 65 separate URLs for posts on the X platform that contained the Stabbing Video. The Notice required X Corp to take "all reasonable steps" to ensure that the Stabbing Video was removed from those URLs so that it was no longer accessible to any end-users in Australia. X Corp "geo-blocked" those URLs so that users identified as being in Australia could not access the Stabbing Video. However, users in Australia were still able to access the Stabbing Video on X by using a virtual private network (**VPN**). That remains the case in respect of some 60 of the URLs.

5. There are "reasonable steps" that X Corp was, and is, capable of taking to ensure that the Stabbing Video could not be accessed at the URLs by end-users in Australia. Most obviously it could simply have removed those particular posts or hidden them behind a notice. So much is clear from the following: X Corp can and does take such steps in relation to posts which it considers to be in breach of its own policies; it has done so in relation to other requests from the eSafety Commissioner; there is no legal impediment to it doing this under US law; and such steps are commonly taken by major platforms and services (including in relation to the Stabbing Video).

6. Given this, there is every reason to expect that the eSafety Commissioner will establish that X Corp has breached s 111 of the Online Safety Act, by failing to comply with the requirements of the Notice, as it was capable of doing. As such, there is the necessary prima facie case to support interim injunctions being made pending a final hearing.

7. ***Balance of convenience:*** The interlocutory injunctions support the important public interests advanced by the Online Safety Act. In the context of the Stabbing Video, this includes the public interest in protecting Australians from exposure to shocking footage of an attack by an alleged terrorist; and it is relevant to reducing the ready proliferation of material that may exacerbate extremist views (a concern underscored by recent attacks and arrests). Such harms are irreparable, by damages or otherwise. While the Stabbing Video can still be accessed elsewhere through targeted searches, there is real utility in reducing its more widespread and ready availability on X. And even if disobeyed, regulatory injunctions of the present kind have important educative and deterrent purposes. Indeed, such disobedience may then provide a basis for contempt proceedings and may inform the scale of penalties necessary to secure deterrence.

8. There is little to be weighed in the balance against the above. Indeed, in circumstances where X Corp seems likely to continue to disobey this Court's orders, the only real consequence for X Corp would seem to be whatever may flow from that disobedience: this is hardly a matter to be weighed in its favour. If X Corp did obey the Court's orders, this would at worst result in the removal of a few seconds of graphic film of an event which is otherwise able to be widely represented and discussed. These consequences would be akin to it having taken down such material itself, as was done by Meta. Any claimed concern about global over-reach in this context is misplaced: X Corp supports total global removal where *it* sees fit under its own policies; but resists removal where required under Australian law and orders made by this Court.

B. EVIDENCE

9. The eSafety Commissioner relies upon the following affidavits:

   9.1 Affidavit of Toby Dagg dated 22 April 2024 (**1Dagg**);

   9.2 Affidavit of Acting Assistant Commissioner Stephen Nutt dated 22 April 2024 (**Nutt**);

   9.3 Affidavit of Matthew Garey dated 24 April 2024 (**Garey**);

   9.4 Affidavit of Toby Dagg dated 6 May 2024 (**2Dagg**);

   9.5 Report of Joshua Matz (annexed to an affidavit of 5 May 2024) (**Matz**).

C. PRINCIPLES FOR INTERLOCUTORY INJUNCTIONS

10. The applicable principles are well-known. The eSafety Commissioner must show a prima facie case sufficient to justify the relief sought and that the balance of convenience favours the grant of an injunction.[1]

D. STANDING AND JURISDICTION

11. Section 111 of the *Online Safety Act 2021* (Cth) (**Online Safety Act**) is a civil penalty provision because it sets out at the foot of the section a pecuniary penalty indicated by the words "civil penalty".[2]

12. Section 162(1) of the Online Safety Act provides that a civil penalty provision (including, therefore, s 111) is enforceable by way of a pecuniary penalty under Part 4 of the *Regulatory Powers Act (Standard Provisions) Act 2014* (Cth) (**Regulatory Powers Act**). Section 162(2)-(3) provides that the eSafety Commissioner is an authorised applicant, and this Court is a relevant court for the purposes of Part 4.

13. Section 165(1)(l) of the Online Safety Act provides that s 111 is enforceable by way of injunction under Part 7 of the Regulatory Powers Act. Section 165(2)-(3) provides that the eSafety Commissioner is an authorised applicant, and this Court is a relevant court for the purposes of Part 7.

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1 See *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [19], [65]; *Samsung Electronics Co. Ltd v Apple Inc* (2011) 217 FCR 238 at [67] (Dowsett, Foster and Yates JJ).

2 *Regulatory Powers (Standard Provisions) Act 2014* (Cth) s 79(a)

14. As to injunctions, the relevant provisions of the Regulatory Powers Act are ss 121(2) (final performance injunctions), 122 (interim mandatory injunctions), 124 (disapplication of certain limits on injunctions) and 125 (Court powers preserved).

15. For these reasons, this Court has **jurisdiction** to hear and determine the eSafety Commissioner's proceeding, she has **standing** to bring the proceeding, and this Court has **power** to grant the relief sought, including the interim injunctive relief sought.

E. PRIMA FACIE CASE

16. The eSafety Commissioner submits that she has a strong prima facie case.

E.1 The statutory context

17. The starting point is the proper interpretation of s 111 when read with ss 12 and 109 of the Online Safety Act. Section 111 provides that "[a] person must comply with a requirement under a removal notice given under section 109 … to the extent that the person is capable of doing so". Section 109 permits the Commissioner to give the provider of a service a written notice requiring the provider to "take all reasonable steps to ensure the removal of the material from the service" within 24 hours or such longer period as the Commissioner allows. Section 12 provides that for the purposes of the Act, "material is *removed* from a social media service, relevant electronic service or designated internet service if the material is neither accessible to, nor delivered to, any of the end - users in Australia using the service".

18. The obligation imposed by these provisions is to take all reasonable steps the provider is capable of taking to ensure that the material identified in a removal notice is neither accessible to, nor delivered to, any of the end-users in Australia using the service. This reads ss 12, 109 and 111 together harmoniously, applying the usual technique that a definition (here, "removal") should be read into the substantive provision in which the defined term is found.[3]

19. The prohibition is a strong and broad one in several respects.

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[3] See *Kelly v The Queen* (2004) 218 CLR 216 at [103] (McHugh J).

20. *First*, "all" reasonable steps must be taken, not just some reasonable steps. "The word 'all' is significant" in "all reasonable steps", because it means that "[i]t is not enough" for X Corp "to demonstrate that it took some of the reasonable steps available" to it.[4]

21. *Second*, the focus of the steps must be to "ensure" a particular result. "Ensure" is "a strong word".[5] It places "a heavy onus"[6] on the provider to make sure that the particular result is achieved. Ensure here takes its ordinary meaning of "guaranteeing, securing or making certain that action is taken".[7]

22. *Third*, the result to be achieved is a state of affairs where no end-user in Australia is able to access the material or delivered the material. That follows from the words "accessible" and "any".

23. The strength and breadth of this statutory language is fully explained and justified by the purpose of these provisions, which are focused on material which the Commissioner is satisfied is "class 1 material" (being material that if it were to be classified by the Classifications Board would be likely to be Refused Classification (or "RC")).[8]

24. The explanatory memorandum accompanying the Online Safety Bill 2021 (Cth) explained s 109 as follows:[9]

> Clause 109 provides the Commissioner with the power, in certain circumstances, to give a provider of a social media service, relevant electronic

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4 *Von Schoeler v Allen Taylor and Company Ltd [No 2]* (2020) 273 FCR 189 at [60] (Flick, Robertson and Rangiah JJ). See also *Chu v Telstra Corporation Ltd* (2005) 147 FCR 505 at [34], [36] (Finn J).

5 *Whittaker v Child Support Registrar* (2010) 264 ALR 473 at [292] (Lindgren J) (appeal dismissed: [2010] FCAFC 112).

6 *DPP (NSW) v Illawarra Cashmart Pty Ltd* (2006) 67 NSWLR 402 at [66] (Johnson J).

7 *DPP (NSW) v Illawarra Cashmart Pty Ltd* (2006) 67 NSWLR 402 at [66] (Johnson J), citing *Carrington Slipways Pty Ltd v Callaghan* (1985) 11 IR 467 at 470 and *McMillan Britton and Kell Pty Ltd v WorkCover Authority of NSW* (1999) 89 IR 464 at 480.

8 Class 1 material is defined in s 106 of the Online Safety Act. Section 106(1)(b) provides that for the purposes of the Act, "class 1 material means … (b) material where the following conditions are satisfied: (i) the material is a film or the contents of a film; (ii) the film has not been classified by the Classification Board under the *Classification (Publications, Films and Computer Games Act 1995;* (iii) if the film were to be classified by the Classification Board under that Act – the film would be likely to be classified as RC". Section 7 of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (**Classification Act**) sets out the types of classifications and defines "RC" as "Refused Classification". Pursuant to s 9 of the Classification Act, "publications, films and computer games are to be classified in accordance with the Code and the classification guidelines". The National Classification Code (see s 6 of the Classification Act) provides in clause 3 that "[f]ilms that (a) depict, express or otherwise deal with matters of … 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" are to be classified as "RC".

9 Explanatory Memorandum, Online Safety Bill 2021 (Cth) at 125-126.

> service or designated internet service a notice requiring them to remove class 1 material that is or has been provided on their service.
>
> It is not relevant for the purposes of giving a notice under clause 109 where the service is provided from (i.e. inside or outside Australia); the material just needs to be able to be accessed by end-users in Australia.
>
> Paragraph 109(1)(f) requires a provider subject to a notice issued under clause 109 to take all reasonable steps to ensure the removal of the material from the service within 24 hours or a longer period if allowed by the Commissioner. The short timeframe for removal reflects the seriously harmful nature of class 1 material.
>
> …

25. The explanatory memorandum explained s 111 as follows:[10]

> Clause 111 requires a person to comply with a requirement under a removal notice to the extent that the person is capable of doing so. The effect of this provision is that if a person has received a notice to remove class 1 material from their service and they are capable of removing that material, or if they have received a notice to cease hosting class 1 material and they are able to cease hosting the material, they must comply with the notice.
>
> Clause 111 provides that a person who contravenes clause 109 or clause 110 will be subject to a maximum penalty of 500 civil penalty units. Civil penalty provisions are enforceable under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act), … in accordance with subclause 162(1) of the Bill.
>
> If a person refuses to comply with a notice, the continuing contravention provisions in section 93 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) would apply.

26. The explanatory memorandum said of this scheme:[11]

> In relation to the online content scheme, the nature of the material potentially subject to a removal notice is class 1 content, which is seriously harmful content, such as material that depicts cruelty, violent, revolting or abhorrent phenomena in such a way that would offend against standards of morality, decency and propriety generally accepted by reasonable adults (i.e. material that would be refused classification material if classified by the Classification Board). Certain types of class 2 content, such as material that would be X 18+ content, may also be removed by the Commissioner where hosted or provided from Australia. The nature of the material covered by the scheme are such that their unrestricted access would be harmful to Australians, particularly children, and accordingly to the extent that the Bill lawfully restricts freedom of speech through these provisions, those restrictions are reasonable, proportionate and necessary to achieve the legitimate objective of protecting Australians online.

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10 Explanatory Memorandum, Online Safety Bill 2021 (Cth) at 126.

11 Explanatory Memorandum, Online Safety Bill 2021 (Cth) at 57-58.

27. The only way in which the obligation in s 109 can be seen to be attenuated is through the qualification that only "reasonable" steps need be taken (albeit *all* such reasonable steps must be taken). "[I]t is unnecessary for" X Corp "to take all steps necessary" to ensure the removal of the material from the service, because "[w]hat must be taken is all steps that are reasonable to take".[12]

28. Reasonableness is an objective question,[13] and "[w]hat steps are reasonable will depend upon the whole of the circumstances".[14] Factors relevant to the assessment include the following.

29. *First*, the harmfulness of the material to be removed. To a significant extent, this will be inherent in its character as class 1 material. It is a factor that will tend towards treating any step that will achieve the required result as a reasonable step.

30. *Second*, the provider's capacity to remove the material. This has an absolute and a temporal dimension. Plainly if the provider simply cannot remove the material, then it would not be a reasonable step to do so. That follows from reading ss 109 and 111 of the Online Safety Act together. But the limited time frame within which to comply with a notice under s 109 could legitimately bear upon what is reasonable in the circumstances, having regard to any extension which is sought in accordance with the notice.

31. *Third*, the fact that the provider's own terms of service or policies would permit (or indeed require) certain steps to be taken is a factor in favour of their reasonableness. The opposite, however, is not true. One factor that must be extraneous to the concept of reasonableness is the subjective desires or preferences of the provider to *have* the material be on its service. A step is not unreasonable merely because a provider does not want to take it. It would undermine the purpose of the statutory scheme if the determination of reasonableness depended on the attitude or opinions of the particular provider. Such an approach to reasonableness would severely restrict the efficacy of the obligation in ss 109 and 111.

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12 *Von Schoeler v Allen Taylor and Company Ltd [No 2]* (2020) 273 FCR 189 at [61] (Flick, Robertson and Rangiah JJ).

13 See *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291 at [150] (Middleton J)

14 *Von Schoeler v Allen Taylor and Company Ltd [No 2]* (2020) 273 FCR 189 at [61] (Flick, Robertson and Rangiah JJ).

E.2 X Corp has not taken all reasonable steps

E.2.1 Reasonable step one: Removal in the ordinary sense of the word

32. The eSafety Commissioner submits that removing the posts (in the ordinary sense of the word, approximating "delete") is a reasonable step that X Corp has not taken. The eSafety Commissioner understands it not to be in dispute that X Corp has not removed the posts, despite the Court's interim injunction.[15]

33. *First*, there is no question that X Corp has the **technical capacity** to remove posts from X in the ordinary sense of the word approximating "delete". This follows from several categories of evidence.

34. **Terms of Service**. Its own terms of service represent it has this capacity. In the Summary of Our Terms, it says {Affidavit of Michael Anderson affirmed 1 May 2024 (**Anderson**) at p 16}:

> **We have broad enforcement rights**: X reserves the right to take enforcement actions against you if you do violate these terms, such as, for example, removing your Content, limiting visibility, discontinuing your access to X, or taking legal action. We may also suspend or terminate your account for other reasons, such as prolonged inactivity, risk of legal exposure, or commercial inviability.

35. The terms of service for those outside the European Union, EFTA States or the United Kingdom include the following {Anderson at p 19}:

> We reserve the right to remove Content that violates the User Agreement, including for example, copyright or trademark violations or other intellectual property misappropriation, impersonation, unlawful conduct, or harassment. Information regarding specific policies and the process for reporting or appealing violations can be found in our Help Center (https://help.x.com/rules-and-policies/x-report-violation#specific-violations and https://help.x.com/managing-your-account/suspended-x-accounts).

36. **Policies**. Its own policies represent that it has this capacity.

36.1 In its Perpetrators of Violent Attacks Policy, X Corp states that:

(i) "We **may also remove Posts** disseminating manifestos or other content produced by perpetrators" {1Dagg at p 130};

[15] Some of the posts appear no longer to be accessible because the posts were removed by the user who published the Post, not X Corp {see 2Dagg at [61]}.

(ii) "As a result **we may remove Posts** that include manifestos or other similar material produced by perpetrators, even if the context is not abusive" {1Dagg at p 130};

(iii) "**We may remove content** containing manifestos and other content created by individual perpetrators or their accomplices" {1Dagg at p 131};

(iv) "As described above, **we may also remove content** containing manifestos and other content created by perpetrators or their accomplices" {1Dagg at p 134}; and

(v) "In addition, **we will also remove content** that violates our policies regarding Violent Speech or other parts of Our Rules" {1Dagg at p 134}.

36.2 In its Violent Speech Policy, X Corp states that:

(i) "As a result, **we may remove** or reduce the visibility of violent speech in order to ensure the safety of our users and prevent the normalization of violent actions" {1Dagg at p 140}.

37. **Representations.** Twitter Inc (now X Corp) has previously represented to the eSafety Commissioner that it has this capacity. Twitter Inc represented to the eSafety Commissioner that "We do not allow CSAM [child sexual abuse material] material on Twitter and when we are aware of it we immediately remove it" {1Dagg at p 147}. The Court would comfortably infer that that is still the case.

38. **What users can do**. X users can delete posts, which removes them being publicly accessible on X {1Dagg at pp 150, 153}. The inference to be drawn absent evidence to the contrary is that X can delete posts if users have the functionality to do so.

39. **Comparable online services**. Other comparable online services such as Meta {1Dagg at p 157}, TikTok {1Dagg at p 165} and YouTube {1Dagg at p 174} can remove material from their services. And a number of them – including Meta, Google, Reddit, and Telegram – appear to have done just that in relation to the Stabbing Video {2Dagg at [10]-[22]}. This supports an inference that X Corp can do so from X.

40. **X Corp's own evidence.** X Corp has not filed any evidence to suggest that it cannot remove (in the sense of delete) posts. "[A]ll evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the

other to have contradicted".[16] Nor has it filed any evidence to suggest that it would have had any difficulty in removing them within 24 hours. That is unsurprising, given that it was able to geo-block the posts within 24 hours {see 1Dagg at p 39}.

41. *Second*, taking this step would achieve the end sought to be achieved by the Parliament and the eSafety Commissioner by s 109, namely *ensuring* that no end-user in Australia was *able* to access the posts. That it would achieve this objective is a factor that weighs in favour of a conclusion of reasonableness.

42. Indeed, if Mr Anderson's evidence is to be accepted, [**redacted**]. That actually *favours* the conclusion that removal is a reasonable step to take.

43. *Third*, there is no obstacle to that course under US law. Mr Matz expresses the opinion that X Corp could have complied with the removal notice without violating the First Amendment or s 230 of the Communications Decency Act {Matz at [12(d)]}, and Ms Kumar expresses no view on that question in the report annexed to her affidavit dated 1 May 2024 (**Kumar**).

44. *Fourth*, the fact that removing the posts (in the sense of deleting them) would deny end-users around the world from accessing the posts does not make the step unreasonable in the present statutory setting.

45. In this regard, the eSafety Commissioner does not dispute the evidence of the American law experts that United States governments could not have issued a similar notice to X Corp under United States law due to the First Amendment {Kumar at [30]-[37]; Matz at [12(a)]}. But this is irrelevant. Material is no less accessible to end-users in Australia because it is accessible to those outside of Australia, and class 1 material is no less harmful to end-users in Australia because it is accessible to those outside of Australia.

46. The concern in this statutory regime is to improve and promote online safety "for Australians": Online Safety Act, s 3. The Parliament did not shrink from affecting those who are overseas. To the contrary, by s 23(2) of the Online Safety Act, the Act is made to extend to "acts, omissions, matters and things outside Australia".

47. Moreover, if the United States government could not have issued X Corp an equivalent notice, that says nothing about the reasonableness of X Corp's steps in responding to

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[16] *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

the eSafety Commissioner's notice. The United States operates in a vastly different constitutional setting.[17]

48. *Fifth*, there is a powerful inference that the real reason why X Corp has not deleted the posts is that it has *chosen* not to do so. Its terms of service and policies make it abundantly clear that X Corp is not opposed to removing material from its service (even if doing so results in denying access to it worldwide) so long as X Corp is the one making the decision to do so; that is to say, so long as the removal is on its terms and it is calling the shots. Yet one thing must be right: a step is not unreasonable merely because the provider does not want to take it.

49. *Sixth*, the fact that X Corp geo-blocked the posts does not make deletion unreasonable in circumstances where deletion actually ensures that no end-user in Australia is able to access the material and geo-blocking does not.

50. There is the evidence of X Corp's own Director of Engineering [**redacted**]. That evidence may require careful testing at trial and it is, in any event, somewhat limited. A number of concerns with that evidence can be identified. [**redacted**]

51. These are not merely theoretical concerns. That X Corp's efforts do not result in no end-user in Australia being able to access the relevant posts is illustrated by the eSafety Commissioner's evidence of the use of VPNs to access the material.

    51.1 On 19 April 2024, 62 of the URLs still had the Stabbing Video on them and were available to an end-user in Australia using a VPN set to the US {1Dagg at [29]}.

    51.2 On 22 April 2024, 62 of the URLs still had the Stabbing Video on them and were available to an end-user in Australia using the Norton Secure VPN {1Dagg at [30]}.

    51.3 On 24 April 2024, 62 of the URLs still had the Stabbing Video on them and were available to an end-user in Australia using the Norton Secure VPN and NordVPN {Garey at [6], [9]}, [**redacted**].

    51.4 On 26, 29, 30 April 2024, 1 and 2 May 2024, 62 of the URLs still had the Stabbing Video on them and were available to an end-user in Australia using

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[17] See, eg, *McCloy v New South Wales* (2015) 257 CLR 178 at [29] (French CJ, Kiefel, Bell and Keane JJ), [317] (Gordon J).

NordVPN while logged into a registered X account where the "Birth date" of the account was over the age of 18 {2Dagg at [53]-[59]}. On 3 and 5 May 2024, only 60 of the URLs had the video on them {2Dagg at [60]-[64]}.

51.5 On 6 May 2024, when searching a sample of 20 of the URLs, all 20 had the Stabbing Video on them and were accessible to an end-user in Australia using CyberGhost VPN, Proton VPN, SurfShark VPN and Express VPN while logged into a registered X account where the "Birth date" of the account was over the age of 18 {2Dagg at [65]-[67]}.

51.6 On 5 May 2024, 20 of the URLs with the Stabbing Video could be accessed by an end-user in Australia using NordVPN while not being logged into a registered X account {2Dagg at [68]} [**redacted**]

51.7 On 5 May 2024, 19 of the URLs with the Stabbing Video could be accessed by an end-user in Australia using NordVPN while logged into a registered X account where the "Birth date" of the account was over the age of 18 and while the account's country was set to Australia {2Dagg at [69]} [**redacted**]

51.8 On 5 May 2024, eight of the URLs (out of a sample of 19) with the Stabbing Video could be accessed by an end-user in Australia using the Norton Secure VPN while logged into a registered X account where the "Birth date" of the account was under 18 {2Dagg at [70]} [**redacted**]

51.9 On 5 May 2024, nine of the URLs (out of a sample of 20) with the Stabbing Video could be accessed by an end-user in Australia using NordVPN while in a private browser without logging into a registered X account {2Dagg at [71]} [**redacted**]

51.10 On 5 May 2024, 20 of the URLs (out of a sample of 20) with the Stabbing Video could be accessed by an end-user in Australia using NordVPN while in a private browser while logged into a registered X account {2Dagg at [72]} [**redacted**]

52. Nor can this level of access be explained or downplayed on the basis that VPNs are some form of unusual or "fringe" technology.

52.1 Elon Musk himself has encouraged X users to use VPNs {1Dagg at pp 108-109}. His account has more than 163 million followers {1Dagg at p 222}.

52.2 A google search of "how to access geoblocked posts on X" provides results that refer to using VPNs {1Dagg at p 72}.

52.3 There are websites that explain that VPNs can be used to access geo-blocked content {1Dagg at pp 84-90, 92-106}.

52.4 According to one survey, between August 2020 and March 2023, approximately one in four Australians used a VPN {1Dagg at [32]}.

52.5 NordVPN, which is one of the VPNs used by eSafety to check the availability of the video on X, is promoted online as "[t]he best VPN for Australia" {2Dagg at [75], p 164}.

52.6 There are legitimate reasons why persons use VPNs beyond avoiding geoblocking, with around half of (American) users surveyed in a 2024 survey using a VPN for work or business applications {2Dagg at [73]}.

E.2.2 Restricting access

53. The Court can also find that X Corp has other ways available to it to **reduce the visibility of posts** so as to ensure that they cannot be accessed by a person in Australia. The eSafety Commissioner will prove that X Corp can do so by reference to its own corporate policies.

54. In particular, its website on "Our range of enforcement options" states that:

54.1 "Where appropriate, we will restrict the reach of posts that violate our policies and create a negative experience for users by making the post less discoverable on X. This can include … Restricting the post's discoverability to the author's profile" {1Dagg p 179}.

54.2 Where a post has violated the X Rules and the violation is severe enough to warrant post removal, "[t]he post will be hidden from public view with a notice during this process" {1Dagg at p 180}.

54.3 If a post has violated the X Rules, "we will hide it behind a notice" until it is deleted {1Dagg at p 188}.

55. So it is plain that steps were available to X Corp to ensure that the material was neither accessible to, nor delivered to, any end-users in Australia using the service. Indeed, there is one instance where a copy of the Stabbing Video on X Corp was placed behind

a notice "This Post is from a suspended account" following an informal removal request from eSafety {2Dagg at [44]-[49]; p 45} such that it can no longer be seen. This tends to suggest that the video may actually violate X Corp's own policies and/or terms of service. If it does, that would be another reason why taking steps to remove the video or restrict its accessibility would be reasonable.

56. The eSafety Commissioner repeats the submissions above at [32]-[52] as to why these are reasonable steps.

57. If it matters, unlike removal (in the sense of deletion), these steps have an added benefit. It can be inferred that these steps to restrict access can be more readily reversed than deletion (which is not to imply that deletion is irreversible). That they can be readily reversed is an *additional* reason why they are reasonable steps.

F. BALANCE OF CONVENIENCE

58. The balance of convenience strongly favours the grant of injunctive relief.

59. *First*, the eSafety Commissioner has a strong prima facie case. As noted, this is relevant to weighing the balance of convenience.

60. *Second*, the purpose of s 109 of the Online Safety Act is to protect Australians from harmful material. The regime concerns "a matter of large importance and the Court should be vigilant in preventing conduct that carries the risk of contravening" the provision.[18] Further, s 122 of the Regulatory Powers Act is a statutory injunction and is "essentially a public interest provision".[19] By permitting ss 109 and 111 to be enforceable by injunction, the Parliament has recognised that the alleged contravening conduct "may be detrimental to the public interest".[20] The eSafety Commissioner "is protecting the public interest in ensuring compliance"[21] with ss 109 and 111.

61. This statutory context weighs the balance heavily in favour of the grant of injunctive relief. Relatedly, Thomas J said in *eSafety Commissioner v Rotondo*:[22]

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18 *Australian Competition and Consumer Commission v IVF Finance Pty Ltd [No 2]* [2021] FCA 1295 at [137] (O'Bryan J).

19 *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 255 (Lockhart J). See also *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at [18] (Black CJ and Finkelstein J); *Australian Competition and Consumer Commission v IVF Finance Pty Ltd [No 2]* [2021] FCA 1295 at [137] (O'Bryan J).

20 *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 255 (Lockhart J).

21 *Australian Competition and Consumer Commission v IVF Finance Pty Ltd [No 2]* [2021] FCA 1295 at [137] (O'Bryan J).

22 [2023] FCA 1296 at [29].

> The eSafety Commissioner has an important public duty, in the context of the eSafety Commissioner's role under the Act and the purpose of the Act, which is to ensure and promote online safety for Australians. This weighs heavily in favour of granting the injunction.

62. *Third*, the fact that an injunction may be ignored, disobeyed or ultimately unenforceable is no reason for refusing relief. "[I]t is not a ground for refusing an injunction that it would not have a practical effect, where its failure to have a practical effect is because the defendant disobeys it".[23]

63. This consideration puts X Corp's ongoing disobedience, and the evidence about United States law, in their proper context. According to the American law experts, injunctive relief will not be enforceable against X Corp in the United States {Matz at [12(c)]; Kumar at [8(a)]}. But the fact that any order might be difficult or impossible to enforce, is not determinative.[24]

64. Where, as here, it is a regulatory injunction in the public interest, there is a well-recognised educative and deterrent effect to be secured by the grant of that relief.[25] Indeed, the grant of an injunction may serve as an important basis for further legal steps to secure those deterrent and educative purposes, eg through the bringing of contempt proceedings and in the imposition of penalties which are sufficiently high to deter even wilful or contumelious contravening conduct.

65. These kinds of broader regulatory objectives are why regulatory injunctions, unlike traditional injunctions, typically do not depend upon showing that the injunction will be effective to prevent further contraventions. Such is the position here under s 124(2)(a) of the Regulatory Powers Act which provides that "[t]he power of a relevant court under this Part to grant an injunction requiring a person to do a thing may be exercised … whether or not it appears to the court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that thing".

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23 *Vincent v Peacock* [1973] 1 NSWLR 466 at 468 (Hardie, Hutley and Bowen JJA); *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3 at [51] (Allsop J).

24 *Australian Competition and Consumer Commission v Chen* (2003) 132 FCR 309 at [45] (Sackville J); *Humane Society International v Kyodo Senpaku Kasiha Ltd* (2006) 154 FCR 425 at [25] (Black CJ and Finkelstein J).

25 See *Humane Society International v Kyodo Senpaku Kasiha Ltd* (2006) 154 FCR 425 at [22]-[24] (Black CJ and Finkelstein J).

66. *Fourth*, the eSafety Commissioner is not required to give an undertaking as to damages and will not give one. That is a factor which, on current authorities,[26] the Court may take into account. The eSafety Commissioner makes the formal contention that this is not a relevant consideration, but does not submit that those authorities are plainly wrong. In any event, the likely damage to X Corp by reason of any interim injunction will be minimal.

67. *Fifth*, as the public interest in the removal of Class 1 material has been primarily determined by Parliament, private opinions as to the possible advantages of class 1 material remaining accessible – however reasonable or well-formed – should not be given significant weight.

68. *Sixth*, the material poses a real risk of harm for Australian end-users {1Dagg at [67]}. Exposure to younger users is especially likely to be distressing, disturbing and produce fear {1Dagg at [67]} who can still access the Stabbing Video at the URLs with a VPN: see [51.6], [51.8] and [51.9] above. The confronting nature of the Stabbing Video is evident from watching and listening to it.

69. To some extent, harm is inherent in the character of the Stabbing Video as class 1 material. But more specifically, it is readily apparent from watching and hearing the Stabbing Video how it may have a high and harmful impact on viewers, particularly younger and more vulnerable ones.

70. Moreover, it is the kind of material that can be co-opted by violent extremist groups to encourage terrorist acts {Nutt at [20], [21], [24(c)], [27]}. The attack depicted in video has already been praised in such propaganda {Nutt at [26]}.

71. *Seventh*, and relatedly, Justin Quill's affidavit (**Quill**) does not establish any reason not to grant the injunction. Mr Quill had a law graduate at Thomson Geer spend eight hours searching for versions of the video online {Quill at p 8}. That he could only find 26 copies of it across 15 different services in that time, while making dedicated searches for the video, far from demonstrates that an injunction requiring X Corp to comply with the removal notice would be inutile. The opposite is true, particularly as X Corp's resistance to complying with the removal notice and with the Court's own orders has brought further notoriety to these particular links.

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[26] See *Australian Competition and Consumer Commission v IVF Finance Pty Ltd [No 2]* [2021] FCA 1295 at [87]-[89] (O'Bryan J).

72. Further submissions can be made about and in response to Mr Quill's affidavit.

72.1 The fact that the video is accessible elsewhere provides no factual basis to refuse the interlocutory injunction. The eSafety Commissioner (and this Court) need not take action everywhere on the internet in order to take action somewhere. They are not so hamstrung.

72.2 The eSafety Commissioner has taken steps to have other providers remove the material {2Dagg at [11]-[22]}. That those have not resulted in the video being removed entirely from the internet provides no reason for X Corp not to have complied, and provides no real basis for this Court to refuse interlocutory relief.

72.3 Terrorist and violent extremist content is more readily found on X rather than on other services {2Dagg at [25], pp 28-32}.

72.4 X has considerably more users in Australia than several of the services that Mr Quill had searched, namely Telegram, Douyin ("the Chinese equivalent to Tik Tok"), Yandex ("a Russian search engine similar to Google"), Odysee, 9Gag, Rumble, VK, Gettr and WeChat {Quill at [4]-[6], p 8; 2Dagg at p 39}.

72.5 Instagram, Reddit and YouTube have more users {2Dagg at p 39}, but the law graduate found only one link to it on Instagram {Quill at [6(b)}, two links to it on Reddit {Quill at [6(n)]} and two links to it on YouTube {Quill at [6(a)}. Reddit had been asked to remove the video from other URLs and it did so {2Dagg at [14]-[16]}.

73. As a matter of principle, where the executive seeks interim relief in order to compel compliance with what is *prima facie* a valid instrument, there is a general public interest in enforcement of compliance with that instrument. For example, in the context of an injunction in the aid of the enforcement of environmental protection laws, Preston CJ held in *Tegra (NSW) Pty Ltd v Gundagai Shire Council* that the Court may consider the "public interest", and that there is a "public interest in the proper enforcement of public welfare statutes".[27] That public interest does not depend on the possibility that the public may be at risk from other sources of the impugned material: it is an interest that

[27] (2007) 160 LGERA 1 at [54].

is founded in the value of the "reliable and predictable public administration of the law".[28]

74. *Eighth,* the relief sought does seek to maintain the status quo. The determination of "what is, or what is not, the status quo in any given case for the purpose of considering an application for an interlocutory injunction is … a question of fact"[29] and "must be determined based on the facts of each case and a careful and commonsense exercise of the court's discretion".[30]

75. The status quo for the purpose of the proceedings is the X platform *without* the video. That was the state of affairs which existed prior to 16 April 2024 when X published the video on its platform, and it coheres with that which the eSafety Commissioner seeks to achieve by its application for interlocutory relief pending final determination of the validity of its notice. Alternatively, the status quo could be characterised as the circumstances following the issuing of the s 109 notice on the fair assumption that X would comply with it. On this characterisation also, the eSafety Commissioner's interlocutory application seeks to preserve the status quo pending the final hearing.

76. Even if the Court were to conclude the status quo is a world *with* the material published and without the Notice, the Court's discretion remains wide enough to permit the granting of interlocutory relief.[31] Indeed, s 124(2)(c) of the Regulatory Powers Act provides that "[t]he power of a relevant court under this Part to grant an injunction requiring a person to do a thing may be exercised … whether or not there is an imminent danger of substantial damage to any other person if the person refuses or fails to do that thing". The removal of the Stabbing Video from *this* platform may not remove the danger of its proliferation elsewhere. But the danger to the community remains from its proliferation on X.

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28 *Tegra (NSW) Pty Ltd v Gundagai Shire Council* [2007] NSWLEC 806; 160 LGERA 1 at [55] (Preston CJ) citing *Ellison v Warringah Shire Council* (1985) 55 LGRA 1 at 13; *Jarasius v Forestry Commission of NSW* (1989) 69 LGRA 156 at 161-162; *Bridgetown/Greenbushes Friends of the Forest Inc v Department of Conservation and Land Management* (1997) 93 LGERA 436 at 438.

29 *Talacko v Talacko* [2009] VSC 349 at [40], quoting *Carr Boyd Minerals Ltd v Ashton Mining Ltd* (1989) 15 ACLR 599 at 605 (Malcolm CJ).

30 [2009] VSC 349 at [42]. See also *Walsh v Police Association* (2000) 140 IR 58 at [58] (Gillard J); *Martin & Pleasance Pty Ltd v A Nelson & Co Ltd* [2021] FCAFC 80 at [62] (Jagot, Yates and Jackson JJ); *The Australian Federation of Islamic Councils Inc v Hafez Kassem* [2017] NSWSC 206 at [37] (McDougall J).

31 See *Liquorland (Aust) Pty Ltd v Anghi*e (2001) 20 ACLC 58 at [74] (Warren J); *Hubbard v Vosper* [1972] 2 QB 84 at 96 and Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* (3rd ed) at [2168].

G. DISPOSITION

77. The Court should grant the interim relief sought.

Date: 8 May 2024

Tim Begbie KC

Christopher Tran

Naomi Wootton
Counsel for the eSafety Commissioner