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Registrar

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In the Federal Court of Australia
District Registry: NSW
Division: General

Case NSD 474/2023

ESAFETY COMMISSIONER

Applicant

X CORP

Respondent

RESPONDENT'S SUBMISSIONS ON INTERIM RELIEF

Introduction

1. The interlocutory injunction made by the Court on 22 April 2024 and continued on 24 April 2024 should be dissolved *ab initio*, and there should be no further interlocutory relief ordered. This is so for the ***six*** reasons set out below.

2. In elaborating those matters, the Respondent will read an Affidavit of Nicholas Perkins dated 8 May 2024 (**Perkins**); an Affidavit of Justin Quill dated 2 May 2024 (**Quill**), and an Affidavit of Michael Anderson dated 2 May 2024 (**Anderson**).

3. It should be noted at the outset that the Respondent has commenced merits review proceedings in the Administrative Appeals Tribunal (**AAT**).

A. Material non-disclosure

4. The Commissioner, at the time of issuing the removal notice on 16 April 2024 (**Removal Notice**), contemporaneously prepared a "Statement of Reasons" which was also signed on 16 April 2024 (**Statement of Reasons**). The Statement of Reasons is Annexure NJP-2 to Perkins. The Statement of Reasons was only provided to the Respondent on 2 May 2024, and has not been disclosed to the Court to date.

5. The Statement of Reasons was disclosed in circumstances where the Respondent had requested the Commissioner to provide a statement of reasons for the decision to give the Removal Notice pursuant to s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) and s 28 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**). In disclosing the Statement of Reasons, the Commissioner's solicitor stated:[1]

> [2] No such statement of reasons has previously been prepared. A statement of reasons will now be prepared and provided in the manner and timeframe required by the statutory provisions.
>
> [3] … [such a statement of reasons] will be prepared as soon as practicable. In the meantime, we enclose a copy of a document entitled "Statement of Reasons" dated and signed on 16 April 2024 that was prepared contemporaneously with the Notice. We are instructed that this was prepared as a record of the decision, but

1 Annexure NJP-2 to Perkins.

not as a statement of reasons for the purposes of, or in accordance with, the ADJR Act and the AAT Act.

6. It is significant that the Commissioner will not rely upon the Statement of Reasons as a compliant set of reasons under s 13(1) of the ADJR Act and s 28(1) of the AAT Act. This is significant because the Statement of Reasons purports to be precisely what those provisions require – i.e., a statement setting out "the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision". In the case of the Statement of Reasons:

   (a) It sets out the reasons for giving the Removal Notice of the delegate of the Commissioner.[2] It has headings titled: "Material relied upon to make decision"; and "Reasons for decision".

   (b) Paragraph 8 states that the delegate took into account "the following documents", and sets out what is in substance the evidence or other material on which the delegate relied.

   (c) Paragraph 9 sets out the reasons for making the decision and sets out what are in substance the Commissioner's findings on material questions of fact.

   There is no reason at all to doubt that the Statement of Reasons is what it purports to be; for example, the delegate has not given an affidavit seeking to depart from or qualify it.

7. Significantly, the Statement of Reasons does not refer to:

   (a) the Guidelines for the Classification of Films 2012 (Cth); nor

   (b) the "principles" set out in cl 1 of the National Classification Code 2005 (Cth).

8. That is significant because those would have been mandatory considerations for the Classification Board in determining whether the "Video" should be refused classification.[3] Accordingly, they were matters to which the Commissioner was required to have regard in seeking to form a state of satisfaction about whether the Classification Board was "likely" to refuse classification to the Video.

9. Instead, the decision-maker appears to have placed emphasis upon a consideration which would be irrelevant to the hypothetical decision of the Classification Board: the fact that the incident had been described by the NSW Premier on 16 April 2024 as an act of terrorism, and had been declared by the NSW Police Commissioner as a terrorist act.

10. Once regard is had to the guiding principles under the Code, and to the relevant parts of the Classification Guidelines, a reasonable person in the position of the Commissioner could not have been satisfied that the Video was "likely" to be refused classification. A film which is refused classification is one that exceeds the R 18+ and X 18+ classification

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2 It states (at [6]) that the delegate has "decided to give the Notice to X Corp. under section 109 of the Act based on the material and the reasons below."

3 *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s 9.

categories, and must satisfy the criteria set out in the Guidelines and the Code. The Video does not satisfy those criteria:

(a) It is a real albeit short depiction of a violent crime. It is a long lens medium shot, where the camera is some distance away from the victim as evident by the number of paces it takes the perpetrator to reach the victim. The knife itself is not clearly visible. Were it not for the audio (presumably recorded in a collar-microphone worn by the Bishop) the Video might be depicting punching rather than stabbing motions.

(b) The audio of the incident is certainly impactful within the meaning of the Guidelines. But the Video and audio are not gratuitous, exploitative or offensive. Assessment of impact reveals that it is not in close-up or slow motion; it is not accompanied by music or any accentuation techniques; it is neither frequent, prolonged nor detailed. As the Classification Guidelines make clear, such "context is crucial" (page 6).

(c) In short, the Video depicts a real event which is newsworthy and about which it is legitimate to express sympathy for the victim, condemn the perpetrator, and discuss the implications for Australian society. It does not depict the Victim's ordeal "in such a way that [it] offend[s] against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that [it] should not be classified" (see also Guidelines page 15). Quite to the contrary, standards of morality, decency and propriety recognise the attitude of the victim himself, namely that: "noting our God given right to freedom of speech and freedom of religion, I am not opposed to the videos remaining on social media."[4] Further, at least one prominent community leader regards it as important content for public circulation.[5]

11. The delegate of the Commissioner, having taken into account irrelevant considerations, and not having taken into account material and mandatory considerations, did not conduct the exercise which s 109(1)(b) of the Online Safety Act required.

12. The foregoing matters are matters which the Respondent, if it had been apprised of the Statement of Reasons and been given a proper opportunity to appear on 22 April 2024, would have (and now does) rely upon as a basis not to grant or continue the interlocutory relief sought.

13. The hearing before this Court on 22 April 2024 appropriately proceeded upon the basis that it was *ex parte*.[6] Accordingly, the Commissioner was under a duty to make "full and frank disclosure of all material facts", including "utmost candour",[7] ie to bring forward "all the material facts which [the absent] party would presumably have brought forward

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4 Affidavit of Bishop Mar Mari Emmanuel dated 24 April 2024, [11].

5 Affidavit of David Adler dated 2 May 2024, [28]. Mr Adler is the President of the Australian Jewish Association.

6 Transcript 22 April 2024, P 2 L 11 and P 10 L 13-22.

7 *Savcor Pty Ltd v Cathodic Protection International APS* (2005) 12 VR 639 at [24]-[36] (Gillard AJA)

in his defence to that application",[8] being "all material including that which might lead the court to refuse the application".[9] As Allsop J (as his Honour then was) put it:[10]

> It means squarely putting the other side's case, if there is one, by coherently expressing the known facts in a way such that the Court can understand, in the urgent context in which the application is brought forward, what might be said against the making of the orders. It is not for the Court to search out, organise and bring together what can be said on the respondents' behalf. That is the responsibility of the applicant, through its representatives.

14. The reasons for the Commissioner's decision to issue the Removal Notice were plainly material. That the reasons are so sparse, that they omit reference to mandatory considerations and refer to seemingly irrelevant considerations, was highly material in circumstances where the Commissioner knew that the Statement of Reasons existed and knew that the Respondent did not consider the Removal Notice to be valid.[11]

15. The Commissioner did not disclose to the Court that:

    (a) there were reasons for decision;

    (b) the reasons for decision make no reference to the Guidelines for the Classification of Films 2012 (Cth, nor the "principles" set out in cl 1 of the National Classification Code 2005 (Cth); and

    (c) the decision-maker appears to have taken into account that the incident was classified as a terrorist act by the NSW Police Commissioner, which is an irrelevant consideration to any determination by the Classification Board.

16. Instead of disclosing these matters and drawing attention to the arguments that might be made in support of the invalidity of the Removal Notice, Counsel:

    (a) informed the Court that "*there could be no issue"* about the satisfaction of s 109(1)(b);[12]

    (b) acknowledged that the Commissioner's state of satisfaction for the purposes of s 109(1)(b) must be reasonable,[13] but stated that "if I thought there was at least a credible argument that it could [be] vitiated on the usual grounds, I would alert your Honour to that";[14]

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8 *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 682 (Isaacs J).

9 *Re Southern Equities Corporation Ltd* (1997) 25 ACSR 394 at 423, *In the matter of Idoport Pty Ltd* (2011) 83 ACSR 164 at [147] (Ward J); *In the matter of Kala Capital Pty Ltd* [2012] NSWSC 1073 at [31] (Black J).

10 *Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 955 at [38].

11 Dagg at [47]; Annexure TAD-16.

12 Transcript 22 April 2024 P 10 L 26-27.

13 Transcript P 8 L5-35.

14 Transcript P 8 L35.

(c) adverted to why, in his submission, the material was "in fact" class 1 material — despite the issue being whether the Commissioner's satisfaction of as much was reasonable and had been informed by the necessary considerations;[15]

(d) said that he did not want to "give any oxygen to the notion that the notice was invalid", and proceeded to give the Court "some assurance" that the Removal Notice "truly was valid here".[16]

17. It is respectfully submitted that material non-disclosure is demonstrated. This requires the injunction to be discharged. As it was put in in *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd*:[17] "the failure of the applicants to make full disclosure of all facts relevant to the application for an interim injunction in itself necessitated the discharge of the order granted".

18. That the Commissioner will not rely upon the Statement of Reasons as a compliant set of reasons under s 13(1) of the ADJR Act and s 28(1) of the AAT Act has a bearing upon the Court's assessment of the strength of the prima facie case. It is tantamount to a concession that the Commissioner (with the benefit of further reflection and no doubt legal advice) now wishes to supplement the findings and reasoning contained in the Statement of Reasons. But in a case where the delegate's state of mind at the time of issuing the Removal Notice is a jurisdictional fact, the contemporaneous and signed reasons for decision should be taken as the best evidence of the process (including the intellectual process) that was adopted at the time.

19. In light of the previously undisclosed matters, the injunction should be dissolved and no further interlocutory order should be made.

B. Virtual impossibility of performance

20. The Interim Injunction should also be discharged because it is virtually impossible for the Respondent to perform. A mandatory injunction, being subject to penal sanction, that is virtually impossible for its subject to perform should not be ordered.[18] Usual principles of this kind apply to injunctions under the Regulatory Powers Act.[19]

21. [redacted]

22. The interlocutory injunction made by the Court on 22 April 2024 requires the Respondent, "no later than within 24 hours, to hide the material identified in the Notice behind a notice such that an X user can only see the notice, not the material identified in the Notice, and cannot remove the notice to reveal the material."

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15 Transcript P 9 L 5-30.

16 **Transcript** 22 April 2024 at P5 L45, P6 L5.

17 (1988) 20 FCR 540 at 543.

18 See *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] 1 AC 1 at 5-6.

19 *Knowles v Secretary, Department of Defence* [2020] FCA 1328 at [88]-[89] (Snaden J).

20 [redacted]

23. In form, the injunction contemplates that the material identified in the Notice will be delivered to the user but "hidden" behind a notice which cannot be removed. As set out in Perkins at [4], the Respondent's current technical processes and technical capability do not enable it to "*hide*" material, which is actually delivered, to an end-user behind a non-removable notice (as required by the Interim Injunction). While a Help Center page on the Respondent's website states colloquially that the Respondent may "hide" a post "behind a notice",[21] such references are used by the Respondent to help users understand in layperson terms the action being taken by X from a user experience perspective.[22]

24. Accordingly, it is virtually impossible for the Respondent to "*hide*" the Video in the manner required by the Interim Injunction.

C. Attachment of punitive sanction, on interim basis, to mandatory final relief

25. The Interim Injunction should be discharged and not remade because it effectively amounts to a form of mandatory final relief in circumstances where the Respondent contends that a valid notice could not require it to take that or any different steps to those which the Respondent is already taking.

26. Where interlocutory relief would be tantamount to the grant of final relief, the strength of the prima facie case will often "attract particular scrutiny".[23] In the present case, the prima facie case should not be characterised as "strong" for two reasons:

(a) ***First***, the only available "Statement of Reasons" is one which the Commissioner does not wish to defend as a compliant set of reasons under s 13(1) of the ADJR Act and s 28(1) of the AAT Act, and is one which indicates that the delegate has not had regard to mandatory considerations, and has had regard to irrelevant considerations: see **Section A** above.

(b) ***Second***, the Commissioner's prima facie case depends upon an incorrect view of the relationship between ss 109(1)(e) and 111 of the Online Safety Act. The proper construction is that 109(1)(e) requires only that "all reasonable steps" be taken;[24] whilst s 111 makes it a contravention not to take such "reasonable steps" only if the steps are within the "capacity" of the recipient to take. In that way, and harmoniously with the legislative object of implementing Australian content standards for Australian users of the world wide web, the obligation is qualified. But the Commissioner's submissions proceed upon an incorrect construction of the relationship between these provisions. On the Commissioner's construction, the reference in s 109(1)(e) to "all reasonable steps" is far more limited: it "simp*ly accommodates the possibility that a recipient of a notice can only do so much within a 24 hour time period*".[25] On that view, if there is a "step" that the recipient of a notice is "capable" of taking (per s 111), then ss 109 and 111 together require

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21 Annexure MA-5, see Anderson [20]; TAD-26, see Dagg [26].

22 Perkins at [4(h)].

23 *StarTrack Express Pty Ltd v TMA Australia Pty Ltd* [2023] FCAFC 200, [54] (O'Callaghan, Stewart and Button JJ).

24 Requirements to take "all reasonable steps to ensure" an outcome are common in regulatory schemes. They relevantly require the "tak[ing] of [all] action [to achieve the outcome] that is commensurate" or proportionate to achievement of the legislative object: *ASIC v RI Advice Group Pty Ltd (No 2)* (2021) 156 ACSR 371 at [396] (Moshinsky J).

25 Written submissions of the Applicant dated 22 April 2024, [29].

that step to be taken provided only that it be "reasonable" to take the step within 24 hours. The Commissioner's prima facie case on that construction cannot be described as "strong".

27. Put simply, having regard to the context and purpose of s 109(1), X Corp. contends that it is not a "reasonable step" within the meaning of s 109(1)(e) of the Online Safety Act to require it to do the only step remaining within its capacity to do, ie to remove access to the Video for 500 million users globally, in order to protect against the possibility that a person in Australia using a VPN to disguise their physical location may view the Video. The evidence does not establish that there are any actual Australian users who are doing that. The evidence goes no further than a theoretical possibility, based upon a potentially flawed process adopted by the Commissioner's staff.

28. The Respondent will therefore contend that, even if the Removal Notice is valid, the Respondent has complied with the requirements of the Removal Notice (regardless of its validity) by taking all steps which a reasonable person in its position would take in order to ensure the specified material is "neither accessible to, nor delivered to, any of the end-users in Australia using the service" for the purposes of s 109(1)(e) of the Online Safety Act. Accordingly, the Respondent's position is that it is not engaging and is not proposing to engage in conduct in contravention of a provision enforceable under Part 6 of the Regulatory Powers Act Act, relevantly s 111 of the Online Safety Act, for the purposes of the chapeau to s 121(1) of that Act.[26]

29. It is not appropriate for the Court to require the Respondent, by interlocutory injunction under pain of contempt, to do in the interim something which, the Respondent will contend at final hearing, the Removal Notice cannot validly require it to do.

D. Impact on Third Parties

30. The Interim Injunction should be discharged because of its impact on third parties. The consequence of specific relief on third parties is relevant to whether that relief ought be granted. This includes "*t*hird persons so connected with the defendant that, by reason of some legal or moral duty which he owes them, it would be 'highly unreasonable' for the court actively to prevent the defendant from discharging his duty",[27] but also extends to effects on the rights or position of members of the public generally.[28]

31. The X platform embodies the values of free speech and free press, and the Respondent's relevant policies (which govern its relationship with its end-users) affirm a "strong" belief that "the open and free exchange of information has a positive global impact, and that the posts must continue to flow."[29]

32. The Court's interim injunction impacts the ability of such of the approximately ~500 million users of the X platform globally who may wish to discuss the incident by reference to the Video from communicating in such manner (consistent with the Respondent's Terms of Service) as they see fit to communicate. It curtails the ability of

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26 *Aged Care Quality and Safety Commissioner v Stonebridge Global Consulting Pty Ltd*[2023] FCA 759 at [22] (Thomas J); *PQ (a pseudonym) v The Law Society of New South Wales (No 5)* [2021] NSWSC 463 at [21] (Adamson J).

27 *Gall v Mitchell* (1924) 35 CLR 222 at 230-231.

28 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 42.

29 "About country withheld content" policy, Annexure MA-6 to Anderson, p.53

those global users to make use of the X platform to express themselves, and communicate online about ideas, news and current affairs which may be of significance to them, in accordance with their rights to free expression.[30]

E. Inutile and futile

33. The Interim Injunction should also be discharged because it is inutile and futile in two distinct senses.

34. ***First***, the Interim Injunction is inutile and futile because the Video was and is widely accessible online otherwise than on X Corp's platform, including on the following platforms (as well as several others):[31]

    (a) YouTube (115,199 views between 15 April 2024 and 2 May 2024);

    (b) Instagram (39,300 views between 15 April 2024 and 2 May 2024);

    (c) TikTok (5,420 views between 30 April 2024 and 2 May 2024); and

    (d) Telegram (219,000 views between 15 April 2024 and 2 May 2024).

35. In its recently-served evidence, the Commissioner appears to concede the wide availability of the Video. The Affidavit of Toby Dagg dated 6 May 2024 at [30] states:

> The Commissioner does not (and cannot) 'police' the internet. To the extent that class 1 material can be located elsewhere online than the locations prioritised by the Commissioner through exercise of regulatory functions, this reflects the size and complexity of the internet. eSafety does not seek to remove all possible instances of an item of material from every site or platform online. If a person undertakes a concerted effort to locate the Video, they will likely succeed in that attempt.

36. In light of this evidence, the Court should not countenance a mandatory injunction tantamount to final relief, on a prima facie case that cannot be regarded as strong, in circumstances where the Video is otherwise widely available and there is no evidence of any actual access to the Video on the X platform by an Australian user (other than the Commissioner's staff). That a Court will not grant specific relief in respect of material which in any event is widely available on grounds of inutility or futility is well-established.[32]

37. <u>*Second*</u>, the Respondent is incorporated in the State of Nevada, in the United States of America, and has its head office and operations in the State of California, USA, and does not have any data center in Australia.[33] The data centers that process all requests to the X platform are all located in the United States. The parties' experts both agree that the

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30 See *Brown v Members of Classification Review Board of Office of Film & Literature Classification* (1998) 82 FCR 225 at 239 (French J).

31 Affidavit of Justin Healy Quill dated 2 May 2024, [6].

32 *Candy v Bauer Media Limited* [2013] NSWSC 979 at [20]-[21] (Pembroke J); *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB) at [36] (Eady J).

33 See Perkins at [7(h)]; Andersen at [14]-[15][redacted]

Interim Injunction is incapable of enforcement against the Respondent in the United States of America, because the Removal Notice (and the Interim Injunction) would contravene the *First Amendment to the United States Constitution* if they were made by any government agency, Congress, or the Courts of the United States.[34] The Interim Injunction would not be enforceable against the Respondent in the United States, where the Respondent is located, including because the Interim Injunction contravenes or is "*repugnant*" to fundamental public policy of the United States, reflected in the *First Amendment* and because of its penal character.[35] The Interim Injunction is to that extent futile.

F. Comity

38. That the Interim Injunction is repugnant to fundamental public policy of the US provides a further reason to discharge it. Injunctive relief that is inconsistent with the comity of nations should only be granted with great caution,[36] still more so on an interim basis. Imposing Australian classification standards on users worldwide clashes with comity,[37] morphing the underlying requirement imposed by s 109(1)(e) of the Online Safety Act and the Removal Notice to take all reasonable steps to restrict access to Australian end-users into an obligation to deny access or delivery globally irrespective of the differing interests, values and laws of other polities — like those reflected in US public policy.

8 May 2024

Bret Walker	**Sebastian Hartford-Davis**	**Samuel Hoare**
5th Floor St James' Hall	Banco Chambers	New Chambers

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34 Annexure AK-1 to the Affidavit of Ambika Kumar of 1 May 2024 (**Kumar Report**) at [8]; Annexure KM-1 to the Affidavit of Joshua Matz of 5 May 2024 (**Matz Report**) at [12].

35 Kumar Report at [8]; Matz Report at [12].

36 See *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 395-396 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

37 See eg *Bateman v Service* (1881) 6 App Cas 386 (PC, appeal from WASC) at 390-391 (Sirs Peacock, Smith and Couch), *Zacharassen v Commonwealth* (1917) 25 CLR 166 at 181 (Barton, Isaac and Rich JJ); *XYZ v Commonwealth* (2006) 227 CLR 532 at [7] (Gleeson CJ).