

NOTICE OF FILING

Details of Filing

Document Lodged:	Concise Statement
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	31/05/2024 3:56:02 PM AEST
Date Accepted for Filing:	31/05/2024 3:56:06 PM AEST
File Number:	NSD474/2024
File Title:	ESAFETY COMMISSIONER v X CORP.
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Concise Statement in Response

No. NSD474 of 2024

Federal Court of Australia

District Registry: New South Wales

Division: General

ESAFETY COMMISSIONER

Applicant

X CORP.

Respondent

The Respondent, **X Corp.**, responds as follows to the Further Amended Concise Statement (**CS**) filed 24 May 2024 by the Applicant, the **Commissioner** (adopting the terms defined in the CS unless otherwise indicated):

A. IMPORTANT FACTS ALLEGED TO GIVE RISE TO THE CLAIM

1. X Corp. admits paragraph 1 of the CS.
2. In response to paragraph 2 of the CS, X Corp.:
 - a. admits that, on 16 April 2024, a delegate of the Commissioner purported to issue the Notice to it under s 109(1) of the Online Safety Act (**purported Removal Notice**);
 - b. says that the purported Removal Notice was invalid for the reasons set out in paragraph 6(c) below; and
 - c. says that it has exercised its right to seek review of the decision to issue the purported Removal Notice under s 220(1) of the Online Safety Act and the *Administrative Appeals Tribunal Act 1975* (Cth) by its pending application for review to the Administrative Appeals Tribunal dated 6 May 2024.
3. In response to paragraph 3 of the CS, X Corp.:
 - a. says the purported Removal Notice identified the material the Notice purported to require to be “removed” (within the meaning of s 12 of the Online Safety Act) by reference to both URLs and a description of a video;
 - b. says the video the subject of the purported Removal Notice (**Video**) was recorded and produced by or with the consent of the victim of the assault;

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- c. says the victim’s position is that “noting our God given right to freedom of speech and freedom of religion, I am not opposed to [the Video] remaining on social media”; and
 - d. otherwise admits paragraph 3 of the CS.
4. In response to paragraph 4 of the CS, X Corp.:
- a. admits that in compliance with the purported Removal Notice, within 24 hours of its receipt, X Corp. geo-blocked the URLs in Australia;
 - b. admits that the effect of doing so is that an X user with an IP address presenting as in Australia cannot access the material at those URLs;
 - c. admits that X Corp. has denied that it needs to do more than it has done in order to comply with the purported Removal Notice; and
 - d. otherwise denies paragraph 4 of the CS.
5. X Corp. objects to paragraph 5 of the CS, because it does not sufficiently identify to X Corp., as a respondent to civil penalty proceedings, the case it is required to meet (in particular, the paragraph fails to identify the “steps” that are being referred to).¹ Under cover of that objection, X Corp. denies paragraph 5 of the CS.

B. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT

6. In response to paragraph 6 of the CS, X Corp.:
- a. admits that s 109(1) of the Online Safety Act confers the Commissioner (including by her delegate) with a discretion to issue “removal notices” where the preconditions specified in that subsection are satisfied, which preconditions include that the Commissioner must be satisfied that the material is or was “class 1 material” within the meaning of s 106 of that Act, being material that has been or is likely to be classified as “RC” by the Classification Board under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (**Classification Act**);
 - b. admits that the purported Removal Notice purports to be issued under s 109(1) of the Online Safety Act; and
 - c. says that the purported Removal Notice was not validly issued under s 109(1) of the Online Safety Act in circumstances where:
 - i. the power to issue the Removal Notice was not enlivened because the Commissioner’s delegate was not lawfully satisfied that the Video is or was “class 1 material” within the meaning of s 109(1)(b) of the Online Safety Act;

Particulars

As demonstrated by the “Statement of Reasons” produced and signed by the Commissioner’s delegate contemporaneously with her decision to issue the Removal Notice on 16 April 2024 (**Contemporaneous Statement of Reasons**), the delegate failed to apply the correct legal test in that she failed to:

¹ *CFMEU v BHP Coal Pty Ltd* (2015) 230 FCR 298 at [63] (Logan, Bromberg and Katzmann JJ).

- (i) consider and give effect to the Classification Code made under s 6 of the Classification Act as required by s 9 of that Act, including the guiding principles specified in cl 1 of that Code; and
- (ii) consider and give effect to the Classification Guidelines made under s 12 of the Classification Act (unless satisfied there were cogent reasons to depart therefrom) as required by s 9 of that Act.

The Commissioner's delegate failed to take into account mandatory relevant considerations in that, as required by the Classification Code and Guidelines, she failed to consider the full context of the Video, including that:

- (i) it was recorded, produced and originally shared by or with the consent of the victim of the assault depicted, rather than by his assailant;
- (ii) it is in the nature of news or current affairs material;
- (iii) the victim's position is that "noting our God given right to freedom of speech and freedom of religion, I am not opposed to [the Video] remaining on social media";

in circumstances where those matters mean that:

- (i) the guiding principle 1(d) of cl 1 of the Classification Code is not engaged;
- (ii) the Video cannot reasonably be said to so offend against the standards of morality, decency and propriety referred to in cl 2 item 1(a) of the Classification Code such that it should not be classified;
- (iii) the Video cannot reasonably be said to promote, incite or instruct in matters of crime or violence for the purposes of cl 2 item 1(c) of the Classification Code; and
- (iv) the Video cannot reasonably be said to promote crime or violence or be a gratuitous, exploitative or offensive depiction of violence for the purposes of the Classification Guidelines with respect to RC.

The Commissioner's delegate improperly took into account extraneous considerations, being the fact that the incident depicted in the Video has been described by the NSW Premier and Police Commissioner as a "terrorist act".

- ii. the Commissioner's delegate's exercise of any discretion to issue the Removal Notice miscarried because:
 - A. no consideration was given by the Commissioner's delegate to whether (or not) that discretion should be exercised as distinct from whether it was available;
 - B. the Commissioner's delegate failed to consider all relevant matters when deciding to exercise the discretion.

Particulars

As demonstrated by the Contemporaneous Statement of Reasons, the Commissioner's delegate failed to consider the facts that:

- (i) the Video was recorded, produced and originally shared by or with the consent of the victim of the assault depicted, rather than by his assailant;
 - (ii) the Video is in the nature of news or current affairs material;
 - (iii) the victim's position is that "noting our God given right to freedom of speech and freedom of religion, I am not opposed to [his video] remaining on social media"; and
 - (iv) the Video is and at all material times has been widely accessible to persons in Australia other than on the X platform, including in its full form on other social media services and various websites.
7. In response to paragraph 7 of the CS, X Corp. admits that s 111 of the Online Safety Act provides as is stated in the paragraph, and further says that there is only an obligation to comply with a valid requirement under a valid removal notice.
 8. X Corp. admits paragraph 8 of the CS but further says that, in accordance with s 109(1)(e) of the Online Safety Act, a removal notice requires that the recipient only "take all reasonable steps to ensure" the material specified in it is "removed" in the sense that word is used in s 12 (and not in the ordinary sense of the word).
 9. X Corp. admits paragraph 9 of the CS.
 10. X Corp. objects to paragraph 10 of the CS (including "taking other [unspecified] reasonable steps"), because it does not sufficiently identify to X Corp., as a respondent to civil penalty proceedings, the case it is required to meet (in particular, the paragraph fails to identify the "steps" that are being referred to (other than in sub-paragraphs (a), (b) and (c))). While maintaining that objection, X Corp.:
 - a. in response to sub-paragraph (a), says that removing the material entirely from the X service globally is not a reasonable step for the purposes of the purported Removal Notice or within the meaning of s 109(1)(f) of the Online Safety Act;
 - b. in response to sub-paragraph (b), says that restricting the material so it is visible only to the user who posted it would require the material to be so restricted from the X service globally, and is not a reasonable step for the purposes of the purported Removal Notice or within the meaning of s 109(1)(f) of the Online Safety Act;
 - c. in response to sub-paragraph (c), says that:
 - i. in addition to the geo-blocking referred to in paragraph 4 of the CS, it has "hidden" the material behind a notice in the sense in which it uses that term;
 - ii. the steps that X Corp. takes when it "hides" material in the sense in which it uses that term permit access to the material after clicking on an

acknowledgement and therefore do not constitute “removal” within the meaning of s 12 of the Online Safety Act; and

- iii. hiding the material behind a notice so that only the notice, and not the material, is visible to X users globally, as alleged in sub-paragraph (c), is not a reasonable step for the purposes of the purported Removal Notice or within the meaning of s 109(1)(f) of the Online Safety Act.

Particulars to sub-paragraphs (a), (b) and (c)

Globally removing, restricting or “hiding” the Video at the URLs listed in the purported Removal Notice is not consistent with the text, context or purpose of s 109(1)(f) of the Online Safety Act, each of which indicates that Parliament intended only that such steps as are reasonable to prevent access by, or delivery to, Australians be required to be taken. Consistently with the comity of nations, the Act does not permit the Commissioner to control what users in all other countries are permitted to see on social media services, based on her (or her delegate’s) assessment of ostensible Australian community values.

Globally removing, restricting or “hiding” the Video at the URLs listed in the purported Removal Notice would result in the Video being unavailable to the X platform’s more than 500 million users globally.

The Video is, and at all material times has been, widely accessible to persons in Australia other than on the X platform, including in its full form on other social media services and various websites.

- d. in response to sub-paragraph (d), says that this sub-paragraph does not identify any action, or alternatively any specific action, which it is alleged is a reasonable step that X Corp. “can and could have done” and so does not sufficiently identify to X Corp., as a respondent to civil penalty proceedings, the case it is required to meet;
- e. in response to sub-paragraph (e), says that:
 - i. this sub-paragraph does not identify any action, or alternatively any specific action, which it is alleged is a reasonable step that X Corp. “can and could have done”; and
 - ii. it objects to the subparagraph on the basis it refers to “taking further [unspecified] steps to restrict access to the material... further details of which are to be provided following discovery” ,

because the sub-paragraph does not sufficiently identify to X Corp., as a respondent to civil penalty proceedings, the case it is required to meet;
- f. in response to sub-paragraph (f), says that this sub-paragraph does not identify any action, or alternatively any specific action, which it is alleged is a reasonable step that X Corp. “can and could have done” and so does not sufficiently identify to X Corp., as a respondent to civil penalty proceedings, the case it is required to meet;
- g. in response to sub-paragraph (g), says that this sub-paragraph does not identify any action, or alternatively any specific action, which it is alleged is a reasonable step that X Corp. “can and could have done” and so does not sufficiently identify

to X Corp., as a respondent to civil penalty proceedings, the case it is required to meet; and

h. otherwise, while maintaining the objections noted above, denies paragraph 10 of the CS.

11. X Corp. objects to paragraph 11 because:

- a. it incorporates the objectionable allegations in paragraph 10 of the CS; and
- b. sub-paragraphs 11(b), (d), (e) and (f) do not identify any action, or alternatively any specific action,

and so paragraph 11 does not sufficiently identify to X Corp., as a respondent to civil penalty proceedings, the case it is required to meet. While maintaining these objections, X Corp.:

- c. repeats paragraph 10 above; and
- d. otherwise denies paragraph 11 of the CS.

12. In response to paragraph 12 of the CS, X Corp.:

- a. repeats paragraphs 10 and 11 above; and
- b. otherwise denies paragraph 12 of the CS.

C. RELIEF SOUGHT FROM THE COURT

13. In response to paragraph 13 of the CS, X Corp.:

- a. denies that the Commissioner is entitled to the final relief sought in her Originating Application or any relief; and
- b. further says that, if it did contravene s 111 of the Online Safety Act as alleged, which is denied, any relief should be refused to the Commissioner as a matter of discretion.

D. ALLEGED HARM

14. In response to paragraph 14 of the CS, X Corp.:

- a. admits that the Video depicts an act of violence;
- b. admits that the assault depicted in the Video has been described as a “terrorist attack” by the NSW Police Commissioner, but denies that the view of the NSW Police Commissioner is material to the issues before the Court; and
- c. otherwise does not admit paragraph 14.

15. In response to paragraph 15 of the CS, X Corp.:

- a. admits that there are approximately 2 million users of the X platform who are located in Australia;
- b. says further that the Video is and at all material times has been widely accessible to persons in Australia other than on the X platform, including in its full form on other social media services and various websites; and
- c. otherwise does not admit paragraph 15.

16. In response to paragraph 16 of the CS, X Corp.:
 - a. says that the Video is and at all material times has been widely accessible to persons in Australia other than on the X platform, including in its full form on other social media services and various websites; and
 - b. otherwise denies paragraph 16.

Certificate of lawyer

I, Robert Todd, certify to the Court that, in relation to the concise statement in response filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 31 May 2024



Signed by Robert Todd

Lawyer for the Respondent