NOTICE OF FILING

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Important Information

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No. NSD of 2024

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

ESAFETY COMMISSIONER
Applicant

X CORP.
Respondent

SUBMISSIONS OF THE ESAFETY COMMISSIONER ON INTERIM RELIEF

A. INTRODUCTION

1. On Monday 15 April 2024, Bishop Mar Mari Emmanuel was stabbed multiple times by a teenage assailant at Christ the Good Shepherd Church in Wakeley, New South Wales.

2. Video footage of the stabbing exists and spread online, in particular via Facebook and X.

3. On Tuesday 16 April 2024, the eSafety Commissioner, by her delegate, issued a notice to X Corp. requiring it to take all reasonable steps to remove the video material from X, more particularly the material located at certain identified URLs (**Notice**). The notice was issued under s 109 of the *Online Safety Act 2021* (Cth) (**Online Safety Act**).

4. In response to that notice, X Corp. geo-blocked the URLs identified in the Notice in Australia, such that a user in Australia with an Australian IP address cannot access the URLs via a computer or mobile phone web browser or the X app. X Corp. has not, however, taken any additional steps to stop Australian users from being able to access the material.

5. Despite having the technical capacity to do so, X Corp. has not done any of the following. It has not removed (ie deleted) the material at the identified URLs, it has not restricted access to those URLs to the account which posted them, it has not hidden the posts behind a notice (such that an X user can see only the notice, not the material at the URL).

6. As a result, a person in Australia can use a VPN to disguise their Australian IP address and, in doing so, then access the URLs identified in the Notice.

7. In these circumstances, the eSafety Commissioner contends that X Corp. has not complied with the Notice to the extent X Corp. is capable of doing so. X Corp. has therefore contravened s 111 of the Online Safety Act, which is a civil penalty provision capable of enforcement by way of civil penalty under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**Regulatory Powers Act**) and injunction under Part 7 of the Regulatory Powers Act.

8. The eSafety Commissioner seeks urgent interim injunctive relief pursuant to s 122 of the Regulatory Powers Act requiring X Corp. to do one of the following as soon as reasonably practicable and no later than within 24 hours, pending the final hearing and determination of this proceeding:

    8.1 restrict the discoverability of the material identified in the Notice to the author's profile so that only the author, and no other end-user, can view the material;

    8.2 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;

    8.3 if X Corp establishes that neither 8.1 or 8.2 is feasible, then restrict the discoverability of the material identified in the Notice to the author's profile and behind a notice so that end-users can only access the material via the author's profile and after viewing the notice;

    8.4 if X Corp establishes that neither 8.1 or 8.2 is feasible, then restrict the discoverability of the material to prevent the material identified in the Notice from appearing in any search results or any X feed on the X service.

9. To be clear, the eSafety Commissioner's primary position is that the orders in [8.1] or [8.2] should be made. The orders in [8.3] and [8.4] are a fall-back position only, in the event X Corp establishes that the other options are impossible for it to comply with.

10. The eSafety Commissioner will rely on two affidavits: one of Toby Allan Dagg dated 22 April 2024 and one to be finalised from an officer of the Australian Federal Police (Stephen Nutt).

B. STANDING AND JURISDICTION

11. Section 111 of the 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".[1] Section 111 provides:

> **111 Compliance with removal notice**
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> A person must comply with a requirement under a removal notice given under section 109 or 110 to the extent that the person is capable of doing so.
>
> Civil penalty: 500 penalty units.

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. Section 162(2)-(3) of the Online Safety Act 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 also provides that s 111 is enforceable by way of injunction under Part 7 of the Regulatory Powers Act. Section 165(2)-(3) of the Online Safety Act provide that the eSafety Commissioner is an authorised applicant, and this Court is a relevant court for the purposes of Part 7.

14. As to injunctions, the relevant provisions of the Regulatory Powers Act are as follows.

15. Section 121(2) of the Regulatory Powers Act confers power to grant a final mandatory injunction known as a "performance injunction":

> **121 Grant of injunctions**
>
> …
>
> *Performance injunctions*
>
> (2) If:
>
> (a) a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do a thing; and
>
> (b) the refusal or failure was, is or would be a contravention of a provision enforceable under this Part;
>
> the court may, on application by an authorised person, grant an injunction requiring the person to do that thing.

16. Section 122 of the Regulatory Powers Act confers power to grant an interim mandatory injunction:

> **122 Interim injunctions**

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[1] *Regulatory Powers (Standard Provisions) Act 2014* (Cth) s 79(a)

Grant of interim injunctions

(1) Before deciding an application for an injunction under section 121, a relevant court may grant an interim injunction:

(a) restraining a person from engaging in conduct; or

(b) requiring a person to do a thing.

No undertakings as to damages

(2) The court must not require an applicant for an injunction under section 121 to give an undertaking as to damages as a condition of granting an interim injunction.

17. Section 124(2) of the Regulatory Powers Act loosens some of the constraints that would otherwise apply to the grant of an injunction in equity:

124 Certain limits on granting injunctions not to apply

…

Performance injunctions

(2) The power of a relevant court under this Part to grant an injunction requiring a person to do a thing may be exercised:

(a) 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; and

(b) whether or not the person has previously refused or failed to do that thing; and

(c) 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.

18. That said, this Court retains its power to grant an injunction under s 23 of the *Federal Court of Australia Act 1976* (Cth). Section 125 of the Regulatory Powers Act provides:

125 Other powers of a relevant court unaffected

The powers conferred on a relevant court under this Part are in addition to, and not instead of, any other powers of the court, whether conferred by this Act or otherwise.

19. 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.

C. PRINCIPLES ON INTERIM INJUNCTIONS

20. The applicable principles are well-known. The eSafety Commissioner must show a prima facie case, in the sense of there being a "sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial", and that the

balance of convenience must favour the grant of an injunction.[2] The two enquiries are related, such that a stronger prima facie case will make up for a weaker balance of convenience and vice versa.[3]

D. PRIMA FACISE CASE

21. The eSafety Commissioner has a **strong prima facie case**.

22. A notice under s 109 of the Online Safety Act requires a recipient of the notice to "take all reasonable steps to ensure the removal of the material from the service" within 24 hours or such other time as is allowed by the eSafety Commissioner. Section 111 requires compliance with such a notice to the extent that the recipient of the notice is capable of doing so.

23. The eSafety Commissioner submits that there can be no question that X Corp. has not "removed" the material, when the Court has regard to the statutory definition of that word. Section 12 of the Online Safety Act defines "removed" as follows:

> **When material is removed from a social media service, relevant electronic service or designated internet service**
>
> For the purposes of this 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.

24. The material identified in the Notice has not been removed within the statutory meaning of this word because it can be, and has been, accessed by end-users in Australia by use of a VPN.

25. The eSafety Commissioner next submits that X Corp. has not taken all reasonable steps to remove the material which it is capable of taking.

26. *First*, X Corp's own website policies make it clear that X Corp. has the technical capability to take down the material, or to restrict access to it by limiting access to the poster or by hiding the material behind a notice. Further, similarly large and

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2 See *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [65] (Gummow and Hayne JJ).

3 See *Samsung Electronics Co. Ltd v Apple Inc* (2011) 217 FCR 238 at [67] (Dowsett, Foster and Yates JJ); *Mobileword Operating Pty Ltd v Telstra Corporation Ltd* [2005] FCA 1365 at [20] (Weinberg J); *Tait v P.T. Ltd as Trustee of the Scentre Tuggerah Trust* [2015] FCA 1015 at [23] (Besanko J).

sophisticated social media providers have the capability of taking down material from their services. There can be no technological impediment to X Corp. doing more.

27. *Second*, the Parliament's view of what was required is recorded in the explanatory memorandum accompanying the Online Safety Bill 2021 (Cth):[4]

> 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.

28. X Corp. is capable of removing the material. The Parliament understood these provision to require it then to remove the material.

29. *Third*, the obligation in ss 109 and 111 and the use of the expression "all reasonable steps" should not be understood as significantly attenuating the obligation to remove the material. It is important that the Parliament used the word "all" and the word "ensure". Limiting the obligation to "all reasonable steps" simply accommodates the possibility that a recipient of a notice can only do so much within a 24 hour time period.

30. The eSafety Commissioner is not aware of any technological reason why X Corp. could not do more to restrict access to the identified URLs within the 24 hour period permitted by the Notice.

E. BALANCE OF CONVENIENCE

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

32. *First*, the material identified in the Notice shows a graphic violent attack. It is confronting and could cause harm to users who watch it. Permitting access to the material is dangerous because it could be co-opted as part of a propaganda campaign by terrorist organisations. These are irreparable harms.

33. *Second*, the purpose of s 109 of the Online Safety Act is to protect Australians from harmful material. To adopt what O'Bryan J said in granting the Australian Competition and Consumer Commission a statutory interlocutory injunction to restrain an apprehended contravention of s 50 of the *Competition and Consumer Act 2010* (Cth):[5]

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

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

> … That is a matter of large importance and the Court should be vigilant in preventing conduct that carries the risk of contravening those prohibitions. As stated by Lockhart J in *ICI*, Parts IV and V of the Act involve matters of high public policy – they relate to practices and conduct that legislatures throughout the world in different forms and to different degrees, have decided are contrary to the public interest. Section 80 is essentially a public interest provision. In seeking interlocutory relief, the ACCC is protecting the public interest in ensuring compliance with the requirements of s 50.

34. Section 122 of the Regulatory Powers Act is a statutory injunction and is "essentially a public interest provision"[6] which recognises that the alleged contravening conduct "may be detrimental to the public interest".[7] This statutory context weighs the balance heavily in favour of the grant of injunctive relief.

35. *Third*, even in equity, it is permissible for a court to consider the interests of third parties. In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*, the joint judgment of Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ approved the following passage from Spry's *Equitable Remedies*:[8]

> the interests of the public and of third persons are relevant and have more or less weight according to the other material circumstances. So it has been said that courts of equity "upon principle, will not ordinarily and without special necessity interfere by injunction, where the injunction will have the effect of very materially injuring the rights of third persons not before the courts". Regard must be had "not only to the dry strict rights of the plaintiff and the defendant, but also the surrounding circumstances, to the rights or interests of other persons which may be more or less involved". So it is that where the plaintiff has prima facie a right to specific relief, the court will, in accordance with these principles, weigh the disadvantage or hardship that he would suffer if relief were refused against any hardship or disadvantage that might be caused to third persons or to the public generally if relief were granted, even though these latter considerations are only rarely found to be decisive. (Conversely, detriment that might be caused to third persons or to the public generally if an injunction were refused is taken into account.)

36. A consideration of third parties favours the grant of an injunction. The material may cause harm to a person viewing it due to its graphic and violent nature. The material may also be used by terrorist organisations to promote their terrorist ends.

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6 *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).

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

8 (1998) 195 CLR 1 at [65].

37. If it is contended that there is some free speech interest in the material, any such interest in the depiction of actual violence must be very, very low. Even in the context of First Amendment jurisprudence in the United States, the Supreme Court has said that "violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy'".[9] Actual violence is no constitutionally protected speech because violence is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality".[10]

38. *Fourth*, it is often useful to consider which course of action carries the lower risk of injustice if the grant or refusal of injunctive relief should turn out to be unjustified at trial.[11] That approach heavily favours the grant of an interim injunction here.

38.1 If an injunction is granted and the eSafety Commissioner's proceeding is ultimately dismissed, X Corp. can remove any notice or allow other users beyond the author to view the posts. The only "harm" will be that X users will have been denied access to such violent material during the pendency of the injunction.

38.2 If an injunction is refused and the eSafety Commissioner succeeds at trial, material that should have been removed will continue to have been accessible to Australian users, contrary to the evident objects of the Online Safety Act.

39. *Fifth*, the proposed interim injunction is capable of compliance. The Notice identified specific URLs. The actions proposed by the eSafety Commissioner and identified in the proposed interim relief are courses identified by X Corp.'s own materials as options available to it to restrict access to material on X.

40. *Sixth*, 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,[12] the Court may

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9 *Samuels v Makell*, 401 US 66 at 75 (1971) (Douglas J); *NAACP v Claiborne Hardware Co*, 458 US 886 at 916 (1982)

10 *Chaplinsky v New Hampshire*, 315 US 568 at 572 (1942).

11 See *Bradto Pty Ltd v Victoria* (2006) 15 VR 65 at [39] (Maxwell P and Charles JA); *4th Dimension Transport Pty Ltd v Australian Couriers Pty Ltd* [2022] FCA 1500 at [16] (McEvoy J); *Isignthis Limited v ASX Limited* [2020] FCA 567 at [5] (Davies J). See also *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2018] FCA 1221 at [9]-[10] (Beach J).

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

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.

41. *Seventh*, it is acknowledged that the interim injunction sought is mandatory in nature, but no different test applies to mandatory injunctions.[13]

42. *Eighth*, it is acknowledged that some of the interim relief sought is tantamount to some of the final relief sought. It will often be the case that the Court must, in this kind of case, scrutinise the strength of the prima facie case with more care.[14] But the prima case here is strong.

43. This is not a consideration weighing against the final fall-back interim relief sought, which limits but does not eliminate the accessibility of the post.

44. *Ninth*, the eSafety Commissioner would not be opposed to as prompt a final hearing as the business of the Court, and procedural fairness to the parties, would permit.

F. DISPOSITION

45. The Court should grant the interim relief sought in the originating application.

G. SUPPRESSION ORDERS

46. A copy of the video which the eSafety Commissioner directed X Corp to remove in the Notice is Confidential Exhibit TAD-2 to the Dagg Affidavit.

47. The eSafety Commissioner seeks a suppression order in respect of this exhibit under s 37AF of the *Federal Court of Australia Act 1976* (Cth) on the grounds that it is necessary to prevent prejudice to the proper administration of justice (in s 37AG(1)(a)) and necessary to prevent prejudice to the interests of the Commonwealth in relation to national security (in s 37AG(1)(b)).

48. In support of that application, the eSafety Commissioner relies on the Dagg Affidavit and the affidavit to be filed from Stephen Nutt.

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13 See *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2018] FCA 1221 at [8] (Beach J); *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2016] WASCA 105 at [85] (McLure P; Corboy J agreeing).

14 See *StarTrack Express Pty Ltd v TMA Australia Pty Ltd* [2023] FCAFC 200 at [53]-[54] (O'Callaghan, Stewart and Button JJ).

49. Necessary is a "strong word"[15] but it is satisfied here.

50. As to s 37AG(1)(a), a suppression order is needed so as not to subvert the statutory object of a removal notice under s 109, compliance with which (in the form of the obligation in s 111) the eSafety Commissioner is seeking to enforce by these proceedings. It would defeat the purpose of the enforcement regime if the eSafety Commissioner had to contribute to the spread of harmful material in order to enforce an obligation to remove that material against a respondent.

51. By way of analogy, in a blackmail case, it would impair the attainment of justice in a particular case, and discourage others from litigating to vindicate their interests, if the material the subject of the blackmail were to be made public by bringing proceedings.[16]

52. As to s 37AG(1)(b), the capacity for material such as Confidential Exhibit TAD-2 to contribute to radicalisation and acts of terrorism is supported by the affidavit from Stephen Nutt. It is necessary to suppress the material in order to prevent prejudice to the Commonwealth's national security.

Date: 22 April 2024

Christopher Tran
Counsel for the applicant

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15 *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [43] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

16 *John Fairfax Group Pty Ltd (recs and mgrs apptd) v Local Court of New South Wales* (1991) 26 NSWLR 131 at 141 (Kirby P); *AA v BB* (2013) 296 ALR 353 at [182] (Bell J).