FEDERAL COURT OF AUSTRALIA

File number:	NSD 474 of 2024
Judgment of:	**KENNETT J**
Date of judgment:	13 May 2024
Date of publication of reasons:	14 May 2024
Catchwords:	**PRACTICE AND PROCEDURE** – application for injunction under s 121 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**RP Act**) – where respondent issued with removal notice pursuant to s 109 of the *Online Safety Act 2021* (Cth) (**OS Act**) – where interim injunction granted under s 122 of the RP Act requiring compliance with notice – whether interim injunction should be extended – whether real issue to be tried – validity of removal notice – whether removal of content identified in notice for all users on the respondent's platform internationally a "reasonable step" required by ss 109 and 111 of the OS Act – where "comity of nations" considerations powerful – whether balance of convenience favours grant of injunction – where unenforceability of injunction has potential to bring administration of justice into disrepute **PRACTICE AND PROCEDURE –** applications for suppression orders pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) – whether orders necessary to prevent prejudice to the proper administration of justice – whether orders necessary to protect the safety of any person
Legislation:	*Acts Interpretation Act 1901* (Cth) ss 18A, 33 *Administrative Appeals Tribunal Act 1975* (Cth) s 28 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13 *Broadcasting Services Act 1992* (Cth) *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ss 7, 9, 9A, 11 *Federal Court of Australia Act 1976* (Cth) s 37AF *Online Safety Act 2021* (Cth) ss 3, 12, 106, 109, 111, 162 *Regulatory Powers (Standard Provisions) Act 2014* (Cth) ss 79, 82, 111, 121, 122

	National Classification Code (Cth) cl 3 *Guidelines for the Classification of Films 2012* (Cth) Explanatory Memorandum, Online Safety Bill 2021 (Cth)
Cases cited:	*BHP Group Ltd v Impiombato* [2022] HCA 33; 96 ALJR 956 *Bullock v Federated Furnishing Trades Society of Australasia (No 1)* (1985) 5 FCR 464 *Malek Fahd Islamic School Ltd v Minister for Education and Training (No 2)* [2017] FCA 1377 *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597 *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323 *Ousley v The Queen* (1997) 192 CLR 69
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	68
Date of hearing:	10 May 2024
Counsel for the Applicant:	T Begbie KC with CJ Tran
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the Respondent:	B Walker SC with S Hartford Davis and SJ Hoare
Solicitor for the Respondent:	Ashurst

ORDERS

NSD 474 of 2024

BETWEEN:	**ESAFETY COMMISSIONER** Applicant
AND:	**X CORP** Respondent
ORDER MADE BY:	**KENNETT J**
DATE OF ORDER:	**13 MAY 2024**

THE COURT ORDERS THAT:

1. The application to extend the interlocutory injunction granted on 22 April 2024 (as extended on 24 April 2024) is refused.
2. Costs of the application are reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

KENNETT J:

1 On 16 April 2024 the applicant (**the Commissioner**) issued a notice (**the removal notice**) to the respondent (**X Corp**) under s 109 of the *Online Safety Act 2021* (Cth) (**the OS Act**). Under s 111 of the OS Act, a person must comply with a requirement under a removal notice "to the extent that the person is capable of doing so". Section 111 specifies a civil penalty of 500 penalty units and is thus a "civil penalty provision" within the meaning of s 79(2) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**the RP Act**).

2 Section 162 of the OS Act provides that a civil penalty provision is enforceable under Part 4 of the RP Act (see also s 111 of that Act). Section 82 of the RP Act provides for an authorised person to apply to a relevant court for an order that a person who is alleged to have contravened a civil penalty provision is to pay a pecuniary penalty. Section 121 of the RP Act provides as follows.

> **121 Grant of injunctions**
>
> *Restraining injunctions*
>
> (1) If a person has engaged, is engaging or is proposing to engage, in conduct in contravention of a provision enforceable under this Part, a relevant court may, on application by an authorised person, grant an injunction:
>
> (a) restraining the person from engaging in the conduct; and
>
> (b) if, in the court's opinion, it is desirable to do so—requiring the person to do a thing.
>
> *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.

3 The Commissioner, who alleges that X Corp has not complied with the notice, seeks a declaration to that effect together with a pecuniary penalty under s 82 and an injunction under s 121(2). The proposed injunction is designed, in substance, to require X Corp to do that which (on the Commissioner's case) the removal notice requires.

4 An application by the Commissioner for an urgent interim injunction came before me as duty judge on 22 April 2024. Section 122 of the RP Act confers an express power to make such an injunction.

5 Although counsel appearing by video link announced an appearance for X Corp, he had no formal instructions and had only just received the material. The hearing therefore proceeded on the basis that the Commissioner was applying for the interlocutory injunction *ex parte*. I granted an injunction, effective until 5.00 pm on 24 April 2024, and listed the matter for further hearing on that day. On 24 April both parties were represented; however, counsel for X Corp informed me that his client needed more time to assemble evidence and provide instructions on the question of interlocutory relief. I extended the injunction to 5.00 pm on 10 May 2024 and listed the matter for further hearing on that day. At the close of argument on 10 May, I extended the injunction until 5.00 pm on Monday 13 May 2024 so that I could consider my decision over the weekend.

6 On the morning of 13 May 2024 I made an order refusing the Commissioner's application for a further extension of the interim injunction. These reasons explain why I concluded that the injunction should not be extended further. I also set out below my reasons for suppression orders that I made during the hearing on 10 May 2024.

The removal notice

7 On the evening of 15 April 2024 Bishop Mar Mari Emmanuel (**Bishop Emmanuel**) was attacked and repeatedly stabbed by a lone assailant while giving a sermon at the Assyrian Christ the Good Shepherd Church in Wakeley, New South Wales. A short video of the attack exists (**the stabbing video**). The video runs for about 11 seconds. It shows, from a vantage point apparently near the back of the church, the lone assailant rushing at Bishop Emmanuel and attacking him. The assailant raises their right arm and strikes the Bishop several times with a downward motion; the Bishop falls backwards. It is not clear from the video that a knife is being used, although that can be inferred from the motions of the assailant. The shocked and distressed reactions of witnesses can be heard.

8 The Commissioner's officers became aware of social media posts containing the stabbing video. They reached the view that the video was of such a nature that it should be the subject of a removal notice under s 109 and approached major online service providers. Some providers removed URLs containing the stabbing video from their platforms altogether. X Corp did not.

9 The removal notice was issued by a delegate of the Commissioner (**the delegate**) on 16 April 2024. Relevantly for present purposes, the notice says:

> This removal notice is given to you under section 109 of the Act and requires you to take all reasonable steps to ensure the removal of the class 1 material specified in **Attachment A**.

10 Attachment A identifies the relevant material by way of a list of 65 specified URLs, each of which designates a post on X Corp's social media platform (**X**). There follows a "Description of material", which consists of a description of the contents of the stabbing video followed by a statement:

> The content is class 1 material under the *Online Safety Act 2021* (Cth), for depicting matters of crime, cruelty and real violence in such a way that it offends against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that it would likely be classified RC.

11 The references in the removal notice to "class 1 material" and taking "all reasonable steps" to ensure removal come from s 109 of the OS Act. At this point, in order to identify the basis and the effect of the removal notice, it is useful to set out the relevant parts of s 109.

> **109 Removal notice given to the provider of a social media service, relevant electronic service or designated internet service**
>
> (1) If:
>
> (a) material is, or has been, provided on:
>
> (i) a social media service; or
>
> …; and
>
> (b) the Commissioner is satisfied that the material is or was class 1 material; and
>
> (c) the material can be accessed by end-users in Australia; and
>
> (d) the service is not:
>
> (i) an exempt Parliamentary content service; or
>
> (ii) an exempt court/tribunal content service; or
>
> (iii) an exempt official-inquiry content service;
>
> the Commissioner may give the provider of the service a written notice, to be known as a *removal notice*, requiring the provider to:
>
> (e) take all reasonable steps to ensure the removal of the material from the service; and
>
> (f) do so within:
>
> (i) 24 hours after the notice was given to the provider; or

(ii) such longer period as the Commissioner allows.

(2) So far as is reasonably practicable, the material must be identified in the removal notice in a way that is sufficient to enable the provider of the service to comply with the notice.

12 "Class 1 material" is defined by s 106. The only relevant aspect of the definition is s 106(1)(b), which is as follows.

(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

13 Another important expression in s 109 that is affected by a definition in the OS Act is "removal". The cognate expression "removed" is defined in s 12, as follows.

12 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.

14 As noted above, s 111 requires a person to comply with a requirement under a removal notice "to the extent that the person is capable of doing so". How that qualification interacts with s 109(1)(e), pursuant to which a notice only requires "all *reasonable* steps", may need to be explored at some stage but was not the subject of argument on this occasion.

15 The final injunction that the Commissioner seeks aligns, as noted above, with the Commissioner's conception of what the removal notice required X Corp to do. It was framed in several alternative forms in the originating application, on the basis that the optimal form would depend on a fuller understanding of how X Corp's systems work at a technical level. The prayer for relief is as follows.

3. An order under s 121(2) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) requiring the respondent to do the following:

(a) remove (in the ordinary sense of the word rather than the meaning in s 12 of the *Online Safety Act 2021* (Cth)) the material identified in the Notice from the respondent's X service (previously known as Twitter);

(b) alternatively, 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;

(c) alternatively, 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 or

(d) alternatively, 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.

The interim injunction

16 The injunction granted on 22 April and extended on 24 April was in the following terms.

> There be an interim injunction under s 122(1)(b) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) requiring the respondent, as soon as reasonably practicable and 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 No tice, and cannot remove the notice to reveal the material.

17 The reference to hiding the material behind a notice was suggested by the Commissioner by reference to an online policy document, published by X Corp to its users, which describes X Corp's processes in relation to material posted on its platform that X Corp considers unsuitable.

Issues in relation to extension of the injunction

18 Consideration of interlocutory injunctions usually proceeds by reference to two issues: whether there is a real issue to be tried (sometimes put as whether the applicant has a *prima facie* case for the relief sought) and where the balance of convenience lies. The parties' arguments in this case proceeded in that way and my reasons will also. The fact that both the injunction sought by way of final relief and the interlocutory injunction are statutory, rather than granted as an exercise of equitable jurisdiction, does not change the issues in any fundamental way.

19 A real issue to be tried is at least ordinarily a *sine qua non* for the grant of an interlocutory injunction, but does not for that reason necessarily resolve into a binary yes/no question. That is because the two issues are not always independent of each other: the nature of the injunctive relief and the burden it would place on the respondent can make it appropriate to consider, as part of the balance of convenience, the strength of the *prima facie* case that is presented (see eg *Bullock v Federated Furnishing Trades Society of Australasia (No 1)* (1985) 5 FCR 464 at 472 (Woodward J, Sweeney J agreeing)).

Real issue to be tried

20 Although the power invoked to support the interim injunction in this case is statutory (s 122(1)(b) of the RP Act), it remains necessary to identify the prayer or prayers for final relief in

support of which it is sought. There must be a real issue to be tried (or a *prima facie case*) in support of some form of final relief to which the interim injunction is connected. Here, the proposed interim injunction connects to the proposed final injunction that would require compliance with the requirements of the removal notice as interpreted by the Commissioner (although, being mandatory in form and effect, it does not so connect by preserving the *status quo* pending a final hearing). For the interim injunction to be continued, the Commissioner must show that she has a *prima facie* case for the final injunction that she seeks. So much was not controversial.

21 Two issues were agitated in this connection:

(a) whether the removal notice was a valid exercise of power under s 109; and

(b) whether, given that the notice only requires (and can only require) X to take "reasonable steps" to ensure removal of the material, the proposed final injunction goes further than what is required for compliance with the notice.

Validity of the removal notice

22 Section 109 of the OS Act, which is the source of power for the removal notice, has been set out above. If the notice was not authorised by s 109, it is of no legal effect and clearly cannot form the basis for the grant of an injunction under s 121 of the RP Act.

23 X Corp argues that, therefore, the issue of a valid removal notice is part of what the Commissioner must prove at a final hearing. The Commissioner has led no evidence at this interlocutory stage for the validity of the removal notice, other than the notice itself. Such evidence as has been adduced (by X Corp) concerning the delegate's reasons for issuing the notice indicates, according to X Corp, that the Commissioner probably will not be able to establish the validity of the notice. That evidence will be considered shortly.

24 The argument that the Commissioner must prove the validity of the notice at the final hearing cannot be accepted at its highest. In *Ousley v The Queen* (1997) 192 CLR 69 at 130-131 (***Ousley***), Gummow J said:

> The more appropriate principle is that the validity of an administrative act or decision and the legality of steps taken pursuant to it are presumed valid until the act or decision is set aside in appropriate proceedings. Where "acts are of an official nature … everything is presumed to be rightly and duly performed until the contrary is shown".
>
> (Citations omitted.)

25 *Ousley* was a case where listening device warrants were asserted to be invalid as a basis for objecting to the tender of evidence obtained under those warrants. In other words, it involved a collateral attack on the warrants rather than an administrative law proceeding seeking to have them set aside. The decision in *Ousley* predated *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597 (***Bhardwaj***), and the reference by Gummow J to a presumption of validity needs to be read in the light of what was decided in that case. In *Bhardwaj* at [151], Hayne J said (referring to *Ousley*):

> … administrative acts and decisions are subject to challenge in proceedings where the validity of that act or decision is merely an incident in deciding other issues. If there is no challenge to the validity of an administrative act or decision, whether directly by proceedings for judicial review or collaterally in some other proceeding in which its validity is raised incidentally, the act or decision may be presumed to be valid. But again, that is a presumption which operates, chiefly, in circumstances where there *is* no challenge to the legal effect of what has been done. *Where there is a challenge, the presumption may serve only to identify and emphasise the need for proof of some invalidating feature before a conclusion of invalidity may be reached*.
>
> (Citations omitted; emphasis added.)

26 Many kinds of litigation would become very unwieldy if a party relying on the legal effect of an administrative decision could be put to proof of all factual matters going to its validity. Where an official notice (such as the removal notice here) is relied upon and is valid on its face, the starting point at least must be that it has the effect it purports to have unless “some invalidating feature” is proved. Even if that is not correct, and the Commissioner must prove the validity of the removal notice at a final hearing, it would in my view be incumbent on X Corp at least to identify clearly any asserted basis of invalidity. For the purpose of identifying a real issue to be tried at an interlocutory stage, it is appropriate to proceed on the basis that the removal notice is valid unless the evidence discloses a substantial basis for doubting that its validity will be established at trial. These observations have some relevance to how the evidence (such as it is) going to the delegate’s reasoning process is to be understood.

27 On 30 April 2024 the solicitors for X Corp wrote to the Commissioner’s solicitors requesting a statement of reasons, under s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**the ADJR Act**) and s 28 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**the AAT Act**), for the decision to issue the notice. The statement was requested as a matter of urgency, although the legislation relied upon allows the decision maker a period of 28 days after a request for the provision of reasons. The Commissioner’s solicitors responded to the effect that a statement of reasons had not been, but would be, prepared. Noting the timing of these proceedings, they enclosed a document signed by the delegate, dated 16 April 2024 and entitled

"Statement of Reasons". They noted that this document (which I will refer to, neutrally, as **the decision record**) had not been prepared for the purposes of, or in accordance with, the ADJR Act or the AAT Act.

28 The decision record would likely be found not to comply with the requirements for a statement of reasons under the ADJR Act and the AAT Act. However, that is currently not to the point. The Commissioner's solicitors were presumably writing on instructions and I am therefore prepared, for present purposes, to proceed on the basis that the author of the decision record did not intend it to be a document that could be furnished in satisfaction of the duty to give reasons under those Acts. However, that also does not take matters very far. The document is signed by the delegate and purports to record her reasons for the decision. It is thus the only evidence, so far, of her reasoning process.

29 The decision record has the following relevant features.

(a) It says expressly that it sets out the delegate's reasons for deciding to give the renewal notice to X Corp (at [2]).

(b) It very briefly sketches the legislative framework and annexes the "relevant" sections of the Act in an appendix. Those sections are ss 106 and 109.

(c) Under the heading "Material relied upon to make the decision", the decision record says:

> I have taken the following information into account in making my decision:
>
> a. On 15 April 2024, the eSafety Commissioner received four complaints about violence and violence extremism on the platform known as X and twitter.com:
>
> Complaints about violence:
>
> i. CYR- 0511323
>
> ii. CYR- 0511326
>
> iii. CYR - 0511328
>
> Complaint about violent extremism:
>
> i. CYR- 0511327
>
> b. The content investigated in these complaints (the Material) is described in Appendix B and was found to depict matters of crime, cruelty or violence at the following URLs:
>
> [redacted]
>
> c. The Material can be accessed by end-users in Australia.

d. eSafety investigators identified further instances of the same material being accessible at different URLs on X. The URLs to the Material, including the URLs identified by eSafety investigators has been included in Appendix B.

e. On 16 April 2024 an informal removal request for all of the U Rls included in Appendix B was sent to X via their Legal Request reporting portal at: https://leqalrequests.twitter.com/forms/landinq disclaimer. The following ticket numbers were provided: 365937303 and 365941713, but no further response was received. The Material is still available at the time of giving the Notice.

f. On 16 April 2024 the incident was described by the NSW Premier Chris Minns as an act of terrorism and the NSW Police Commissioner Karen Webb declared the incident a terrorist act.

(Footnotes omitted.)

(d) Reference is then made to "documents" taken into account. These were the offending material, two policy documents issued by the Commissioner and the relevant sections of the OS Act.

(e) Under the heading "Reasons for decision", the decision record says:

I am satisfied that the requirements for giving a removal notice under section 109 have been met. Having considered the above documents and information, I am satisfied that:

a. The Material is class 1 material as defined in section 106(b) of the Act, because:

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; and

iii. if the film were to be classified, the film would likely to be classified RC (refused classification) by the Classification Board as it depicts matters of crime, cruelty and real violence in such a way that it offends against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that it would likely be classified RC.

b. The Material is provided on X which is a social media service as defined under section 13 of the Act because:

i. it is an electronic service that has the sole or primary purpose of enabling online social interaction between 2 or more end-users;

ii. the service allows end-users to link to, or interact with, some all of the other end-users; and

iii. the service allows end-users to post material on the service.

c. X Corp. is the provider of the social media service, X.

d. The Material is not provided on an exempt service as defined in section

5 of the Act.

e. The Material can be accessed by end-users in Australia.

(f) The decision record also says:

> In addition, I have considered the following circumstances:
>
> a. On 15 April 2024, X Corp. were notified by email at kreen@x.com of the Material being accessible on X. A representative from X Corp replied advising their teams were across the situation and for eSafety to report the material using their Legal Requests form.

30 I pause here to note that, while the decision record would be admissible on a final hearing as evidence of the delegate's thought process, the same might not be true of a statement of reasons prepared, in the shadow of this litigation, under the ADJR Act or the AAT Act. If the Commissioner sees a need to prove further facts concerning the delegate's reasons, it may be necessary for that to be done by way of an affidavit.

31 The view which I take as to where the onus of proof lies in relation to the validity of the notice means that the decision record supports X Corp's case to the extent that it provides evidence of a misconception of a relevant legal test or an extraneous consideration being taken into account. To the extent that the decision record merely fails to disclose the taking into account of a mandatory consideration, it advances X Corp's position only if that failure leads to an inference that the consideration was not taken into account. Such an inference can be readily drawn in the case of a statement of reasons produced in purported compliance with a provision such as s 13 of the ADJR Act, because compliance requires an explanation of the reasons and reference to the evidence relied on: see eg *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323 at [5] (Gleeson CJ), [35] (Gaudron J), [69] (McHugh, Gummow and Hayne JJ). More caution is needed when reasons are given voluntarily: *Malek Fahd Islamic School Ltd v Minister for Education and Training (No 2)* [2017] FCA 1377 at [42] (Griffiths J). In effect, silences in a statement of reasons are meaningful only if it appears that the statement was intended to be comprehensive. The decision record in the present case does not appear to be of that kind.

32 The decision record indicates that some attention was given to the test posed by s 106(1) as to whether material is "class 1 material". That test requires consideration of whether the material would be likely to receive an "RC" classification under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (**the Classification Act**); and [9(a)(iii)] of the decision record expresses itself in language taken from the relevant clause of the *National Classification Code* made under that Act (**the Code**). Neither the Code nor the *Guidelines for the*

Classification of Films 2012 (also determined under the Classification Act) is expressly referred to, and no reasoning process is set out. However, given the nature of the document, it is difficult to infer from this that there was no such reasoning process or that considerations necessary to the analysis were ignored. To the extent that things are not said in the decision record, therefore, this does not advance X Corp's case that the notice is invalid. Further, if my conclusion above as to where the onus of proof lies on this issue is wrong, omissions from the decision record do not prevent the Commissioner from proving the delegate's reasoning process in more detail (even though that might require the courageous step of calling evidence from the decision maker).

33 As to positive indications of error, X Corp relies on [7(f)] of the decision record, which notes that the incident shown in the stabbing video was "described as an act of terrorism" by the Premier of New South Wales and the NSW Police Commissioner. There is a strong argument that the characterisation of the attack depicted in the stabbing video as an act of terrorism, and the opinions of other persons as to this characterisation, are irrelevant to whether the video would be classified as RC. Briefly, the argument is as follows:

(a) RC is the highest classification for films: Classification Act, s 7(2).

(b) The matters to be taken into account in a classification decision, under s 11 of the Classification Act, "include":

> (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
>
> (b) the literary, artistic or educational merit (if any) of the publication, film or computer game; and
>
> (c) the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and
>
> (d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published

(c) Films must be classified in accordance with the Code: Classification Act, s 9. Section 9A, which gives an automatic RC classification to a film that "advocates" a terrorist act, is not engaged by the mere depiction of such an act.

(d) Relevantly to a depiction of an act of violence, cl 3 the Code calls for an RC classification for films that:

> depict, express or otherwise deal with matters of … violence … 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 …

(e) The Guidelines focus on what is termed an "impact test". Material is to be classified as RC if its "impact" exceeds that of R 18+ material (which is not to exceed "high"). The Guidelines then add that films "will be refused classification" if they contain, relevantly:

> Gratuitous, exploitative or offensive depictions of:
>
> (i) violence with a very high degree of impact or which are excessively frequent, prolonged or detailed; [or]
>
> (ii) cruelty or real violence which are very detailed or which have a high impact; …

(f) The classification regime is thus concerned with how an act of violence is depicted and whether the depiction is likely to offend standards of morality, decency and propriety. The language of the Classification Act, the Code and the Guidelines applies both to fictional works and to footage of real events. Material that *advocates* or provides instruction for terrorist acts is dealt with separately by specific provisions. Hence, whether a violent act has characteristics that attracts the label of terrorism is not relevant to how a film showing that act (and only the act) would be classified. *A fortiori*, whether the act has been described by others as an act of terrorism is also irrelevant.

34 However, while this argument has considerable force, it does not lead to the conclusion that the delegate erred. Section 109(1) is expressed in discretionary terms and, by force of s 33(2A) of the *Acts Interpretation Act 1901* (Cth) (**the Acts Interpretation Act**), is to be read as conferring a discretion as to whether or not to issue a removal notice once the conditions in paras (a) to (d) are satisfied. The fact that the incident shown in the stabbing video has been identified by persons in authority as a terrorist act may confer particular meaning on the video in the eyes of some viewers. It may make the video more likely to be used as a recruiting tool or a means of intimidation by terrorist groups. This is at least potentially relevant to the exercise of the discretion in s 109(1). The decision record does not identify the particular stage of the decision-making process at which the description of the act as one of terrorism was given weight. Mere reference to the description as something that was taken into account therefore does not point to that matter having been erroneously considered as an aspect of the classification question.

35 Finally, X Corp submitted that the decision to issue the notice was vitiated by jurisdictional error in that it was unreasonable. The stabbing video, it was submitted, was simply not capable of being seen by a reasonable person as class 1 material. It is difficult to say much about this

point without entering into the merits of the decision, which are not a matter for the Court. The decision is the subject of an application for merits review in the Administrative Appeals Tribunal, where those merits can be carefully weighed with the benefit of detailed submissions and potentially expert evidence.

36 The decision to be made under the Classification Act, the Code and the Guidelines is evaluative and involves identification and application of "the standards of morality, decency and propriety generally accepted by reasonable adults". These things are highly debatable. While it is certainly arguable that the depiction of violence in the stabbing video is not sufficiently long, detailed or otherwise impactful to warrant an RC classification, it does not follow that the view taken by the delegate was not open.

37 For these reasons I have concluded that:

(a) on the current evidence, there is not a substantial possibility that X Corp will be able to establish that the removal notice is invalid; and

(b) if the Commissioner bears the onus to prove validity, there is not a sufficient reason at this stage to depart from the assumption that that onus can be met.

"All reasonable steps"

38 The source of the dispute between the parties on this issue is that, while X Corp has agreed to "geoblock" the 65 URLs specified in the removal notice (so that they are not accessible to users with IP addresses in Australia), the Commissioner contends that this is not sufficient to comply with the notice. A significant number of people in Australia use Virtual Private Networks (**VPNs**) to connect to the internet without using an IP address linked to an Australian provider. These users, while physically in Australia, are not affected by the geoblocking X Corp has imposed and therefore still have access to the 65 URLs.

39 The Commissioner therefore seeks a final injunction that would require X Corp to remove the 65 URLs from its platform altogether or make them inaccessible to all users. There appears to be no dispute that, because of the use of VPNs, this is what it would take to prevent *all* users in Australia from going to one of the 65 URLs and viewing the stabbing video. The Commissioner argues that such action is within the "all reasonable steps" that the removal notice requires to be taken. X Corp argues that a requirement for worldwide removal or blocking of the material goes beyond what is "reasonable".

40 The policy questions underlying the parties' dispute are large. They have generated widespread and sometimes heated controversy. Apart from questions concerning freedom of expression in Australia, there is widespread alarm at the prospect of a decision by an official of a national government restricting access to controversial material on the internet by people all over the world. It has been said that if such capacity existed it might be used by a variety of regimes for a variety of purposes, not all of which would be benign. The task of the Court, at least at this stage of the analysis, is only to determine the legal meaning and effect of the removal notice. That is done by construing its language and the language of the Act under which it was issued. It is ultimately the words used by Parliament that determine how far the notice reaches.

41 Section 109(1), which is set out above, determines what a removal notice is and does. The only notice that may be given is a notice "requiring the provider" to "take all reasonable steps to ensure the removal of the material from the service". The Commissioner chooses the material to which the notice is to apply (based on whether it is "class 1 material") but does not have a discretion concerning how stringent or widespread the restrictions on access to that material are to be. The notice necessarily requires "all reasonable steps" to "ensure the removal" of the material.

42 "Removed", as noted above, is defined by s 12 of the OS Act. Section 18A of the Acts Interpretation Act requires (as common sense would suggest) that other grammatical forms of the same word be given corresponding meanings. "Removal" of material from a social media platform is a process that results in the material being "removed" in the defined sense: that is, a state of affairs where "the material is neither accessible to, nor delivered to, any of the end-users in Australia using the service".

43 The phrase "any of the end-users in Australia" must be read in context.

(a) One aspect of the context is s 23, which provides that the OS Act extends to acts, omissions, matters and things outside Australia.

(b) A second aspect of the context is the objects of the OS Act, set out in s 3, which are to promote and improve "online safety for Australians". The reference to "Australians" suggests that the Act directs its attention to all Australian residents, not only those who use Australian service providers to connect to the internet.

(c) A third aspect of the context is the Explanatory Memorandum to the Bill for the OS Act (the Online Safety Bill 2021 (Cth)). The Explanatory Memorandum does not cast any direct light on the intended scope of a removal notice under s 109 (other than by

observing that the section was intended to apply whether or not the relevant service is provided from within Australia). It notes that the provisions in what became Part 9 of the OS Act were substantially a re-enactment of earlier provisions in Schedules 5 and 7 to the *Broadcasting Services Act 1992* (Cth) (**the BS Act**). Within the time frame of an urgent interlocutory decision, the extent to which I have been able to do my own research on the legislative history is limited. With the parties (both represented by competent counsel) not having submitted that any part of the legislative history would assist me in resolving the constructional issues as to what a removal notice requires to be done, I have proceeded on the basis that analysis of the former provisions of the BS Act would not be illuminating.

44 The breadth with which the objects of the OS Act are expressed indicates that "any of the end-users in Australia" in s 12 should not be read narrowly. I was not taken to anything in the Act suggesting that the location of the IP address through which a person physically located in Australia connects with the internet was intended to make a difference as to whether they were to be denied access to class 1 material by operation of a removal notice. The Act does not use concepts derived from the structure of the internet, in lieu of ordinary geographical or territorial notions, to describe where people are. I have concluded that the phrase was intended to have its ordinary meaning and that "removal" therefore means making the material inaccessible to all users physically located in Australia. The original location of the relevant provisions in the BS Act, which regulates traditional broadcast media, tends (albeit not very strongly) to confirm this conclusion.

45 What the removal notice requires, therefore, is "all reasonable steps to ensure" that the 65 URLs are not accessible to any users physically in Australia. What is meant by "reasonable" steps is therefore critical.

46 I have no doubt that removing the 65 URLs from its platform altogether would be a reasonable step for X Corp to take, in the sense that a decision by X to take that step could readily be justified. There is uncontroversial evidence that this is what other social media platforms have done, and that X Corp would not be in breach of any United States law if it took this step. However, this is not the test. The OS Act pursues a policy. It is not bounded by the policies of service providers or their contractual relationships with their users. Section 109 imposes its requirements regardless of the wishes of providers and of individual users.

47 The qualifier "reasonable" should therefore be understood as limiting what must be done in response to a notice to the steps that it is reasonable to expect or require the provider to undertake. That understanding is consistent with how duties arising under the general law to take "reasonable" steps commonly work. Identification of the steps that are "reasonable" in this sense may involve consideration of expense, technical difficulty, the time permitted for compliance (which may be short: see s 109(2)) and the other interests that are affected. It is the last of these factors that is the focus of the parties' disagreement.

48 The argument that making the 65 URLs inaccessible to all users of X Corp's platform everywhere in the world is *not* a step that it is "reasonable" to require X Corp to perform in order to ensure that the URLs are inaccessible to Australian users (and therefore is not a step required by the removal notice) is powerful.

49 If s 109 of the OS Act provided for a notice imposing such a requirement, it would clash with what is sometimes described as the "comity of nations" in a fundamental manner. That concept, and the principle of statutory construction that arises from it, were recently discussed by reference to earlier cases in *BHP Group Ltd v Impiombato* [2022] HCA 33; 96 ALJR 956 at [23]-[32] (Kiefel CJ and Gageler J). It is not limited to the familiar presumption against the extraterritorial operation of statutes and is therefore not excluded here by the express provision for extraterritorial operation in s 23 of the OS Act. It is useful to set out their Honours' recitation of the authorities at [27]-[31].

> Exposition of the common law presumption in play in *Morgan v White* and in *Meyer Heine* can be traced in Australia to *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association*. There O'Connor J said:
>
> > Most Statutes, if their general words were to be taken literally in their widest sense, would apply to the whole world, but they are always read as being prima facie restricted in their operation within territorial limits. Under the same general presumption every Statute is to be so interpretated and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law: *Maxwell on Statutes*, 3rd ed, p 200.
>
> Plainly, O'Connor J did not see the implied restriction on the territorial operation of a statute to which he referred in the first sentence as freestanding but rather as a reflection of the "general presumption" which he expressed in the second sentence with reference to *Maxwell on Statutes*. There, the presumption appeared in the precise terms adopted by O'Connor J under the heading "Presumption against a Violation of International Law".
>
> In *Barcelo v Electrolytic Zinc Co of Australasia Ltd*, Dixon J expressed the presumption in the same language drawn from *Maxwell on Statutes* as had been adopted by O'Connor J in *Jumbunna*. His Honour did so interchangeably with language drawn from 19th century English authority to the effect that "[i]t is always to be

> understood and implied that the legislature of a country is not intending to deal with persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or State".
>
> Dixon J returned to the presumption in *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society*. The "well settled rule of construction", his Honour there explained, is that "an enactment describing acts, matters or things in general words, so that, if restrained by no consideration lying outside its expressed meaning, its intended application would be universal, is to be read as confined to what, according to the rules of international law administered or recognized in our Courts, it is within the province of our law to affect or control".
>
> In *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd*, Dixon CJ expressed the presumption yet again. He did so, more pithily, in terms which he said were appropriate to be applied to a Commonwealth statute after the Statute of Westminster Adoption Act. He described it as "a presumption which assumes that the legislature is expressing itself only with respect to things which internationally considered are subject to its own sovereign powers".
>
> (Footnotes omitted.)

50 If given the reach contended for by the Commissioner, the removal notice would govern (and subject to punitive consequences under Australian law) the activities of a foreign corporation in the United States (where X Corp's corporate decision-making occurs) and every country where its servers are located; and it would likewise govern the relationships between that corporation and its users everywhere in the world. The Commissioner, exercising her power under s 109, would be deciding what users of social media services throughout the world were allowed to see on those services. The content to which access may be denied by a removal notice is not limited to Australian content. In so far as the notice prevented content being available to users in other parts of the world, at least in the circumstances of the present case, it would be a clear case of a national law purporting to apply to "persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or State". Those "persons or matters" can be described as the relationships of a foreign corporation with users of its services who are outside (and have no connection with) Australia. What X Corp is to be permitted to show to users in a particular country is something that the "comity of nations" would ordinarily regard as the province of that country's government.

51 The potential consequences for orderly and amicable relations between nations, if a notice with the breadth contended for were enforced, are obvious. Most likely, the notice would be ignored or disparaged in other countries. (The parties on this application tendered reports by experts on US law, who were agreed that a US court would not enforce any injunction granted in this case to require X Corp to take down the 65 URLs.)

52 Section 23(2) of the OS Act extends the operation of its provisions to "acts, omissions, matters and things outside Australia". It confirms that X Corp is in breach of the removal notice if it fails to take some "reasonable step" notwithstanding that the act or omission constituting that failure occurs overseas. However, s 23(2) does not control the meaning of "all reasonable steps". A clear expression of intention would be necessary to support a conclusion that Parliament intended to empower the Commissioner to issue removal notices with the effect for which she contends.

53 The result is that, read in context and in the light of normal principles of statutory construction, the "reasonable steps" required by a removal notice issued under s 109 do not include the steps which the Commissioner seeks to compel X Corp to take in the present case.

Conclusions

54 For these reasons I have come to the view, based on the arguments advanced at this interlocutory stage, that the Commissioner will not succeed in establishing that compliance with the removal notice entails blocking access to the 65 URLs by all users of X Corp. It follows that there is not a *prima facie* case for the grant of a final injunction in the terms sought.

Balance of Convenience

55 The conclusion reached in the previous paragraph makes it unnecessary to express any detailed view as to the balance of convenience.

56 If the considerations relating to the comity of nations (discussed at [48]–[51] above) had not led me to the view that the Commissioner has not made out a *prima facie* case, the same considerations would have led me to conclude that the balance of convenience does not favour extending the interlocutory injunction in its current (or any similar) form.

57 On the one hand the injunction, if complied with or enforced, has a literally global effect on the operations of X Corp, including operations that have no real connection with Australia or Australia's interests. The interests of millions of people unconnected with the litigation would be affected. Justifying an interlocutory order with such a broad effect would in my view require strong prospects of success, strong evidence of a real likelihood of harm if the order is not made, and good reason to think it would be effective. At least the first and the third of these circumstances seem to be largely absent. The first is discussed above. As to the third, it is not in dispute that the stabbing video can currently be viewed on internet platforms other than X. I was informed that the video is harder to find on these platforms. The interim injunction is therefore

not wholly pointless. However, removal of the stabbing video from X would not prevent people who want to see the video and have access to the internet from watching it.

58 On the other hand, there is uncontroversial expert evidence that a court in the US (where X Corp is based) would be highly unlikely to enforce a final injunction of the kind sought by the Commissioner; and it would seem to follow that the same is true of any interim injunction to similar effect. This is not in itself a reason why X Corp should not be held to account, but it suggests that an injunction is not a sensible way of doing that. Courts rightly hesitate to make orders that cannot be enforced, as it has the potential to bring the administration of justice into disrepute.

59 It was suggested that an injunction, even if not enforceable, could have an educative or deterrent effect. X Corp's amenability to education and deterrence might be thought to be open to doubt. In any event, while these are sometimes important considerations in the framing of final relief, I doubt whether they have a proper role in the making of interlocutory orders.

A further issue: material non-disclosure

60 X Corp also submitted that the Commissioner's failure to disclose the decision record at the initial hearing (which proceeded as if it was an *ex parte* application) required the interlocutory injunction to be dissolved. In oral submissions it was stressed that no allegation of deliberate concealment or anything professionally improper was being made. It was also accepted that the point only affected the period between the initial grant of the injunction and the orders made two days later that extended it. The extension followed a further hearing at which X Corp was represented.

61 It may be theoretically possible to dissolve the interim injunction, *nunc pro tunc*, only in so far as it had effect during a particular period. However, the point seems to be largely academic in the light of the difficulties attending the enforcement of the injunction.

62 In any event, while disclosure of the decision record at the first hearing might have lengthened that hearing, I am not persuaded that it would have led to the injunction being refused. I have explained above why I do not consider that the decision record points to error in the decision to issue the removal notice.

Disposition of the application to extend the injunction

63 The application to extend the interlocutory injunction will be refused. I will reserve the question of costs.

Suppression orders

64 At the hearing on 10 May 2024 I made orders under s 37AF of the *Federal Court of Australia Act 1976* (Cth) (**the Federal Court Act**) prohibiting disclosure of certain evidence. The orders were not opposed by any party. However, because orders of this kind involve a departure from the principle of open justice (the importance of which is affirmed by s 37AE of the Federal Court Act), such orders should not go unnoticed and some brief reasons should be given for making them.

65 Order 1 of the orders made on 10 May prohibits disclosure of:

(a) the particular URLs which contain the stabbing video; and

(b) the names and contact details of employees of the Australian Communications and Media Authority who work to the Commissioner.

66 Disclosure of the URLs containing the stabbing video would advertise where the stabbing video can be viewed on X and facilitate access to the video by any user of the platform who is able to circumvent X Corp's geoblocking. This would undermine what the Commissioner is seeking to achieve by bringing the proceeding and compromise the utility of the injunction that the Commissioner is seeking. I was satisfied that an order preventing disclosure of this information before the proceeding is determined was justified on the ground set out in s 37AG(1)(a) of the Federal Court Act: that the order is necessary "to prevent prejudice to the proper administration of justice".

67 The evidence supporting the suppression of the names and details of the Commissioner's officers was contained in an affidavit affirmed by Mr Toby Dagg which I was also satisfied should be suppressed. That evidence persuaded me that, in the heated political environment surrounding the removal order and its enforcement, disclosure of the names of individual officers could be prejudicial to their safety. The same is true of the details of communications which are recited in Mr Dagg's affidavit. I was satisfied that the suppression of this information was justified on the ground set out in s 37AG(1)(c): the order is "necessary to protect the safety of any person". I was asked to make this order effective for a period of two years or until further order and agreed that that was appropriate.

68 Order 8 of the orders made on 10 May 2024 prohibits disclosure of an annexure and an exhibit to the affidavit of Mr Michael Anderson affirmed on 1 May 2024 and one sentence of an affidavit of Mr Nicholas Perkins affirmed on 8 May 2024. These parts of the evidence involved technical information about the operation of X Corp's platform and usage data which, I was satisfied, was commercially sensitive and potentially useful to competitors. The order was only proposed to have effect until the determination of the proceeding or further order (although I expect an application will in due course be made to extend its operation). I was satisfied that this order should be made under the ground set out in s 37AG(1)(a). It would be undesirable if the conduct of proceedings in the Court were to have as a by-product the disclosure of commercially sensitive material, or if fear of that outcome were to deter parties from presenting relevant evidence.

I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Kennett.

Associate:

Dated: 14 May 2024