

FEDERAL COURT OF AUSTRALIA

X Corp v eSafety Commissioner [2024] FCA 1159

File number: VID 956 of 2023

Judgment of: **WHEELAHAN J**

Date of judgment: 4 October 2024

Catchwords: **PRIVATE INTERNATIONAL LAW** — *Online Safety Act 2021* (Cth) ss 56(2), 57 – where the eSafety Commissioner issued a notice to Twitter Inc under s 56(2) of the *Online Safety Act* on 22 February 2023 (the **reporting notice**), requiring a response by 29 March 2023 – where Twitter Inc merged into X Corp on 15 March 2023, and thereupon ceased to exist – where X Corp sought a declaration that it was not obliged to respond to the reporting notice – whether X Corp was obliged to respond to the reporting notice – in the case of a foreign corporation, it is necessary to refer to foreign law to identify the juristic status of the “person” on whom s 57 of the *Online Safety Act* operates – s 7(3)(a) of the *Foreign Corporations (Application of Laws) Act 1989* (Cth) directs attention to the law of Nevada, as the law of the place where X Corp is incorporated, to decide questions about the “status” of X Corp – the law of Delaware, the place where Twitter Inc was incorporated, is not selected by s 7(3)(a) – an aspect of the “status” of X Corp pursuant to Nevada law is that it is subject to all of the “liabilities” to which Twitter Inc was subject before the merger – the term “liabilities” in the relevant Nevada law is broad enough to encompass non-pecuniary regulatory obligations – X Corp was required to respond to the reporting notice.

ADMINISTRATIVE LAW — where X Corp was issued with an infringement notice under the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**Regulatory Powers Act**) – where X Corp sought a declaration that the infringement notice was invalid because it did not specify the geographical location where the conduct constituting the alleged contraventions took place – s 104(1)(e)(iii) of the *Regulatory Powers Act* requires an infringement notice to specify the geographical location of where the conducting constituting the alleged contraventions took place – *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 and *Minister for Immigration and Citizenship v SZIZO* [2009] HCA 37; 238 CLR 627, applied – it was not a purpose of the legislation

to invalidate an infringement notice where the omission of the place of the contravention could not lead to prejudice – there was no prejudice to X Corp by the omission of the place of the alleged contraventions from the infringement notice – the infringement notice was not invalid for non-compliance with s 104(1)(e)(iii) – declaration refused.

ADMINISTRATIVE LAW — where X Corp challenged the validity of the infringement notice on the basis that X Corp had been allowed additional time within which to respond to the reporting notice – whether, pursuant to s 56(2)(c)(ii) of the *Online Safety Act*, the Commissioner had allowed extensions of time to X Corp to respond to the reporting notice – the Commissioner had not allowed X Corp any extension of time to respond.

Legislation:

Acts Interpretation Act 1901 (Cth) s 2C

Administrative Decisions (Judicial Review) Act 1977 (Cth)

Bank Integration Act 1991 (Cth) s 12

Competition and Consumer Act 2010 (Cth) ss 4(1), 50

Corporations Act 2001 (Cth) s 413

Evidence Act 1995 (Cth) s 136

Foreign Corporations (Application of Laws) Act 1989 (Cth) ss 7, 7(3)(a)

Judiciary Act 1903 (Cth) s 39B

Migration Act 1958 (Cth) ss 425A, 441A, 441G

Online Safety Act 2021 (Cth) ss 5, 24, 26, 45, 56, 56(2), 56(2)(c)(ii), 57, 62(1), 162, 163, 163(1), 163(2), 238

Regulatory Powers (Standard Provisions) Act 2014 (Cth) ss 79(2)(a)(i), 79(2)(b)(i), 103(1), 104, 104(1), 104(1)(e)(iii), 104(1)(h), 104(1)(i), 105, 107(1), 107(1)(a), 107(1)(c)–(e)

Online Safety (Basic Online Safety Expectations) Determination 2022 (Cth)

Magistrates' Court Act 1989 (Vic) ss 50, 92

Road Safety Act 1986 (Vic) s 49(1)(e)

Yooralla Society of Victoria Act 1977 (Vic) s 4(1)

Canada Corporations Act, RSC 1970, c C-32, s 137

Companies Act 1993 (NZ) s 219

Delaware General Corporation Law ss 259, 261

Nevada Gaming Commission Regulations 8.030, 15.510.1-

2, 15.585.7-1

Nevada Revised Statutes §§ 78.495, 92A.200, 92A.250,
92A.270, 463.510, 695E.060

Cases cited:

*Allstate Life Insurance Co v Australia & New Zealand
Banking Group Ltd (No 6)* (1996) 64 FCR 79

*Commonwealth Bank of Australia v Deputy Commissioner
of Taxation* [2009] FCAFC 126; 180 FCR 161

Crocodile Gold Corp v Commissioner of Territory Revenue
[2015] NTSC 13; 35 NTLR 65

Duro Felguera Australia Pty Ltd v Samsung C&T Corp
[2015] WASC 484

Gigante v Hickson [2001] VSCA 4; 3 VR 296

*Gold & Resource Developments NL v Australian Stock
Exchange Ltd* (1998) 30 ACSR 105

Goodman v Stafford (1992) 15 MVR 145

Johnson v Miller (1937) 59 CLR 467

*La Mancha Group International BV v Federal
Commissioner of Taxation* [2020] FCA 1799; 112 ATR 660

Minister for Immigration and Citizenship v SZIZO [2009]
HCA 37; 238 CLR 627

Neilson v Overseas Projects Corp of Victoria Ltd [2005]
HCA 54; 223 CLR 331

Project Blue Sky Inc v Australian Broadcasting Authority
[1998] HCA 28; 194 CLR 355

Sher v Director of Public Prosecutions (Vic) [2001] VSCA
110; 34 MVR 153

Sipad Holding ddpo v Popovic (1995) 61 FCR 205

R v Black & Decker Manufacturing Co Ltd [1975] 1 SCR
411

Stanward Corp v Denison Mines Ltd [1966] 2 OR 585

Carter Holt Harvey Ltd v McKernan [1998] 3 NZLR 403

Adams v National Bank of Greece SA [1961] AC 255

F & K Jabbour v Custodian of Israeli Absentee Property
[1954] 1 WLR 139

Henriques v Dutch West India Co (1728) 2 Ld Raym 1532
at 1535; 92 ER 494

Lazard Brothers & Co v Midland Bank Ltd [1933] AC 289

National Bank of Greece and Athens SA v Metliss [1958]
AC 509

Parkasho v Singh [1968] P 233

Perry v Lopag Trust Reg [2023] UKPC 16; [2023] 1 WLR 3494

Chanos v Nevada Tax Commission 124 Nev 232 (2008)

Cote H v Eighth Judicial District Court 124 Nev 36 (2008)

Great Hill Equity Partners IV, LP v SIG Growth Equity Fund I, LLLP, Del Ch 80 A.3d 155 (2013)

Lamb v Leroy Corp 85 Nev 276 (1969)

McKay v Board of Supervisors 102 Nev 644

Quixtar, Inc v Signature Management Team, LLC (7 April 2009)

Savage v Pierson 123 Nev 86 (2007)

Black's Law Dictionary (12th ed, Thomson Reuters, 2024)

Buckland WW, *A Text-Book of Roman Law: From Augustus to Justinian* (3rd ed, Cambridge University Press, 1963)

Division:	General Division
Registry:	Victoria
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	210
Date of hearing:	9–10 September 2024
Counsel for the Applicant:	Mr B Walker SC with Mr M Albert
Solicitor for the Applicant:	Thomson Geer
Counsel for the Respondent:	Mr S Lloyd SC with Mr C Tran
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

VID 956 of 2023

BETWEEN: **X CORP.**
Applicant

AND: **ESAFETY COMMISSIONER**
Respondent

ORDER MADE BY: **WHEELAHAN J**

DATE OF ORDER: **4 OCTOBER 2024**

THE COURT ORDERS THAT:

1. The proceeding is dismissed.
2. The applicant pay the respondent's costs of the proceeding.

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

REASONS FOR JUDGMENT

WHEELAHAN J:

- 1 The respondent is the eSafety Commissioner, which is an office established by s 26 of the *Online Safety Act 2021* (Cth). In the digital era where access to online content, including by children, is ubiquitous, the *Online Safety Act* is an important piece of Commonwealth legislation. As the long title to the Act suggests, its objects are to improve and promote online safety for Australians. In furtherance of those objects, the Act confers extensive functions and powers upon the Commissioner that include the collection of information by coercive means and the civil enforcement of the Act. Under s 24 of the Act, the Commissioner must, as appropriate, have regard to the Convention on the Rights of the Child in the performance of functions conferred by or under the Act, and in relation to Australian children.
- 2 The applicant, X Corp, is a private company incorporated in the State of Nevada in the United States. X Corp is currently the provider of a social media service known as “X” through the domain “www.x.com”. X was formerly known as “Twitter”, and used the domain “www.twitter.com”. The Twitter service was provided by Twitter Inc, which was a publicly traded company incorporated under the laws of the State of Delaware in the United States.
- 3 A central feature of this proceeding is that, on 15 March 2023, Twitter Inc merged into X Corp. Upon that occurring, Twitter Inc ceased to exist. These facts were not in dispute, as they were the subject of a statement of agreed facts that was received into evidence.
- 4 On 22 February 2023, and therefore before Twitter Inc ceased to exist, the Commissioner gave a notice (the **reporting notice**) to Twitter Inc under s 56(2) of the *Online Safety Act*. The reporting notice required Twitter Inc to prepare a report, in the manner and form specified in the notice, about the extent to which it had complied with specified applicable basic online safety expectations during the period 24 January 2022 to 31 January 2023. The notice required that the report be given by 29 March 2023.
- 5 Under s 57 of the *Online Safety Act*, a person must comply with a notice under s 56(2) to the extent that the person is capable of doing so. Under s 163 of the Act, a failure to comply with s 57 may be subject to an infringement notice under Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**Regulatory Powers Act**).

6 A report was provided to the Commissioner on 29 March 2023. The Commissioner contends that the report did not provide all the information that was required, claiming that various responses were absent, incomplete, or inaccurate.

7 Subsequently, and after requests for further information and exchanges of correspondence, a response to additional matters raised by the Commissioner was given on 5 May 2023. This response was given in answer to “some clarifying questions” raised by the Commissioner under cover of an email dated 6 April 2023.

8 On 3 October 2023, an infringement officer issued an infringement notice to X Corp, purportedly under s 163(1) of the *Online Safety Act*. The infringement notice specified several claimed contraventions of s 57 of the Act and itemised penalties of \$16,500 for each claimed contravention, being a penalty for each day from 29 March to 5 May 2023. The total sum of the penalties claimed was \$610,500.

9 Also on 3 October 2023, the Commissioner gave X Corp a service provider notification under s 62(1) of the *Online Safety Act*. The notification stated that the Commissioner was satisfied that X Corp had contravened ss 56(2) and 57 of the Act by failing to comply with the reporting notice. The Commissioner is authorised to publish the notification on the Commissioner’s website and to give a copy to the service provider. The notification carries no other consequences under the Act.

The issues in overview

10 There are two main issues in this proceeding –

- (1) Was X Corp required to comply with the reporting notice that was issued to Twitter Inc? Both parties adduced evidence of foreign law, namely the corporations legislation of Nevada and Delaware, which was said to be relevant to the first issue.
- (2) If X Corp was not required to comply with the reporting notice, then was the infringement notice issued to X Corp invalid on this ground? Relevant to the second main issue is whether the infringement officer had reasonable grounds to believe that X Corp had contravened s 57 of the *Online Safety Act*.

11 There are two alternative claims made by X Corp on the supposition that it was required to comply with the reporting notice –

- (1) X Corp claims that the Commissioner allowed it an extension of time until 5 May 2023 within which to comply with the notice. That claim turns on what the Commissioner did, upon a correct understanding of the correspondence that took place, and upon the terms of s 56(2)(c)(ii) of the *Online Safety Act*. X Corp claims that if an extension of time was given, then it cannot be liable for any failure to respond prior to 5 May 2023, and that the infringement officer who issued the infringement notice could not have had a reasonable belief to that effect.
- (2) In addition, X Corp claims that the infringement notice was invalid on the discrete ground that its terms failed to comply with the requirements as to content in s 104 of the *Regulatory Powers Act* because the infringement notice did not specify the place of the contraventions.

12 Amongst other relief, X Corp seeks a declaration that it was not required to respond to the reporting notice, and a declaration that the infringement notice that was issued to it is void, inoperative, or invalid. The relief is sought on grounds under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and in the Court’s jurisdiction conferred by s 39B of the *Judiciary Act 1903* (Cth) on the basis of claimed jurisdictional error.

The legislation in more detail

The Online Safety Act

13 Section 45 of the *Online Safety Act* authorises the Minister, by legislative instrument, to specify basic online safety expectations for a social media service. Pursuant to s 45, on 20 January 2022, the Minister made the *Online Safety (Basic Online Safety Expectations) Determination 2022* (Cth).

14 Section 56 of the *Online Safety Act* provides that the Commissioner may give a written notice under that section to the provider of a social media service if there are basic online safety expectations for the service.

15 Under s 5 of the Act, a “provider” of a social media service has a meaning affected by s 238. Nothing turns on s 238 in this case because it is an agreed fact that Twitter Inc was the provider of the social media service until 15 March 2023, and that X Corp was the provider thereafter.

16 Section 56 is, relevantly, in the following terms –

56 Non-periodic reporting notice

Scope

- (1) This section applies to the following services:
- (a) a social media service, if there are basic online safety expectations for the service;

...

Notice

- (2) The Commissioner may, by written notice given to the provider of the service, require the provider to:

- (a) do whichever of the following is specified in the notice:

...

- (i) prepare a report about the extent to which the provider complied with one or more specified applicable basic online safety expectations during the period specified in the notice; and
- (b) prepare the report in the manner and form specified in the notice; and
- (c) give the report to the Commissioner:
 - (i) within the period specified in the notice; or
 - (ii) if the Commissioner allows a longer period—within that longer period.

...

- (4) The period specified in subparagraph (2)(c)(i) must not be shorter than 28 days after the notice is given.

...

17 The terms of s 56(2)(c)(ii), which provide for the Commissioner to allow a longer period within which the provider may give the report, should be noted. As I have mentioned, one of the alternative issues in this application is whether the Commissioner allowed a longer period within which to comply with the reporting notice.

18 Section 57 provides –

57 Compliance with notice

A person must comply with a notice under subsection 56(2) to the extent that the person is capable of doing so.

Civil penalty: 500 penalty units.

19 Part 10 of the *Online Safety Act* concerns enforcement. Under s 162, a civil penalty provision is enforceable under Part 4 of the Regulatory Powers Act, and the Commissioner is an authorised applicant in relation to a civil penalty provision in the *Online Safety Act*. Section 57 of the *Online Safety Act* is a civil penalty provision because it sets out at its foot a pecuniary penalty indicated by the words, “Civil penalty” and the provision is not a section divided into subsections: see Regulatory Powers Act ss 79(2)(a)(i) and (b)(i).

20 Under s 163(1) of the *Online Safety Act*, several provisions of the Act, including s 57, are subject to an infringement notice under Part 5 of the Regulatory Powers Act. Section 163(2) of the Act provides that a member of staff of the Australian Communications and Media Authority authorised, in writing, by the Commissioner for the purposes of the subsection is an infringement officer in relation to s 163(1).

The Regulatory Powers Act

21 Section 103(1) of the Regulatory Powers Act authorises an infringement officer to give an infringement notice if the officer believes on reasonable grounds that a person has contravened a relevant provision –

103 When an infringement notice may be given

- (1) If an infringement officer believes on reasonable grounds that a person has contravened a provision subject to an infringement notice under this Part, the infringement officer may give to the person an infringement notice for the alleged contravention.

22 Section 104(1) of the Regulatory Powers Act provides for certain requirements of an infringement notice, which relevantly include the requirement in s 104(1)(e)(iii) to state the place of each contravention, and the requirement in ss 104(1)(h) and (i) to state the consequences of payment –

104 Matters to be included in an infringement notice

- (1) An infringement notice must:
- ...
- (e) give brief details of the alleged contravention, or each alleged contravention, to which the notice relates, including:
- ...
- (iii) the time (if known) and day of, and the place of, each alleged contravention; and
- ...

(h) state that, if the person to whom the notice is given pays the amount within 28 days after the day the notice is given, then (unless the notice is withdrawn):

...

(iii) if the alleged contravention is of a civil penalty provision—proceedings seeking a pecuniary penalty order will not be brought in relation to the alleged contravention; and

(i) state that payment of the amount is not an admission of guilt or liability ...

23 Some of the legal effects of the payment of a penalty that is the subject of an infringement notice are provided for in s 107(1) of the Regulatory Powers Act. There are three relevant effects. The first is that the liability of the person for the alleged contravention is discharged. The second is that proceedings seeking a civil penalty will not be brought. And the third is that the person is not regarded as having admitted guilt or liability for the alleged contravention: see Regulatory Powers Act ss 107(1)(c)–(e).

24 Under s 105 of the Regulatory Powers Act, a person to whom an infringement notice has been given may apply for an extension of the 28-day period for payment referred to in s 104(1)(h) of the Act. If an application is made before the end of that 28-day period, then the relevant chief executive may extend the period, and may extend the period before or after the end of the period.

Further background

Interactions between the Commissioner, Twitter Inc, and X Corp

25 On 13 February 2023, the Commissioner’s office provided a notice in draft to Twitter Inc. The Commissioner’s office requested confirmation that Twitter Inc was the appropriate legal entity for service of the notice, as well as the name and contact details of the individual to whom the notice should be directed.

26 In response, on 16 February 2023, Twitter Inc advised the office of the Commissioner by email that it was the appropriate legal entity, and that the notice should be sent to Justin Quill. Mr Quill is a member of the firm Thomson Geer, the solicitors currently acting for X Corp.

27 On 22 February 2023, the office of the Commissioner sent an email to Mr Quill that attached the Commissioner’s notice under s 56(2) of the Act. The covering email to Mr Quill stated that Twitter Inc was required to comply with the relevant notice within 35 days, and no later than

17:00 Australian Eastern Daylight Time on 29 March 2023, or a later date if agreed by the Commissioner. Mr Quill responded by email the following day, stating that Twitter Inc would send its response in due course.

28 The notice had the following features –

- (a) the notice was given under cover of a letter addressed to Twitter Inc, care of Mr Quill;
- (b) the notice itself was directed to Twitter Inc;
- (c) the cover page of the notice included the following text –

This non-periodic reporting notice (**Notice**) is given to you under section 56(2) of the *Online Safety* [sic] *Act 2021* (Cth) (**the Act**) in respect of the following service that you provide in Australia:

1. Twitter, being a ‘social media service’ within the definition of section 13 of the Act.

You are required to prepare a report about the extent to which you complied with the applicable basic online safety expectations specified in **Schedule A** from 24 January 2022 to 31 January 2023 inclusive (**Report Period**).

The report must include answers to the questions specified in **Schedule B**, and use the template provided.

You are required to give the report to the Commissioner within 35 days of being given this notice (being no later than 17:00 Australian Eastern Daylight Time on 29 March 2023) or within such longer period as I allow if I am contacted by you with a request for extension.

The report is to be given to the Commissioner by email to [address]@esafety.gov.au ...

29 A copy of Schedule B to the notice was not tendered, but the response to the reporting notice was. It can be inferred from the response that Schedule B contained 31 numbered questions, which themselves included sub-questions. Most of the questions were expressed to enquire about present states of affairs. One question, namely Question 9, was directed to the “reporting period”.

30 On 29 March 2023, Mr Quill sent by email a covering letter and a document to the Commissioner that was said to relate to the reporting notice. The covering letter stated –

Please see **enclosed** Twitter Inc’s [Twitter] response to the Non-periodic reporting BOSE notice (the Notice) sent under section 56(2) of the Online Safety Act 2021 (Cth) (the Act) on February 22nd.

The report is provided without prejudice. While avenues are available legally or administratively as communicated to us are reserved by Twitter, in the first instance seek to submit this report on the date requested, and to work as cooperatively as possible.

In some areas, data is not available or is impacted by other limitations, however Twitter welcomes follow up and engagement that may help elucidate approaches or commitments to safety and service in ways meaningful to the Commission and users in Australia.

31 On 6 April 2023, the Commissioner’s office sent an email to Mr Quill attaching some questions about the response to the notice, and seeking a response by midday on 24 April 2023. Amongst other things, the email stated –

We have reviewed carefully, and have some clarifying questions regarding your response to the non-periodic reporting notice (the Notice) given to you on 22 February.

These questions are aimed at:

- 1 Clarifying some of Twitter’s responses
2. Identifying where Twitter has not provided the information in answer to a question in Schedule B of the Notice, in order to provide another opportunity for Twitter to respond
3. Understanding any reasons why Twitter was not able to provide the information in answer to a question in Schedule B of the Notice. Please provide specific reasons to help eSafety assess Twitter’s compliance with the Notice.

Please review the questions attached and respond by **12:00 Australian Eastern Standard Time on 24 April**. eSafety remains available to discuss any questions or issues.

32 The questions that were attached were set out in a table which provided spaces for responses. The document containing the questions stated in its preamble –

Questions to Twitter, Inc. related to its non-periodic reporting notice

These questions relate to the non-periodic reporting notice (**the Notice**) given to Twitter, Inc. (**Twitter**) under section 56(2) of the *Online Safety Act 2021* (Cth) (**the Act**) on 22 February 2023, and Twitter’s response on 29 March 2023.

The follow-up questions are aimed at:

1. Clarifying some of Twitter’s responses;
2. Identifying where Twitter has not provided the information in answer to a question in Schedule B of the Notice, in order to provide another opportunity for Twitter to respond;
3. Understanding any reasons why Twitter was not able to provide the information in answer to a question in Schedule B of the Notice. Please provide specific reasons to help eSafety assess Twitter’s compliance with the Notice.

33 On 20 April 2023, Thomson Geer wrote to the Commissioner. The letter was marked “Privileged and confidential”, but it is not evident that any information in the letter was privileged in some way, or confidential. The letter raised two topics. The first concerned the merger of Twitter Inc into X Corp. On that topic, the letter stated –

We are instructed to inform you that, effective 15 March 2023, Twitter, Inc. merged into X Corp., a company incorporated and registered under the laws of the State of Nevada, USA. We have been informed that, as a result:

- Twitter, Inc. has ceased to exist as a legal entity with effect from 15 March 2023;
- X Corp. is the successor in interest to Twitter, Inc.;
- All of Twitter, Inc.'s assets, liabilities, rights, etc. passed to X Corp. on 15 March 2023 by operation of law;
- There has been no change in control and the ultimate ownership interests in X Corp. remains [sic] the same as it was for Twitter, Inc.; and
- X Corp., being the successor in interest to Twitter, Inc., has become the provider of the Twitter service in Australia.

The address of X Corp. remains the same as Twitter, Inc., i.e. 1355 Market Street, Suite 900, San Francisco, California, 94103, USA.

The Company would prefer that X Corp. continues to be referred to as "Twitter" where references are made to the provider of the Twitter service.

34 The second topic was a request for an extension of time to respond to the follow-up questions, which was in the following terms –

In addition, Twitter respectfully requests an extension of additional time to respond to the follow up questions sent in response to our submission to the Non-periodic reporting BOSE notice (the Notice) sent under section 56(2) of the Online Safety Act 2021 (Cth) (the Act). We would very much appreciate it if our teams could be given until Wednesday May 5th to compile additional information and submit the responses then.

35 There were email exchanges that followed, in which –

- (a) the office of the Commissioner noted the "change in legal entity";
- (b) Thomson Geer clarified that the extension sought was until Friday, 5 May 2023; and
- (c) the office of the Commissioner advised by email that an extension was granted until 16:00 Australian Eastern Standard Time on 5 May 2023.

36 That last email was dated 26 April 2023, and was in the following terms –

Thank you for the further information regarding Twitter's request for an extension, which the Commissioner has considered.

She has decided to grant an extension until 16:00 Australian Eastern Standard Time on 5 May 2023.

Let us know if you have any questions regarding the information sought.

37 On 5 May 2023, Mr Quill sent an email to the Commissioner attaching responses to the clarifying, or “follow-up” questions. The responses were set out in the table format for the questions that had been supplied by the Commissioner.

38 Between 10 July 2023 and 20 October 2023 there were exchanges of correspondence between Thomson Geer and the office of the Commissioner in relation to the office’s proposal to publish a summary of the information provided in response to the reporting notice on the Commissioner’s website in the exercise of the Commissioner’s powers under the *Online Safety Act*. On 2 August 2023, X Corp itself sent an undated communication to the Commissioner in relation to the proposed publication of information. The communication from X Corp referred to the attached “final submissions from X Corp. (successor in interest to Twitter, Inc.)”.

39 As I mentioned earlier, an infringement officer issued an infringement notice to X Corp on 3 October 2023, alleging contraventions of s 57 of the *Online Safety Act*, and on the same day the Commissioner gave X Corp a service provider notification under s 62(1) of the *Online Safety Act* alleging non-compliance with the reporting notice. Thereafter, on 15 October 2023, Thomson Geer on behalf of X Corp made a submission to the Commissioner seeking the withdrawal of the infringement notice, or alternatively the issue of a formal warning, and an amendment of the service provider notification on the supposition that no infringement notice was given. In the further alternative, it was submitted that the penalty should be reduced to \$16,500. The submission included the following passages –

X acknowledges its obligation to comply with non-periodic reporting notices given under section 56(2) *Online Safety Act 2021* to the extent that X is capable of doing so, in accordance with section 57 of the *Online Safety Act 2021*.

X has fulfilled its statutory obligation and has complied with the BOSE Notice [being a reference to the reporting notice] to the extent that it was capable, in all circumstances.

40 After considering the submissions of X Corp, the Commissioner decided not to withdraw the infringement notice or the service provider notification, and Thomson Geer was advised of this decision on 20 October 2023.

41 On 27 October 2023, the Commissioner extended until 10 November 2023 the time within which X Corp might pay the amount stated in the infringement notice. X Corp did not pay the amount, and on 10 November 2023 it commenced this proceeding.

42 On 21 December 2023, the Commissioner commenced her own proceeding against X Corp, seeking the imposition of civil penalties and the making of declarations in respect of a claimed

continuing contravention of s 57 of the *Online Safety Act*. That alleged continuing contravention comprised X Corp’s claimed failure to comply with the reporting notice issued on 22 February 2023 by preparing a report by 29 March 2023 in the manner and form specified in the notice to the extent that X Corp was capable of doing so. The further progress of the civil penalty proceeding awaits the outcome of this proceeding.

The merger agreement

43 Twitter Inc and X Corp entered into an instrument titled “Agreement and Plan of Merger” dated 15 March 2023 (the **merger agreement**). Article 2.1 of the merger agreement provided –

2.1 Merger. Upon the terms and subject to the conditions set forth in this Agreement, and in accordance with the NRS, the Company shall be merged with and into the Acquiror as of the Effective Time. Following the Effective Time, the separate corporate existence of the Company shall cease and the Acquiror shall be the surviving corporation (the “Surviving Corporation”). The effects and consequences of the Merger shall be as set forth in this Agreement and the NRS.

44 For the purposes of the merger agreement: (a) “NRS” referred to the Nevada Revised Statutes; (b) “the Company” was Twitter Inc; and (c) “the Acquiror” was X Corp. The definitions set out in the merger agreement also provided for a definition of “the Effective Time”, which was the time and date provided in the Articles of Merger, being the article of merger filed with the Nevada Secretary of State pertaining to the merger. That document was not in evidence, but I will infer that the date specified in the document was 15 March 2023, consistently with the agreed fact that Twitter Inc merged into X Corp on that day.

45 Article 3.2 of the merger agreement provided –

3.2 Effect. Upon the Effective Time, (a) the Acquiror, without further act, deed or other transfer, shall retain or succeed to, as the case may be, and possess and be vested with all the rights, privileges, immunities, powers, franchises, and authority, of a public as well as of a private nature, of the Company; (b) all property of every description and every interest therein, *and all debts and other obligations of or belonging to or due to the Company on whatever account shall thereafter be taken and deemed to be held by or transferred to, as the case may be, or invested in the Acquiror without further act or deed*; (c) title to any real estate, or any interest therein vested in the Company, shall not revert or in any way be impaired by reason of the Merger; and (d) all of the rights of creditors of the Company shall be preserved unimpaired, and all liens upon the property of the Company shall be preserved unimpaired, *and all debts, liabilities, obligations and duties of the Company shall thenceforth remain with or be attached to, as the case may be, the Acquiror and may be enforced against it to the same extent as if it had incurred or contracted all such debts, liabilities, obligations, and duties.*

(Emphasis in italics added.)

46 Article 4.5 of the merger agreement provided –

4.5 No Third-Party Beneficiaries. This Agreement is for the sole benefit of the parties hereto and their respective successors and permitted assigns, and nothing herein, express or implied, is intended to or shall confer upon any other entity or person any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

47 Finally, Article 4.8 of the merger agreement provided that it was governed by the laws of Nevada, with an endeavour to avoid the possibility of *renvoi* –

4.8 Governing Law and Jurisdiction

This Agreement and all matters arising out of or relating to this Agreement, are governed by and shall be construed in accordance with the laws of the State of Nevada without regard to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the State of Nevada.

Summary of the parties' submissions

48 In order to give focus to the evidence about the content of foreign law, I will summarise the cases advanced on behalf of the parties on the question whether X Corp was required to comply with the reporting notice.

The submissions of X Corp

49 There were two layers to X Corp's submissions on whether it was required to comply with the reporting notice. The first layer directed attention only to the terms of ss 56(2) and 57 of the *Online Safety Act*. X Corp submitted that, as a matter of construction, the "person" whom s 57 requires to comply with the notice must be the same person who was capable of complying with the notice given under s 56(2). That is to say, the Act assumes that the person referred to in s 57 is the same person as the provider who received the notice under s 56(2). X Corp submitted that, on and from 15 March 2023, Twitter Inc ceased to be a person, and therefore ceased to be a provider of a social media service. It was submitted that Twitter Inc therefore lacked capacity to comply with the notice, and that X Corp was not obliged to prepare any report in Twitter Inc's place, as X Corp was not the same person as the provider to whom the notice was issued. In perhaps over-simple terms, X Corp's primary submission was that ss 56(2) and 57 do not call for any choice-of-law analysis — strict correspondence between the s 56(2) "provider" and the s 57 "person" is required.

50 X Corp's alternative submission was that, if ss 56(2) and 57 are subject to a choice-of-law analysis, then the question whether X Corp was subject to the obligation to respond to the

reporting notice was governed by the law of Nevada. It was submitted that under Nevada law X Corp did not take on the legal obligation of Twitter Inc to respond to the reporting notice. This submission turned on the proper construction of the relevant Nevada statute.

The submissions of the Commissioner

51 The Commissioner submitted that X Corp was required, as a matter of the law of Nevada and Delaware, to comply with the reporting notice that was given to Twitter Inc under s 56(2) of the *Online Safety Act*. The Commissioner's primary position was that, for the purposes of Australian law, the legal effects of the merger on X Corp's liability to respond to the reporting notice are determined by the law of Delaware.

52 In written submissions, the Commissioner submitted in the alternative that X Corp had represented to the Commissioner that X Corp was the appropriate entity to respond to the notice and that the Commissioner had relied on that representation. It was submitted that as late as 15 October 2023, when X Corp provided its submissions to the Commissioner concerning the withdrawal of the infringement notice, X Corp had not referred to the merger with Twitter Inc as some kind of exculpatory consideration. In these circumstances, it was submitted that X Corp is appropriately said not to have complied with the reporting notice that was given to Twitter Inc. This line of argument was not developed at the hearing.

The expert evidence as to foreign law

53 Two United States practising attorneys gave evidence. Counsel for X Corp adduced evidence from Mr I Scott Bogatz, an attorney practising in commercial business law in Las Vegas, Nevada. Mr Bogatz produced a report that was received into evidence, subject to some limitations on its use that were the subject of a direction under s 136 of the *Evidence Act 1995* (Cth). The limitations related to aspects of the report which appeared to go beyond the role of the expert in identifying the relevant content of foreign law and which encroached upon the question before the Court, namely the application of s 56(2) of the *Online Safety Act* to X Corp: see *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 6)* (1996) 64 FCR 79 at 82–3 (Lindgren J), cited in *Neilson v Overseas Projects Corp of Victoria Ltd* [2005] HCA 54; 223 CLR 331 at [120] (Gummow and Hayne JJ).

54 Counsel for the Commissioner adduced evidence from Alexander Hugh Pyle, an attorney practising in corporate mergers and acquisitions in Boston, Massachusetts. Mr Pyle produced a report and a supplementary report. While no objections were made to his reports, questions

arise in relation to the weight to be given to some aspects of his opinions, which went beyond the role of an expert in identifying the content of the relevant foreign law.

55 It must be said that noting the encroachment by Mr Bogatz and Mr Pyle in their written reports into issues that went beyond their role as experts on the content of foreign law is no criticism of them. The questions that they were asked in the instructions given to them invited them to take this course.

56 Both experts were cross-examined. I observed them give their evidence. Mr Bogatz gave evidence in the courtroom. Mr Pyle gave evidence by video link. Senior counsel for the Commissioner adduced evidence from the experts concurrently, which was in accordance with directions that I had made prior to the hearing. Senior counsel for X Corp took a traditional approach, choosing to cross-examine Mr Pyle in the conventional way, albeit in the presence of Mr Bogatz who remained in the witness box. There was no re-examination of Mr Bogatz.

57 As I have mentioned, Twitter Inc was incorporated under the laws of Delaware. Mr Bogatz gave evidence that because the merger occurred under Nevada law, Twitter Inc ceased to exist pursuant to Nevada law, in accordance with the terms of the merger agreement. Mr Pyle gave evidence that because Twitter Inc was incorporated under the laws of Delaware, and X Corp was incorporated under the laws of Nevada, the legal effect of the merger of Twitter Inc into X Corp was governed by both the Delaware General Corporation Law and the laws of Nevada.

58 I did not hear any evidence which to my satisfaction explained the interaction of the statutes of the two states, which are differently expressed. As I will explain, Mr Pyle noted in his reports that a choice-of-law analysis could be required within the United States to ascertain the applicable statutory law. He also acknowledged in cross-examination that there could be some room for the operation of the constitutional full faith and credit doctrine. But Mr Pyle did not conduct any detailed analysis of these questions because he held the opinion that there was no relevant difference between the laws of Delaware and Nevada in relation to the legal effect of the merger. Mr Bogatz did not appear to advert to the issue at all.

59 There are at least apparent differences between the statutes of Nevada and Delaware, respectively, regarding the legal consequences of the merger. As I will explain, Delaware law provides that X Corp became subject to the “restrictions, disabilities and duties” of Twitter Inc upon the merger. Nevada law instead provides that, upon the merger, X Corp became subject to all the “liabilities” of Twitter Inc.

The Delaware statute

60 Although, for reasons that will become apparent, I will focus on the Nevada statute, I will also set out the Delaware statute as a point of comparison and as context to explain the opinions that Mr Pyle expressed concerning the content of the applicable law on the supposition that Nevada law applied.

61 Section 259 of the Delaware General Corporation Law relevantly provides –

§ 259. Status, rights, liabilities, of constituent and surviving or resulting corporations following merger or consolidation

(a) When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into 1 of such corporations, as the case may be, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, *and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated*; and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of the said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the corporation surviving or resulting from such merger or consolidation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations, and the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constituent corporations, shall not revert to be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

(Emphasis added.)

62 In addition, s 261 of the Delaware General Corporation Law provides –

§ 261. Effect of merger upon pending actions.

Any action or proceeding, whether civil, criminal or administrative, pending by or against any corporation which is a party to a merger or consolidation shall be prosecuted as if such merger or consolidation had not taken place, or the corporation surviving or resulting from such merger or consolidation may be substituted in such action or proceeding.

The Nevada statute

63 The relevant Nevada provision is § 250(1) of Chapter 92A of the Nevada Revised Statutes (NRS), which provides –

92A.250 Effect of merger, conversion or exchange.

1. When a merger takes effect:
 - (a) Every other entity that is a constituent entity merges into the surviving entity and the separate existence of every entity except the surviving entity ceases;
 - (b) The title to all real estate and other property owned by each merging constituent entity is vested in the surviving entity without reversion or impairment;
 - (c) An owner of a constituent entity remains liable for all the obligations of such constituent entity existing at the time of the merger to the extent the owner was liable before the merger;
 - (d) The surviving entity has all of the liabilities of each other constituent entity;
 - (e) A proceeding pending against any constituent entity may be continued as if the merger had not occurred or the surviving entity may be substituted in the proceeding for the entity whose existence has ceased;
 - (f) The articles of incorporation, articles of organization, certificate of limited partnership or certificate of trust of the surviving entity are amended to the extent provided in the plan of merger; and
 - (g) The owner’s interests of each constituent entity that are to be converted into owner’s interests, obligations or other securities of the surviving or any other entity or into cash or other property are converted, and the former holders of the owner’s interests are entitled only to the rights provided in the articles of merger or any created pursuant to NRS 92A.300 to 92A.500, inclusive.

The opinions of Mr Bogatz

64 Much of the evidence of Mr Bogatz was directed to the construction that a Nevada court would give to the term “obligations” in NRS § 92A.250(1)(c). That was because this was an issue that he was asked to address. That provision was not relied on by X Corp in final submissions, with senior counsel for X Corp characterising it as a “red herring”.

65 Nevertheless, in answering questions about the construction of NRS § 92A.250(1)(c), Mr Bogatz referred to legislative history and public policy as matters that may inform statutory interpretation, citing Nevada case law. In particular, Mr Bogatz cited the following passage

from a decision of the Supreme Court of Nevada in *Chanos v Nevada Tax Commission* 124 Nev 232 at 240 (2008) –

Generally, when “the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.” A statute is ambiguous when it “is capable of being understood in two or more senses by reasonably informed persons” or it does not otherwise speak to the issue before the court. An ambiguous statute may be examined through legislative history, reason, and considerations of public policy to determine the Legislature’s intent. We look first to the language of former NRS 360.247 to determine whether it is ambiguous.

(Citations omitted.)

66 As to public policy, Mr Bogatz referred to gaming as a primary industry in Nevada, and to the consideration that mergers do not automatically result in the transfer of gaming licences. On this topic, Mr Bogatz referred to specific statutory provisions said to have this effect, namely Nevada Gaming Commission Regulations 8.030, 15.510.1-2 and 15.585.7-1, and NRS § 463.510. In oral evidence, Mr Bogatz stated that he had not found any case law or treatise that suggested that § 92A.250(1)(d) should be construed in light of gaming regulation. However, Mr Bogatz explained that everything in Nevada was coloured by its history with gaming. He added that there was a clear-cut policy that agreements to merge or change ownership did not transfer gaming licences, and that this was relevant to his opinion as to a Nevada court’s likely approach to the question whether a liability to comply with a regulatory notice was transferred upon a merger. He did not accept that the existence of specific laws about the transfer of gaming licences told against the proposition that merger laws of general application would be given a restricted interpretation in relation to the transfer of “liabilities”. Instead, he pointed to the specific matters that were dealt with in § 92A.250(1), including property and legal proceedings, and expressed the opinion that regulatory requirements such as reporting obligations were outside the scope of the provision. However, he accepted that an obligation to comply with an injunction would transfer to the surviving entity.

67 In relation to the term “liabilities” in § 92A.250(1)(d), Mr Bogatz referred to two decisions which he annexed to his report: *Lamb v Leroy Corp* 85 Nev 276 (1969), a reported decision of the Supreme Court of Nevada; and *Quixtar, Inc v Signature Management Team, LLC* (7 April 2009) (*Quixtar*), an unreported decision of the United States District Court for the District of Nevada.

68 The decision in *Lamb* did not concern a merger or consolidation of two corporations, but a sale of assets in exchange for shares. In contrasting that position with a merger or consolidation,

the Court stated, “[a] consummated agreement of merger or consolidation imposes upon the surviving corporation all liabilities of the constituent corporations so merged or consolidated”, citing NRS § 78.495, a provision which was a precursor of NRS § 92A.250. The consequences of a merger or consolidation under Nevada law were not otherwise considered in *Lamb*.

69 *Quixtar* concerned an application for summary dismissal in a proceeding brought against several defendants who, prior to their purported joinder, had merged into another corporate entity pursuant to NRS § 92A.200. In granting the application, the judge stated, *inter alia* –

Quixtar expresses concern that if the pending motion to dismiss is granted, the constituent corporations “might be permitted to insulate themselves (and their co-conspirators) from liability and deny Quixtar rights to satisfy a judgment.” (P.’s Opp. 1 (#239).) This concern is not warranted. By law, all liabilities of a constituent corporation pass to the surviving corporation. NEV. REV. STAT. § 92A.250(1)(c); see *Lamb v. Leroy Corp.*, 85 Nev. 276, 454 P.2d 24, 26 (Nev. 1969) (“A consummated agreement of merger or consolidation imposes upon the surviving corporations all liabilities of the constituent corporations so merged or consolidated.”). Any rights that Quixtar could have asserted against the constituent defendants absent the merger can instead be asserted against Sky Scope as the surviving entity after the merger. There is no basis for concluding that this transfer of liability to the surviving entity would not include liability for conspiracy or for fraudulent conveyance, Quixtar’s suggestion to the contrary notwithstanding.

In short, under Nevada law, after a business entity merges into another, the constituent entity cannot later sue or be sued because the separate existence of every entity except the surviving entity ceases. All liabilities of the constituent entity, however, survive the merger, and are the responsibility of the surviving entity. The discovery with regard to Quixtar’s claims against the constituent defendants that has, according to Quixtar, “barely commenced,” should therefore proceed. Those claims are still a part of this case. The sole, nominal difference is that the corporate entity that is liable for the alleged wrongful acts by the constituent defendants is Sky Scope.

70 In addressing NRS § 92A.250(1)(d), Mr Bogatz said that a “liability” is something that is incurred and has to be paid. In reaching this view, Mr Bogatz relied on the following principles of construction for which he cited decisions of the Supreme Court of Nevada –

- (a) Nevada courts look to “similar based statutes” in finding the meaning of a statute;
- (b) the court “has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized”;
- (c) “when the same word is used in different statutes that are similar in respect to purpose and content, the word will be used in the same sense, unless the statutes’ context indicates otherwise”;
- (d) “when the legislature enacts a statute, this court presumes that it does so ‘with full knowledge of existing statutes relating to the same subject’”; and

(e) that it was the court’s “obligation to construe statutory provisions in such a manner as to render them compatible whenever possible”.

71 Mr Bogatz referred to provisions of the NRS, namely § 92A.250(3)(h) and § 92A.270(8), that used the expression “pay its liabilities”, and also § 92A.270(7), which used the expression, “liability and duties had been incurred or contracted by the domestic entity”. These provisions were annexed to Mr Bogatz’s report, and I will set them out so that their context may be appreciated.

72 NRS § 92A.250(3)(h) is concerned with the “conversion” of a constituent entity, under which it appears that the conversion is a continuation of the existence of the constituent entity, as indicated by § 92A.250(3)(b). Set out below is the full text of § 92A.250(3), which places paragraph (h) in context –

3. When a conversion takes effect:
 - (a) The constituent entity is converted into the resulting entity and is governed by and subject to the law of the jurisdiction of the resulting entity;
 - (b) The conversion is a continuation of the existence of the constituent entity;
 - (c) The title to all real estate and other property owned by the constituent entity is vested in the resulting entity without reversion or impairment;
 - (d) The resulting entity has all the liabilities of the constituent entity;
 - (e) A proceeding pending against the constituent entity may be continued as if the conversion had not occurred or the resulting entity may be substituted in the proceeding for the constituent entity;
 - (f) The owner’s interests of the constituent entity that are to be converted into the owner’s interests of the resulting entity are converted;
 - (g) An owner of the resulting entity remains liable for all the obligations of the constituent entity existing at the time of the conversion to the extent the owner was liable before the conversion; and
 - (h) The domestic constituent entity is not required to wind up its affairs, *pay its liabilities*, distribute its assets or dissolve, and the conversion is not deemed a dissolution of the domestic constituent entity.

(Emphasis added.)

73 NRS § 92A.270 is concerned with the “[d]omestication” in Nevada of “undomesticated” organisations. Importantly, §§ 92A.270(3) and (4) appear to provide that the undomesticated

entity becomes the domesticated entity, with no effect on obligations or liabilities incurred before the domestication –

3. Upon filing the articles of domestication and the charter document with the Secretary of State, and the payment of the requisite fee for filing the charter document of the domestic entity, the undomesticated organization is domesticated in this State as the domestic entity described in the charter document filed pursuant to subsection 1. The existence of the domestic entity begins on the date the undomesticated organization began its existence in the jurisdiction in which the undomesticated organization was first formed, incorporated, organized or otherwise created.

4. The domestication of any undomesticated organization does not affect any obligations or liabilities of the undomesticated organization incurred before its domestication.

74 This is consistent with § 92A.270(8), which provides in part –

8. When an undomesticated organization is domesticated, the domestic entity resulting from the domestication is for all purposes deemed to be the same entity as the undomesticated organization. *Unless otherwise agreed by the owners of the undomesticated organization or as required pursuant to applicable foreign law, the domestic entity resulting from the domestication is not required to wind up its affairs, pay its liabilities or distribute its assets.* The domestication constitutes a continuation of the existence of the undomesticated organization in the form of a domestic entity. If, following domestication, an undomesticated organization that has become domesticated pursuant to this section continues its existence in the foreign country or foreign jurisdiction in which it was existing immediately before the domestication, the domestic entity and the undomesticated organization are for all purposes a single entity formed, incorporated, organized or otherwise created and existing pursuant to the laws of this State and the laws of the foreign country or other foreign jurisdiction. ...

(Emphasis added.)

75 It is in this context that § 92A.270(7) uses the expression “liability and duties had been incurred or contracted by the domestic entity” that was relied on by Mr Bogatz –

7. When a domestication becomes effective, all rights, privileges and powers of the undomesticated organization, all property owned by the undomesticated organization, all debts due to the undomesticated organization, and all causes of action belonging to the undomesticated organization are vested in the domestic entity and become the property of the domestic entity to the same extent as vested in the undomesticated organization immediately before domestication. The title to any real property vested by deed or otherwise in the undomesticated organization is not reverted or impaired by the domestication. All rights of creditors and all liens upon any property of the undomesticated organization are preserved unimpaired and *all debts, liabilities and duties of an undomesticated organization that has been domesticated attach to the domestic entity resulting from the domestication and may be enforced against it to the same extent as if the debts, liability and duties had been incurred or contracted by the domestic entity.*

(Emphasis added.)

76 Mr Bogatz also referred to another Nevada statute, concerning liability risk retention for the purposes of insurance law: NRS § 695E.060. The definition of “liability” in that provision was annexed to Mr Bogatz’s report –

695E.060. “Liability” defined.

1. “Liability” means legal liability for damages, including costs of defense, legal costs and fees, and other expenses for claims, because of injuries to other persons, damage to their property, or other damage or loss to those persons resulting from or arising out of any:
 - (a) Business, whether or not conducted for profit, or any trade, product, services, whether or not professional, or any premises or operations; or
 - (b) Activity of any state or local government, or any agency or political subdivision thereof.
2. The term does not include personal risk liability and an employer’s liability concerning its employees, other than legal liability under the Federal Employers’ Liability Act.

77 By reference to the provisions relating to domestication, and the definition of “liability” for the purposes of the provisions relating to insurance law, Mr Bogatz expressed the following opinion about the meaning of “liability” in NRS § 92A.250(1)(d) as a consequence of a corporate merger –

By both reference to the language in NRS 92A, and to keep the definition consistent with its use in NRS 695E.060, it is clear under Nevada Law that the term “liability” refers to monetary obligations and not to a requirement of providing information under a regulatory request from a foreign regulator, and a Nevada Court would come to that conclusion if such a question was presented to it.

78 Mr Bogatz then gave an opinion in response to a question concerning whether an obligation of Twitter Inc to respond to a foreign regulatory request for information was a “debt” for the purposes of the merger agreement, as read with NRS Chapter 92A. Mr Bogatz expressed the opinion that a “debt” was a monetary obligation, and that a Nevada court would not construe it as including a requirement to respond to a request for information from a regulatory body.

79 Mr Bogatz was also asked to give an opinion on the question whether an obligation of Twitter Inc to respond to a foreign regulatory request for information was a “duty” for the purposes of the merger agreement, as read with NRS Chapter 92A. Mr Bogatz expressed the opinion that a “duty” under Nevada law applied in contexts such as fiduciary obligations owed by one person to another, such as an obligation of a trustee, and not to regulatory reporting requirements. He referred to other provisions of the Nevada statutes that concerned the duties of trustees and company directors.

80 In response to a question concerning whether the Commissioner had a right to enforce the contractual provisions of the merger agreement against X Corp, Mr Bogatz referred to Nevada laws concerning the rights of third parties to bring proceedings on a contract. Mr Bogatz referred to the “No Third-Party Beneficiaries” provision in article 4.5 of the merger agreement and stated that Nevada courts would enforce such provisions.

The concurrent evidence of Mr Bogatz and Mr Pyle

81 As I have mentioned, Mr Bogatz was examined by senior counsel for the Commissioner in the course of a concurrent evidence session with Mr Pyle.

82 *First*, Mr Bogatz agreed that the starting point in interpreting a legislative provision is whether it has a plain meaning. If the interpretation is in doubt, then its legislative history can be relevant. Mr Pyle agreed with this evidence.

83 *Secondly*, Mr Bogatz gave evidence that the plain meaning of the word “liability” referred to some type of monetary obligation, stating that this was his “initial impression”. On this issue, both witnesses were taken to an entry in *Black’s Law Dictionary* (12th ed, Thomson Reuters, 2024), a well-respected legal dictionary in the United States, that attributed meanings to the word “liability” in different senses, including a wide sense that extended to duties and criminal responsibility –

liability *n.* (18c) 1. The quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment <liability for injuries caused by negligence>. — Also termed *legal liability*; *subjection*; *responsibility*. Cf. *fault*. 2. (*often pl.*) A financial or pecuniary obligation in a specified amount; debt <tax liability> <assets and liabilities>.

84 Mr Bogatz said that context was relevant to interpretation, and noted the reference to criminal responsibility. Mr Bogatz referred in his evidence to mergers in the context of regulated industries such as gaming and liquor, and expressed the opinion that a merger did not automatically result in the transfer of licences necessary to carry on business in those industries.

85 Mr Pyle considered that at least the first definition in *Black’s* extended the word “liability” to any liability to society enforceable by civil remedy or punishment, and said that he read the word “liability” in NRS § 92A.250(1)(d) not only as encompassing pecuniary liabilities, but also as extending to any legally binding obligation, including obligations to respond to a regulatory notice. Mr Pyle stated that in his experience of mergers, he had never seen the narrow meaning of “liability” being supported. He explained that if a narrow view were taken,

then mergers would become a popular vehicle to escape such things as regulatory enquiries and investigations.

86 *Thirdly*, the witnesses were taken to some legislative background to the enactment of NRS § 92A.250. Neither witness referred to the legislative background in written evidence, and it was evidently drawn to their attention only shortly before the hearing.

87 Before Mr Bogatz was taken to this material, I asked him if he knew whether NRS § 92A.250 was modelled on the laws of any other state. He said he did not, and said that he did not “know for certain if this section came from some other state, or some model rules”.

88 In 1969, the merger of corporations under the NRS was regulated by § 78.495. This provision was referred to by the Supreme Court of Nevada in *Lamb*. At one point, NRS § 78.495(1) provided –

1. When an agreement of merger or consolidation, or a certificate of ownership and merger, has been signed, acknowledged and filed, as required by this chapter, for all purposes of the laws of this state the separate existence of all the constituent corporations, except that of the surviving corporation in case of merger, shall cease, and *the constituent corporations shall thereupon be merged into the surviving corporation, in the case of merger*, or shall become the consolidated corporation, in the case of consolidation, and shall possess all the rights, privileges, powers and franchises as well of a public as of a private nature, *and be subject to all the restrictions, disabilities and duties of each of the constituent corporations so merged or consolidated*, and all and singular, the rights, privileges, powers and franchises of each of the constituent corporations, and all property, real, personal and mixed, and all debts due to any of the constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of the constituent corporations, shall be vested in the surviving or consolidated corporation.

(Emphasis added.)

89 Pausing there, the language “subject to all the restrictions, disabilities and duties of each of the constituent corporations so merged” resembles the language in the corresponding provision of the Delaware statute to which I referred at [61] above. Mr Bogatz accepted that these words, which seem to have appeared in the 1969 version of § 78.495(1), did not expressly limit liabilities to pecuniary liabilities, but stated that he would need to read the statute to see to what it was pertaining, and to see the context. My Pyle expressed the opinion that the formulation clearly went beyond pecuniary obligations.

90 In 1991, a Bill was before the Nevada legislature to amend Chapter 78 of the NRS. Those amendments included the addition of the following –

Sec. 16. 1. When a merger takes effect:

- (a) Every other corporation that is a party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;
- (b) The title to all real estate and other property owned by each corporation that is a party to the merger is vested in the surviving corporation without reversion or impairment;
- (c) The surviving corporation has all of the liabilities of each corporation that is a party to the merger;
- (d) A proceeding pending against any corporation that is a party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation whose existence ceased;
- (e) The articles of incorporation of the surviving corporation are amended to the extent provided in the plan of merger; and
- (f) The shares of each corporation that is a party to the merger that are to be converted into shares, obligations or other securities of the surviving or any other corporation or into cash or other property are converted, and the former holders of the shares are entitled only to the rights provided in the articles of merger or to their rights under sections 22 to 42, inclusive, of this act.

91 Paragraph (c) of the above extract was in terms that are similar to what is now NRS § 92A.250(1)(d).

92 A summary of legislation prepared by the Legislative Counsel Bureau of the Nevada Legislature stated that the Bill was the result of an extensive study of the corporate code conducted on behalf of the Secretary of State, and that the Bill “simplifies and modernizes Nevada corporate law statutes, particularly with regard to takeovers and nonprofit corporations”. Minutes of the Nevada State Legislature Joint Senate and Assembly Committees on Judiciary dated 7 May 1991 stated that the Bill “would delete antiquated language, create the option of a limited liability company, [and] make corporations mergers easier”. The minutes recorded that the firm of Vargas and Bartlett had been engaged to perform a study to examine corporate laws “for outdated, inconsistent, duplicative language”.

93 Written testimony of Mr John P Fowler of the firm Vargas and Bartlett, which was before the legislature, referred to the drafting of new merger statutes “based on the merger statutes contained in the Revised Model Act”. Mr Fowler’s testimony recorded that the model statutes “provide[d] a clear procedural outline with shorter, modernized language”. The report of Vargas and Bartlett set out a draft of a provision relating to the effect of a merger or share exchange, containing a provision similar to sec 16.1(c) of the Bill, set out above. A note to the draft provision stated, *inter alia* –

From Model Act §11.06, the proposed language basically describes in simple and more

direct fashion, the legal consequences of a merger or share exchange on its effective date. ... On the effective date, every disappearing corporation that is a party to the merger disappears into the surviving corporation and the surviving corporation automatically becomes the owner of all real and personal property and becomes subject to all liabilities, actual or contingent, of each disappearing corporation.

94 I pause to note that Mr Bogatz did not agree that the note described the effect of the legislation to the extent that it referred to “all liabilities, actual or contingent”.

95 The terms of a Revised Model Business Corporation Act adopted by the Committee on Corporate Laws of the American Bar Association’s Section of Corporation, Banking and Business Law, dated Spring 1984, support the statements in other extrinsic material that the relevant provisions of the 1991 Nevada Bill were based upon the Revised Model Act.

The opinions of Mr Pyle

96 Mr Pyle prepared two reports: an initial report dated 1 March 2024, and a supplementary report dated 14 March 2024. The reports have to be read together, for the opinions given in the supplementary report are explanatory of the opinions given in the first report. Some of the opinions expressed by Mr Pyle in response to questions that he was asked went to issues that were not material to the way the case was argued, such as the proper construction of NRS § 92A.250(1)(c), the effect of the *merger agreement* on any obligation to comply with the reporting notice, and whether the conduct of X Corp’s solicitors in responding to the reporting notice was relevant evidence under the laws of the United States. Some aspects of Mr Pyle’s evidence went beyond the content of foreign law, and I will put these opinions to one side.

97 As I have already mentioned, Mr Pyle stated that both Nevada and Delaware laws govern the issue whether X Corp is obliged to respond to the reporting notice which the Commissioner gave to Twitter Inc. Mr Pyle maintained this opinion when challenged in cross-examination by senior counsel for X Corp, and maintained that the laws, although differently expressed, were to the same effect. Mr Pyle referred to ss 259 and 261 of the Delaware General Corporation Law and NRS § 92A.250. He expressed the opinion that the laws of both states provided that the obligations of a merged corporation became obligations of a surviving corporation –

In sum, both Delaware and Nevada law provide that the obligations of a merged corporation (such as Twitter, Inc.) become obligations of the surviving corporation (such as X Corp.) following a merger, and any legal proceeding against the merged corporation may continue against the surviving corporation. Neither state’s laws, by their terms, exclude any type of obligation, duty or liability from becoming an obligation, duty or liability of the surviving corporation. The plain language of both states’ laws indicate that all obligations of Twitter, Inc. have become obligations of X Corp. There is no basis in these laws to treat Twitter, Inc.’s obligation to respond to

the Notice in a manner different from any other legal obligations of Twitter, Inc.

98 In support of this opinion, Mr Pyle referred to decisions of the Supreme Court of Nevada which have held that courts should interpret statutory language in accordance with its plain meaning, unless there is a clear reason to do otherwise: *Cote H v Eighth Judicial District Court* 124 Nev 36 (2008). However, I note that the Court in *Cote H* also said that “[s]tatutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained”. Mr Pyle said that Delaware courts also applied the “plain meaning” rule of statutory interpretation, citing an unreported decision of the Delaware Chancery Court in *Great Hill Equity Partners IV, LP v SIG Growth Equity Fund I, LLLP*, Del Ch 80 A.3d 155 (2013) (*Great Hill*) in which the Court, in interpreting s 259 of the Delaware General Corporation Law, stated: “If a valid statute is not ambiguous, the court will apply the plain meaning of the statutory language to the facts before it”. Mr Pyle said that he had not identified any case law that specifically bore upon the proper interpretation of “liabilities” in the context of a merger, but relied on the “plain meaning” rule of interpretation referred to in the cases that he cited, noting that *Great Hill* concerned the interpretation of s 259 of the Delaware General Corporation Law.

99 Mr Pyle disagreed with Mr Bogatz’s opinion in relation to the proper interpretation of the term “liabilities” in NRS § 92A.250(1)(d). Mr Pyle was of the opinion that “liabilities” should be read to mean any type of legal responsibility, and not only monetary obligations. In his first report, Mr Pyle referred to a definition of liability in the Britannica Dictionary as “the state of being legally responsible for something: the state of being liable for something”. He stated that Mr Bogatz’s reference to a definition of “liability” in an insurance statute was in an entirely different context.

100 In cross-examination by senior counsel for X Corp, Mr Pyle did not agree that “liabilities” in NRS § 92A.250(1)(d) referred only to financial liabilities. He accepted that § 92A.250(1)(d) did not operate on a fictitious premise that the constituent entities continued in existence. When asked to explain his opinion as to how in this circumstance the surviving entity inherited regulatory requirements to which it had not been subject, Mr Pyle reiterated his view, which rested on giving “liabilities” a broad interpretation.

101 As for Mr Bogatz’s reference to the decision of the United States District Court for the District of Nevada in *Quixtar*, Mr Pyle expressed the opinion that it demonstrated that Nevada courts understand that the surviving corporation in a merger becomes responsible for all obligations

of the constituent corporations, not just monetary amounts. Mr Pyle said that in over 30 years of representing clients in mergers and acquisitions, he had never before seen it argued that only monetary obligations of a constituent corporation passed to the surviving corporation in a statutory merger, or that certain types of liabilities can be extinguished by means of a merger.

102 On the topic of the differences between the Nevada and Delaware statutes, it was put to Mr Pyle in cross-examination that there were some material differences between NRS § 92A.250(1)(e) and s 261 of the Delaware General Corporation Law concerning the effect of merger upon pending actions. It was put to Mr Pyle that the Delaware provision extended specifically to civil, criminal or administrative actions or proceedings, whereas the Nevada provision did not so specify. Mr Pyle stated that he had not analysed those provisions because the case was not concerned with a proceeding by a merged corporation. He later agreed to a proposition that the Nevada provision on his analysis operated with the effect that after a merger the surviving corporation can be prosecuted and punished for a criminal offence that had been committed by a corporation that had ceased to exist. When pressed on this evidence, Mr Pyle accepted that he did not consider himself to be an expert specifically in Nevada corporate law.

Analysis of the main issues — was X Corp required to comply with the notice given to Twitter Inc on 22 February 2023?

103 I will address the main issues, before addressing the issues that arise in the alternative.

Framing the analysis required

A choice-of-law analysis is required

104 The first question is to consider what sort of choice-of-law analysis is required, if any.

105 X Corp submitted that no complicated choice-of-law analysis is required. Senior counsel for X Corp submitted that on a “simple reading” of ss 56–7 of the *Online Safety Act*, the word “person” in s 57 has to be read as referring inexorably back to the s 56 notice, to which s 57 refers. Senior counsel continued that this analysis can be further focused by reference to the provider of the service, who is the only permitted recipient of the reporting notice. Senior counsel for X Corp supported this submission by identifying that the obligation to comply with a reporting notice requires work to be done. I understood senior counsel for X Corp to submit that this implies that the obligation under s 57 is designed to apply to the person to whom the notice was given, since that is the person who is in a position to perform the required work.

Senior counsel for X Corp also drew support for this position from the fact that the reporting notice must be complied with within a particular period of time. Senior counsel for X Corp further submitted that ss 56–7 should not be construed by reference to “abusive phoenixing exercises”.

106 For the following reasons, I do not accept the submission of X Corp that the issues in this proceeding are to be resolved solely by reference to ss 56(2) and 57 of the *Online Safety Act*, and on the bare premise that the Commissioner gave the notice to Twitter Inc, which on the agreed facts ceased to exist after being given the notice.

107 I accept that the starting point of the analysis is provided by the terms of s 57. The fundamental question in this part of the case is whether X Corp is “[a] person” who “must comply with a notice under subsection 56(2) to the extent” that it can do so.

108 X Corp is, and Twitter Inc was, a foreign corporation. Foreign corporations are not natural persons, nor are they given artificial legal personality directly by the laws of Australia. Nevertheless, the common law has long recognised that companies may be incorporated under the laws of foreign countries. As Lord Wright put it in *Lazard Brothers & Co v Midland Bank Ltd* [1933] AC 289 (*Lazard Brothers*) at 297, “English Courts have long since recognized as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law”.

109 The statutory expression “person” in s 57 directs attention to the juristic status of an entity that is said to be subject to an obligation under s 56(2). (See also *Acts Interpretation Act 1901* (Cth) s 2C.) Where that “person” is said to be a foreign corporation, the juristic status of that entity falls to be determined by reference to foreign law, at least to this extent. The reference in s 57 to a “person” must be understood in the light of the common law’s longstanding approach to the question of the legal personality of foreign corporations.

110 But once it is accepted that s 57 directs attention to foreign law for the purpose of deciding whether a given foreign corporation is a “person”, certain consequences follow. Relevantly, s 7 of the *Foreign Corporations (Application of Laws) Act 1989* (Cth) assumes significance. Section 7 relevantly provides –

7 Law applied in place of incorporation applicable law in determining questions relating to status of foreign corporation etc.

- (1) The section applies in relation to the determination of a question arising under Australian law (including a question arising in a

proceeding in an Australian court) where it is necessary to determine the question by reference to a system of law other than Australian law.

- (2) Any question relating to whether a body or person has been validly incorporated in a place outside Australia is to be determined by reference to the law applied by the people in that place.
- (3) Any question relating to:
 - (a) the status of a foreign corporation (including its identity as a legal entity and its legal capacity and powers); or
 - ...
 - (h) the validity of a foreign corporation's dealings otherwise than with outsiders;is to be determined by reference to the law applied by the people in the place in which the foreign corporation was incorporated.
- (4) A matter mentioned in subsection (2) or (3) is not to be taken, by implication, to limit any other matter mentioned in those subsections.

111 I am not persuaded that ss 56–7 should be understood as operating in isolation from these provisions. Rather, in my view, it is implicit in ss 56–7 that the law will supply a means of ascertaining the juristic personality of corporations. Sections 56(2) and 57 do not supply that means themselves, as they well might. In the case of foreign corporations, that means is supplied by s 7(3)(a).

112 For these reasons, identifying whether a given foreign corporation is a “person” subject to an obligation imposed by s 57 of the *Online Safety Act* requires regard to be had to the “status” of the foreign corporation by reference to the law of the place where the corporation is incorporated.

The relevant choice-of-law analysis concerns the status of X Corp, not Twitter Inc

113 In itself, this analysis may not establish whether it is the status of X Corp or of Twitter Inc that must be decided. The Commissioner submitted that s 7(3)(a) of the *Foreign Corporations (Application of Laws) Act* directs the Court to go to the law under which the status of the company with which the Court is concerned is governed. The Commissioner submitted that, in this case, the Court is concerned with the status of Twitter Inc. On this footing, the Commissioner submitted that s 7(3)(a) selected the law of Delaware as supplying the relevant law concerning the status of Twitter Inc.

114 X Corp submitted that the relevant question in this proceeding concerns the status of X Corp. As senior counsel for X Corp put it, the question is whether the person before the Court is, by reason of its status, answerable for the alleged non-compliance.

115 I prefer the submissions of X Corp on this issue. Choice-of-law rules do not exist in isolation from curial proceedings. Rather, they operate to select the rules of decision that a Court will apply to resolve a dispute. The question for this Court does not concern the status of Twitter Inc. If the Commissioner were to seek to bring enforcement proceedings against a respondent in the name of Twitter Inc, then s 7(3)(a) would likely operate to select the law of Delaware to determine whether Twitter Inc is a juristic person, capable of being sued. At least on the evidence adduced in this proceeding, it appears that Delaware law would answer that Twitter Inc is no longer an extant legal person. This hypothetical example is simply designed to show that the law that is selected by a choice-of-law rule is necessarily chosen to be applied in a concrete dispute. There is no illogicality or inconsistency in the proposition that proceedings with different issues will adopt the law of different places, because they may be answering different questions.

116 There is a further pragmatic reason that supports this conclusion, although it was not the subject of submissions, and so I do not attach any real weight to it. That reason is that if the choice-of-law rule were to select the law of somewhere *other* than the place where the company before the Court is incorporated, inconvenient results may follow. Consider a case in which the law of an extraneous jurisdiction provided that a Nevada corporation became the universal successor of a company in that extraneous jurisdiction. If that other company had obligations under Australian law, selecting the law of the place where the *original* company was incorporated as relevantly determining “status” would have the result that Australian law might recognise a transfer of the original company’s obligations under Australian law to the Nevada company. Such a result could be inappropriate in circumstances where there was no connection between the original company and the Nevada company. This potential result simply shows that a choice-of-law rule that may seem appropriate in cases of *consensual* cross-border merger may be entirely inapposite if generalised to apply to cross-border conflicts of laws on the question of universal succession. It reinforces that, in such a case, the true issue is whether a given company is subject to a particular obligation by reason of *its* status, which is to be determined by the law of the place of *its* incorporation. But for this consideration to carry weight, it would need to have been the subject of considered submissions from both sides.

117 Twitter Inc is not a party to the present proceeding. The present proceeding is an application
by X Corp for relief, substantially in the nature of a declaration that X Corp is not subject to a
particular liability. It is thus the status of X Corp, not Twitter Inc, that is in issue.

NRS § 92A.250 is a law that governs the “status” of X Corp

118 As I have noted, prior to the enactment of the *Foreign Corporations (Application of Laws) Act*,
the common law had long recognised bodies that were created under foreign laws as juristic
entities: *Lazard Brothers* at 297 (Lord Wright), citing *Henriques v Dutch West India Co* (1728)
2 Ld Raym 1532 at 1535; 92 ER 494 at 496. Questions as to the creation, existence, status,
powers, and dissolution of a foreign corporation were determined by reference to the laws of
the place of domicile, which was the place of incorporation.

119 For these purposes, the status of a foreign corporation extended beyond its mere existence, and
included all the attributes with which the corporation was invested under the laws of its
domicile, including the identification of liabilities that attached to it, at least at the point of its
creation: *National Bank of Greece and Athens SA v Metliss* [1958] AC 509 (*Metliss*) at 525
(Viscount Simonds) and 529 (Lord Tucker).

120 Once engaged, s 7 of the Act supplies the content of the choice-of-law rule to the questions set
out in the section. But the reference to the status of a foreign corporation in s 7(3)(a) should be
understood in the same way as the common law choice-of-law rule was formulated. As
Davies J observed in *La Mancha Group International BV v Federal Commissioner of Taxation*
[2020] FCA 1799; 112 ATR 660 (*La Mancha*) at [21], the relevant common law principle
finds expression in s 7(3)(a) of the Act.

121 Choice-of-law rules for determining the status of foreign corporations may be applicable to
private causes of action. *Metliss* itself concerned the recovery of moneys due under a guarantee
of bonds governed by English law against a Greek company that was held to be the “universal
successor” under Greek law of the bank that had originally guaranteed payment. It is important
to identify that universal succession is a concept that was known to Roman law, which has been
adapted to juristic entities incorporated under the laws of several civil law countries. It is a
label that describes a complex doctrine, with many exceptions. It is often explained by the
metaphor that the successor entity “stands in the shoes” of the old entity, noting the limitations
on metaphors as complete expressions of legal principle: see, for example, *Adams v National
Bank of Greece SA* [1961] AC 255 at 274 (Viscount Simonds) and 279 (Lord Reid); *Duro
Felguera Australia Pty Ltd v Samsung C&T Corp* [2015] WASC 484 at [82] (Le Miere J);

Buckland WW, *A Text-Book of Roman Law: From Augustus to Justinian* (3rd ed, Cambridge University Press, 1963) at 316.

- 122 For present purposes, it is sufficient to say that universal succession does not form part of the common law of Australia, because liabilities cannot usually be transferred without the consent of the obligee. That said, succession is sometimes sought to be achieved by statutes providing that a new entity becomes “the successor in law” of another entity: see *Bank Integration Act 1991* (Cth) s 12, referred to in *Commonwealth Bank of Australia v Deputy Commissioner of Taxation* [2009] FCAFC 126; 180 FCR 161 at [1], [32] (Finn and Perram JJ). There are many other examples under state legislation, for instance in the *Yooralla Society of Victoria Act 1977* (Vic) s 4(1).
- 123 Some corporations statutes in other jurisdictions provide for succession by the express terms of the statute. For example, s 219 of the *Companies Act 1993* (NZ) provides that two or more companies may amalgamate and continue as one company. The result is that the amalgamated company is not to be treated as a different entity, but “stands in the shoes” of the amalgamating company: *Carter Holt Harvey Ltd v McKernan* [1998] 3 NZLR 403 at 411 (Richardson P, Gault, Henry, Blanchard and Tipping JJ), cited in *Gold & Resource Developments NL v Australian Stock Exchange Ltd* (1998) 30 ACSR 105 at 110 (Wheeler J). A similar conclusion was reached in relation to Ontario legislation, which provided that two or more corporations may amalgamate and continue as one corporation: *Stanward Corp v Denison Mines Ltd* [1966] 2 OR 585, cited in *Crocodile Gold Corp v Commissioner of Territory Revenue* [2015] NTSC 13; 35 NTLR 65 at [35] (Kelly J). See also *R v Black & Decker Manufacturing Co Ltd* [1975] 1 SCR 411, concerning the criminal liability of a corporation that was the product of an amalgamation under the *Canada Corporations Act*, RSC 1970, c C-32, s 137.
- 124 Choice-of-law rules for determining the status of foreign corporations have also been held to be applicable to working out the rights and obligations of parties arising under statute. One example is *Sipad Holding ddpo v Popovic* (1995) 61 FCR 205, which was an application for relief under the *Corporations Law*, including for the rectification of a register of members of an Australian corporation, where the status of the members was in issue. That occurred in circumstances where foreign law had operated to transfer the assets and liabilities of former entities (including their shareholding in the Australian corporation) to new entities by universal succession. Another example is *La Mancha*, where the status of a corporation which was the product of a cross-border merger under the laws of two European countries that recognised

universal succession was relevant to whether the surviving corporation was a “taxpayer”, with obligations and corresponding rights under Australian taxation legislation.

125 There are limits upon what matters relate to the status of a foreign corporation. In *Metliss*, the liabilities that attached to the new bank that was incorporated under a decree made pursuant to the laws of Greece for the purpose of assuming the assets and liabilities of the old bank went to the status of the new bank. That was because Greek law clothed the new bank with the assets, powers and liabilities of the old bank, with the relevant decree providing that the new bank would become the universal successor of the old bank which thereupon ceased to exist. However, a moratorium declared by the Greek government that purported to suspend obligations on bonds payable in foreign currency did not go to the status of the new bank. The moratorium was thus not given effect, because the obligations on the bonds were governed by English law, which could not be varied by foreign legislation.

126 In my view, NRS § 92A.250 is a law that makes provision for the status of X Corp. There are several points that lead me to this conclusion.

127 The first point is that NRS § 92A.250(1) is to be construed in a context where the evidence is that a merger of two or more corporations under Nevada law does not require the approval of a court, or some regulatory authority. The merger is brought about by a merger agreement and plan of merger, and some regulatory filings. This may be compared with the Australian position, where the *Corporations Act 2001* (Cth) does not directly facilitate mergers in this way, and where corporate re-arrangements are often subject to schemes of arrangement which require the approval of a court under s 413.

128 The second point is that NRS § 92A.250(1) uses the words “merger” and “merges”. Now, to speak of a “merger” of two or more corporations is to use a metaphor, as senior counsel for the Commissioner accepted. When used as a metaphor, a “merger” may not always accurately describe the underlying legal transactions that take place. Under Australian law, those transactions might involve the acquisition of shares or assets, but without combining the juristic entities involved into one entity: cf *Competition and Consumer Act 2010* (Cth) s 50, and the definition of “merger authorisation” in s 4(1). In the case of Nevada law, however, it is significant that § 92A.250(1)(a) employs the direct language of “merges into” to describe a legal consequence of a “merger”. These words are to be given their plain meaning. They describe a situation where the constituent elements become one whole element, being the

surviving entity. Indeed, an entity that is not the surviving entity is referred to in § 92A.250(1)(a) as “a constituent entity”.

129 The third point is that a constituent entity involved in a merger that is not the surviving entity does not simply disappear, for that is only half the picture. The text of § 92A.250(1)(a) is important. It provides that the *separate* existence of every entity except the surviving entity ceases when a merger takes effect. The use of the word *separate* reinforces that what occurs is not the complete extinction of the constituent entities, but their merger *into* the surviving entity.

130 The fourth point is that the scheme of § 92A.250(1) is to transfer, *uno actu*, a whole host of legal incidents from Twitter Inc to X Corp, while at the same time extinguishing the separate existence of Twitter Inc. Those legal incidents relate to liabilities, real estate and other property, owners’ obligations and pending proceedings. They are broad, and the transfer is wholesale. As a matter of characterisation, this (together with the fact that Twitter Inc ceased to exist) tells in favour of considering the transfer of legal incidents as one that affects the status of X Corp.

131 For these reasons, NRS § 92A.250(1) is a law that goes to the status X Corp for the purposes of the *Foreign Corporations (Application of Laws) Act*. To adopt the language of the Nevada statute, Twitter Inc was a *constituent entity* that merged *into* X Corp. It was only upon that occurrence that Twitter Inc ceased to exist, and it was only its *separate* existence that ceased. X Corp’s “status” is as the *surviving entity* of a statutory merger, in which Twitter Inc was a *constituent entity* that merged *into* X Corp, with all of the legal consequences that ensue pursuant to § 92A.250(1).

Findings as to the content of Nevada law

132 Accordingly, whether X Corp was subject to an obligation under s 57 of the *Online Safety Act* turns on whether NRS § 92A.250(1)(d) has the effect, by virtue of the *Foreign Corporations (Application of Laws) Act*, of making it part of the “status” of X Corp that it is subject to regulatory obligations to which Twitter Inc was subject immediately before the merger.

133 To resolve this issue, it is necessary to make a finding as to whether the word “liabilities” in § 92A.250(1)(d) includes regulatory obligations.

134 In making findings as to the effect of the law of Nevada upon the status of X Corp, I must proceed on the basis that “Australian courts know no foreign law”: *Neilson* at [115] (Gummow and Hayne JJ). The content of foreign law is therefore a question of fact that is to be proven. However, elements of foreign law are facts of a peculiar kind: *Parkasho v Singh* [1968] P 233

at 250 (Cairns J, Sir Jocelyn Simon P agreeing at 252). In part, that has been attributed to the nature of the factual enquiry, where a judge is able to use legal skills and experience in the understanding and evaluation of the evidence as to foreign law, particularly where the foreign law is that of another common law jurisdiction which adopts a similar approach to the question in issue: see *Perry v Lopag Trust Reg* [2023] UKPC 16; [2023] 1 WLR 3494 at [10] and [12] (Lord Hodge DPSC for the Board).

135 However, because foreign law is a question of fact, it is not for the judge to undertake independent investigations to ascertain the primary content of foreign law. The judge has a “duty of deciding the question on the actual evidence given in the particular case”: *Lazard Brothers* at 298 (Lord Wright). This has the result that the body of material available is confined to what is in evidence. There may be gaps in the evidence. If there is some gap, the presumption that foreign law is the same as the law of the forum may come into play. This principle has been held to enable a judge to apply the rules of statutory construction of the forum to a foreign statute, where there was no evidence of the content of those rules in the foreign jurisdiction: *F & K Jabbour v Custodian of Israeli Absentee Property* [1954] 1 WLR 139 at 147–8 (Pearson J), cited in *Neilson* at [125].

136 In relation to the rules of statutory construction, I accept that the starting point in Nevada is the plain meaning rule. Both Mr Bogatz and Mr Pyle gave evidence to this effect. The plain meaning rule involves giving a statute its plain meaning in the absence of ambiguity, or some clear reason to do otherwise, such as where the plain meaning was clearly not intended: *McKay v Board of Supervisors* 102 Nev 644 at 648 (1986); *Cote H*. I also accept the evidence of Mr Bogatz that the principles of construction in Nevada include those that I set out at [70]. In the general terms in which those principles were expressed, they were not disputed by Mr Pyle, who was asked to review Mr Bogatz’s report. I find that these principles, which are essentially emanations of basic linguistic canons of construction, apply to the ascertainment of meaning, whether or not there is an ambiguity. Where there is an ambiguity, I accept that the principles identified in *Chanos* that I extracted at [65] above are applicable. Again, the general terms of those principles were not disputed by Mr Pyle.

137 With those principles in mind, I turn now to the resolution of disputed issues arising from the evidence of Mr Bogatz and Mr Pyle, which will involve assessing the weight that I should give to contentious aspects of their evidence.

Mr Bogatz

138 The central opinion of Mr Bogatz that falls for consideration is his opinion that the word “liabilities” in § 92A.250(1)(d) encompasses only *monetary* liabilities, and does not encompass non-monetary regulatory obligations.

139 Mr Bogatz gave his evidence in an open manner. He generally answered questions directly, and did not attempt to avoid questions that challenged positions essayed in his report. As I have noted, Mr Bogatz was asked to give opinions that sometimes strayed outside the identification of the content of foreign law, as a result of which a direction was made under s 136 of the *Evidence Act* in relation to some passages in his report.

140 There were some aspects of Mr Bogatz’s reasoning that were not sufficiently explained. For example, Mr Bogatz was asked about the meaning of the word “duty” as that term was used in the merger agreement, in combination with NRS Chapter 92A. Mr Bogatz began by noting that there was no definition of “duty” in NRS Chapter 92A. He then immediately proceeded to the proposition that the term “duty” in Nevada law “applies to contexts such as fiduciary obligations”. Mr Bogatz gave two examples of where the word “duty” is used to refer to what he cast as fiduciary duties. Without any further analysis, Mr Bogatz then said that, because these two sections related to relationships between parties, a Nevada court would not conclude that a foreign regulator’s information request is a “duty”. The reasoning behind this analysis, and how it accords with the principles of interpretation that Mr Bogatz identified, was otherwise left unexplained.

141 Mr Bogatz’s reliance on Nevada gaming legislation was another area where the path of reasoning supporting his opinions was not always apparent. Mr Bogatz relied on analogies with Nevada gaming legislation in his answer concerning NRS § 92A.250(1)(c), and during cross-examination on the public policy of Nevada. Clearly, the law relating to business transactions involving gaming in Nevada lies squarely within Mr Bogatz’s field of experience. But the logic of Mr Bogatz’s reliance on Nevada gaming law was not persuasive. For example, in the concurrent evidence session, Mr Bogatz explained that the reason he referred to Nevada gaming law in his report was that the present case deals with regulatory law, so he looked at regulatory issues in Nevada as they pertain to mergers. This led him to consider gaming law because, in Nevada, the regulatory consequences of mergers are usually related to gaming regulation. Mr Bogatz’s reasoning appeared to proceed by identifying that Nevada courts are keen to uphold Nevada’s policy of not permitting gaming rights to be transferred by corporate

restructures. Mr Bogatz explained it was the “very clear-cut policy” of Nevada courts not to accept an argument that a corporate restructure necessarily transfers gaming rights under Nevada law. From there, Mr Bogatz said that “it has to go both ways”, meaning that corporate regulatory *obligations* could not be transferred in a merger. He stated that Nevada courts would “pause” at such a prospect, out of a concern that acknowledging the transfer of a regulatory obligation would open the door to a regulated company claiming that gaming rights had been transferred by a merger.

142 I do not accept Mr Bogatz’s evidence that gaming in Nevada would influence the proper construction of the merger laws. Gaming has no connection with the present application, and is subject to its own regulation in the ways identified by Mr Bogatz in his evidence. Further, the Nevada merger laws appear to be based upon model laws. Where there are special laws about the transfer of interests and securities in the holders of gaming licences, I am not persuaded that model-based merger laws of general application would take on some special complexion in Nevada, and Mr Bogatz did not refer to any authority that suggested otherwise.

143 There were also aspects of Mr Bogatz’s analysis of the meaning of the word “liabilities” in NRS § 92A.250 that were not persuasive. As I recounted earlier, Mr Bogatz referred to two sections of the NRS — §§ 92A.250(3)(h) and 92A.270(8) — which contain the expression “pay its liabilities” in support of the proposition that the word “liabilities” in § 92A.250(1)(d) necessarily refers to pecuniary obligations. He also referred to § 92A.270(7), which deals with liability and duties incurred or contracted by certain entities, and § 695E.060, which deals with risk retention groups in the context of insurance. Mr Bogatz then cited the general principles of construction, which require Nevada courts to construe statutes as a whole, reconcile and harmonise statutory provisions, and recognise consistency of meaning unless context requires otherwise. Without further explanation, Mr Bogatz stated that “it is clear under Nevada Law that the term ‘liability’ refers to monetary obligations”.

144 I cannot accept this evidence without a much better explanation of Mr Bogatz’s path of reasoning. For one thing, Mr Bogatz’s conclusion appears to be that, owing to its use in two statutes, the word “liability” has a uniform meaning across the sweep of Nevada law. It was not explained how Mr Bogatz reconciled this conclusion with his reference to the decision of the Supreme Court of Nevada in *Savage v Pierson* 123 Nev 86 (2007), which he produced, which held at 94 that “when the same word is used in different statutes *that are similar in respect to purpose and content*, the word will be used in the same sense, *unless the statutes’*

context indicates otherwise” (emphasis added). Mr Bogatz did not analyse the purpose or content of Chapter 92A, as opposed to the other provisions regarding risk retention groups for the purposes of liability insurance. As Mr Pyle pointed out, “liability” in an insurance context is apt to refer to pecuniary liability, since insurance policies represent an obligation to pay monetary amounts. I do not accept Mr Bogatz’s evidence in seeking to align the meaning of “liabilities” in § 92A.250(1)(d) in a corporate merger context with the use of the same term in the patently different context of insurance.

145 Nor did Mr Bogatz grapple with the significance of § 92A.270(7), a provision he cited in this context. That section relevantly provides that, when a non-Nevada corporation becomes domesticated in Nevada –

all debts, liabilities and duties of [that company] attach to the domestic entity resulting from the domestication and may be enforced against it to the same extent as if the debts, liability and duties had been incurred or contracted by the domestic entity.

146 Mr Bogatz appeared to assume, without analysis, that “liabilities” in this context refers to pecuniary obligations only. But without analysis, that is far from obvious. While debts are obviously pecuniary, the term “duties” — even on Mr Bogatz’s own analysis of the term in his report — is not limited to pecuniary obligations. I do not accept Mr Bogatz’s assumption that § 92A.270(7) uses the term “liabilities” in a purely monetary sense.

147 Moreover, there were gaps in reasoning even in respect of §§ 92A.250(3)(h) and 92A.270(8). These provisions *do* refer to pecuniary liabilities, because they assume that the liabilities may be paid. But Mr Bogatz proffered no analysis of why the use of the word “liabilities” in these sections should shape the meaning of the word in other sections. I have already noted Mr Bogatz’s reference to *Savage*, which requires words to be given consistent meanings in statutes, where their purpose and content are aligned, and subject to contextual indications to the contrary. Mr Bogatz did not explain the purpose of §§ 92A.250(3)(h) or 92A.270(8), or whether there were any indications of context that bore on his construction. Indeed, the fact that § 92A.270(7) may well use the term “liabilities” in a broader sense may be a critical piece of context that would weigh on the analysis.

148 Further, there were occasions when it appeared that Mr Bogatz’s evidence was moulded to support the conclusions he expressed in his report. An example came when Mr Bogatz was taken to the two definitions of the word “liability” in *Black’s*, set out at [83] above. The first definition defined “liability” as “[t]he quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or

criminal punishment”. The second definition defined “liability” as “[a] financial or pecuniary obligation in a specified amount; debt”. Mr Bogatz did not accept that the first definition is broader than the second, in that it is not limited to pecuniary obligations. Instead, he insisted that whether the first definition was broader in this way would “depend on the context”. This is to be contrasted with the fact that Mr Bogatz was able to state what “plain meaning” the word “liability” bears in isolation, with that plain meaning denoting in Mr Bogatz’s view “some type of monetary obligation”. I consider that Mr Bogatz’s opinion in this regard was strained.

149 A related issue arose in relation to Mr Bogatz’s evidence concerning the 1969 version of NRS § 78.495. That section relevantly provided that when a merger took place, the surviving entity “shall ... be subject to all the restrictions, disabilities and duties of each of the constituent corporations so merged”. Mr Bogatz was asked whether the plain meaning of this version of the Nevada legislation was that the surviving entity becomes subject to all of the restrictions, disabilities and duties of the constituent corporations, in a way that is not limited to pecuniary liabilities. In response, Mr Bogatz stated that the text of the statute did not use the word “pecuniary”, and that while the words of the statute did not impose such a limit, he would have to see the context. Given that Mr Bogatz was capable of explaining the plain meaning of the word “liability” isolated from context, it was not obvious why it was necessary for him to see further context in respect of this example before he could proffer the plain meaning of the words used.

150 Mr Bogatz’s analysis of the meaning of “liabilities” in § 92A.250(1)(d) was to my mind superficial, and did not sufficiently explain the reasoning that led him from the uncontroversial principles of interpretation he laid out to the conclusions he reached. In my view, there were gaps in Mr Bogatz’s path of reasoning, and leaps in logic that were not supported by adequate explanation.

151 Overall, I formed the impression that Mr Bogatz was knowledgeable about certain areas of practice that fell within the ambit of his experience, in particular business transactions, gaming, and perhaps liquor licensing. I was, however, surprised that Mr Bogatz appeared to be unaware of the legislative history that led to the enactment of the current Nevada law relating to corporate mergers, despite being a practising attorney in Nevada for some years. I also consider that Mr Bogatz was inclined to rely on propositions from his areas of experience in an anecdotal fashion, without explaining in a thorough way how they should inform the proper construction of the statutory provisions in issue. Without in any way impugning Mr Bogatz’s desire to assist

the Court, I formed the view that his allegiance to the opinions expressed in his report made him reluctant in oral evidence to make all the concessions that might have been made if he had been given more time to consider the questions, and analyse them in a more rigorous way. These considerations lead me to conclude that Mr Bogatz’s opinions on disputed issues relating to the operation of Nevada’s merger laws do not carry much weight.

Mr Pyle

152 The central opinion of Mr Pyle that falls for consideration is his opinion that the word “liabilities” in § 92A.250(1)(d) is broad enough to encompass non-pecuniary regulatory obligations.

153 Mr Pyle gave his evidence in a straightforward and confident manner. The reasoning in his reports was clear, and particularly succinct. However, a product of his succinct reasoning was that, like Mr Bogatz, some of his opinions were not supported by rigorous analysis. Despite this, I formed a generally positive impression of Mr Pyle as a witness who was doing his best to explain the content of the applicable law.

154 Mr Pyle has broad experience in mergers. As Chair of the corporate transaction group at Sheehan Phinney Bass & Green PA, and previously as a lawyer and partner at Foley Hoag LLP, Mr Pyle has handled over 100 United States merger and acquisition transactions. His confidence in his understanding of the applicable law across jurisdictions in the United States was apparent during cross-examination.

155 Mr Pyle’s testimony during the concurrent evidence session stood in contrast from that of Mr Bogatz in some respects. By way of example, Mr Pyle accepted that the definition of “liability” in *Black’s* bore two separate meanings, including one that related to pecuniary obligations only, despite his opinion that in NRS § 92A.250(1)(d) the word “liabilities” bears a broader meaning. This concession was entirely appropriate and, indeed, necessary.

156 During cross-examination, Mr Pyle was challenged on his view that both Nevada law and Delaware law were relevant to the legal effects of the merger of Twitter Inc into X Corp. More than once, senior counsel for X Corp put to Mr Pyle that the merger was a “Nevada merger”. Mr Pyle observed that this formulation carried with it the implication that the merger was really a matter of Nevada law, but that the very issue raised during cross-examination was whether that implication was correct. Mr Pyle referred to his view that the law of both Delaware and Nevada could provide for the consequences of a merger, and that in the case of substantial

divergence between them, a detailed choice-of-law analysis would be required to identify the applicable law governing the particular issue in question. In Mr Pyle's view, Nevada law and Delaware law did not substantially differ with respect to their provision for the consequences of the merger. Accordingly, on his understanding, he could reach his opinions without conducting a detailed choice-of-law analysis. Nevertheless, I was left with the impression that more could have been said to explain to the Court the interaction of Delaware and Nevada law. However, for reasons that I have explained this does not go to a substantive issue, because the relevant choice-of-law analysis takes place by reference to Australian choice-of-law rules, and in the case of the status of X Corp, that directs attention to Nevada. There was no suggestion that the law of Nevada, to which Australian law gives effect, would itself conduct any choice-of-law analysis before applying the provisions of § 92A.250(1).

157 There were some aspects of Mr Pyle's evidence that provided less assistance. For example, Mr Pyle was asked to address in his supplementary report the relevance of X Corp's representations to the Commissioner for the purposes of Delaware and Nevada law. Mr Pyle opined that the statements made by X Corp's solicitors were relevant, because they indicated that X Corp's solicitors believed that X Corp did have an obligation to respond to the reporting notice. Mr Pyle noted, however, that he did not view these statements as "a binding judicial admission", and cited a decision of the United States Court of Appeals for the 9th Circuit. Senior counsel for X Corp made much of this in cross-examination. Mr Pyle did not explain in his report how or why the statements would be relevant to the content of the law. Viewed charitably, his opinion was one as to how an American court would treat those statements as evidence, perhaps allied with some preclusive doctrine. During cross-examination, Mr Pyle properly and readily accepted that these statements did not affect the existence of the obligation to respond to the reporting notice. While this aspect of Mr Pyle's evidence was not of assistance, I regarded Mr Pyle as honest and ready to make appropriate concessions. In my view, nothing about this aspect of the evidence undermines Mr Pyle's opinion as to the correct construction of § 92A.250(1)(d).

Conclusions on expert evidence

158 On the critical issue of the proper construction of § 92A.250(1)(d), I do not accept Mr Bogatz's opinion that "liabilities" is confined to pecuniary liabilities on its plain meaning, or otherwise. I prefer Mr Pyle's evidence on this issue. Mr Pyle took a synoptic view of the operation of Nevada law, in its context and having regard to the public policy aims that he discerned as

underpinning it. He identified the public policy underpinning NRS § 92A.250(1)(d) as being to avoid the situation of having legal obligations disappear and become unenforceable against any entity that had existed prior to the merger. This accords with an important piece of context that I have mentioned, which is that a merger under the laws of Nevada is substantially the act of the parties and not subject to substantive curial or regulatory oversight.

159 Having regard to the fact that § 92A.250(1) uses the descriptive language of a “merger” of a “constituent entity” “into” a “surviving entity”, I find that no narrow construction is likely to be given by the Supreme Court of Nevada to the word “liabilities” in § 92A.250(1) on its plain meaning. Context requires that the word “liabilities” be construed in a way that is consistent with the object of the surrounding provisions in § 92A.250(1), which is to alter the status of the juristic entities so that the constituent entities become one surviving entity.

160 In the alternative, if there be an ambiguity, then the legislative history of the provision, which Mr Bogatz and Mr Pyle agreed to be relevant, supports a broad construction. As I have recounted at [92] above, that legislative history supports the view that the object of the current form of § 92A.250 is to simplify and modernise Nevada’s corporate law, and to provide a clear procedural outline with shorter, modernised language. On the face of it, then, the change in language from “restrictions, disabilities and duties” to “liabilities” does not appear to have been intended to effect a fundamental refashioning of the legal consequences of mergers under Nevada law. Mr Pyle’s evidence that “restrictions, disabilities and duties” and “liabilities” in this context share a substantially similar meaning accords with what the legislative history suggests.

161 Accordingly, I find that a Nevada court would likely hold that the word “liabilities” in NRS § 92A.250(1)(d) is broad enough on its proper construction under Nevada law to encompass non-pecuniary liabilities, such as the obligation to respond to the reporting notice.

Conclusions on the application of the Online Safety Act to X Corp

162 This brings me back to the application of ss 56(2) and 57 of the *Online Safety Act* to X Corp, which as a result of the above analysis is now straightforward.

163 On 15 March 2023, the status of X Corp changed so that it became the surviving entity into which Twitter Inc merged. From the perspective of Nevada law, X Corp’s new status entailed being subject to all the liabilities, including the regulatory obligations, to which Twitter Inc had been subject immediately before it merged into X Corp.

164 By virtue of the *Foreign Corporations (Application of Laws) Act*, X Corp thus became, for the purposes of s 57, the “person” required to comply with the reporting notice to the extent that it was capable of doing so.

165 X Corp has therefore failed to show that it was not required to respond to the reporting notice. It also necessarily follows that X Corp has not shown, on this ground, that the infringement officer did not have reasonable grounds to believe that X Corp had contravened s 57 of the *Online Safety Act*, which was the other main issue.

Analysis of the first alternative issue — the claimed extension of time within which to comply with the reporting notice

166 Section 56(2)(c)(ii) of the *Online Safety Act* (see [16] above) has the effect that the Commissioner may allow a longer period of time within which a provider of a service is to give a report to the Commissioner in response to a notice given under that section.

167 X Corp claims that on two occasions the Commissioner allowed a further period of time within which X Corp was required to comply with the reporting notice, which by its terms required compliance by 29 March 2023. The two occasions relied on by X Corp are cumulative, and were –

- (a) the email from the office of the Commissioner to Thomson Geer of 6 April 2023 which attached some clarifying questions, requesting a response by 24 April 2023 — see [31] above; and
- (b) the email from the office of the Commissioner to Thomson Geer of 26 April 2023 in response to X Corp’s request for an extension of time within which to respond to the follow-up questions — see [34]–[36] above.

168 I infer, in the absence of any evidence to the contrary, that the Commissioner authorised the emails from her office of 6 and 26 April 2023. Indeed, the Commissioner was copied in on both emails, and the second email referred expressly to the Commissioner deciding to grant the extension.

169 However, the correspondence relied on by X Corp is not to be construed as amounting to the Commissioner allowing additional time within which X Corp was required to comply with the reporting notice. Commencing with the Commissioner’s email of 6 April 2023 and its attachment, the terms of the email proceeded on the premise that the response to the notice had already been given. The email stated that the Commissioner’s office had “reviewed ... [the 29

March 2023] response to the non-periodic reporting notice”. This establishes the basis of the communication as being that “Twitter” had *already* responded to the notice. The questions were thus described in the email and its attachment as “follow-up questions” to clarify some of the responses. Tellingly, Thomson Geer in its letter of 20 April 2023 understood that they were “follow-up questions”. In context, the Commissioner’s email of 6 April 2023 should be understood as assuming that a response had already been given, and moving on to consequential matters, rather than allowing more time for a response to be given.

170 While the Commissioner’s covering email of 6 April 2023 and its attachment referred to providing Twitter with “another opportunity to respond”, I do not regard this as amounting to the Commissioner allowing further time to respond to the initial notice. My principal reason is that the paragraphs numbered “3” of both the covering email and the attachment asked Twitter to “provide specific reasons to help eSafety assess Twitter’s compliance with the Notice”. This was a reference to the reporting notice that had to be complied with by 29 March 2023, and is inconsistent with any idea that there was any allowance of extra time for compliance. Read fairly, and in its statutory context, the information requested went to whether X Corp *had* complied with the notice, where s 57 required a person to comply “to the extent that the person is capable of doing so”.

171 Nor does the fact that the 6 April 2023 email from the Commissioner’s office specified a deadline for responses to the follow-up questions gainsay this analysis. True, the deadline is not referable to any power under the *Online Safety Act* to stipulate a time within which follow-up questions must be answered. But the deadline simply reflects the pragmatic demands of administration: the Commissioner’s office was requesting answers to the follow-up questions by a certain time, so that the Commissioner could act accordingly. The deadline does not imply that the time for responding to the reporting notice itself had been extended.

172 For these reasons, this aspect of X Corp’s challenge to the infringement notice fails.

Analysis of the second alternative issue — the claimed failure of the infringement notice to identify the place of the alleged contravention

173 Section 104(1)(e)(iii) of the Regulatory Powers Act relevantly provides that “[a]n infringement notice must ... give brief details of ... each alleged contravention ... to which the notice relates, including ... the place of ... each alleged contravention”.

174 The dispute between the parties concerning the operation of this provision upon the infringement notice issued to X Corp comprised two issues. *First*, there was a dispute as to whether the infringement notice identified the place of each contravention to which the notice related. *Secondly*, there was a dispute as to whether any failure to identify the place of each contravention would invalidate the infringement notice.

175 On this topic, I understood X Corp to submit that the infringement notice did not comply with s 104(1)(e)(iii) because it did not state the place of the contraventions. Although this was not the subject of detailed submissions, I understood X Corp's position to be that the "place" of the contravention is the geographical place where the conduct constituting the contravention occurred.

176 The Commissioner submitted that the infringement notice identified the place of the contraventions by identifying the report that X Corp gave in response to the reporting notice issued to Twitter Inc. A starting point of the Commissioner's submission was that the word "place" is a broad word, which is used to ensure that the person who receives an infringement notice is able to identify what contravention is being addressed. Senior counsel for the Commissioner submitted that the relevant contraventions in this case occurred in a document, being the report given to the Commissioner, and that where the report was sent from or where it was received had no significance to the contraventions. On this basis, senior counsel submitted that, in this case, "the place of the contravention is the report" because that was "where the contravention happened". Since the infringement notice identified the report with sufficient precision, it followed on this submission that the infringement notice complied with the requirements of s 104(1)(e)(iii).

177 I do not accept the Commissioner's submissions on this first topic.

178 Importantly, I did not understand the Commissioner to submit that s 104(1)(e)(iii) only requires the "place" of the contravention to be identified in an infringement notice in some circumstances. Rather, I understood the Commissioner to accept that s 104(1)(e)(iii) requires the "place" to be identified irrespective of the contravention alleged (subject to the issue of what the consequences of non-compliance with this statutory requirement are to the validity of the infringement notice).

179 I do not accept that the infringement notice in this case identified the place of the contraventions alleged. Section 104(1)(e) calls for "brief details of the alleged contravention, or each alleged

contravention, to which the notice relates”. It thereby directs attention to the particular contravention in question. Here, the infringement notice alleged that X Corp had contravened s 57 of the *Online Safety Act*. Section 57 relevantly provides that “[a] person must comply with a notice under subsection 56(2)”. The alleged contraventions, then, comprise failures to comply with a s 56(2) notice. Section 56(2) relevantly empowers the Commissioner to require a provider “by written notice” to “prepare a report” about certain matters, in a specified manner and form, and to “give the report to the Commissioner” within a certain time. When the Commissioner gives written notice under s 56(2), the provider thereby comes under obligations to engage in conduct, by preparing a report and giving it to the Commissioner. The conduct of X Corp that is alleged to have constituted contraventions of s 57 is thus the focus. The “place” that s 104(1)(e)(iii) requires to be identified is therefore a geographical place connected with the conduct of X Corp and the obligation imposed by the *Online Safety Act*. It is not necessary for me to essay any view as to where that place was. It is enough to conclude that the contraventions alleged did not occur *in* the report in any relevant sense. On the supposition that the contraventions took place they occurred *by* failing to furnish a report that complied with s 56(2) within the time allowed. Noting again that the Commissioner did not submit that, as a matter of statutory construction, there was no need for any place to be identified in the infringement notice, it follows that the infringement notice failed to comply with s 104(1)(e)(iii) because it did not identify the place of the contraventions.

180 What consequences for the validity of the infringement notice flow from this conclusion?

181 X Corp submitted that the failure of the infringement notice to identify the place of the contraventions resulted in the invalidity of the notice. Among its reasons for this position, X Corp submitted that s 104 of the Regulatory Powers Act employs mandatory language, which makes it clear that substantial compliance is insufficient to establish the validity of an infringement notice.

182 X Corp also identified, as a pragmatic consideration, the fact that specifying the location of the alleged contraventions could have indicated which was the correct legal entity to whom the notice should have been directed. It was not explained to my satisfaction how including the place of the contraventions could have any bearing on that contested question.

183 X Corp also submitted that s 104(1)(e)(iii) of the Regulatory Powers Act “aligns with the general law to the effect that where there is a charge for an offence, the place of that offence must be specified”. In support of this supposed position at general law, X Corp referred to

Goodman v Stafford (1992) 15 MVR 145. It will be necessary to return to *Goodman* in due course.

184 The Commissioner submitted that the failure of the infringement notice to identify the place of the contraventions did not result in the invalidity of the notice. The Commissioner relied upon *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 (*Project Blue Sky*) at [91], where in a joint judgment McHugh, Gummow, Kirby and Hayne JJ said –

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.

185 The Commissioner submitted that the infringement notice identified the relevant contraventions with sufficient specificity to satisfy the purpose of the requirements in s 104(1)(e)(iii), which I understood the Commissioner to submit was giving fair notice of alleged contraventions to persons receiving infringement notices. The Commissioner submitted that there was no ambiguity as to which contraventions were the subject of the notice, and so X Corp suffered no prejudice by any omission of the place of the contraventions. Senior counsel for the Commissioner accepted that a failure to comply with s 104(1)(e)(iii) would result in invalidity if the particular failure “could well lead to prejudice” to the recipient of the infringement notice.

186 I accept the Commissioner’s submission that the consequences of non-compliance with s 104(1)(e)(iii) must be discerned as the result of a process of statutory construction.

187 In *Project Blue Sky* at [91], McHugh, Gummow, Kirby and Hayne JJ described the relevant question as turning on “whether there can be discerned a legislative purpose to invalidate *any* act that fails to comply with the condition” (emphasis added). Amongst other things, this purpose fell to be discerned by reference to “the consequences for the parties of holding void *every* act done in breach of the condition” (emphasis added). It could be thought that these formulations suppose that failure to comply with a statutory condition on the exercise of a power either invalidates “every act done in breach of the condition” or none.

188 But, because of the path of reasoning adopted by the majority in *Project Blue Sky*, it was not necessary in that case to consider whether some statutory schemes might have the result that

breach of a given condition could sound in invalidity in some cases, but not in others, depending on the consequences of the breach. *Project Blue Sky* left that question open, even if the logic of the decision arguably supports the view that this result would follow, if that were the purpose of the statutory scheme in question.

189 The High Court resolved the question in *Minister for Immigration and Citizenship v SZIZO* [2009] HCA 37; 238 CLR 627 (*SZIZO*). That decision concerned provisions of the *Migration Act 1958* (Cth) that set out an exhaustive statement of the requirements of the natural justice hearing rule in relation to certain matters forming part of a review conducted by the Refugee Review Tribunal. In the events that transpired, ss 425A, 441A and 441G of the *Migration Act* obliged the Tribunal to give a notice inviting the review applicants to attend a hearing by giving the notice to an “authorised recipient”. Instead of giving the notice to the relevant authorised recipient, the Tribunal gave the notice to SZIZO. The High Court accepted at [24] that SZIZO and the other respondents had not suffered any unfairness or prejudice by reason of the Tribunal’s failure to comply with its statutory obligation.

190 In these circumstances, the High Court framed the question at [26] as being –

what consequence follows if an invitation to attend a hearing was not given to the authorised recipient, but was given to one of the applicants for review, and came to the attention of other applicants for review and the authorised recipient in due time? Was it a purpose of the legislation that, despite holding a hearing at which all of the applicants for review, including their authorised recipient, appeared before the Tribunal to give evidence and to present arguments relating to the issues arising in relation to the decision under review (s 425(1)), the Tribunal could not validly decide the review?

(Citations omitted.)

The Court cited *Project Blue Sky* at [91] in support of this framing of the issue.

191 The Court then analysed the place of the relevant provisions as part of an exhaustive statement of the requirements of the natural justice hearing rule. At [33]–[34], the Court described ss 425A and 441G as ensuring that an applicant for review receives timely and effective notice of the hearing. Ultimately, ss 441A and 441G were described at [36] as “procedural steps that are designed to ensure that an applicant for review is enabled to properly advance his or her case at the hearing”. Accordingly, the Court held that “a failure to comply with them will require consideration of whether in the events that occurred the applicant was denied natural justice”. In other words, whether failure to comply with these conditions on the exercise of a statutory review jurisdiction invalidates the subsequent exercise of power was said to turn on

whether, in the particular case, the review applicant was denied natural justice. It was thus a purpose of the statutory scheme to invalidate some, but not all, exercises of power in breach of the relevant statutory conditions.

192 On one view, s 104 of the Regulatory Powers Act is similarly concerned with affording fair notice of the details of alleged contraventions to those who receive infringement notices. The context is thus allied to the context of procedural fairness, but the relevance of *SZIZO* does not turn on that. Rather, *SZIZO* illustrates that, where a condition on the exercise of a statutory power has not been observed, it may be a purpose of a statute to invalidate *only some* exercises of power made in breach of the statutory condition. Indeed, *SZIZO* demonstrates that it may be a purpose of an empowering statute to invalidate certain exercises of power by reference to “the extent and consequences of the departure” from the requirements of the statute: see *SZIZO* at [35]. In the particular context of *SZIZO*, the Court held at [36] that determining the consequences of a failure to comply with ss 441G and 441A for the validity of subsequent statutory activity “will require consideration of whether in the events that occurred the applicant was denied natural justice”.

193 In my view, it is not a purpose of s 104(1)(e)(iii) to invalidate the issue of an infringement notice without reference to the consequences of non-compliance with that provision.

194 In the Replacement Explanatory Memorandum that accompanied the Regulatory Powers (Standard Provisions) Bill 2014 (Cth) at [177], infringement notices are described as follows: “An infringement notice is a notice of a pecuniary penalty imposed on a person by statute setting out particulars of an alleged contravention of a law.” The Replacement Explanatory Memorandum also states at 5 that “[t]he Bill engages the right to a fair and public hearing through the creation of an infringement notice scheme”.

195 The scheme of the Regulatory Powers Act illustrates that infringement notices are designed to provide a means of imposing sanctions for contravention of certain regulatory obligations that stands as an alternative to curial proceedings. Section 107(1)(a) provides, in effect, that if a person pays the amount stated in an infringement notice before the deadline stated in the notice, any liability of the person for the contravention alleged in the notice is discharged.

196 It is in this context that s 104(1) provides that “[a]n infringement notice must” fulfil certain requirements. In general terms, these requirements relate to details concerning –

- (a) the provision of, and authority for, the infringement notice itself (ss 104(1)(a)–(d));

- (b) the alleged contravention, including the relevant provision, the applicable maximum penalty, and the time, day and place of each contravention (s 104(1)(e)); and
- (c) the amount payable under the notice, and the various legal consequences that could follow from the issuing of the notice (ss 104(1)(f)–(n)).

197 In this way, the requirement for an infringement notice to identify the “place” of the contravention serves to ensure that a person who receives an infringement notice is given sufficient details about the alleged contravention to understand the import of the notice, and to evaluate the options available. This object of providing fair notice of the alleged contravention must also be understood in the shadow of potential enforcement proceedings, which may be more or less likely to occur depending on the actions that the recipient of an infringement notice takes.

198 It should also be noted, however, that infringement notices do not create enforceable liabilities. Rather, they operate to give persons who are alleged to have contravened certain statutory obligations the opportunity to discharge their liability without facing civil penalty proceedings, if they so choose: see Replacement Explanatory Memorandum at [178]. As a matter of substance, infringement notices do not impose enforceable penalties; they in fact provide an alternative avenue for discharging civil and criminal liability.

199 These features of the Regulatory Powers Act lead me to the conclusion that it is not a purpose of the Act to invalidate any infringement notice that fails to state the “place” of the alleged contraventions, regardless of the effects of that failure. On its proper construction, the Regulatory Powers Act evinces an intention of invalidating an infringement notice for non-compliance with this requirement only where that non-compliance could prejudice the recipient of the notice.

200 In the present case, X Corp did not advance any persuasive basis on which to conclude that the failure of the infringement notice to identify the place of the contraventions could have prejudiced it. I have already mentioned that X Corp submitted that the location of the alleged contravention could have indicated which was the correct legal entity to which the notice should have been directed. But on X Corp’s own case, the location of the alleged contraventions had no relevance to this question, which was said to turn on the *Online Safety Act* itself, or the effects of the merger between Twitter Inc and X Corp, as provided for by Nevada law. And, as the Commissioner submitted, the infringement notice was addressed to X Corp and identified both Twitter Inc and X Corp as the relevant “provider”. It was not otherwise explained how X

Corp was prejudiced by the fact that the notice did not identify where the failure to comply with s 57 of the *Online Safety Act* occurred. No prejudice, or even potential prejudice, is apparent. To the contrary, I accept the Commissioner's submission that X Corp had everything it needed to know in order to consider the allegations made against it in the infringement notice.

201 For these reasons, I conclude that the failure of the infringement notice to identify the place of the contraventions did not, in the circumstances of this case, spell invalidity for the notice.

202 It remains to consider X Corp's reliance on *Goodman*. In that decision, Hampel J was dealing with an appeal on a question of law from the Magistrates' Court of Victoria to the Supreme Court of Victoria under s 92 of the *Magistrates' Court Act 1989* (Vic). The appellant had been convicted by a magistrate of an offence against s 49(1)(e) of the *Road Safety Act 1986* (Vic) for failing to furnish a breath sample for analysis on 1 July 1988. The underlying criminal proceeding had proceeded on an information laid on 14 July 1988. That original information made no reference to the place at which the offence was alleged to have been committed. For various reasons, the hearing of the original information was adjourned several times. On 22 February 1990, a separate information was laid in respect of the same offence. This new information gave the place of the offence as Windsor. The new information was struck out for having been issued more than 12 months after the alleged offence, contrary to a statutory time limit. For this reason, the old information was heard by a magistrate on 16 July 1991. The magistrate allowed the information to be amended by the insertion of the place of the alleged offence, and convicted the appellant.

203 The ground of appeal before Hampel J was that the magistrate had erred by holding that allowing an amendment in these circumstances would not amount to the laying of a fresh information outside the 12-month time limit. This question fell to be determined by reference to s 50 of the *Magistrates' Court Act*. In substance, s 50 relevantly provided that the Court must not allow objections on the basis of defects or errors of substance or form, but may allow for an amendment to correct the defect or error.

204 Hampel J held at 148 that the omission from the original information of the place of the alleged offence was not a defect or error within the ambit of s 50. Accordingly, his Honour held that the magistrate had erred in allowing the amendment. Along the way, Hampel J referred to the following dictum of Latham CJ in *Johnson v Miller* (1937) 59 CLR 467 at 479 –

The complaint must show upon its face that what is charged is an offence according to law, and it is sufficient if it sets forth the acts which are relied upon as constituting the

offence with such a reference to time and place as identifies those acts.

205 Hampel J expressed a view at 147 that an information must state the nature of the alleged offence, as well as when and where it is alleged to have been committed. In his Honour’s view, given the mobile nature of breathalyser testing stations, being in ignorance of the place where the alleged offence was said to have been committed could well have prejudiced the appellant’s defence.

206 There are two reasons why the decision of Hampel J in *Goodman* does not assist in the resolution of any issue in this case.

207 *First, Goodman* was a case concerned with the proper exercise of a power to allow an amendment to an information. Hampel J’s consideration turned on the “peculiar facts” and “particular context” of that case, as his Honour explained at 147. Hampel J’s conclusion, more implicit than expressed in his Honour’s reasons, that the failure to identify the place of the alleged offence was a “fundamental defect” outside the terms of s 50 turned on the particular features of the offence in question. I note in passing that the decision in *Goodman* occurred prior to a discernible condemnation by the Victorian Court of Appeal of the taking of technical points in drink-driving cases: see the opening remarks of Brooking JA in *Sher v Director of Public Prosecutions (Vic)* [2001] VSCA 110; 34 MVR 153 at [1]–[2] and the law reporter’s response at 154–5.

208 *Secondly*, and more importantly, the Victorian Court of Appeal has cast doubt on the correctness of *Goodman*, and in particular the proposition cited by X Corp. In *Gigante v Hickson* [2001] VSCA 4; 3 VR 296, which I observe was not cited by either of the parties, Batt JA (with whom Tadgell JA and Callaway JA agreed) said at [19] in relation to Hampel J’s decision in *Goodman* –

Hampel J held that the magistrate erred in allowing an amendment to insert the place. His Honour’s decision can be upheld as turning on discretionary considerations. But in addition his Honour agreed “with the view expressed in *Kerr v Hannon* that an *information must state ... where [the offence] is alleged to have been committed and concluded that the omission of the place did not constitute a defect or error within the ambit of s 50. As is apparent from what I have already said, in my view neither of those propositions is correct.*

(Citations omitted.)

209 Ultimately, *Goodman* has nothing to say about the issue that is before the Court on this application. Even concerning the requirements that were to be satisfied by an information under the laws governing summary offences in Victoria at that time, *Goodman* is doubtful authority.

It does not support the large proposition for which it was cited by X Corp, namely that at general law, where there is a charge for an offence, the place of that offence must be specified. Accordingly, nothing said in *Goodman* affects my analysis concerning the proper construction of s 104(1)(e)(iii) of the Regulatory Powers Act which is resolved by reference to the principles essayed in *Project Blue Sky* and *SZIZO*.

Conclusions

210 X Corp has failed on all its claims. The proceeding will be dismissed with costs.

I certify that the preceding two hundred and ten (210) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wheelahan.

Associate:

Dated: 4 October 2024