

## NOTICE OF FILING

### Details of Filing

Document Lodged:	Concise Statement
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	21/12/2023 9:41:48 AM AEDT
Date Accepted for Filing:	21/12/2023 11:18:22 AM AEDT
File Number:	VID1092/2023
File Title:	ESAFETY COMMISSIONER v X CORP.
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Sia Lagos".

Registrar

### Important Information

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

The date of the filing of the document is determined pursuant to the Court's Rules.



NCF1  
Rule 8.05(1)(a)

## Concise Statement

No VID

of 2023

Federal Court of Australia  
District Registry: Victoria  
Division: General Division

### ESAFETY COMMISSIONER

Applicant

### X CORP.

Respondent

## A IMPORTANT FACTS GIVING RISE TO THE CLAIM

### A1 Reporting regime

1. The *Online Safety Act 2021* (Cth) (the **Act**) establishes a regime for the eSafety Commissioner to require providers of social media services to prepare reports about their compliance with the basic online safety expectations (**BOSEs**) determined by the Minister. Those expectations are currently contained in the *Online Safety (Basic Online Safety Expectations) Determination 2022* (the **Determination**). The eSafety Commissioner is responsible for the civil enforcement of the Act.
2. Pursuant to s 56(2) of the Act, the eSafety Commissioner may, by written notice given to the provider of a social media service, require that provider to prepare a report about the extent to which the provider complied with one, more than one or all applicable BOSEs during the period specific in the notice, such report to be prepared in the manner and form specified in the notice and given to the eSafety Commissioner within the period specified in the notice unless an extension is granted by the eSafety Commissioner.

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Filed on behalf of the Applicant, the eSafety Commissioner  
Prepared by: Paulina Fusitu'a  
AGS lawyer within the meaning of s 551 of the *Judiciary Act*  
1903

Address for Service:  
The Australian Government Solicitor,  
Level 10, 60 Martin Place, Sydney, NSW 2000  
Matthew Garey

File ref: 23002259

Telephone: 02 9581 7625  
Lawyer's Email:  
Matthew.Garey@ags.gov.au  
Facsimile: 02 9581 7413

3. Pursuant to s 57 of the Act, a person must comply with a notice given under s 56(2) of the Act to the extent that the person is capable of doing so. Section 57 is a civil penalty provision.

**A2 Twitter, Inc. and X Corp.**

4. 'Twitter', rebranded as 'X' in July 2023, is a social media service, within the meaning of s 13(1) of the Act, as it is an electronic service within the meaning of s 5 of the Act:

- (a) the sole or primary purpose of which is to enable online social interaction between two or more end-users;
- (b) which allows end-users to link to, or interact with, some of the other end-users; and
- (c) which allows end-users to post material on the service

and is not an exempt service (the **Twitter service**). The Twitter service has at all relevant times been provided through the domain <https://twitter.com>.

5. Twitter, Inc. was a company incorporated in the state of Delaware in the United States and, until 15 March 2023, was the provider of the Twitter service. On 15 March 2023, Twitter, Inc. merged with X Corp., a company incorporated in the state of Nevada in the United States. On and from 15 March 2023, X Corp. was the provider of the Twitter service.

**A3 The notice issued to X Corp.**

6. On 22 February 2023, the eSafety Commissioner gave to Twitter, Inc., as the provider of the Twitter service, a written notice pursuant to s 56(2) of the Act (the **Notice**). The Notice required Twitter, Inc. as the provider of the Twitter service, to prepare and give to the eSafety Commissioner a report in the manner and form specified, being responses to particular questions about its compliance with certain BOSEs, by the Notice deadline of 29 March 2023, or a later date if any extensions were granted. The Notice related to child sexual exploitation and abuse material and activities.
7. On 29 March 2023, Thomson Geer Lawyers provided to the eSafety Commissioner a report in response to the Notice (the **Report**). While Thomson Geer Lawyers represented that this was "Twitter Inc's [Twitter] response", by this time, Twitter, Inc. had merged with X Corp. and Twitter, Inc. had ceased to exist: see paragraph 5 above.
8. X Corp. did not prepare the Report in the manner and form specified in the Notice because it failed to respond or failed to respond truthfully and accurately, to certain



questions in the Notice, being: questions 1(b), 1(c), 3(b), 4(b), 6(c), 7(a)–(f), 10, 14(b), 14(e), 16(a), 17(b), 19(a), 22(a)–(i), 25, 26, 26(a) and 27.

9. X Corp. was capable of truthfully and accurately responding to each of the Relevant Notice Questions. That is clear from the fact that X Corp. later provided the eSafety Commissioner with material additional to that which was in the Report that was initially prepared. There is no apparent reason why that material could not have been provided earlier.

#### **A4 X Corp.'s further responses**

10. On 6 April 2023, the eSafety Commissioner sought to clarify aspects of the Report by causing to be sent to X Corp. follow up questions.
11. On 20 April 2023, Thomson Geer Lawyers wrote to the eSafety Commissioner. They explained that “[t]he company would prefer that X Corp. continues to be referred to as “Twitter” where references are made to the provider of the Twitter service”. And they represented that “Twitter respectfully requests an extension of additional time to respond to the follow up questions sent in response to our submission to the [Notice] sent under section 56(2) of the Online Safety Act 2021 (Cth)”. The requested extension to respond to the follow up questions was granted by the eSafety Commissioner.
12. On 5 May 2023, Thomson Geer Lawyers provided X Corp.'s response to the follow up questions.
13. On 2 August 2023 and 20 October 2023, Thomson Geer Lawyers provided further information to the eSafety Commissioner relating to questions in the Notice.
14. Even taking account of the further responses provided by Thomson Geer Lawyers in addition to the Report, the eSafety Commissioner alleges that X Corp. has still not responded to, or still has not responded truthfully and accurately to, questions 10, 14(b), 17(b) and 19(a) of the Notice.

#### **A5 X Corp.'s obligation to comply with s 57 of the Act**

15. Although the Notice was initially given to Twitter, Inc. as the provider of the Twitter service until it merged with X Corp., the Court should find that the eSafety Commissioner gave the Notice to X Corp. so as to expose X Corp. to a pecuniary penalty for non-compliance with s 57 of the Act. That is because:
  - (a) there is no prescribed manner by which a notice is to be given under s 56 of the Act. It is a question of fact;
  - (b) the Notice was about the Twitter service, which X Corp. provided on and from 15 March 2023;



- (c) on and from 15 March 2023, X Corp. took on all of the liabilities of Twitter, Inc. by operation of the applicable United States law;
- (d) X Corp. responded to the Notice, requested an extension of time to respond to follow up questions and responded to follow up questions, and it did so at a time when Twitter, Inc. no longer existed.

**B THE RELIEF SOUGHT FROM THE COURT**

- 16. The eSafety Commissioner seeks the relief set out in the accompanying Originating Application, namely a declaration, pecuniary penalties and costs.

**C THE PRIMARY GROUNDS FOR THE RELIEF SOUGHT**

- 17. By reason of the matters in paragraphs 4 to 15 above, X Corp. did not comply with the Notice to the extent that it was capable of doing so, contrary to s 57 of the Act.

**D. THE ALLEGED HARM SUFFERED**

- 18. Section 27(1) of the Act charges the eSafety Commissioner with, among other things: promoting online safety for Australians; collecting, analysing, interpreting and disseminating information relating to online safety for Australians; publishing reports relating to online safety for Australians; and monitoring and promoting compliance with the Act. The objects of the Act are to improve and promote online safety for Australians. This includes seeking information from the regulated community of providers of social media services about their compliance with the BOSEs as determined by the Minister through the Determination. The purpose of the Commissioner's powers in relation to the BOSEs is to improve the transparency and accountability of service providers and improve online safety for Australians.
- 19. The eSafety Commissioner's functions also include, under s 27(1) of the Act: supporting and encouraging the implementation of measures to improve online safety for Australians; coordinating activities of Commonwealth departments, authorities and agencies relating to online safety for Australians; giving reports to, and advising, the Minister about online safety for Australians; and formulating in writing and promoting guidelines or statements that recommend best practices for persons and bodies involved in online safety for Australians. In advancing those functions, it is critical that the eSafety Commissioner has a timely and accurate understanding of the measures put in place by social media service providers relating to online safety.
- 20. A failure by a social media service provider to comply, to the extent that it is capable of doing so, with a non-periodic reporting notice given pursuant to s 56(2) of the Act is harmful to the Australian community because it impairs the performance of the eSafety

Commissioner's functions and the objects of the Act, including the ability to disseminate relevant and up to date information about online safety and effectively monitor compliance with the Act.

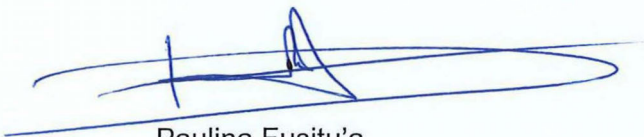
21. More specifically, the Notice related to the steps the provider was taking to address child sexual exploitation and abuse material and activity on its social media service. The objects of the Act to improve and promote online safety for Australians are advanced by responding to the grave danger posed by this kind of material and activity. Doing so reduces risks to Australians and Australian children related to exposure to child sexual exploitation material as well as its creation and dissemination. Social media services are common platforms on which child sexual exploitation abuse material is disseminated, and the grooming of children and livestreaming of abuse takes place. Promoting and supporting the online safety of Australians requires the providers of social media services to comply with statutory obligations to be transparent with regulators. In doing so, it assists regulators to put in place effective and informed mechanisms targeted towards minimising and eliminating child sexual abuse material and related activities online.

This Concise Statement was settled by Stephen Lloyd SC and Christopher Tran of Counsel.

#### **CERTIFICATE OF LAWYER**

I, Paulina Fusitu'a, certify to the Court that, in relation to the concise statement filed on behalf of the eSafety Commissioner, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 21 December 2023



Paulina Fusitu'a  
AGS lawyer  
for and on behalf of the Australian Government Solicitor  
Solicitor for the Applicant

