

NOTICE OF FILING

Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	8/05/2024 4:03:27 PM AEST
Date Accepted for Filing:	8/05/2024 4:03:30 PM AEST
File Number:	NSD474/2024
File Title:	ESAFETY COMMISSIONER v X CORP.
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

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.

Form 59
Rule 29.02(1)

Affidavit

No. NSD474 of 2024

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

eSafety Commissioner

Applicant

X Corp.

Respondent

Affidavit of: **Nicholas James Perkins**
Address: Level 11, 5 Martin Place Sydney 2000
Occupation: Lawyer
Date: 8 May 2024

Contents

Document number	Details	Paragraph	Page
1	Affidavit of Nicholas James Perkins affirmed on 8 May 2024	1-10	1
2	Annexure "NJP-1", being a copy of the letter sent by Ashurst to the solicitors for the Applicant on 30 April 2024	8	8
3	Annexure "NJP-2", being a copy of the letter and "Statement of Reasons" received by Ashurst from the solicitors for the Applicant on 2 May 2024	9	10
4	Annexure "NJP-3", being a copy of the letter sent by Ashurst to the solicitors for the Applicant on 3 May 2024	10	21

Filed on behalf of (name & role of party) X Corp., Respondent

Prepared by (name of person/lawyer) Robert Todd

Law firm (if applicable) Ashurst


Tel (02) 9258 6000

Fax (02) 9258 6888

Email Robert.todd@ashurst.com / imogen.loxton@ashurst.com

Address for service Level 9, 5 Martin Place
(include state and postcode) Sydney NSW 2000

[Version 3 form approved 02/05/2019]



I, Nicholas James Perkins, affirm:

1. I am a solicitor employed by Ashurst Australia (**Ashurst**) working under the supervision of Robert Todd and Andrew Carter, partners at Ashurst, who have the care and day to day carriage of this matter on behalf of the Respondent, X Corp. (**X**).
2. I make this affidavit from my own knowledge save where otherwise stated. Nothing in this affidavit is intended to waive client or legal professional privilege. To the extent that any part of this affidavit may be construed as a waiver of privilege, I withdraw and do not rely on that part of the affidavit.

Steps required to comply with the orders made by the Court on 24 April 2024

3. I note that order 1 of the orders made by Kennett J on 24 April 2024 requires X forthwith to:

*...hide the material identified in the notice given to the response under s 109 of the Online Safety Act 2021 (Cth) (**Removal Notice**) behind a notice such that an X user can only see the notice, not the material identified in the Removal Notice, and cannot remove the notice to reveal the material,*

(the **Hiding Order**).

4. I am informed by Michael Anderson, Director of Engineering for Core Services for X, and believe that it is not possible under X's current processes and functionality for X to comply with the terms of the Hiding Order because:

- (a) when a user attempts to access a post on the X platform, a request is sent by the user's client to the X server via the Twitter Front-End (**TFE**). "Client" in this context refers to the system or program being used by the user to access the X platform (for example, iOS and Android are both referred to as clients);
- (b) once the request is received by the TFE, X's internal content-delivery services evaluate a series of over one hundred rules which may apply to the post (**Visibility Filtering Rules**), including whether the post contains content which X has withheld or "geo-blocked" in one or more countries (that is, X has determined that the content will be not accessible or delivered to a user that X identifies as being located in one or more countries);
- (c) if the process referred to in sub-paragraph (b) above identifies that the user attempting to access the post is located in a country from which the content in the post has been withheld by X, the X server does not send the requested content to the user and "hide" said content behind a notice. Instead, the X server sends the user's device an empty response. The user's client then interprets that empty




response as a withheld post, and the client generates and displays an error message to the user;

- (d) when X applies the process referred to in sub-paragraph (c) above, the requested content is not "hidden" by the notice or placed "behind" the notice. Rather, the withheld content is never delivered to the user from the X server in the first place;
- (e) X is currently applying the withholding rules referred to in sub-paragraphs (a) to (d) above to each of the 65 posts identified in the Removal Notice, such that an empty or "tombstone" response is delivered by X's servers whenever the content is requested by a user identified as being within the jurisdictional boundaries of Australia, and the user's client generates and shows the user an error message in lieu of such content;
- (f) accordingly, to the extent the Hiding Order requires X to "hide" the material identified in the Removal Notice "behind" a notice, such a process is not possible under X's current processes and functionality. X has not designed or built this functionality because, among other reasons, it could give users the opportunity to circumvent X's geo-blocking restrictions and view the withheld content by, for example, altering the code on X's website to remove the notice using the Google Chrome Browser's "Developer Tools" or similar functionality in other browsers;
- (g) for certain types of content, such as sensitive content, X has a separate process which involves showing users an interstitial containing a warning about the nature of the content in the post, which users are able to "click through" to access the post. The technical process for applying these types of interstitials is different to the process which applies to withheld content, which is set out in sub-paragraphs (a) to (d) above, including because, in the case of withheld content, the X server does not send the requested content to the user and the user therefore has no ability to "click through" to access the content; and
- (h) X's Help Centre page titled "Notices on X and what they mean" (Annexure MA-5 to Mr Anderson's affidavit affirmed 1 May 2024), refers to X "hiding" posts behind a notice. Such a reference to content being "hidden" behind a notice (or similar) is used by X in a colloquial sense to help users understand in layperson terms the action being taken by X from a user experience perspective (that is, from a user perspective, the posts appear to be "hidden" behind a notice). As noted in sub-paragraph (f) above, it is not possible under X's current processes and functionality for X to "hide" withheld content behind a notice. When pages on X's website refer to content being "hidden" behind a notice, this can refer to one of several different




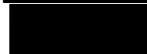

technical processes, including to describe circumstances where a user is shown an interstitial which the user is able to click through to access the post (such as the interstitial shown to users for sensitive content, referred to in sub-paragraph (g) above).

5. I am further informed by Mr Anderson and believe that:

- (a) he became aware of the issue referred to in sub-paragraphs 7(a) and (b) below when it was identified by Ben Elron, Senior Legal Counsel at X, on 5 May 2024 and was not aware of the impact that issue was having on the technical operation of X's systems at the time of affirming his affidavit in this proceeding on 1 May 2024;
- (b) since becoming aware of the issue, he and his team have worked to rectify the issue as described in sub-paragraphs 7(c)-(g) below.

Effect of caching on the distribution of content in Australia

6. I am informed by Mr Anderson and believe that:

- (a) 
 In that process, the engineering team ascertained that certain requests sent by Australian users, including at least some of the requests recreating those described in the second affidavit of Toby Dagg (**Second Dagg Affidavit**), to access via VPNs the withheld posts identified in the Removal Notice, were not being delivered to X's servers;
- (b) X conducted testing by tracing requests sent by users in Australia under the conditions described in paragraph 69 of the Second Dagg Affidavit. Specifically, X recreated the situation described by Mr Dagg, in which Mr Dagg stated that he was able to view the video at issue despite having location sharing enabled on the X app and his device. When X recreated this situation, in those instances when its server received the request from the user's client, X successfully geo-blocked the content. However, X determined that, in some instances, its server never received the request from the user's client and therefore X never served the withheld content to the Australian user. In other words, in those instances in which the video was received in Australia under the conditions described in paragraph 69 of the Second Dagg Affidavit, it was not delivered from X's data centres;
- (c) "caching" is a process whereby intermediate network infrastructure stores content that it has previously retrieved, so that it can be re-served to the requesting user




efficiently and quickly (i.e., without sending additional requests to the ultimate destination server);

(d) the most likely explanation for X users in Australia being able to access withheld posts using a VPN under the conditions described in paragraph 69 of the Second Dagg Affidavit is that the user is being served by the cache of an intermediate server, and not by X. For example, in the case of intermediate servers operated by a VPN:

- i. the intermediate server (such as a VPN) would intercept the user's request to X servers, and never ultimately deliver said request to X's servers;
- ii. the intermediate server (such as a VPN) would then retrieve the cached (i.e., copied) version of the content from the intermediate server's own network infrastructure; and
- iii. finally, the intermediate server (such as a VPN) would deliver its copy of the content to the user, notwithstanding the fact that the user has shared location data indicating that they are in Australia.

System fix to address issues with withholding a subset of content from logged-out and underage users

7. I am informed by Mr Elron and believe that:

- (a) at around 18:46 on Sunday, 5 May 2024 EST, prior to receiving the Second Dagg Affidavit, Mr Elron identified during the course of testing the availability of content on the X platform that, in some instances, a subset of media labelled as sensitive was not being processed properly by X's Visibility Filtering Rules and could therefore be accessed by users who were not logged into the X platform and by users with a birth date on their X profile indicating they are under the age of eighteen years old;
- (b) Mr Elron's investigations indicated that, in cases where X had determined that content was sensitive and should be withheld from users who are logged out of the X platform, or who are under the age of 18, the Visibility Filtering Rules applied by X to that content were working in respect of content which had been added by a user in their original post (**Uploaded Media**), but may have sometimes failed in respect of content which a user had copied and pasted to their post from an existing post by a different user on the X platform (**Pasted Media**);
- (c) following identification of this issue, Mr Elron worked with X engineers over the course of Sunday evening (EST) to investigate the issue further and develop a fix;





- (d) at around 08:15 on the morning of Monday 6 May (EST), Mr Elron reviewed the Second Dagg Affidavit, which informed X's ongoing investigation into the issue;
 - (e) throughout Sunday evening and Monday (EST), X designed, developed, deployed and commenced testing a system fix to address the issue referred to in subparagraph (b) above and ensure that X's Visibility Filtering Rules are working as intended in relation to Pasted Media;
 - (f) at around 01:39 on the morning of Tuesday 7 May (EST), following testing, the system fix was implemented for approximately half of the users of the X platform (namely, those connecting to X's data centre in Atlanta, Georgia);
 - (g) at around 05:05 on Tuesday morning (EST) the system fix was implemented for all other users of the X platform; and
 - (h) X is incorporated in the State of Nevada, in the United States of America, and has its head office and operations in the State of California, USA.
8. I am informed by Lachlan Wright, Senior Associate at Ashurst, and believe that:
- (a) on the evening of Tuesday, May 7, 2024 Australian Eastern Standard Time (AEST), Mr Wright repeated the test described in paragraph 70 of the Second Dagg Affidavit;
 - (b) for 1 of the 65 posts identified in the removal notice, Mr Wright was able to access the post without restriction, and he observed that the video contained in this post did not depict any violence or offensive content but rather showed a video of Bishop Mar Mari Emanuel unrelated to the attack on 15 April 2024; and
 - (c) for the remaining 64 posts identified in the removal notice, Mr Wright was unable to view any of the posts while logged-out, nor was he able to view any of the posts from an account with a birth date indicating the user is under the age of eighteen years old.

Filing of proceedings in the Administrative Appeals Tribunal

9. On 6 May 2024, Ashurst, on behalf of X, filed an application with the Administrative Appeals Tribunal for review of the Applicant's delegate's decision to issue the Removal Notice (the **AAT Application**), on the grounds that the decision was not the correct or preferable decision under section 109 of the *Online Safety Act 2021* (Cth).

Statement of Reasons

10. On 30 April 2024, Ashurst sent a letter to the solicitors for the Applicant, which included a request in accordance with section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and section 28 of the *Administrative Appeals Tribunal Act 1975*





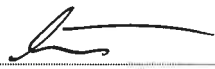
(Cth) that the Applicant provide a statement of reasons for the decision to issue the Removal Notice as a matter of urgency. A copy of this letter is annexed to this affidavit and marked Annexure **NJP-1**.

11. On 2 May 2024, Ashurst received a letter from the solicitors for the Applicant, which stated that no such statement of reasons had been prepared, and that a statement of reasons would be prepared and provided in the timeframe required by the statute. The solicitors for the Applicant enclosed with their letter a copy of a signed document entitled "Statement of Reasons", dated and signed on 16 April 2024 that was prepared contemporaneously with the Notice. The solicitors for the Applicant noted they were instructed that this was prepared as a record of the decision, but not as a statement of reasons for the purposes of the acts. A copy of the letter and its enclosure is annexed to this affidavit and marked Annexure **NJP-2**.
12. On 3 May 2024, Ashurst sent a letter to the solicitors for the Applicant, which included a request for an explanation as to why the "Statement of Reasons" is not the Applicant's statement of reasons under the relevant provisions, and as to why the "Statement of Reasons" was not provided to the Court. A copy of this letter is annexed to this affidavit and marked Annexure **NJP-3**.

Affirmed by the deponent
at Martin Place
in Sydney
on 8 May 2024
Before me:

)
)
)
)
)


Signature of deponent


Signature of witness

IMOGEN COXTON
SOLICITOR

Form 59
Rule 29.02(1)

Affidavit

No. NSD474 of 2024

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

eSafety Commissioner

Applicant

X Corp.

Respondent

Affidavit of: **Nicholas James Perkins**
Address: Level 11, 5 Martin Place Sydney 2000
Occupation: Lawyer
Date: 8 May 2024

ANNEXURE NJP-1

This is the Annexure marked "**NJP-1**" annexed to the affidavit of Nicholas James Perkins affirmed on 8 May 2024.

Filed on behalf of (name & role of party)	X Corp., Respondent
Prepared by (name of person/lawyer)	Robert Todd
Law firm (if applicable)	Ashurst
Tel (02) 9258 6000	Fax (02) 9258 6999
Email	Robert.todd@ashurst.com / imogen.loxton@ashurst.com
Address for service (include state and postcode)	Level 9, 5 Martin Place Sydney NSW 2000

Ashurst Australia
Level 11
5 Martin Place
Sydney NSW 2000
Australia

GPO Box 9938
Sydney NSW 2001
Australia

Tel +61 2 9258 6000
Fax +61 2 9258 6999
www.ashurst.com

Your ref:
24003626

Partner:
Geoff McGrath
+61 2 9258 6816
geoff.mcgrath@ashurst.com

Robert Todd
+61 2 9258 6082
robert.todd@ashurst.com

30 April 2024

By email

Confidential & Not for Publication

Matthew Garey
Australian Government Solicitor
Level 10
60 Martin Place
Sydney NSW 2000

Dear Mr Garey

Section 109 Removal Notice to X Corp - Request for statement of reasons

We have been instructed to act for X Corp. in relation to a notice dated 16 April 2024 addressed to our client purportedly made under section 109 of the *Online Safety Act 2021*.

On behalf of our client, we request the Commissioner please provide a statement of reasons for the decision. This request is made under both section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and section 28 of the *Administrative Appeals Tribunal Act 1975* (Cth).

While reserving our client's position in relation to the proceeding you have instituted in the Federal Court of Australia and generally, we note that the statement of reasons is relevant to the application for an interim injunction that your client has made in the Federal Court. Given the timetable in that proceeding, we request that the statement of reasons be provided as a matter of urgency. If your client does not anticipate being able to provide the statement of reasons by noon on 1 May 2024, we request that you let us know by return.

Yours faithfully



Ashurst

Form 59
Rule 29.02(1)

Affidavit

No. NSD474 of 2024

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

eSafety Commissioner

Applicant

X Corp.

Respondent

Affidavit of: **Nicholas James Perkins**
Address: Level 11, 5 Martin Place Sydney 2000
Occupation: Lawyer
Date: 8 May 2024

ANNEXURE NJP-2

This is the Annexure marked "**NJP-2**" annexed to the affidavit of Nicholas James Perkins affirmed on 8 May 2024.

Filed on behalf of (name & role of party)	X Corp., Respondent
Prepared by (name of person/lawyer)	Robert Todd
Law firm (if applicable)	Ashurst
Tel	(02) 9258 6000
Fax	(02) 9258 6999
Email	Robert.todd@ashurst.com / imogen.loxton@ashurst.com
Address for service (include state and postcode)	Level 9, 5 Martin Place Sydney NSW 2000



Our ref. 24003626

2 May 2024

Geoff McGrath and Robert Todd
Ashurst
Level 11
5 Martin Place
Sydney NSW 2000

Australian Government Solicitor
Level 10, 60 Martin Place Sydney NSW 2000
GPO Box 2727 Sydney NSW 2001
T 02 9581 7777
www.ags.gov.au

Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

By email: geoff.mcgrath@ashurst.com; robert.todd@ashurst.com

Dear Mr McGrath and Mr Todd

Removal Notice to X Corp dated 16 April 2024

1. We refer to your letter dated 30 April 2024 in relation to the decision to give X Corp the removal notice dated 16 April 2024 (**Notice**). You have requested that X Corp be provided with a statement of reasons for that decision, pursuant to s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 28 of the *Administrative Appeals Tribunal Act 1975* (Cth).
2. No such statement of reasons has previously been prepared. A statement of reasons will now be prepared and provided in the manner and timeframe required by the statutory provisions.
3. We note what you say about timing in the context of the Federal Court proceeding. While it was not possible to prepare and provide reasons in the requested 24 hour timeframe, they will be prepared as soon as practicable. In the meantime, we enclose a copy of a document entitled "Statement of Reasons" dated and signed on 16 April 2024 that was prepared contemporaneously with the Notice. We are instructed that this was prepared as a record of the decision, but not as a statement of reasons for the purpose of, or in accordance with, the ADJR Act and the AAT Act.

4. This document is disclosed to you on the basis of the implied undertaking; if you do not agree to accept it on those terms please advise us of that before opening the document.

Yours sincerely



Matthew Garey
Senior Executive Lawyer
T 02 9581 7625
matthew.garey@ags.gov.au

Statement of Reasons

Date	16 April 2024
Decision	To give the attached removal notice to X Corp under section 109 of the <i>Online Safety Act 2021</i> (Cth)
Decision-maker	[REDACTED] Manager, Illegal and Restricted Content
Contact person	[REDACTED] Senior investigator, Illegal and Restricted Content
Case reference	CYR – 0511323 CYR – 0511326 CYR – 0511327 CYR – 0511328

Introduction

1. I am a delegate of the eSafety Commissioner (**eSafety**) for the purposes of section 109 of the *Online Safety Act 2021* (Cth) (**the Act**).
2. This statement sets out my reasons to give the attached removal notice to X Corp. under section 109 of the Act (**the Notice**). The Notice requires X Corp. to take all reasonable steps to ensure the removal of the material specified in the notice.

Legislative framework

3. Part 9 of the Act deals with the online content scheme, including class 1 material. Section 109 provides eSafety with the power, if certain requirements are met, to give a removal notice to a provider of a social media service, relevant electronic service or designated internet service requiring them to take all reasonable steps to ensure the removal of class 1 material from the service.
4. The Act provides for notices to be given to service providers to take reasonable steps to remove class 1 material that is or has been provided on their service.
5. Relevant sections of the Act are extracted at **Appendix A** to this statement.

Decision

6. I have decided to give the Notice to X Corp. under section 109 of the Act based on the material and the reasons below.

Material relied upon to make decision

7. I have taken the following information into account in making my decision:

- a. On 15 April 2024, the eSafety Commissioner received four complaints about violence and violence extremism on the platform known as X and twitter.com:

Complaints about violence:

- i. CYR – 0511323
- ii. CYR – 0511326
- iii. CYR – 0511328

Complaint about violent extremism:

- i. CYR – 0511327

- b. The content investigated in these complaints (**the Material**) is described in Appendix B and was found to depict matters of crime, cruelty or violence at the following URLs:

INV-2024-11184

[REDACTED]

INV-2024-11182

[REDACTED]

INV-2024-11183

[REDACTED]

INV-2024-11181

[REDACTED]

- c. The Material can be accessed by end-users in Australia.
- d. eSafety investigators identified further instances of the same material being accessible at different URLs on X. The URLs to the Material, including the URLs identified by eSafety investigators has been included in Appendix B.
- e. On 16 April 2024 an informal removal request for all of the URLs included in Appendix B was sent to X via their Legal Request reporting portal at: https://legalrequests.twitter.com/forms/landing_disclaimer. The following ticket numbers were provided: 365937303 and 365941713, but no further response was received. The Material is still available at the time of giving the Notice.
- f. On 16 April 2024 the incident was described by the NSW Premier Chris Minns as an act of terrorism and the NSW Police Commissioner Karen Webb declared the incident a terrorist act¹.

8. I have taken the following documents into account in making my decision:

- g. The Material, as described above and attached at **Appendix B**

¹ ABC News, 16 April 2024, <https://www.abc.net.au/news/2024-04-16/nsw-wakeley-church-bishop-stabbing-attack-police-minns/103728120>

- h. eSafety's Compliance and Enforcement Policy (December 2021)
- i. eSafety's Online Content Scheme Regulatory Guidance (December 2023);
and
- j. The relevant sections of the Act which are extracted in **Appendix A**.

Reasons for decision

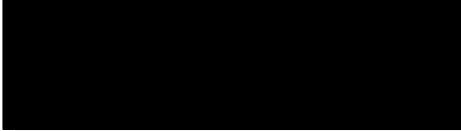
9. I am satisfied that the requirements for giving a removal notice under section 109 have been met. Having considered the above documents and information, I am satisfied that:
 - a. The Material is class 1 material as defined in section 106(b) of the Act, because:
 - i. the Material is a film or the contents of a film;
 - ii. the film has not been classified by the Classification Board under the *Classification (Publications, Films and Computer Games) Act 1995*; and
 - iii. if the film were to be classified, the film would likely to be classified RC (refused classification) by the Classification Board as it depicts matters of crime, cruelty and real violence in such a way that it offends against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that it would likely be classified RC.
 - b. The Material is provided on X which is a social media service as defined under section 13 of the Act because:
 - i. it is an electronic service that has the sole or primary purpose of enabling online social interaction between 2 or more end-users;
 - ii. the service allows end-users to link to, or interact with, some all of the other end-users; and
 - iii. the service allows end-users to post material on the service.
 - c. X Corp. is the provider of the social media service, X.
 - d. The Material is not provided on an exempt service as defined in section 5 of the Act.
 - e. The Material can be accessed by end-users in Australia.
10. In addition, I have considered the following circumstances:
 - a. On 15 April 2024, X Corp. were notified by email at kreen@x.com of the Material being accessible on X. A representative from X Corp replied advising their teams were across the situation and for eSafety to report the material using their Legal Requests form.

Conclusion

The reasons provided above are the reasons for my decision to give the Notice under section 109 of the Act to X Corp.



Signed: Signature of delegated officer:



Manager, Illegal and Restricted Content (EL2)
Delegate of the eSafety Commissioner

Date: 16 April 2024

Appendix A - Relevant sections of the *Online Safety Act 2021* (Cth)

106 Class 1 material

- (1) For the purposes of this Act, class 1 material means:
- (a) material where the following conditions are satisfied:
 - (i) the material is a film or the contents of a film;
 - (ii) the film has been classified as RC by the Classification Board under the *Classification (Publications, Films and Computer Games) Act 1995*; or
 - (b) material where the following conditions are satisfied:
 - (i) the material is a film or the contents of a film;
 - (ii) the film has not been classified by the Classification Board under the *Classification (Publications, Films and Computer Games) Act 1995*;
 - (iii) if the film were to be classified by the Classification Board under that Act—the film would be likely to be classified as RC; or
 - (c) material where the following conditions are satisfied:
 - (i) the material is a publication or the contents of a publication;
 - (ii) the publication has been classified as RC by the Classification Board under the *Classification (Publications, Films and Computer Games) Act 1995*; or
 - (d) material where the following conditions are satisfied:
 - (i) the material is a publication or the contents of a publication;
 - (ii) the publication has not been classified by the Classification Board under the *Classification (Publications, Films and Computer Games) Act 1995*;
 - (iii) if the publication were to be classified by the Classification Board under that Act—the publication would be likely to be classified as RC; or
 - (e) material where the following conditions are satisfied:
 - (i) the material is a computer game;
 - (ii) the computer game has been classified as RC by the Classification Board under the *Classification (Publications, Films and Computer Games) Act 1995*; or
 - (f) material where the following conditions are satisfied:
 - (i) the material is a computer game;
 - (ii) the computer game has not been classified by the Classification Board under the *Classification (Publications, Films and Computer Games) Act 1995*;
 - (iii) if the computer game were to be classified by the Classification Board under that Act—the computer game would be likely to be classified as RC; or
 - (g) material where the following conditions are satisfied:
 - (i) the material is not a film, the contents of a film, a computer game, a publication or the contents of a publication;
 - (ii) if the material were to be classified by the Classification Board in a corresponding way to the way in which a film would be classified



under the *Classification (Publications, Films and Computer Games) Act 1995*—the material would be likely to be classified as RC.

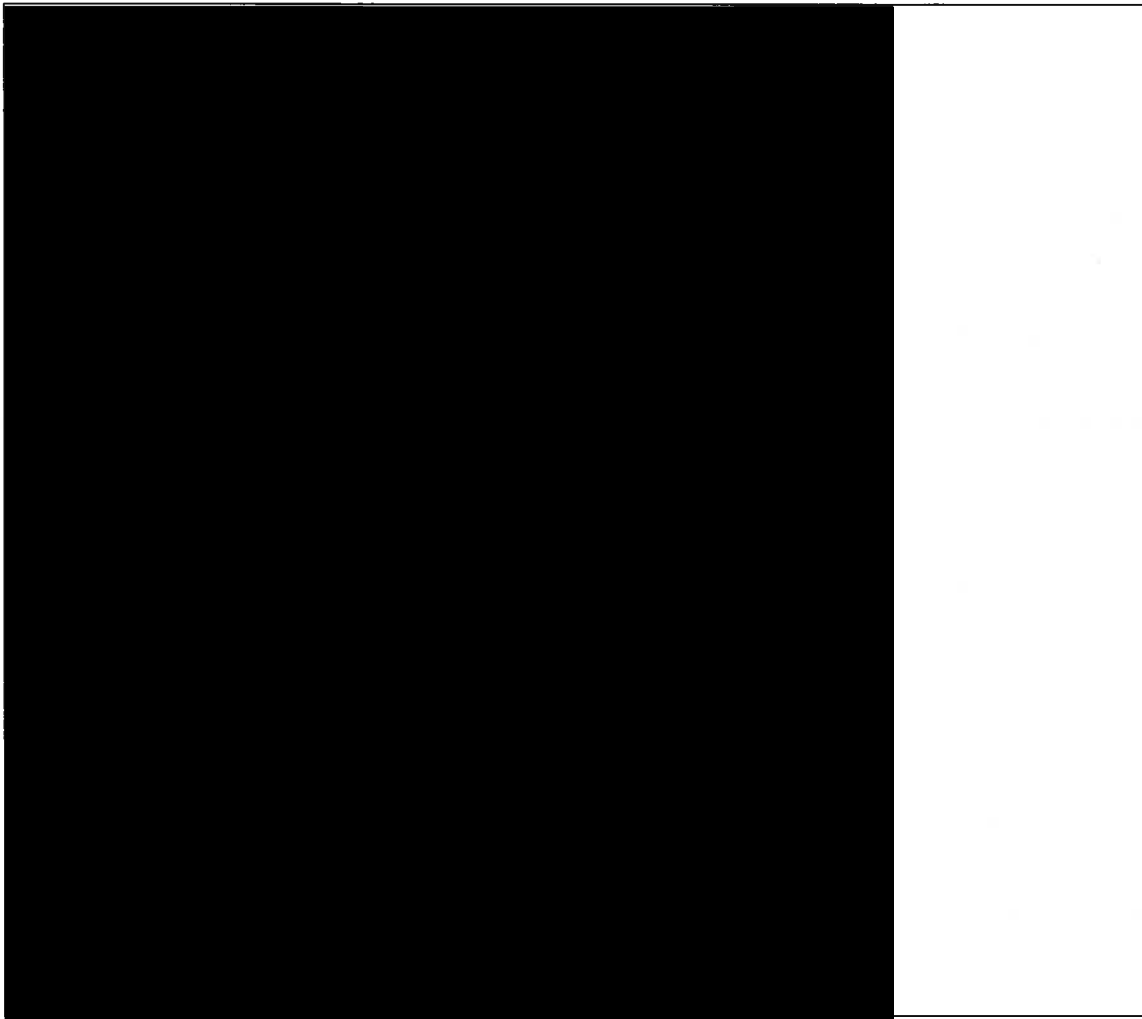
- (2) Section 22CF of the *Classification (Publications, Films and Computer Games) Act 1995* (which deals with classification using an approved classification tool) applies for the purposes of this section in a corresponding way to the way in which it applies for the purposes of that Act.

109 Removal notice given to the provider of a social media service, relevant electronic service or designated internet service

- (1) If:
- (a) material is, or has been, provided on:
 - (i) a social media service; or
 - (ii) a relevant electronic service; or
 - (iii) a designated internet service; and
 - (b) the Commissioner is satisfied that the material is or was class 1 material; and
 - (c) the material can be accessed by end-users in Australia; and
 - (d) the service is not:
 - (i) an exempt Parliamentary content service; or
 - (ii) an exempt court/tribunal content service; or
 - (iii) an exempt official-inquiry content service;
- the Commissioner may give the provider of the service a written notice, to be known as a **removal notice**, requiring the provider to:
- (e) take all reasonable steps to ensure the removal of the material from the service; and
 - (f) do so within:
 - (i) 24 hours after the notice was given to the provider; or
 - (ii) such longer period as the Commissioner allows.
- (2) So far as is reasonably practicable, the material must be identified in the removal notice in a way that is sufficient to enable the provider of the service to comply with the notice.

Appendix B – the Material the subject of the Notice

Description of Material
<p>The material (film) shows a male priest inside a church standing on a pulpit facing towards a camera. The priest is heard speaking in a non-English language (Arabic). From this point, a person (the attacker) appears in front of the camera dressed in a dark coloured jumper and approaches the priest to the left of screen. When the attacker is near the priest, they raise their right arm and lunge, bringing their right hand down and into contact with priest. The attacker appears to be holding a pointed object (a knife) in their right hand. The attacker is seen to strike the priest with the knife several times (5) to the head and upper body. The priest falls backwards with the attacker standing over him. Screams can be heard coming from other people inside the church, several people stand up in front the camera, and rush towards the pulpit. The camera pans to the left.</p> <p>If the film were to be classified, the film would likely to be classified RC (refused classification) by the Classification Board as it depicts matters of crime, cruelty and real violence in such a way that it offends against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that it would likely be classified RC.</p>
URLs depicting the material:
<div style="background-color: black; width: 100%; height: 400px;"></div>



Form 59
Rule 29.02(1)

Affidavit

No. NSD474 of 2024

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

eSafety Commissioner

Applicant

X Corp.

Respondent

Affidavit of: **Nicholas James Perkins**
Address: Level 11, 5 Martin Place Sydney 2000
Occupation: Lawyer
Date: 8 May 2024

ANNEXURE NJP-3

This is the Annexure marked "**NJP-3**" annexed to the affidavit of Nicholas James Perkins affirmed on 8 May 2024.

Filed on behalf of (name & role of party)	X Corp., Respondent		
Prepared by (name of person/lawyer)	Robert Todd		
Law firm (if applicable)	Ashurst		
Tel	(02) 9258 6000	Fax	(02) 9258 6999
Email	Robert.todd@ashurst.com / imogen.loxton@ashurst.com		
Address for service (include state and postcode)	Level 9, 5 Martin Place Sydney NSW 2000		



Ashurst Australia
Level 11
5 Martin Place
Sydney NSW 2000
Australia

GPO Box 9938
Sydney NSW 2001
Australia

Tel +61 2 9258 6000
Fax +61 2 9258 6999
www.ashurst.com

Your ref:
24003626

Partner:
Robert Todd
+61 2 9258 6082
robert.todd@ashurst.com

Andrew Carter
+61 2 9258 6581
andrew.carter@ashurst.com

3 May 2024

Confidential

Matthew Garey
Australian Government Solicitor
Level 10
60 Martin Place
Sydney NSW 2000

Dear Colleagues

**eSafety Commissioner v X Corp.
Federal Court of Australia Proceedings No. NSD474/2024**

We refer to your letter of 2 May 2024 in relation to our client's request for a statement in respect of the notice issued by your client to our client on 16 April 2024, purportedly under s 109 of the *Online Safety Act* 2021 on 16 April 2024.

You have indicated that a statement of reasons that complies with s 13 of the *Administrative Decisions (Judicial Review) Act* 1977 and s 28 of the *Administrative Appeals Tribunal Act* 1975 will be prepared in the time frame specified under the time frame relevant to those provisions. However, you then say it will be done as soon as practicable. We take this to mean that your client will provide the proposed further document as soon as practicable, and in any event within the applicable statutory timeframe.

We request that you provide a concrete time by which this will be done. Your client has brought urgent proceedings and it is only reasonable that your client provide its reasons accordingly, and certainly well in advance of any further hearing (whether interlocutory or otherwise) in the matter. Your client must know the reasons for which it made the decision. Your client must be in a position to know by when this will be done. Unless a satisfactory explanation is provided, it would appear to us this should be done by no later than Monday, 6 May 2024, but if that is not possible we request that we be informed by when it will be done by 10 am that day with an explanation for the delay. We reserve our client's right to rely on delay in provision of the reasons as a factor relevant to whether or not any relief should be granted or continued.

In the meantime, we would be grateful if you would:

1. Please explain why you say the document dated 16 April 2024 is not your client's statement of reasons under the relevant provisions. Presumably, what is being said is that it does not record all the findings made,

adequately refer to the evidence or other material on which the findings were based, or adequately identify particulars of the reasons of the decision. Please indicate which, if any, of these is said to be missing from the document, or if you say it is not the statement of reasons for some other reason (and if so, what). Further, given the proceedings on foot, if your client is not in a position to provide the further statement of reasons by the time requested, our client should be told what findings or evidence, if any, are omitted from the statement of reasons dated 16 April 2024.

2. Please explain why the statement of reasons dated 16 April 2024 was not provided to the Court on your client's ex parte interlocutory application made on 22 April 2024, of which we understand you gave our client approximately six minutes' notice. In those circumstances, your client had a duty to disclose to the Court all relevant facts or circumstances known to it, both for and against the application. The reasons for the issue of the notice under s 109 of the *Online Safety Act 2021* would appear to be one such matter. Please let us know why your client did not disclose the statement of reasons dated 16 April 2024 to the Court by no later than Monday, 6 May 2024
3. Please also obtain instructions as to whether, putting the statement of reasons dated 16 April 2024 aside, there were no other facts or circumstances relevant to the ex parte application not disclosed to the Court, and either provide confirmation there are no such matters or provide details of them by no later than Monday, 6 May 2024.

We put you on notice that we may seek to tender a copy of the statement of reasons for decision dated 16 April 2024 at the next hearing.

We reserve our client's position in respect of the statement of reasons generally.

Yours faithfully



Ashurst