



4 July 2024

EXECUTIVE SUMMARY

Tattarang welcomes the opportunity to make a submission to this important inquiry into the *Online Safety Act 2021* (the Act).

Tattarang is the private investment group of Dr Andrew Forrest AO and Nicola Forrest AO.

Tattarang is proudly Australian and invests across a wide variety of sectors and asset classes, including in real assets, public and private markets. We believe in using our capital as a force for good.

Since March 2019 Dr Forrest has been the subject of thousands of misleading, fake, fraudulent and AI empowered scam advertisements on Meta's¹ social media platforms Facebook and Instagram (**Scam Ads**). Despite giving immediate notice of the Scam Ads and having a direct dialogue with Meta's most senior Australian executives who promised to work to eliminate them, the Scam Ads continue to be displayed today, five years later.

What that means for the 17 million Australians who use these Meta apps for on average 75 mins per day is that there has been five years of:

- Scam Ads proliferating across Facebook and Instagram;
- Meta's algorithms roaming out of control finding vulnerable Australians; and
- countless Australians losing their life savings, and being reduced to poverty and welfare.

The board and executives of Meta have taken no responsibility for the epidemic of fraud proliferating across their advertising platforms.

In those five years Meta's revenue has grown exponentially from AU\$94.1 billion in FYE 2019 to \$202 billion in FYE 2023.²

Australians deserve better – young and old - we cannot allow social media platforms like Meta to continue to be operated by boards and senior management that sit offshore in Silicon Valley and are tone deaf to the damage their platforms are wreaking on Australian society.

Many submissions to this Review will focus on concern about harms on social media from algorithmically targeted user generated content. We acknowledge and agree that these harms need to be addressed.

This submission, however, focuses on Meta's advertising platform which services both Meta's Facebook and Instagram apps and numerous third-party apps. It highlights the apparent board indifference or delinquency in failing to adequately address the proliferation of harms done through Meta's advertising platform. The business model of the advertising platform seeks to maximise profits by permitting content that, among other things, seeks to use images of prominent people like Dr Forrest to drive engagement with those advertisements.

We also emphasise a problem that is fundamental to addressing any of the issues raised in the Committee's Terms of Reference or any other ills or harms that will undoubtedly be raised by other interested parties making

¹In this submission Tattarang refers to Meta Inc, formerly known as Facebook Inc, Meta Platforms Ireland Ltd, formerly Facebook Ireland Ltd and Meta Platforms Australia Pty Ltd, formerly Facebook Australia Ltd

²The Social App Report: Revenues, Users and Demographics for major social platforms 2023.

submissions to the Review. That problem relates to the capacity of any Australian citizen, or regulator to obtain and enforce an Australian court order against foreign corporations like Meta and X Corp, which deliberately adopt legal and operational structures that circumvent Australian jurisdiction.

This was made starkly evident in the recent attempt by the eSafety Commissioner to obtain an injunction against X Corp. That case exposed a lacuna in the regulatory system that needs to be addressed.

In other sectors of the economy which have the potential to pose serious systemic or other risks we require foreign corporations to submit to the Australian jurisdiction through licensing regimes and other mechanisms. For example, foreign banks must have local subsidiaries that hold Australian banking licences³ because the banking system is so critical to the economy and society.

The pervasiveness and influence of social media platforms has elevated them to a similar level of significance, dictating the same approach should be taken to regulating them.

The seriousness of the issues being addressed by the Review requires speedy, effective action being taken by the Government and Parliament to protect the Australian public. The Government's response should be to ensure that foreign social media companies and their boards are able to be held accountable, compelled to be domiciled in Australia, subject to Australian laws, and submit to the jurisdiction.

There should be a level playing field for litigants and regulators in Australia regarding the Australian platform. It is not acceptable that Australian litigants and regulators face jurisdictional impediments when seeking to enforce the rights and obligations that the Australian Parliament has considered appropriate for social media platforms servicing Australians on their Australian platforms.

DR FORREST'S EXPERIENCE WITH SCAM ADS

Meta was first made aware of the Scam Ads in 2019 by Dr Forrest. Despite promises made to him to move quickly to take the Scam Ads down, Meta's advertising platform has not stopped the scourge.

Meta asserted to Dr Forrest that its Australian Facebook and Instagram services are run by Meta's foreign corporations⁴ and that it does not do business in Australia. Meta further asserts that it is not subject to Australian jurisdiction, and does not accept service of process either on its own behalf or through solicitors.

Dr Forrest has therefore been forced to take action in the U.S. for harms done to him on the Australian Meta platforms. Dr Forrest has commenced proceedings in the United States District Court, Northern District of California, San Jose Division against Meta Inc, a Delaware Corporation. These proceedings are currently pending though a judgement permitting Dr Forrest to proceed with claims was delivered on Monday 17th June 202 (see Appendix 1).

Dr Forrest is fortunate that he can afford to take such proceedings. However, that is not an option for the thousands of Australian victims who have been defrauded by the Scam Ads. Moreover, despite years of litigation by Dr Forrest, Meta continues to flood its Australian platform with fraudulent ads featuring Dr. Forrest's image.

Nor is there any legitimate reason why Australian regulatory authorities seeking to enforce Australian laws against the platform owners' Australian operations must rely on voluntary compliance or go to U.S. courts to enforce the judgments of Australian courts.

It is clear from the recent *X Corp v eSafety Commissioner* judgment that enforcement attempts in the U.S. of an Australian court order would be subject to U.S. law. Th facing lee includes facing legal hurdles which do not apply under Australian law such as U.S. First Amendment protections and s230 of the *Communication Decency Act 1996*. This effectively gives U.S. social media companies immunity from all tort liability on the Australian platform,

³ *Banking Act (Cth) 1969 and APRA Guidelines – Overseas Banks: Operating in Australia*

⁴ *Meta Inc, a US listed corporation owns and operates the Australian Facebook and Instagram services. Meta Platform's Ireland Ltd (an Irish corporation) contracts with advertisers and receives self-service ads revenue for Australian advertising.*

including wilful negligence (s.230 Immunity). These provisions are not only contrary to Australian law but contrary to the legislative intention of regulators like the eSafety Commissioner trying to provide a safe internet experience.

Vulnerable Australians are being adversely impacted

One Australian woman lost \$670,000.

Another man was swindled out of \$77,254.

A 72-year-old Western Australian, who relied on an advertisement featuring Dr Forrest's image, lost \$250,000.

The collateral damage being done to innocent Australians is alarming.

We are also aware of many other prominent Australians whose images have also been used in a similar fashion to defraud Australian citizens⁵.

THE CURRENT LEGISLATIVE AND REGULATORY FRAMEWORK IS NOT WORKING

Despite the best intentions of our parliamentarians to curb and mitigate the harms caused by social media companies through a raft of world-leading legislative measures⁶, our courts and regulators have continued to operate with limitations on their enforcement powers. The result of this is that the platforms' compliance with Australian orders regarding their Australian platform is voluntary. When it no longer suits a platforms' corporate interest to continue voluntary co-operation, they remain at liberty to abandon it. We are seeing this behaviour with the News Media Bargaining Code.

Social media platforms such as Meta and X Corp seek to rely on a veil to shield themselves from unfavourable regulation and engage in what is known as jurisdictional arbitrage to avoid effective enforcement and accountability to Australian regulators and courts.

⁵ Including David Koch, Dick Smith, Gina Rinehart, Richard Wilkins, Karl Stefanovic, Maggie Beer, Sam Kerr and the Hon. Anthony Albanese MP, Prime Minister of Australia.

⁶ News Media and Digital Platforms Mandatory Bargaining Code; Online Safety Act, 2021 etc

What is Jurisdictional Arbitrage?

Jurisdictional arbitrage occurs where a corporation seeks to avoid unfavourable law or judicial enforcement in a particular location and structures its entities and operations to circumvent potential liability, finding legal shelter elsewhere.

The behaviour of Meta in Dr Forrest's case is a prime example of jurisdictional arbitrage which in this case involves locating, organising, and structuring the business functions of a corporation or lines of business in a foreign jurisdiction to avoid, reduce, or even eliminate legal obligations from operations that would ordinarily arise if they were present in or submitted to Australian jurisdiction.

The impact of jurisdictional arbitrage is as follows:

- citizens who have suffered harm at the hands of the platforms have no effective remedy; and
- regulators seeking to enforce laws on behalf of our citizens have no means to compel or enforce the remedies they seek.

By structuring their businesses so that all operations are managed and controlled by foreign corporations, with no relevant entity based in Australia, they can:

- frustrate and delay attempts at service;
- refuse to comply with codes of practice;
- refuse to comply with legislation;
- render voluntary compliance with injunctions and other court orders;
- force litigants to go through convoluted processes to get a court order enforced in the U.S.;
- force litigants to sue in U.S. courts at considerable expense and where the prospects of success are limited by the application of U.S. law; and
- generally, put themselves beyond the reach of ordinary Australian litigants.

Furthermore, they claim an absolute immunity for all tortious liability for their conduct on the Australian platform by reasons of their claimed s.230 Immunity. The claim that s230 Immunity is available to immunise U.S. companies operating social media platforms in Australia has now been upheld by a U.S. Federal court⁷.

⁷ See *Andrew Forrest v Meta Platforms Inc No 22-cv-03699-PCP United States District Court, Northern District of California*

Recent example of Jurisdictional Arbitrage: eSafety Commissioner v X Corp

The issue of jurisdictional arbitrage was starkly on display in the eSafety Commissioner's recent attempt to regulate content on X.

X Corp *voluntarily* complied in relation to material in Australia but resisted an injunction to prevent dissemination of material outside Australia.

Even the Commissioner's own US law expert gave evidence that any order, including an injunction order granted by an Australian court was not subject to reciprocal enforcement in the U.S. and the matter would need to be relitigated there under U.S. law having regard to its First Amendment and s.230 Immunity.

It is imperative that parliamentarians reach consensus on the need to move quickly to fix these fundamental jurisdictional problems.

Failure to do so will render any other measures aimed at the platforms ineffective.

HOW SOCIAL MEDIA PLATFORMS OPERATE IN AUSTRALIA

The legal and operational structure of the social media platforms operating in Australia is opaque at best. However, it is evident from information in the public domain and litigation brought against them that:

- the platforms are operated by non-resident, offshore legal entities, and all operations are handled from offshore;
- all operational, technical and decision-making functions necessary for hosting the Australian user platforms and delivering advertising to them, are undertaken offshore, largely outside the reach of Australian law; and
- the operational and legal distinctions between the user platform and the advertising business that delivers ads to Australian users is not transparent and intentionally blurred.

As a result of this last point, content regulation has focused on the user platform and Scam Ads appear to be outside the remit of attempts at direct regulatory action, whilst an epidemic of online consumer fraud continues unabated.

Because the platforms are hosted by offshore entities, and despite their very high adoption by Australian users, the platforms can circumvent Australian laws, relying on a lack of physical presence and physical delivery of goods and services to contest that they do business in Australia:

- they do not unequivocally submit their platforms, controllers and operational activities to Australian law, both regulatory action and civil litigation;

- they compel Australian users and advertisers to contract with them under exclusive California law and courts provisions and impose other unfair contract terms on them;⁸ and
- this means that the platforms' compliance with Australian regulatory action is essentially voluntary.

It remains untested whether effective regulatory enforcement action against a non-compliant, non-resident corporate entity, controlling the platforms would be effective. The evidence from the recent attempt by the eSafety Commissioner to obtain orders against X Corp would suggest not.

The corporate entities they choose to operate their platforms can – and indeed do – change overnight depending on:

- the regulatory environment in other jurisdictions; or
- corporate choices - and this can happen without the government or users even knowing. (e.g. following introduction of the European Union's General Data Protection Regulation (GDPR) in 2018 the entity operating the Facebook Australia platform switched from Facebook Ireland to Facebook Inc.).

As a result, the corporate choices they make in connection with the Australian platforms:

- enables them to put themselves at will, beyond the reach of ordinary Australian civil litigants; and
- allows them to delay, if not completely frustrate, Australian regulatory action on substantive jurisdictional grounds – which would impede or delay swift action or any action at all.

The corporate entities that operate the Australian platforms are U.S. companies and they claim the s.230 Immunity for all tort liabilities under U.S. law, including activities in Australia – arguing it covers all Australian user content **and** advertising activities. Because U.S. law will give U.S. corporations s.230 Immunity for their operations abroad, the legal and operational structure of the platforms is designed to:

- erect legal and practical jurisdictional impediments for Australian civil litigants and regulatory bodies bringing actions or enforcement in Australia;
- export their s.230 Immunity from liability to the operation of the Australian platform; and
- avoid compliance with or circumvent Australian anti-money laundering legislation, remittance and money transfer legislation and other laws such as the Online Safety Act 2021.

Furthermore, it is also worth noting that the legal and regulatory systems of these U.S. entities is underpinned by:

- a U.S. model of largely self-regulation;
- a broad sweeping constitutional right of free speech;
- the s.230 Immunity (subject to very limited exception under U.S. case law); and
- an unfettered plaintiff litigation environment with virtually no exposure to adverse costs which serves as a regulating influence on their behaviour – Australian law and court procedure does not have an equivalent litigation environment.

The above construct and framework mean their corporate governance and compliance culture is wholly unsuited to the litigation constraints of Australian law and misaligned with the regulatory aspirations of ordinary Australians.

For example, the stated culture of Meta is to 'Move fast and break things'. Meta has a history of only taking action to remedy harms on their platform **if ordered to by a court** under a final judgment - as they have been in the

⁸On June 1st 2024, Meta changed its user Terms and Conditions such that "consumers are subject to the governing law and courts of the jurisdiction in which they reside"- the full legal effect of this change in so far as it applies from that date to Australian users is still being studied. Importantly, the foreign corporations operating the platforms remain the same.

European Union⁹. Given the litigation constraints referred to above, Australians are powerless to obtain court orders under Australian law.

In view of the circumstances expressly set out above, it is essential that the fundamental jurisdictional and enforcement issues must be addressed.

THE EPIDEMIC OF FRAUDULENT ADVERTISING ON SOCIAL MEDIA PLATFORMS

As noted in our Executive Summary, Dr Forrest has been the subject of thousands of Scam Ads on Facebook since at least 2019 and these Scam Ads are still being produced today.

Examples of Scam Ads featuring Dr Forrest

Video of Dr Forrest, manipulated and empowered by artificial intelligence, appeared in over 1700 different Scam Ads on Meta Platforms between April and December 2023.¹⁰

Over five fraudulent "Dr. Andrew Forrest" profiles appear **every week** on Meta's Facebook user platform.

There is presently an epidemic of Scam Ads on Australia's social media platforms and the platforms facilitate a significant proportion of the almost \$3 billion of reported online fraud affecting Australians last year¹¹.

The problem disproportionately targets people over the age of 50 years who are not as accustomed to recognising fraud and deception on the content fed to them by the platforms' advertising algorithms and who remain trusting of statements made online by prominent people like Dr Forrest.

Unlike user-generated content – which is posted by users with little or no prior vetting by the platforms prior to release on the user platform - advertising content on social media is digital display advertising delivered by the platforms' systems with 100% control on its release. It is paid for by advertisers before its release to the user platform and when it does Meta places a monitoring pixel on the advertisement to track revenue and metrics. Meta knows to whom the Scam Ads have been displayed.

The metadata of the criminals who place Scam Ads is retained by the platforms and not available to any other party. It is replaced by the platform's own metadata when displayed to enable the platform to monitor the success of the ad and charge appropriately. Law enforcement agencies have no visibility of who has placed the Scam Ad.

The integrity, authenticity and bona fides of advertising customers and content displayed to users is entirely within the platforms' control before it is displayed to users.

⁹ *Dutch court orders Facebook to pull financial fraud adverts | Reuters*

¹⁰ *Data from Meta's ad library*

¹¹ *ACCC "Targeting Scams Report" April 2024*

It is subject only to the adequacy (or lack thereof) of the platforms':

- fully automated systems for onboarding;
- conduct of know your customer (KYC) assessments and credit approvals;
- cyber security to prevent hacking; and
- computational power that they are willing to devote to review ads and detection fraud.

These all occurs **before** a pre-paid ad is displayed to innocent users.

The revenue model for social media platforms is not aligned with good and proper compliance practices and instead fosters the unrestricted display of advertising, whatever its content.

There is no apparent financial incentive for the social media platforms to take steps to reduce fraudulent content despite their claims that when such violations are brought to their attention they will "promptly take action"¹².

Given their extensive and well documented in-house technical expertise as developers, they could carry out more effective pre- and post-display monitoring of advertising content, but because advertising is their primary income source, it appears they make an active choice not to invest in compliance costs to remove Scam Ads because that would slow the platform's performance down and potentially disrupt their extremely successful revenue model.

LEGISLATIVE MEASURES COULD BE CONSIDERED TO ADDRESS THESE PROBLEMS?

We are of the view that there are several measures that should be considered by this Review that could lead to legislative reform to address the above issues.

Australian corporation requirement

Companies operating and controlling social media platforms available to Australian resident users should be subject to a requirement that they operate these businesses through Australian corporations or resident foreign corporations that submit to Australian law with a place of business in Australia including:

- a board that includes **directors, resident in Australia**, and with decision making authority for the day-to-day operations of the platform's activities in Australia;
- sufficient **assets in the jurisdiction** to meet reasonably anticipated civil and regulatory liabilities; and
- a prohibition from contracting with Australian users and advertisers on the platforms under any law or dispute resolution provision other than **Australian law and courts**.

Greater regulatory oversight of advertising platforms

The eSafety Commissioner, the Australian Communications and Media Authority, the Australian Competition and Consumer Commission or another appropriate regulatory body should be given express powers in connection with advertising on the platforms.

To address these systemic issues that regulator should have the power to:

- investigate the platforms in connection with online scams and fraud be staffed with sufficient data scientists and software engineering, AI and other experts necessary to assess whether the steps being taken by the platforms to combat fraud are sufficient, fair and reasonable;
- mandate the use of appropriate, proportionate and auditable computational resources by the platforms to ensure the safety of the advertising content and the security of the platform and user accounts;

¹² *Wissam Al Mana v Facebook Ireland Limited et al*, High Court of Ireland, Defence of the First Named Defendant (Record Number 2020/1218P), paragraph 53(vi).

- require that the platforms provide a publicly accessible repository that includes all advertisements and sponsored content displayed on the Australian platform and maintain the original metadata for the advertising content; and
- ensure that, where platforms undertake the deployment of machine learning and AI to automated critical advertising functions that review and detect fraud such as onboarding and KYC, credit approvals and cyber security, those systems be auditable and subject to regular reporting.

There are other measures specific to combatting Scam Ads that should be required to be taken by platforms such as:

- the application of age or other appropriate filtering and verification criteria to prohibit the display of unlicensed ads to certain platform users;
- the application of acceptable onboarding and KYC procedures for non-Australian advertising customers;
- the issuing of warning notices to users in connection with fraudulent advertising known by the platforms to have been displayed to them;
- mandating that the contractual requirement of Terms & Conditions be subject to Australian law and any proposed changes be notified to the regulatory authorities; and
- a prohibition on contractual limitations on rights and remedies, such as capped damages, forced arbitration, class action prohibitions, and no entitlement to legal costs.

CONCLUSION

Social media has clearly become immensely influential in Australian society and, while the platforms are valued by millions of citizens, they contribute to and amplify a significant number of harms.

These include the financial damage outlined above as well as the impacts on the mental health of children and young people; ease of access to child abuse material; the spread of misleading and deceptive information; and the undercutting of media business models, to name but a few.

Governments and parliaments around the world are exploring how to combat these harms and we applaud efforts by this Committee to understand the issues and frame positive solutions.

However, as this submission demonstrates, there is an underlying problem for the Australian platform caused by the way companies such as Meta structure their businesses offshore deliberately avoiding Australian law. These frustrate attempts to create solutions using Australian laws and regulators. Unless that fundamental jurisdictional issue is addressed first other measures will be ineffective.

We urge the Review to recommend to the Government that laws along the lines of those proposed in the submission by introduced as soon as possible.

APPENDIX 1: Update on Californian litigation

In the action brought by Dr Forrest in California Meta attempted to have the whole matter struck out on the basis of s.230 immunity. The judgment on that strike out application was handed down on 20 June 2024.

The court ruled in Dr Forrest's favour that the action should continue and that s.230 does not confer a blanket immunity over Meta's advertising platform. The judge found that there was a plausible argument that Meta participated in the creation of ads on the platform and, if so, was not entitled to the immunity. He further held that Dr Forrest is entitled to pursue his claims for misappropriation of his name and likeness and for negligence.

The matter will now move forward to discovery which means Dr Forrest's team will be entitled to look under the hood of the advertising platform.

This does nothing to bring the platforms within the jurisdiction of Australian courts or regulators. Indeed, the ruling on extraterritoriality makes plain that Australian regulators and litigants will face a s.230 defence when trying to enforce their judgments - this is the problem that the expert evidence in the eSafety Commissioner's case X Corp addressed.