

NOTICE OF FILING

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Sia Lagos

Registrar

Important Information

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

No: NSD474/2024

ESAFETY COMISSIONER

Applicant

X CORP

Respondent

Intervenors' Written Submissions in reply

Introduction

1. These reply submissions supplement, and should be read together with, the interveners' written submissions filed on 10 May 2024.
2. The Application to intervene is supported by the Respondent. However, it is opposed by the eSafety **Commissioner**. In oral submissions,¹ and unsupported by authority, the Commissioner said, in substance, that the Court is concerned with the *Online Safety Act (OS Act)*, not free speech policy debates better confined to the "ballot box".
3. Respectfully, that opposition is misconceived and provides no good reason to dismiss the Application to intervene for the following reasons.
4. The *OS Act* cannot be so easily divorced from questions bearing on freedom of speech. So much was made clear in the Explanatory Memorandum.² Statutes such as the *OS Act* should be construed, where constructional choices are open, in a manner that does not encroach, or encroach as little as possible, upon fundamental freedoms such as freedom of speech.³ The Court was respectfully correct to adopt that approach (at [52]) of the interlocutory judgment.⁴ In *Tajjour v New South Wales*,⁵ for example, French CJ said (at [28]) that "freedom of speech has long enjoyed special recognition at common law...in order to displace it, the Parliament must have chosen clear language which permits no other outcome". Likewise, in *A-G (SA) v Corporation of the City of*

¹ During argument on 10 May 2024.

² Explanatory Memorandum, Online Safety Bill 2021 (Cth), pp 27 and 55.

³ Sometimes referred to as the 'principle of legality': *Electrolux Home Products Pty Limited v AWU* (2004) 221 CLR 309, 21 (citing: *R v Home Secretary; Ex parte Pierson* [1998] AC 539, 587, 589).

⁴ *eSafety Commissioner x X Corp* [2024] FCA 499.

⁵ (2014) 254 CLR 508.

Adelaide,⁶ French CJ again stated that freedom of speech has been linked to “the proper functioning of representative democracies and on that basis has informed the application of public interest considerations to claimed restraints upon publication of information”. There are many other examples in the High Court⁷, and at intermediate appellate level.⁸

5. Further, in *Australian Broadcasting Commission v O’Neil*,⁹ the joint judgment of Gleeson CJ and Crennan J carefully explained (at [19] and [31]) that where a court is asked to exercise the powers of a censor (as it is here),¹⁰ the public interest in freedom of speech was the “foremost”¹¹ consideration which warranted caution. Whilst this was said in a different context, it is nonetheless difficult to reconcile with the Commissioner’s opposition to the interveners’ Application.
6. Finally, the policy questions underlying the dispute that have already been identified in the Court’s interlocutory judgment¹² will loom large at final hearing. Importantly, there remains the capacity for many global internet users to be substantially affected. When measured against that yardstick, the exceptional order sought by the Commissioner, and the submissions advanced by the interveners, each of the EFF and FIRE ought to be granted leave to intervene or be appointed *amicus curiae*.

Dated: 17 May 2024.



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⁶ (2013) 249 CLR 1 at [43]; and see [151]-[152] (Heydon J).

⁷ *Monis v The Queen* (2013) 249 CLR 92, [28], [331]; *Hogan v Hinch* (2011) 243 CLR 506, [5]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [15]; *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52; *Davis v The Commonwealth* (1988) 166 CLR 79, 100; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 31.

⁸ *Rinehart v Welker* (2011) 93 NSWLR 311 at [26]-[29] (Bathurst CJ and McColl JA) (in the context of discussion of the principle of open justice); *Evans v New South Wales* (2008) 168 FCR 576 at [72]-[77] (Branson, French and Stone JJ); *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16.

⁹ (2006) 227 CLR 57.

¹⁰ Originating Application, filed 22 April 2024, prayer 3.

¹¹ See at [19] (per Gleeson CJ and Crennan J).

¹² *eSafety Commissioner v X Corp* [2024] FCA 499, [40].