

NOTICE OF FILING

Details of Filing

Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	22/05/2024 12:36:20 PM AEST
Date Accepted for Filing:	22/05/2024 12:36:26 PM AEST
File Number:	NSD474/2024
File Title:	ESAFETY COMMISSIONER v X CORP.
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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.



ESAFETY COMMISSIONER

Applicant

X CORP.

Respondent

RESPONDENT'S SUBMISSIONS IN SUPPORT OF INTERVENTION

1. X Corp. supports the application of the EFF and FIRE (**Intervenors**) to intervene in the proceeding or, alternatively, be appointed *amicus curiae*. X Corp. endorses both the Intervenors' 10 May 2024 submissions in chief and their 17 May 2024 submissions in reply (**ISR**).
2. The Commissioner opposes the application on the bases that, first, "the issues will be fully ventilated" absent intervention or appointment of *amicus*; and, second, that the Intervenors seek "really to agitate a policy debate which is for the ballot box, not this proceeding".¹
3. Contrary to the Commissioner's first submission, the Intervenors are well placed to assist the Court with respect to the "comity of nations" in the context of the construction of the phrase "all reasonable steps" in s 109(1) of the Online Safety Act.² While the Court has found at a *prima facie* level that the deleterious "consequences for orderly and amicable relations between nations, if a notice with the breadth contended for [by the Commissioner] were enforced, are obvious",³ the Intervenors can and intend to provide an evidentiary foundation and submissions, at final hearing, with respect to those matters. As set out in the McSherry and Terr affidavits dated 9 May 2024, the Intervenors have significant practical experience in those matters beyond the experience of the parties to the proceeding: (a) the Commissioner is an Australian regulator; and (b) X Corp.'s experience, while global, concerns matters affecting only the X platform. The Intervenors would aid the Court because one of the central issues in this proceeding is the proper construction and meaning of s 109(1), and when enacting it, the Australian Parliament was concerned with social media platforms (and other online services), not only the X platform.
4. For their part, the Intervenors are not-for-profit organisations dedicated to the promotion of civil liberties regardless of platform and concerned for the interests of all "internet users not party to the case but who may be impacted if this Court makes a global takedown order".⁴
5. The Commissioner's second submission, that that the Intervenors seek "really to agitate a policy debate which is for the ballot box, not this proceeding", ignores the legal

¹ Transcript 10 May 2024 at P 36, L 25-40.

² See *eSafety Commissioner v X Corp.* [2024] FCA 499 at [49]-[53].

³ *Ibid* at [51].

⁴ McSherry at [15]. See also Terr at [19]-[20].

relevance of comity and free expression to the construction of s 109(1) of the Online Safety Act: see **ISR [3]-[6]**. The principles of construction set out at ISR [3]-[6] have been applied specifically to the cognate Classification Act and Code in *Brown v Members of Classification Review Board of Office of Film & Literature Classification*,⁵ where French J (as his Honour then was) held that “the value accorded to freedom of expression [at common law, in accordance with Australia’s international obligations under the *International Covenant on Civil and Political Rights* and by the implied constitutional freedom] will support a conservative approach to the construction of statutes [like the Classification Act and Code] which would impair or abrogate it”.

21 May 2024

Sebastian Hartford-Davis

Banco Chambers

Samuel Hoare

New Chambers

⁵ (1998) 82 FCR 225 at 334-339.