

NOTICE OF FILING

Details of Filing

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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.



No. NSD474 of 2024

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

ESAFETY COMMISSIONER

Applicant

X CORP.

Respondent

SUBMISSIONS OF THE ESAFETY COMMISSIONER

IN RELATION TO THE APPLICATION TO INTERVENE

1. The application of EFF and FIRE to intervene or appear as amicus curiae should be refused.
2. **Requirements for leave:** EFF and FIRE have not demonstrated any direct legal interest in the proceedings, nor the kind of indirect legal interest in the proceedings necessary for a grant of leave to intervene.¹ Whether counsel for EFF and FIRE should be permitted to appear as amicus curiae then depends upon the Court being satisfied that:
 - 2.1 it will be “significantly assisted” by the contribution; and
 - 2.2 costs and delay will not be disproportionate to the expected assistance.²
3. **No significant assistance:** In cases where the parties are large organisations represented by experienced lawyers “*applications for leave to intervene or to make submissions as amicus curiae should seldom be necessary and if such applications are made it would ordinarily be expected that the applicant will identify with some particularity what it is that the applicant seeks to add to the arguments that the parties will advance.*”³ EFF and FIRE propose to make submissions about the construction of the *Online Safety Act 2021*: see its reply submissions of 17 May 2024 at [4]. X Corp submits that this would be useful in relation to the “comity” of nations point: see its submissions of 22 May 2024 at [3]-[5]. However, such questions of construction can be expected to be fully ventilated by the parties. In particular, it is unlikely that X Corp

¹ See *Roadshow Films Pty Ltd v iiNet Limited* (2011) 248 CLR 37; [2011] HCA 54 at [2]-[5]. See also *Hua Wang Bank Berhard v Commissioner of Taxation* (2013) 296 ALR 479; [2013] FCAFC 28 at [51]-[57] (the Court); *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 3)* [2015] FCA 542 at [13]-[15] (Edelman J).

² *Roadshow Films* at [4].

³ *Roadshow Films* at [6].

would overlook or omit significant matters of construction. Neither EFF nor FIRE claim particular expertise in Australian statutory construction, and have not otherwise particularised proposed arguments that would satisfy the Court they would provide real assistance.

4. Additionally EFF and FIRE each “anticipates raising issues” of a much broader and largely unparticularised kind, including raising “awareness” and “raising public policy issues”: see its submissions of 9 May 2024 at [13]. X Corp does not appear to submit that they should be permitted to do this. These kinds of general “issues” are almost completely unparticularised. To the extent inferences can be drawn as to the kinds of things that might be raised, it could not be said that they would “significantly assist”.
5. **Costs and delay would be disproportionate:** EFF and FIRE seek to lead evidence and make submissions as to the general matters above. Far from assisting, this is likely to add to the cost of the proceeding and, insofar as there was any need to respond to evidence, may also occasion delay. In particular, having regard to the general matters which they appear to propose to raise, that evidence may well be of a potentially ambulatory and contestable kind, introduced with a view to raising awareness and public policy concerns. These proceedings are not a vehicle or platform for such matters and the parties and Court should not be burdened with considering and addressing them.
6. **Orders:** There should be no leave to intervene, and no leave to appear as amicus curiae. If the Court is minded to grant any form of leave it should be confined to making written submissions as amicus curiae on the proper construction of the Online Safety Act. Should any grant of leave beyond that be considered, it should be deferred until the specifics of actual submissions and proposed evidence have been properly particularised. EFF and FIRE should bear the costs of any resulting intervention.⁴

Date: 22 May 2024

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⁴ See eg *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. (No 3)* (2021) 392 ALR 443; [2021] FCAFC 112 at [28].