

## WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENORS

Federal Court of Australia

New South Wales District Registry

Division: General

No: NSD474/2024

**ESAFETY COMMISSIONER**

Applicant

**X CORP**

Respondent

### Written Submissions on behalf of the Intervenors

#### Introduction

1. By application filed on 9 May 2024, the Foundation for Individual Rights and Expression (**FIRE**), and the Electronic Frontier Foundation (**EFF**), seek leave to intervene in the proceedings, or alternatively be appointed *amicus curiae* (**Application**), to advance submissions directed to whether the provision of a removal notice under s.109 of the *Online Safety Act* (Cth) ought to operate globally.
2. In support of the Application, the intervenors will rely on the affidavits of Corynne McSherry Legal Director of EFF, affirmed 9 May 2024 (**McSherry Affidavit**), and Aaron Terr, Director of Public Advocacy of FIRE, dated 9 May 2024 (**Terr Affidavit**).<sup>1</sup>

#### Principles

3. The Court is conferred with a discretionary power to grant each of FIRE and EFF leave to intervene in the proceedings or to appoint them as *amicus curiae*: sections 5(2) and 23, *Federal Court Act* 1976 (Cth); and, r 9.12(1) *Federal Court Rules* 2011 (Cth).
4. With respect to an application to intervene in the proceedings, the exercise of that discretion is informed by the satisfaction or otherwise of the criteria set out in r.9.12(1) of the Rules. Relevantly, the Court may have regard to whether the intervenor's contribution:

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<sup>1</sup> To be affirmed by 10 May 2024.

- (a) will be useful and different from the contribution of the parties to the proceeding;  
and
  - (b) might unreasonably interfere with the ability of the parties to conduct the proceeding as the parties wish; and
  - (c) any other matter that the Court considers relevant.
5. A grant of leave to intervene in the proceedings may be the subject of any conditions the Court considers appropriate: r.1.33 of the Rules.
6. Different considerations apply with respect to the power to appoint a non-party as *amicus curiae*.<sup>2</sup> Indeed, the Rules do not make express provision for such an appointment. In *Hua Wang Bank Berhad v Commissioner of Taxation*,<sup>3</sup> the plurality (Logan, Jagot, and Robinson JJ) stated (at [49]) that the power to appoint an *amicus curiae* is an incident of the Court’s judicial discretionary power. Substantially similar observations were also made by the Full Court (at 534) in *United States Tobacco Co v Minister for Consumer Affairs*<sup>4</sup>.
7. There are obvious differences between an intervener on the one hand, and an *amicus curiae* on the other. At their extremes, an intervener is a person affected by the outcome of proceedings whilst an *amicus curiae* is not so affected, but assists the Court to ensure that justice is done. As observed (at [8]) by the Full Court in *Sharman Networks Ltd v Universal Music Australia Pty Ltd*,<sup>5</sup> between the two extremes is a class of persons that include an “organisation that puts itself forward as acting in the public interest”.
8. Indeed, the appointment of an *amicus curiae* has been characterised as a “valuable tool” with respect to “judgments which may affect the community generally or persons other than the parties who are before it”.<sup>6</sup>

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<sup>2</sup> Sections 5(2) and 23, *Federal Court Act* 1976 (Cth); *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 534.

<sup>3</sup> [2013] FCAFC 28.

<sup>4</sup> (1988) 20 FCR 520.

<sup>5</sup> (2006) 155 FCR 291 (referred to with approval in *Hua Wang Bank*, [52]).

<sup>6</sup> *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 534.

9. In *Roadshow Films Pty Ltd v iiNet*,<sup>7</sup> the joint judgment of the High Court restated what Brennan CJ said in *Levy v Victoria*,<sup>8</sup> and explained (at [2]-[4]) the relevant principles this way:

A non-party whose interests would be directly affected by a decision in the proceeding, that is one who would be bound by the decision, is entitled to intervene to protect the interest likely to be affected. A non-party whose legal interest, for example, in other pending litigation is likely to be affected substantially by the outcome of the proceedings in this Court will satisfy a precondition for leave to intervene. Intervention will not ordinarily be supported by an indirect or contingent affection of legal interests following from the extra-curial operation of the principles enunciated in the decision of the Court or their effect upon future litigation.

Where a person having the necessary legal interest can show that the parties to the particular proceedings may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene, albeit subject to such limitations and conditions as to costs as between all parties as it sees fit to impose.

The grant of leave for a person to be heard as an *amicus curiae* is not dependent upon the same conditions in relation to legal interest as the grant of leave to intervene. The Court will need to be satisfied, however, that it will be significantly assisted by the submissions of the *amicus* and that any costs to the parties or any delay consequent on agreeing to hear the *amicus* is not disproportionate to the expected assistance.

10. That passage has been cited on many occasions in the context of r.9.12 of the Rules.<sup>9</sup> In *Mineralogy Pty Ltd v Sino Iron Pty Ltd* (No.3),<sup>10</sup> for example, Edelman J (at [13]-[15]) explained that the High Court can be understood to be saying:

“...that the requirement of a “direct interest”, will establish an *entitlement* to intervene, but if there is no direct interest then *leave* to intervene may be granted if the non-party’s legal interest is “likely to be affected substantially by the outcome of the proceedings”. However, an indirect interest, following from the extra-curial operation of a decision or its effect on future litigation is not sufficient...

... it is clear that the less direct the interest of the non-party, the more unlikely it will be that intervention will be allowed. See also *Comcare v Martinez* [2013] FCA 160 [14] (Robinson J)”.

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<sup>7</sup> [2011] HCA 54; (2011) 248 CLR 37.

<sup>8</sup> [1997] HCA 31; (1997) 189 CLR 579, 600-605.

<sup>9</sup> *BLG23 v BLH23, in the matter of BLG23* [2023] FCA 572, [103] (Goodman J); *Hillier v Martin* (No.13) [2022] FCA 939, [40] (O’Sullivan J); *Construction, Forestry, Maritime, Mining and Energy Union v Duluxgroup (Australia) Pty Ltd* [2022] FCA 357, [32] (Collier J); *Construction, Forestry, Maritime, Mining and Energy Union v CPB Contractors Pty Ltd*, [2021] FCA 1107, [71] (Greenwood J); *Congoo v State of Queensland* [2013] FCA 1113 [20] (Logan J); *Hua Wang Bank v Commissioner of Taxation* [2013] FCAFC 28 [51] (Logan, Jagot and Robertson JJ).

<sup>10</sup> [2015] FCA 542.

## Application

11. Here, the contribution by each of EFF and FIRE would be “useful and different” and/or would provide significant assistance to the Court for the following reasons:
12. *First*, each of EFF and FIRE are international human rights and media freedom organisations whose area of expertise include the right to freedom of expression or free speech. Each has extensive experience as *amicus curiae* in the United States. EFF also has extensive international experience. Notably, it was appointed amicus in the Canadian case of *Google Inc v Equustek Solutions Inc.*<sup>11</sup> That case, much like here, concerned the global operation of a domestic court order. Cases of that kind are rare. Considering the outcome of this proceeding has the capacity to affect the global online community, the contribution of each of EFF and FIRE (representing the public interest) should be considered invaluable.
13. *Second*, each of EFF and FIRE do not anticipate that the matters they wish to advance will be duplicated by the parties to the proceeding. In particular:
  - (a) EFF anticipates raising issues relating to the importance of ensuring that the internet remains an open platform, including the potential human rights implications of blocking access to content.<sup>12</sup> Further, it seeks to raise awareness of the public interests at stake, particularly for internet users who may be impacted should s.109 of the *Online Services Act* have global operation.<sup>13</sup> If so, EFF would propose a public-policy grounded legal test.<sup>14</sup>
  - (b) FIRE anticipates raising issues relating to the impact of global orders on national sovereignty and the implications of restricting access to information that is protected by the laws of other jurisdictions.<sup>15</sup> It also anticipates raising public policy issues in the context of the rise of censorship, by governments, of speech on social media platforms and websites.<sup>16</sup>

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<sup>11</sup> 2017 SCC 34.

<sup>12</sup> McSherry Affidavit, [10]-[12].

<sup>13</sup> McSherry Affidavit, [15].

<sup>14</sup> McSherry Affidavit, [13] and [21].

<sup>15</sup> Terr Affidavit, [23].

<sup>16</sup> Terr Affidavit, [27]-[28].

14. Further or alternatively, but for substantially similar reasons to those advanced above, each of FIRE and EFF would significantly assist the Court. It is desirable that the Court is adequately informed about the matters that come before it. The subject-matter expertise of each of FIRE and EFF put them in a position to render that assistance and ensure justice is done.
15. *Third*, the intervention or appointment of EFF and FIRE will not unreasonably interfere with the conduct of the proceeding. Specifically, each of EFF and FIRE anticipate that their intervention, if allowed, will not unduly add to the length or costs of the hearing. To the extent necessary, the Court might consider imposing conditions that protect the parties from any additional costs burden occasioned by the Application. For example, it might consider limiting the evidence and submissions to be relied on by each of EFF and FIRE.


### **Conclusion**

16. For all of the above reasons, the Application ought to be granted.

**Dated:** 10 May 2024.



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