

## NOTICE OF FILING

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A handwritten signature in blue ink that reads "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.

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No. VID 1173/2024\*

**JAN MAREK KANT**

Applicant

**COMMISSIONER OF TAXATION**

Respondent

### **Applicant's Submissions**

(Interlocutory application of 08 September 2025)

#### **CHRONOLOGY**

1. On 5 Sep 2025, the Judicial Registrar Curnow determined an 11 Apr 2025 interlocutory application for summary judgment against the Applicant (the **dismissal application**), ordering that the proceeding be dismissed and the applicant pay costs.
2. On 08 Sep 2025, the Applicant lodged an Interlocutory Application for review of the exercise by the Judicial Registrar Curnow of a power of a court (the **review application**) under 35A(5) of the *Federal Court of Australia Act 1976 (FCA Act)* and in accordance with *Rules 3.11, 17.01 & 17.02*.

#### **REVIEW OF AN EXERCISE BY THE REGISTRAR OF A POWER OF THE COURT**

3. The exercise of delegated jurisdiction, powers and functions by a registrar must be subject to review or appeal by a judge or judges of the court, on questions of both fact and law, for the delegation to be valid<sup>1</sup>. There must be a complete rehearing of the facts and the law as they exist when the judge reviews the decision made by the Judicial Registrar Curnow<sup>2</sup>. The review must be by way of *hearing de novo*; accordingly, the Applicant refers to and repeats paragraphs 1 through 80 of his *Outline of Submissions* dated 29 April 2025.
4. The proceeding was dismissed pursuant to *Rule 26.01(1)(a)* and 31A(2) FCA Act. *Rule 26.01(1)(a)* reads:

*A party may apply to the Court for an order that judgment be given against another party because:*

*(a) the applicant has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding;*

5. The decision to dismiss the proceeding must be wrong if the Applicant had any reasonable prospect of prosecuting any part of the proceeding. The order specifies the relevant paragraph of *subrule 26.01(1)* and the decision would therefore remain wrong if another paragraph of *subrule 26.01(1)* correctly applied.

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<sup>1</sup> *Harris v Caladine* [1991] HCA 9 [11]

<sup>2</sup> *Zdrilic v Hickie* [2016] FCAFC 101 [28, 29]

## THE CONSTITUTION

### Judicial independence

6. The legislative power of Parliament to authorize the exercise by officers of the Federal Court of part of its powers is subject to limitations, as is the Court's power to delegate part of its powers<sup>3</sup>. The delegation must not be to an extent where a litigant cannot avail himself of the judicial independence guaranteed in s.72 of the Constitution. The Federal Court cannot, in accordance with the Constitution, finally disposes of a matter without a Judge giving to it so much consideration as summary judgement requires.

### Due process of law

7. Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which must evoke their contemporary and undiminished force<sup>4</sup>. *Observance of Due Process of Law Act 1368*, requiring "no Man be put to answer without Presentment before Justices" and overlooked by the Court in delegating to officers of the Commonwealth executive the power to give summary judgment under 31A(2) FCA Act, is such a law.
8. To be "*put to answer*", within the intended meaning of *Observance of Due Process of Law Act 1368* includes having a claim finally disposed of.
9. Limitations on the powers expressly granted by the Constitution may be implied in and from the text of the Constitution. In considering whether a particular limitation on a grant of power is implied in the Constitution, the text of the Constitution must be read in the light of the law in force when it was made<sup>5</sup>. The Imperial Parliament must have intended a requirement that judicial power be exercised in accordance with *Observance of Due Process of Law Act 1368* be implicit to Chapter III of the Constitution; otherwise, the *Commonwealth of Australia Constitution Act 1900* (Imperial), the *Commonwealth of Australia Constitution Act* and the Constitution would be "*void in the Law*" for reason of each being a thing "*done to the contrary*" of *Observance of Due Process of Law Act 1368*.

### Responsible government

10. Provisions of the Constitution which prescribe a system of *responsible government* necessarily imply a limitation on legislative and executive power to deny the electors information concerning the conduct of the executive branch of government.<sup>6</sup> This limitation on legislative power necessarily limits also the judicial power of courts created by the Parliament.
11. The Federal Court may, in certain circumstance, refuse to consider scandalous or frivolous or vexatious materials; however, it must not refuse to consider relevant materials concerning *political or government matters* because to do so would be inconsistent with *responsible government*.

### Legislative powers of the Parliament

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<sup>3</sup> *Harris v Caladine* [1991] HCA 9 [10, 11]

<sup>4</sup> See: *Re Bolton; ex parte Beane* [1987] HCA 12 [11]

<sup>5</sup> See: *Nationwide News Pty Ltd v Wills* [1992] HCA 46 [40 – 42]

<sup>6</sup> See: *Lange v Australian Broadcasting Corporation* (1997); 189 CLR 520

12. Chapter II of the Constitution empowers the *Government of the Commonwealth* to enter into treaties, including treaties requiring the Commonwealth ensure a person whose rights are violated “*shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity*”<sup>7</sup>, and those requiring the Commonwealth “*develop the possibilities of judicial remedy*”<sup>8</sup>.
13. 51(xxxix) of the Constitution empowers the Parliament to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the *Government of the Commonwealth* or the *Federal Judicature*. The power is limited by Chapter III and all of the rights and responsibilities therein.

#### **logical order and form**

14. “*The law must be kept in logical order and form, for an aspect of justice is consistency in decisions affecting like cases and discrimination between unlike cases on bases that can be logically explained.*”<sup>9</sup> A requirement that law be kept in logical order and form is implicit to Chapter III of the Constitution.
15. The common law must change as required to give “*logical order and form*” to the general law. s.71 of the Constitution requires the courts innovate in the common law as necessary.

#### **So what?**

16. FCA Act stands in excess of the legislative power of the Parliament so far as it allows proceedings be determined by officers of the Commonwealth executive [24]<sup>10</sup>. The option to seek review of the 05 Sep 2025 decision of the Judicial Registrar Curnow does not make *a posteriori* 31A(2) FCA Act or the *Rules* constitutionally valid.
17. The review application must not be dismissed (or determined by a registrar).
18. Opinion (including judicial opinion) and other information about conduct of the Respondent and his lawyer is necessarily information about *political or government matters*. The Court must not refuse to consider the Applicant’s claims or submissions [69] because it would wrongly “*prevent the electors from getting information concerning the policy of the government*”<sup>11</sup>.
19. *Privacy Act 1988* has, in relation to *regulated entities* such as the Respondent, the “*widest possible operation consistent with Commonwealth constitutional legislative power*”<sup>12</sup> [61] including the legislative power in 51(xxxix). That includes also the effect *Privacy Act 1988* would have if its operation in relation to the Commonwealth were expressly confined to an operation to give effect to the *International Covenant on Civil and Political Rights* done at New York on 16 December 1966 (*ICCPR*)<sup>13</sup>.

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<sup>7</sup> See: Art.3(a) *International Covenant on Civil and Political Rights*

<sup>8</sup> See Art.3(b) *International Covenant on Civil and Political Rights*

<sup>9</sup> See: *Dietrich v The Queen* [1992] HCA 57 [48]

<sup>10</sup> in these submissions, a number enclosed in brackets is a reference to the same-numbered item in the 5 Sep 2025 *Reasons for Judgment*.

<sup>11</sup> See: *Nationwide News Pty Ltd v Wills* [1992] HCA 46 [43 – 47]

<sup>12</sup> See: Item 48 Explanatory Memorandum, *Privacy Amendment (Private Sector) Bill 2000*

<sup>13</sup> See: 12B(1)(d), 12B(2)(a) *Privacy Act 1988*

20. 12B(2) *Privacy Act 1988* makes the 3(b) ICCPR undertaking to “*develop the possibilities of judicial remedy*” also “*binding on the courts*”<sup>14</sup>.
21. *Privacy Act 1988* (and other legislation) must be read subject to a Constitutional requirement that law have “*logical order and form*”, and the Federal Court must innovate as necessary to give such order and form to the general law.
22. Costs incurred by result of the 5 Sep 2025 order are necessarily an outcome of unlawful exercise of powers by an officer of the Commonwealth executive. There can be no award of such costs except against the Commonwealth.

#### LEGAL PRINCIPLES

##### **Summary dismissal**

23. Summary dismissal is a “*serious step taken only with great care and if it is possible to conclude with confidence that there is no reasonable prospect of success*” [25]. The *reasonable person test* must consider if a *Justice* may conclude so with confidence. A registrar is necessarily unable to decide what a reasonable *Justice* might conclude.
24. “*In Sop and Sop Pty Ltd v Cmr of Taxation [2019] FCA 102 at [14]–[15], Kenny J said that “when well established propositions of law deny the prospect of success” summary judgment is available.*” [25]
25. There are no “*well established propositions of law*” concerning operation of s.12B *Privacy Act 1988*.
26. There are no “*well established propositions of law*” concerning development of the common law in line with the 3(b) ICCPR undertaking to “*develop the possibilities of judicial remedy*”.
27. There are no “*well established propositions of law*” concerning development of the common law for “*logical order and form*” of the general law.

##### **ICCPR**

28. “*Subject to certain limitations and to an evolving extent, the ICCPR, and (some) other instruments, may at least inform the interpretation of statutes (so as to be consistent with and not to abrogate international obligations), the exercise of relevant statutory and judicial powers and discretions, the application and operation of the rules of natural justice, the development of the common law and judicial understanding of the value placed by contemporary society on fundamental human rights*” – *Tomasevic v Travaglini* [2007] VSC 337 (emphasis added).
29. s.32 of *Charter of Human Rights and Responsibilities Act 2006* (**Charter**) requires *Privacy Act 1988* and *Judiciary Act 1903* be interpreted in a way that is compatible with the right of *privacy*, including the right to “*protection of the law*” against arbitrary or unlawful interference “*notwithstanding that the violation has been committed by persons acting in an official capacity*”<sup>15</sup>.

##### **Widest possible operation**

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<sup>14</sup> See: s.5 *Commonwealth of Australia Constitution Act*

<sup>15</sup> See: *Tomasevic v Travaglini* [2007] VSC 337 [69]; 32(2) **Charter**; Arts.3,17 ICCPR

30. The operation of *Privacy Act 1988* given it by s.12B is complex and can be better explained [56] by a Judge than by the Applicant.

31. Every subsection of s.12B *Privacy Act 1988* except 12B(1), which defines the term ***regulated entities***, begins with the words “*This Act also has the effect it would have if its operation in relation to regulated entities were expressly confined to*”. s.12B in its entirety is<sup>16</sup>:

- a. a single provision causing some entities to be *regulated entities* and the effect of *Privacy Act 1988* (apart from s.12) not be limited by s.12B; and,
- b. several provisions each causing the Act have additional effect in relation to the *regulated entities*.

32. On reading together of s.12B *Privacy Act 1988* and the *Explanatory Memorandum* to the *Privacy Amendment (Private Sector) Bill 2000* [60 – 62] it would appear that, in relation to *regulated entities*, *Privacy Act 1988* “*also has the effect it would have if*” the Act were “*given the widest possible operation consistent with Commonwealth constitutional legislative power*”. So wide an operation would, by effect of 51(xxxix) of the Constitution as subject to Chapter III, necessarily include private remedy against the *Commissioner of Taxation* not requiring things be done by the *Information Commissioner*.

33. 25(1)(a) & 25A(1)(a) *Privacy Act 1988* would appear on plain reading to require the *Information Commissioner* (successfully) apply for a *civil penalty order* in respect of a relevant invasion of privacy by an *agency* before the Commonwealth can be sued. This would in effect unlawfully empower the *Information Commissioner* to finally determine a claim if in favour of the Commonwealth<sup>17</sup>. Reading *Privacy Act 1988* subject to the Constitution<sup>18</sup> requires the Applicant can also be an “*authorised applicant*” in relation to relevant civil penalty provisions [55].

34. *Re Kant (2025)* was an application for leave to commence in the High Court a proceeding against the *United Nations Commissioner for Human Rights (HCHR)*. Relief sought against the HCHR comprised “*a writ or an injunction*” requiring he do all things necessary to have some complaints resolved without delay. Regarding the source of its jurisdiction to hear the proposed application, the High Court found “*Section 12B(2) of the Privacy Act relevantly provides*: (the words in 12B(2)(a) *Privacy Act 1988*)”. Neither *Re Kant (2025)* nor the “*proposed application*” had anything to do with *privacy*. The application for leave in *Re Kant (2025)* was refused [57] but observations made by Gleeson J about the relevant laws are nonetheless valid.

35. The Applicant submits s.12B(2)(a) *Privacy Act 1988* is a source of jurisdiction of the High Court because it makes rights in the relevant treaty enforceable with injunctions made under *Regulatory Powers (Standard Provisions) Act 2014*, and makes the High Court a “*relevant court*” in relation to such an injunction. This can be deduced from the fact of the High Court having jurisdiction to require by injunction the HCHR do things required of him by treaties, the set of particular provisions identified by High Court as relevant to its jurisdiction, and the observation that a treaty is not a law that can be enforced with an injunction under 75(i) of the Constitution if 75(v) is inapplicable.

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<sup>16</sup> See also: Item 48 *Explanatory Memorandum, Privacy Amendment (Private Sector) Bill 2000*

<sup>17</sup> It is common knowledge that the *Information Commissioner* is an officer of the Commonwealth executive

<sup>18</sup> See: 15A *Acts Interpretation Act 1901*

36. In summation, s.12B *Privacy Act 1988* does “something”; that “something” includes causing there exist in *Privacy Act 1988* remedies that would otherwise be unavailable.

#### **Necessary implication**

37. The meaning of a statutory provision must be all of that of its words<sup>19</sup>. s.80 *Judiciary Act 1903* may “aid the identification of the applicable law in a Commonwealth law area” [52] but its operation is not so limited. By necessary implication of s.80 *Judiciary Act 1903*:

- a. There is one common law of Australia (not a different common law of each state and territory); and,
- b. The common law is modified by statute law (including Commonwealth statute law) in force in the relevant state or territory<sup>20</sup>; and,
- c. The provisions of laws of the Commonwealth can be insufficient to carry them into effect; and,
- d. Remedies and punishments provided by laws of the Commonwealth can be inadequate; and,
- e. The common law may prescribe further or additional remedies or punishments in civil matters when those provided by laws of the Commonwealth are inadequate; and,
- f. The common law may prescribe remedies or punishments in civil matters when provisions of laws of the Commonwealth are not applicable; and,
- g. The common law may prescribe remedies or punishments in civil matters when provisions of laws of the Commonwealth are insufficient to carry them into effect.

#### **REASONS FOR JUDGMENT**

##### **Whoopsie**

38. The Applicant did not do work for *University of Melbourne*, or receive any payment made by *University of Melbourne*, between 1 July 2023 and 31 May 2024 or on any calendar day in June of 2024 numbered between 1 and 31 [30,33].

##### **Omissions**

39. The Registrar omitted to consider the letter dated 26 Sep 2024 and emails dated 16 Oct 2024. The correspondence is not immaterial.

40. The Registrar omitted to consider the record in “**JMK-7**” pp.59-65. The record is not immaterial.

41. The Registrar omitted to consider the letter dated 26 Feb 2025. The letter is not immaterial.

42. The Registrar omitted to consider the letter dated 17 Mar 2025. The letter is not immaterial.

43. The Registrar omitted to consider the facts in paragraphs 12 through 14 of the affidavit affirmed by the Applicant on 22 Apr 2025. Those facts are not immaterial.

44. The Affidavit affirmed by the Applicant on 07 Nov 2024 was “Accepted for Filing” on the same date [3].

##### **Mobile phone number**

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<sup>19</sup> *Momcilovic v The Queen* [2011] HCA 34 [38, 39]

<sup>20</sup> *Blunden v Commonwealth of Australia* [2003] HCA 73 [18]

45. The Applicant asserts his mobile telephone number was **not** provided to the *Australian Tax Office* with use his *myGov* account [27,28].
46. It is common knowledge that *Centrelink* is part of *Services Australia*. *Centrelink* is not part of the *Australian Tax Office* nor is the *Australian Tax Office* part of *Centrelink*.
47. *Services Australia* did not between 01 Jun 2024 and 11 Apr 2025 create a new, different record of the 12 Nov 2022 disclosure of the Applicant's phone number. Jordan Patrick Sullivan incorrectly deposed to facts in paragraph 9 of the affidavit affirmed by him on 11 Apr 2025.
48. APP 6.2(a) applies in relation to a use by an APP entity of personal information about an individual if the individual would "reasonably expect" the APP entity to use or disclose the information for that (secondary) purpose. An individual would not "reasonably expect" his phone number be used by *Australian Tax Office* to contact him in relation to an *FOI request* unless he requests it. This must be especially true if the phone number is not amongst information given by the individual in/for the *FOI request*. APP 6.2(a) did not apply in relation to the Respondent's use of the Applicant's phone number in responding to an *FOI request* because the Respondent using the information for that secondary purpose was not "reasonably expectable" [44].
49. *Siebel* is a "national identification system" in 7(1) *Privacy (Tax File Number) Rule 2015 (TFN Rule)* [38], which can be interrogated "using a variety of different fields" including an individual's *tax file number (TFN)*. In operating *Siebel*, the *Commissioner of Taxation* ordinarily uses an individual's TFN "as an identifier in accordance with taxation law, superannuation law or personal assistance law" as permitted by 7(2) TFN Rule. In retrieving the Applicant's phone number, the *Commissioner of Taxation* may have used the TFN as part of a "national identification system" in circumstances not permitted by 7(2) TFN Rule. There must be a remedy to a contravention of 7(1) TFN Rule and so the proceeding must not be dismissed absent findings on the relevant questions of fact [63].

#### **SOC and Submissions**

50. The Applicant's 28 Apr 2025 (outline of) submissions are compliant with the case management order made 03 Mar 2025. These do not exceed 10 pages and therefore cannot be "prolix" [37].
51. Neither the Applicant's submissions nor his 07 Mar 2025 *Statement of claim (SOC)* are prolix [37] to an extent causing the Respondent substantial injustice.
52. The SOC raises (many) points of law consistently with *subrule 16.02(3)*. This is done to limit the issues for decision; the Court need not determine a question of law if the parties agree on an answer to that question for the purposes of the proceeding [18]. Such use of pleadings is consistent generally with the *overarching purpose of the civil practice and procedure provisions* and 37M(2)(b) FCA Act in particular.
53. Paragraphs 105, 106 & 107 of the SOC concern respectively [39] the requirement to provide "further information", "personal information about (the Applicant)" and "personal information surplus to requirements...".
54. The SOC pleading "the proceeding is not defamatory or otherwise vexatious" [40] may be unnecessary. It is not reason to dismiss the proceeding.

55. The Respondent is yet to file a response to the SOC and the Applicant a reply. It cannot be known the proceeding won't involve "*important questions of public and constitutional law*" [65 – 67] before pleadings close.

### **Coincidence Rule**

56. The court may, on the application of a party, direct that the *coincidence rule* is not to apply to particular *coincidence evidence* despite the party's failure to give notice (in proper form) under s.98 *Evidence Act 1995*. A judge does not direct a jury in a proceeding without a jury, and in such proceedings 100(2) *Evidence Act 1995* requires only the Court decide that the *coincidence rule* is not to apply. Accordingly, the Applicant seeks [45] the Court decide the *coincidence rule* not apply in (re)considering the dismissal application.

57. The Applicant relies on documentary evidence to prove things stated in his 22 Apr 2025 *Notice of Intention to Adduce Coincidence Evidence (coincidence notice)*. No examination of witnesses is required and 7(3)(b) *Evidence Regulations 2018* must be inapplicable [7].

58. Disregarding any defect in the *coincidence notice* [7,8] is consistent with the Court's obligation (not limited to just criminal matters) to ensure a fair hearing in circumstances where a party is unrepresented<sup>21</sup>.

59. The nature of materials produced by the Respondent might be a benign coincidence if he hadn't sought to prove on those materials that no interference with privacy had taken place. In reality the Respondent making his submissions [footnote 1] in the dismissal application was a final step in his plan to evade responsibility, should the Applicant seek remedy, by causing the matter to appear as one concerning the administration of his "*tax law*" so that it might be summarily dismissed or otherwise determined in his favour by a relevant court or other arbitrator for reason of no impropriety.

### **Scandalous**

60. A matter is scandalous if it contains unnecessary allegations bearing upon the *moral character* of individuals<sup>22</sup>. The Respondent is sued in his official capacity; he is not an individual and has no relevant *moral character*.

61. Paragraphs 142 through 147 of the SOC do not contain unnecessary allegations. The relevant conduct is actionable:

- a. in *Privacy Act 1988* (by extension of s.12B and Article 14.1 of ICCPR or otherwise); or,
- b. as a *misfeasance in public office*; or,
- c. as a *breach of statutory duty* (imposed by *Public Service Act 1999* or otherwise)

62. The claims in paragraphs 142 through 147 of the SOC are joined [69] in accordance with *subrule 16.02(5)*. If these claims are struck out or dismissed, the Court will be required by Part VB of FCA Act to take account of the relevant conduct in exercising the discretion to award costs.

63. Paragraphs 32 through 36 below the subheading "Abuse of Process" in the Applicant's 28 Apr 2025 *Outline of submissions* are critical to arguing the dismissal application should itself be dismissed. The Registrar erred in setting aside the submissions [47].

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<sup>21</sup> See: *Andelman v The Queen* [2013] VSCA 25 [61 – 66]

<sup>22</sup> See: *Solomon v Psychologists Board of Western Australia* [2000] WASCA 266 [49]

#### THERE MUST BE A REMEDY

64. Interpreting *Privacy Act 1988* and *Judiciary Act 1903* consistently with obligations in ICCPR and/or in accordance with s.32 Charter requires there exist a private remedy to arbitrary or unlawful interference with *privacy* by the *Commissioner of Taxation*. The fact of no civil penalty having been imposed and no finding of guilt having been made must not be fatal to the proceeding [63].
65. If laws of the Commonwealth other than those referred to in the *Originating application* provide adequate remedy in the matter, the Applicant should have leave to amend the *Originating application* and to replead accordingly<sup>23</sup> [23]. If not, a remedy **must** exist in the common law of Australia (as modified by *Privacy Act 1988* and other good laws) despite the common law having in the past not recognised a “*tort of invasion of privacy*” [19,20,53].

#### PUBLIC INTEREST

66. The *Information Commissioner* makes decisions concerning lawfulness of relevant conduct<sup>24</sup> and requires a decision of the Court in this proceeding to assist him in determining whether such conduct is unlawful<sup>25</sup>. This is clear to see in item 3.62 of the *APP guidelines* and reference cited therein. The “*public interest in protecting privacy*”<sup>26</sup> requires the *Information Commissioner* have the necessary assistance. This proceeding is a *public interest case*.

#### COSTS

67. Costs should not be awarded against the Applicant because the proceeding is both a *test case* and a *public interest case*<sup>27</sup>.

**Prepared by:** Jan Marek Kant, Applicant  
**05 October 2025**

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<sup>23</sup> See: *Spencer v Commonwealth of Australia* [2010] HCA 28 [23]

<sup>24</sup> See: Ross, J (2025)

<sup>25</sup> See: Falk, A (2020), item 6.6

<sup>26</sup> See: 3(aa) *Privacy Act 1988*

<sup>27</sup> See: *Martin v Electoral Districts Boundaries Commission (No 2)* [2017] SASCFC 43 [8]