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IN THE FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA REGISTRY
DIVISION: GENERAL

NO. VID 528 OF 2024

JAN MAREK KANT
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

RESPONDENT'S SUBMISSIONS

PART I INTRODUCTION

1. The Applicant seeks leave to appeal from the orders of the primary judge given on 11 June 2024, by which the primary judge affirmed the orders of a registrar refusing to require the Respondent to produce to the Applicant "all information about him as is reasonably accessible to the Office of the Australian Information Commissioner" by way of an injunction under s 80W(1) of the *Privacy Act 1988* (Cth) (the **Privacy Act**) (the **injunction**), and otherwise dismissed the Applicant's interlocutory application filed on 23 December 2023 (the **review application**).

2. For the reasons that follow, the Applicant's application for leave to appeal should be dismissed, with costs.

PART II BACKGROUND AND THE JUDGMENT BELOW

3. The factual background to this application is set out in *Kant v Australian Information Commissioner* [2024] FCA 599 (**J**) at [1]-[11].

4. The primary judge noted that both parties agreed that the registrar's dismissal of the Applicant's interlocutory application dated 26 November 2023 (the **suppression order application**) should be affirmed: J[7]-[8]. The only issue for determination was whether the registrar was right to dismiss the interlocutory application dated 22 November 2023 (the **injunction application**): J[9].

5. The primary judge summarised the basis upon which the Applicant sought the injunction: J[10]. The primary judge identified the sources of power the Applicant was relying upon, namely s 80W of the Privacy Act as applied by ss 121 and 122 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (the **Regulatory Powers Act**): J[15]-[16]. In order to be granted an interim injunction, the Applicant was required to demonstrate a *prima facie* case for the orders he sought, and that the balance of convenience favoured granting them: J[17].

6. The primary judge found that the Privacy Act grants an individual a right to *request* information from an APP entity, and the entity is required to deal with such requests in accordance with Australian Privacy Principle 12 (**APP 12**): J[23]. However, there was no evidence before the Court of the Applicant having made such a request and accordingly, the primary judge found the Applicant had no *prima facie* case that the jurisdiction conferred by s 80W of the Privacy Act was enlivened: J[23]-[[26]. The balance of convenience also did not warrant the grant of the injunction because

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imposing the burden of providing information on the Respondent, in the absence of a statutory obligation and in circumstances where the benefit to the Applicant was unclear, would be an undue imposition: J[26]. The primary judge affirmed the registrar's decision to dismiss the injunction application: J[28].

PART III SUBMISSIONS

7. The applicant requires a grant of leave to appeal from the primary judge's interlocutory judgment.[1] In deciding whether to grant leave, this Court will ordinarily consider whether the primary decision is attended with sufficient doubt to warrant reconsideration by the Full Court, and whether if leave were refused there would be substantial injustice to the Applicant.[2] The grounds set out in the application for leave to appeal do not raise sufficient doubt about the primary decision, nor would refusing leave cause substantial injustice.

The primary decision is not attended with doubt

8. The primary judge's decision to refuse interlocutory relief in this case required the primary judge to exercise a judicial discretion.[3] Accordingly, the Applicant's proposed appeal grounds must raise an arguable error of the kind identified in *House v The King* (1936) 55 CLR 499 at 504-505.

Ground 1

9. Ground 1 contends that the primary judge did not consider submissions considering the orders he sought, specifically the applicant's submissions concerning his application for what he termed "declaratory suppression orders".[4]

10. The primary judge's role was to review the registrar's decision to dismiss the suppression order application. The review application sought orders to affirm this dismissal, which is precisely what the primary judge did. The registrar did not dismiss any application for declaratory suppression orders, nor had the applicant made such an application. Therefore, the judge was not required to address whether declaratory suppression orders should be made.

11. The matters that the Applicant contends were not considered were not required to be considered by the primary judge. The primary judge understood the review application before him, understood the Applicant's position on those orders, and did not err in affirming the dismissal of the suppression order application. The primary judge was not then required to go on to consider an application that was not before him.

Ground 2

12. The matters the Applicant contends that the primary judge failed to consider are set out at AS [9].

13. The matters set out at AS [9(a)-(c)] were not raised by the Applicant before the primary judge. It is, therefore, unsurprising that the primary judge did not refer to those matters in the judgment. The absence of reference to those matters does not raise an arguable case that the primary judge acted upon a wrong principle or otherwise erred.

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1 *Federal Court of Australia Act 1976* (Cth) (the **FCA Act**), s 24(1A).
2 *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398–9.
3 *StarTrack Express Pty Ltd v TMA Australia Pty Ltd* [2023] FCAFC 200 at [55].
4 Applicant's submissions filed 7 August 2024 (**AS**) at [11]-[12].

14. The injunction application was refused because the primary judge was not satisfied that the Applicant had raised a *prima facie* case that the Respondent was either engaging in conduct, or refusing to do a thing, in contravention of a provision enforceable under the Regulatory Powers Act as required by s 121 of the Regulatory Powers Act. Whether or not the Respondent intended to engage in conduct (s 124(1)(a)), had previously engaged in conduct (s 124(1)(b)), intended to refuse to do a thing (s 124(2)(a)), or had previously refused to do a thing (s 124(2)(b)) was of no consequence because, on the primary judge's findings, the relevant conduct or thing was not *prima facie* in contravention of a provision enforceable under the Act. The same reasoning applies to sub-ss 124(1)(c) and 2(c) and the purported relevance of those matters to the balance of convenience.

15. As to AS [9(c)], the primary judge's reasoning on the balance of convenience at J[26] indicates that the primary judge was well aware that granting the injunction would see a change of status by requiring the provision of information. There was no misapprehension that the injunction was not sought to preserve a status quo.

16. With respect to AS [9(d)], the Applicant contended that "the requisite access request is taken to be made on application for the injunction.[5] The primary judge, however, found that there was "no evidence before the court that Mr Kant has made a valid request of the Respondent for information pursuant to [APP] 12": J[25]. That finding was sufficient to dispose of the Applicant's contention that his application for the injunction was a request for information under APP 12. Even if the primary judge did fail to consider the Applicant's submission that his injunction application was a request for the purposes of APP 12, the submission was without merit. The injunction application was not a request under APP 12 because it was not a request made to the Respondent for information "held" by the Respondent about the Applicant. Instead, it was for information "reasonably accessible" to the Office of the Australian Information Commissioner (**OAIC**), which, at best, is a request for a different category of information held by a different APP entity[6] and thus did not engage the criteria of APP 12.1.

Proposed appeal grounds

17. The proposed appeal grounds are largely unconnected to the primary judgment. The Applicant's submissions also raise other arguments not strictly covered by any of his grounds of application or proposed grounds of appeal. None of the proposed appeal grounds properly raise sufficient doubt in the primary judgment to warrant a grant of leave.

18. The Respondent notes that several of the proposed grounds refer to the Constitution yet notices under s 78B of the *Judiciary Act 1903* (Cth) have not been given. If the Court considers that there is a real constitutional issue raised by the proceedings, then the Court will be under a duty not to determine the point unless and until s 78B has been complied with. However, s 78B does not impose a duty on the Court "if the

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5 Applicant's submissions to the primary judge at [37] cited at AS [8].

6 "APP entity" is defined in s 6 of the Privacy Act to mean "an agency or organisation". "Agency" is also defined in s 6. The OAIC is an APP entity under para (c) of the definition of agency and the Respondent is an APP entity under para (e) of the definition of agency.

asserted constitutional point is frivolous or vexatious or raised as an abuse of process."[7] Further, "[t]he constitutional point must be real and substantial".[8]

Proposed appeal grounds 1-3

19. The crux of the issue before the primary judge was whether the Applicant had requested access to information in a way that raised a *prima facie* case of breach of APP 12. The primary judge found that he had not done so. There was no finding that the Applicant did not have such a right exercisable under the Privacy Act. APP 12 entitles the Applicant to request information held about him directly from the Respondent or the OAIC. The Applicant does not require a reason to make such a request of the Respondent, and a fishing expedition request is permissible.[9] It is, therefore, unnecessary to determine whether the Constitution guarantees the rights asserted by the Applicant by proposed appeal grounds 1 and 2. The asserted constitutional questions do not properly arise.

20. There is, in any event, no merit to the Applicant's contentions of Constitutional rights to the freedoms recognised in the International Covenant on Civil and Political Rights (**ICCPR**) and to privacy. Any constitutional right must be securely based in the text and structure of the Constitution.[10] There is no textual basis in the Constitution for a right to privacy. There is nothing in the structure of the Constitution that indicates a right of privacy is logically or practically necessary for the preservation of the integrity of the that structure. The Full Court of this Court has held that an argument that there is an implied right of privacy in the Constitution is untenable and not supported by authority.[11]

21. The same reasoning applies to the Applicant's claim to privacy based in Ch III of the Constitution. It is well settled that where the provisions of a treaty have not been incorporated into domestic law they cannot operate as a direct source of individual rights and obligations.[12] The Privacy Act has incorporated parts of the ICCPR into domestic law. Any ICCPR rights, therefore, arise under the Privacy Act and not the Constitution.

Proposed appeal ground 4

22. APP 12.1 provides that "[i]f an APP entity holds personal information about an individual, the entity must, <u>on request by the individual</u>, give the individual access to the information."[13] The text of APP 12 does not support the Applicant's contention that an enforceable obligation arises from APP 12 absent a request from the Applicant.

23. Additionally, if an injunction is to be granted when there is no threatened or intended contravening conduct, such an injunction ought to be limited precisely to preventing a

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7 *Australian Competition & Consumer Commission v C G Berbatis Holdings Pty Ltd* (1999) 95 FCR 292 at [14] (French J); .

8 *Re Culleton* (2017) 230 ALR 550 at [29] (Gageler J).

9 Though discovery would not be ordered to assist the applicant in a fishing exercise: *Carmody v MacKellar* (1996) 68 FCR 265 at 280.

10 *Gerner v Victoria* (2020) 270 CLR 412 at [14] (the Court) *and Zurich v Koper* (2023) 277 CLR 164 at [26] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), and [45] (Gordon, Edelman and Steward JJ).

11 *Wilson v State of Victoria* [2023] FCAFC 204 at [45].

12 *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J).

13 Emphasis added.

repetition of contravening conduct that has occurred.[14] There is no justification for an injunction covering possible contraventions that the Respondent has neither committed before nor threatened or intended to commit in the future.

Proposed appeal ground 5 and declaratory suppression orders (AS [22]-[31])

24. As to proposed appeal ground 5, the Respondent repeats [10]-[11] above. As to AS [22]-[31], no suppression or non-publication order has been sought, and it is the Respondent's view that there are no realistic prospects of asking for such an order to be made. Therefore, the validity of the constitutional basis of the suppression and non-publication provisions in the FCA Act does not properly arise.

Leave to appeal (AS [32]-[35])

25. The Applicant's assertion that he has a right of appeal is incorrect in light of s 24(1A) of the FCA Act. The Applicant advances no cogent reason why s 24(1A) is invalid.[15] Nothing in s 73 of the Constitution (which provides for the appellate jurisdiction of the High Court), either on its own or read together with ss 71 and 79 of the Constitution (which respectively provide for the creation of the High Court and federal courts, and for federal jurisdiction to be exercised by such number of judges as the Parliament prescribes), provides for any right of appeal to this Court. (Even in relation to appeals to the High Court provided by s 73 of the Constitution, the High Court's jurisdiction is expressed by s 73 to be subject to "such exceptions and subject to such regulations as Parliament prescribes".)

No injustice to the Applicant

26. There is no apparent injustice to the Applicant from refusing to grant him leave to appeal the judgment. The Applicant has not identified why he requires the information sought by the injunction application to pursue his substantive application. He remains entitled to request access to personal information about him held by the OAIC by requesting it from the OAIC.

PART IV COSTS

27. The Respondent seeks its costs if the application for leave to appeal is dismissed.

Date: 29 August 2024

KYLIE MCINNES
Counsel for the Respondent

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Elena Arduca
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For and on behalf of the Australian Government Solicitor
Solicitor for the Respondent

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[14] See, for example, *Australian Competition and Consumer Commission v G.O. Drew Pty Ltd* [2007] FCA 1246 at [40]; *Australian Competition and Consumer Commission v Bloomex Pty Ltd* [2024] FCA 243 at [90].

[15] The Respondent notes that s 24(1A) had previously withstood constitutional challenge: see *Chan v Harris (No 3)* [2011] FCA 341 at [3], [25]-[27]. Note also that the restriction in s 24(1A) is considerably qualified by s 24(1E).