

NOTICE OF FILING

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File Title:	JAN MAREK KANT v THE AUSTRALIAN INFORMATION COMMISSIONER
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "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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IN THE FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA REGISTRY
DIVISION: GENERAL

NO. VID 829 QF 2023

JAN MAREK KANT

Applicant

AUSTRALIAN INFORMATION COMMISSIONER

Respondent

**RESPONDENT'S OUTLINE OF SUBMISSIONS REGARDING APPLICANT'S AMENDED
INTERLOCUTORY APPLICATION DATED 18 JULY 2024**

PART I INTRODUCTION

1. These submissions address the third interlocutory application filed by the applicant in this proceeding. The first two applications have been dismissed.¹
2. The current interlocutory application should be dismissed because, in summary, the orders sought by the applicant are unnecessary. The respondent seeks its costs if the interlocutory application is dismissed.

PART II BACKGROUND

3. The relevant background to this proceeding is set out at [3] to [7] of the respondent's submissions filed on 12 April 2024.

PART III THE INTERLOCUTORY APPLICATION

4. The interlocutory application dated 18 July 2024 seeks the following interlocutory orders:
 1. The Respondent is to investigate the alleged interference with the rights of the Applicant as are recognised in the *International Covenant on Civil and Political Rights* (ICCPR).
 2. The Respondent is to find, secure, and make discoverable all information about said interference, coordinating with the government bodies identified in the Applicant's 22 Aug 2023 letter except *National Anti-Corruption Commission* (NACC).

¹ *Kant v Australian Information Commissioner* [2024] FCA 599.

3. The Respondent is to refrain taking action pursuant to (1) and (2), unless and until the Applicant requests the Respondent to commence doing so.
4. Further orders as mentioned in *Applicant's Submissions* dated 12 Mar 2024, including all of:
 - a. An order causing that no person may intervene or be otherwise joined as a party to this proceeding except on further application by the Applicant; and,
 - b. An order causing this proceeding, except so much of it as relates to costs or damages in lieu thereof, be stayed pending further application by the Applicant; and,
 - c. An order causing this proceeding, except so much of it as relates to costs or damages in lieu thereof, be transferred to the Supreme Court of Victoria; and,
 - d. An order withdrawing the directions which limit authorities in this proceeding to those at *legislation.gov.au*.
5. The Judge's *Reasons for judgement* in the *Interlocutory application* are to be published; or if the *Interlocutory application* is decided by a Registrar, the Registrar's *Reasons for decision* are to be published.
6. The costs of the *Interlocutory application* are reserved.

PART IV SUBMISSIONS

Proposed orders 1 and 3

5. Proposed order 1, when read with the applicant's submissions dated 24 September 2024 at [6]-[9], appears to seek a writ of mandamus requiring the respondent to conduct an investigation. It effectively reflects the final relief sought by the applicant in these proceedings. Both parties have filed their submissions, and the matter is ready for hearing (subject to the resolution of the present application). The question of whether a writ of mandamus should be issued is one that ought to be determined at the final hearing. There is no justification for granting interlocutory relief at this stage.
6. In his submissions at [23], the applicant argues that any investigation by the respondent into the alleged interferences with his privacy by ASIO—requested by him on 22 August 2023—would, “in prevailing circumstances, be of no value to the Applicant and would constitute unnecessary interference with his right of privacy.” Since the applicant has stated that the relief sought under proposed order 1 holds no value to him, there is no reason to grant it. Furthermore, there is no basis to assume the applicant will consider the respondent's actions any less ineffectual before the Court reaches a final determination on the issuance of a writ of mandamus. In any event, proposed order 1 serves no useful purpose in light of proposed order 3.

Proposed orders 2 and 3

7. Proposed order 2 appears to be, in substance, an application for discovery. As this Court held in relation to the applicant's interlocutory application dated 22 November

2023, an application for discovery of this kind would constitute an impermissible fishing expedition² and should not be permitted.

8. Like with proposed order 1, the applicant has sought for proposed order 2 not to be actioned until he requests the respondent to commence doing so. How discovery could assist the respondent in this proceeding if that discovery is not required now is entirely unclear. The seeking of proposed order 3 suggests that proposed order 2 is unnecessary.

Proposed order 4(a)

9. The respondent is not aware of any application for joinder by any party. An order of this kind is unnecessary.

Proposed order 4(b)

10. The Court has a general power to control its own proceedings pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth), which enables the Court to order a temporary stay of proceedings.
11. The applicant contends at [19]-[21] that this proceeding should be temporarily stayed because the applicant's access to legal information is (according to him) being interfered with. The applicant's submissions rely heavily on speculative assertions, and the evidence he relies upon does not substantiate the serious allegations he is making. The applicant has identified no sound basis to support the claims made that would warrant the granting of a temporary stay of proceedings.

Proposed order 4(c)

12. Section 5(4) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) (the **Cross-Vesting Act**) relevantly provides:

Where:

- (a) a proceeding (in this subsection referred to as the relevant proceeding) is pending in the Federal Court ... (in this subsection referred to as the first court); and
- (b) it appears to the first court that:
 - (i) the relevant proceeding arises out of, or is related to, another proceeding pending in the Supreme Court of a State or Territory and it is more appropriate that the relevant proceeding be determined by that Supreme Court;

...

the first court shall transfer the relevant proceeding to that Supreme Court.

² *Kant v Australian Information Commissioner* [2024] FCA 559 at [27].

13. The applicant appears to rely on s 5(4)(b)(i), by contending that he is “also a Plaintiff in another proceeding, pending in the Supreme Court, that arises out of similar matter.”³
14. Two proceedings are related for the purposes of s 5(4)(b)(i) if they are “associated or connected”, such as where a substantial common question arises in both proceedings, or where the facts and circumstances in the two proceedings appear to be intertwined.⁴
15. The applicant’s proceeding in the Supreme Court is a proceeding against the Inspector-General of Intelligence and Security seeking to pursue allegations of violations of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).⁵ On the other hand, this proceeding concerns whether the delegate of the respondent erred in finding that the applicant’s complaint was not a complaint pursuant to s 36 of the *Privacy Act 1988* (Cth) because ASIO is excluded from the operation of that Act. There is no common legal question arising between the two proceedings, nor are the facts and circumstances in the two proceedings intertwined. Section 5(4)(b)(i) of the Cross-Vesting Act is not enlivened and this proceeding should not be transferred to the Supreme Court of Victoria.

Proposed order 4(d)

16. Proposed order 4(d) is unnecessary. The applicant may have interpreted something Registrar Luxton said on 20 December 2023 as being a ‘direction’ that limits authorities in this proceeding to those at *legislation.gov.au*, but no order of that kind was made on 20 December 2023 (or at any other time in this proceeding).

Proposed order 5

17. The respondent makes no submissions in respect of proposed order 5.

Proposed order 6

18. The respondent seeks her costs if the interlocutory application is dismissed. There are no special circumstances justifying a departure from the usual rule that costs follow the event.
19. The applicant’s submission at [30] that the *Legal Services Directions 2017* (Cth) (**LSDs**) requires the respondent to pay his costs is misconceived. None of the obligations in the LSDs are enforceable except on the application of the Attorney-

³ Applicant’s submissions at [25], citing exhibit JMK-47 to the applicant’s affidavit filed on 8 March 2024.

⁴ *Civil & Civic Corporation Pty Ltd v Nova Builders Pty Ltd* [2022] FCA 1515 at [13]; *Amalia Investments Ltd v Virgtel Global Networks NV (No 2)* (2011) 198 FCR 248 at [41].

⁵ See JMK-47, page 5.

General,⁶ and nothing in the LSDs requires an entity bound by the LSDs to pay costs if any part of a proceeding is a public interest test case.

Date: 18 October 2024

KYLIE MCINNES
Counsel for the Respondent



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

⁶ *Judiciary Act 1903* (Cth), s 55ZG(2).