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Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
Division: General **No VID 1173 of 2024**

BETWEEN: **JAN MAREK KANT**
Applicant

-and-

COMMISSIONER OF TAXATION
Respondent

RESPONDENT'S SUBMISSIONS

PART I INTRODUCTION

1. By interlocutory application dated 8 September 2025 (the **review application**) the applicant seeks review of the orders of Registrar Curnow dated 5 September 2025 (the **Registrar's orders**) dismissing the proceedings with costs pursuant to s 31A of the *Federal Court Act 1976* (Cth) (**FCA Act**) and rule 26.01 of the *Federal Court Rules 2011* (Cth) (**Rules**).

2. The Registrar's orders were made on the respondent's interlocutory application dated 11 April 2025. The respondent's interlocutory application was supported by affidavits affirmed on 11 April 2025 by Jordan Sullivan and Michael Wright, respectively, and an outline of submissions also dated 11 April 2025.

3. On 5 October 2025, the applicant filed submissions in support of the review application (**applicant's submissions** or **AS**). The applicant's submissions:

   3.1. refer to and repeat the applicant's Outline of Submissions filed on 29 April 2025: AS [3]

   3.2. challenge the constitutional validity of the delegation to, and exercise by, Registrar Curnow of the power to give summary judgment pursuant to s 31A(2) of the FCA Act and rule 26.01 of the Rules: AS [6]-[22]

   3.3. address, under the heading, "Legal Principles", why summary dismissal would not be appropriate in the present proceedings: AS [23]-[37]

   3.4. critique the reasons given by Registrar Curnow on 5 September 2025 for the Registrar's orders: AS [38]-[63]

3.5. contend that either statutory or common law must provide a remedy for interferences with privacy by the respondent: AS [64]-[65]

3.6. characterise the proceedings as a test case and a public interest case, and that this means the applicant should not be ordered to pay the respondent's costs: AS [66]-[67].

4. The respondent submits that the Court should dismiss the applicant's review application for several reasons. *First*, the applicant's claims for damages and purported application for a civil penalty order are untenable. The applicant claims damages – including exemplary damages – based on erroneous propositions concerning ss 25 and 25A of the *Privacy Act 1988* (Cth) (**Privacy Act**), s 80 of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) and the common law. Further, the applicant purports to apply for a civil penalty order against the respondent for a breach of Part IIIA of the Privacy Act but lacks the power to bring such an application. *Second*, there is no utility in permitting the applicant an opportunity to replead. The evidence is sufficiently clear for the Court to conclude that the respondent did not interfere with the applicant's privacy. *Third*, the constitutional questions sought to be raised by the applicant, insofar as they are intelligible, need not be determined by the Court as part of this proceeding.

5. With the exception of Section D (paragraphs [28]-[35]) of Part III, and Part IV (paragraph [36]), the balance of these submissions substantially reproduce the submissions of the respondent filed on 11 April 2025.

PART II FACTS

6. On 12 September 2024, the applicant applied to the respondent under s 48 of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) for an income statement relating to the applicant to be amended or annotated (**section 48 amendment application**) to reflect the applicant's stated position that he had neither been employed nor paid by the University of Melbourne (the issuer of the income statement) during the financial year ending 30 June 2024 (**FY24**).[1]

7. On 20 September 2024, an APS employee in the Australian Taxation Office's Office of General Counsel (**the first ATO officer**) who had been tasked with progressing the applicant's request, retrieved the applicant's mobile telephone number from an ATO

[1] Affidavit of Jan Marek Kant dated 29 October 2024, Annexure JMK-1, pages 7-8.

database (**the first impugned use**)[2] and used it to attempt to speak with him about the request (**the second impugned use**).[3]

8. On 24 September 2024, the first ATO officer sent an email to the applicant in which he referred to his attempt to contact the applicant by telephone. The first ATO officer explained that he required further information from the applicant in connection with his section 48 amendment application.[4]

9. On 25 September 2024, the applicant sent an email to the first ATO officer, attaching a statutory declaration[5] in which he declared that he had not worked for, or received payments from, the University of Melbourne during FY24. In the same email, the applicant asked the first ATO officer how he had obtained his mobile telephone number, stating that "I also haven't provided my phone number for purposes of my FOI requests."[6]

10. On 26 September 2024, the first ATO officer sent an email to the applicant in which he said he had obtained the applicant's mobile telephone number from "the internal ATO system". He then posed a series of questions relating to the applicant's s 48 amendment application.[7] The applicant did not respond to these questions.

11. On 21 November 2024, a different ATO officer (**the second ATO officer**) informed the applicant by email that as the amendment sought by the applicant in his 12 September 2024 request would not alter his liability to tax, the respondent had decided to remove the income statement from his records.[8] On 9 December 2024, the applicant withdrew his s 48 amendment application, citing the email of 21 November 2024.[9]

12. After these proceedings commenced, a case management hearing took place before Registrar Curnow on 3 March 2025. The respondent's representative made oral submissions as to the procedural orders that ought to be made.[10]

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2 Affidavit of Michael Wright, [9].

3 Affidavit of Michael Wright, [9]-[10], and Annexure MLW-4.

4 Affidavit of Michael Wright, [10], and Annexure MLW-4.

5 Affidavit of Michael Wright, [11]-[12], Annexures MLW-5A and MLW-5B.

6 Affidavit of Michael Wright, [11]-[12], Annexure MLW-5A.

7 Affidavit of Jan Marek Kant dated 29 October 2024, at JMK-1, pp 4-5.

8 Affidavit of Michael Wright, [14], Annexure MLW-6.

9 Affidavit of Michael Wright, [15], Annexure MLW-7.

10 Affidavit of Michael Wright, [16]-[21], Annexure MLW-8.

PART III RESPONDENT'S ARGUMENT

13. The respondent submits that the proceedings are ripe for summary judgment, and that, accordingly, the Court should dismiss the applicant's review application.

A Claims for damages are untenable

14. The applicant seeks damages, including exemplary damages, based on ss 25 and 25A of the Privacy Act, s 80 of the Judiciary Act, and the common law. The statutory provisions relied upon do not permit an award of damages against the respondent, and the common law provides no such remedy.

Claim for damages relying upon the Privacy Act

15. The claims for damages against the respondent based upon the Privacy Act confront a fundamental, insurmountable difficulty. That difficulty is that ss 25 and 25A of the *Privacy Act 1988* (Cth) (**Privacy Act**) are found in Part IIIA of the Privacy Act. Part IIIA deals with privacy of information relating to credit reporting. Compensation orders can be made against an entity under ss 25 and 25A only where either:

    15.1. a civil penalty order has been made under s 82(3) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**Regulatory Powers Act**) against the entity for a contravention of a civil penalty provision contained in Part IIIA of the Privacy Act, or

    15.2. the entity is found guilty of an offence against Part IIIA of the Privacy Act; and the loss, or the likely loss or damage, resulted from the contravention or commission of the offence.

16. The respondent is not a credit reporting entity for the purposes of Part IIIA of the Privacy Act. Nor is the Australian Taxation Office, the executive agency of which the respondent is Agency Head for the purposes of the *Public Service Act 1999* (Cth) (**Public Service Act**). The statutory criteria referred to above are therefore incapable of being met in respect of the respondent.

17. Accordingly, the applicant's claim for damages or compensation based on ss 25 of 25A of the Privacy Act are misconceived and cannot possibly succeed.

Claim for damages relying upon s 80 of the Judiciary Act

18. The applicant relies upon s 80 of the Judiciary Act as an alternative basis upon which the Court may award damages. This reliance is misplaced. The provision is incapable of having that operation in the present case.

19. Section 80 of the Judiciary Act is in the following terms:

> **80 Common law to govern**
>
> So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

20. The provision does not operate to confer upon the Court a power to order damages in respect of interferences with privacy.[11] There is no 'gap' in the applicable law to enliven s 80 of the Judiciary Act: the Privacy Act governs the circumstances in which interferences with privacy are compensable. While that is sufficient to deal with this particular aspect of the applicant's claim, it is as well to observe that even if there was such a gap, there is no rule of common law capable of being picked up by s 80 which would permit the Court to award damages for interferences with privacy of the nature alleged. The common law of Australia does not recognise a tort of invasion of privacy.[12]

Claim for damages relying upon the common law

21. The applicant asserts an entitlement to damages based on common law.[13] In addition to being inadequately pleaded, this aspect of the applicant's claim is incapable of being cured by repleading, for 3 reasons. *First*, as already mentioned, there is no tort of invasion of privacy in the common law of Australia. *Second*, "injury to feelings" is not actionable at common law. *Third*, there is nothing in the materials before the Court to

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11 Contrary to what is pleaded at paragraph 213 of the applicant's SOC.

12 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 258 [132] (Gummow and Hayne JJ).

13 See SOC, at 190 and 198.

suggest that there is any cause of action at common law capable of being brought against the Respondent in respect of the material facts.

B. Applicant's purported application for a civil penalty order

22. The applicant purports to apply for a civil penalty order against the respondent under the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**Regulatory Powers Act**) in respect of conduct contravening Part IIIA of the Privacy Act. However, such an application must be made by an "authorised applicant".[14] The power to bring an application for a civil penalty order in respect of a breach of a civil penalty provision of Part IIIA of the Privacy Act is vested solely in the Australian Information Commissioner.[15] Accordingly, as the applicant is not entitled to prosecute this aspect of the proceeding, it follows he has no reasonable prospect of successfully doing so.

C. Defects cannot be cured by repleading; there has been no interference with the applicant's privacy

23. The respondent submits that this is not a case where defects in the applicant's claims are capable of being cured by repleading. That is because there has been no interference with the applicant's privacy.

No contravention of APP 6.1

24. The respondent submits that the Court would not accept the applicant's contention that the first ATO officer used his personal information for a purpose other than the primary purpose for which it was collected (i.e. tax administration purposes). Plainly, a request made to the respondent by a taxpayer to amend an income statement has a direct connection with the respondent's functions of administering the tax law. The first ATO officer used the applicant's personal information to attempt to speak with the applicant for the purpose of progressing the administration of the applicant's request to amend an income statement. That is a purpose relating to tax administration.

25. The applicant characterises the impugned uses as having been for the purposes of dealing with requests made by the applicant under the FOI Act.[16] He says he had not

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14 Regulatory Powers Act, s 82(1), read with s 80.

15 Privacy Act, s 80U(2).

16 SOC [98], [101]. Affidavit of Jan Marek Kant dated 29 October 2024, Annexure JMK-3,

consented to his information being used for this purpose.[17] On that basis, he alleges an interference with his privacy.

26. The fact that the applicant's request to amend the income statement was a request made under the FOI Act did not alter the fact that administering his request necessarily related to the administration of the tax law by the respondent. Accordingly, the use to which the first ATO officer made of the applicant's telephone number was consistent with the primary purpose of its collection: the administration of tax. However, even if we are wrong in that submission, the Court would find that the impugned use of the information was for an authorised secondary purpose in circumstances where the applicant would reasonably have expected such use. On either basis, there has been no contravention of Australian Privacy Principle 6.1.

No unfair collection of information

27. The applicant alleges that the email of 26 September 2024, referred to at paragraph 10 above, constituted an attempt on the part of the respondent to collect personal information about the applicant otherwise than by fair means, in breach of Australian Privacy Principle 3.5.[18] This allegation is misconceived. The questions posed by the first ATO officer in the email of 26 September 2024 were reasonable questions aimed at establishing whether the income statement was incomplete, inaccurate, out of date or misleading. It should be recalled that when the first ATO officer sent the email in question, the applicant had only provided bare assertions to the effect that the income statement was incorrect. It would be surprising, to say the least, if the respondent was prepared to amend an income statement of a taxpayer on such scant information.

D. Constitutional grounds are either indecipherable or are not necessary to determine as part of these proceedings

28. Paragraphs [6]-[22] of AS contain a number of assertions relating to the Constitution. In summary, it appears the applicant contends that:

    28.1. the delegation of the power to give summary judgment to a registrar is constitutionally impermissible, because:

        28.1.1. Registrars lack the independence from the executive that a judge of a Chapter III Court enjoys by virtue of holding office according to s 72 of

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17 SOC, [124]-[125]; [129]-[130].

18 SOC, [129]-[130].

the Constitution, and therefore cannot exercise a power of this nature (AS [6], [16])

28.1.2. A constitutionally entrenched guarantee of due process requires that proceedings be determined by judges and not by registrars (AS [7]-[9], [16])

(**delegation issue**)

28.2. Registrar Curnow's conclusion that the content of paragraphs 142 to 147 of the Statement of Claim were "scandalous and irrelevant"[19] infringes some form of constitutional limitation on judicial power derived from our system of responsible government (AS [10]-[11], [18])

(**implied freedom issue**)

28.3. the Court must alter the common law and award the applicant damages due to the combined effect of: (a) the fact that Australia is a State party to the International Covenant on Civil and Political Rights (**ICCPR**), (b) Article 3 of the ICCPR, (c) the Commonwealth's powers to enter treaties, (d) the power conferred on the Commonwealth Parliament by s 51(xxxix) of the Constitution, and (d) a supposed requirement, implicit in Chapter III of the Constitution, that the law be kept in "logical order and form" (AS [12]-[15], [19]-[21]).

(**"logic and order" issue**)

29. The respondent will deal with each of these issues briefly, below.

The delegation issue

30. The respondent submits that it is unnecessary for the Court to determine the delegation issue in circumstances where it is reviewing the respondent's interlocutory application of 11 April 2025 pursuant to s 35A(6) of the FCA Act by way of hearing de novo in the Court's original jurisdiction.[20] Accordingly, a judge of this Court will determine the matter with respect to which the registrar exercised delegated power after considering that matter afresh.[21] The delegation issue does not arise.

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19 Registrar Curnow's reasons for the Registrar's Orders, 5 September 2025, at [69].

20 See, for example, *Mazukov v University of Tasmania* [2004] FCAFC 159 [22]-[24] (Keifel, Weinberg and Stone JJ); *Pattison v Hadjimouratis* (2006) 155 FCR 226.

21 *Bechara v Bates* (2021) 286 FCR 166, at [17] (Allsop CJ, Markovic and Colvin JJ); *Totev v Sfar* (2008) 167 FCR 193, at [12]-[13] (Emmett J).

31. In any event, the respondent submits that if the Court were required to determine the delegation issue, it would uphold the validity of the delegation and exercise of power consistent with the decision of the majority of the High Court of Australia in *Harris v Caladine* (1991) 172 CLR 84. There, a majority of the High Court held that the exercise of federal judicial power could be delegated to a registrar of a federal court (in that case, the Federal Magistrates Court) conformably with Chapter III of the Constitution, subject to certain conditions. Relevantly, for present purposes, one of those conditions is that the matter with respect to which the registrar exercises delegated judicial power must be subject to review by a judge or judges of the court on questions of both fact and law – that is, the review must proceed by way of de novo hearing.[22]

The implied freedom issue

32. Similarly, the implied freedom issue is not necessary to determine in order to resolve this proceeding. The applicant submits that it arises as a result of Registrar Curnow's conclusions as to the content of paragraphs 142 to 147 of the Statement of Claim. The question before the Court is whether the applicant has any reasonable prospect of successfully prosecuting any part of the proceeding.

33. If it was necessary to decide the issue, the respondent submits that the Court would not accept the applicant's submissions, which appear to assert a personal right to have the applicant's purported political communications reflected in a decision of this Court. The Court is bound by decisions of the High Court of Australia which make clear that the implied freedom of political communication does not create personal rights of communication: *Levy v Victoria* (1997) 189 CLR 579 at 622 (McHugh J). See also *Brown v Tasmania* (2017) 261 CLR 328 at 1124 [185] (Gageler J), [262] (Nettle J), [459] (Gordon J).

The "logic and order" issue

34. The logic of the applicant's submissions in relation to this issue is unclear. Insofar as the applicant submits that there is a constitutional requirement of "logical order and form" that imposes on the Court a requirement to "innovate" to ensure such "logical order and form" in the general law:

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22 *Harris v Caladine* (1991) 172 CLR 84, at [94]-[95] (Mason CJ and Deane J), 123, 126 (Dawson J), [150]-[151] (Gaudron J) and [164] (McHugh J). See also *Bechara v Bates* (2021) 286 FCR 166 [1]-[8] (Allsop CJ, Markovic and Colvin JJ).

34.1. no such constitutional requirement has been held to exist, and the applicant has not identified anything in the text or structure of the Constitution to support its existence.

34.2. the paragraph from Brennan J's judgment in *Dietrich v The Queen* (1992) 177 CLR 292, at 320, reproduced at AS [14], does not establish such a requirement.

35. The rest of the applicant's submissions are insufficiently clear as to enable the respondent to provide a meaningful response or, for that reason also, are so manifestly hopeless as to not properly arise.[23] If the applicant seeks to raise any further constitutional arguments, the Commissioner may seek a further opportunity to be heard on those arguments.

PART IV CONCLUSION

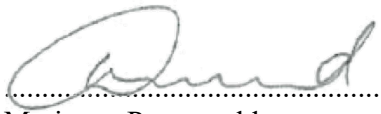
36. For the reasons set out above, the respondent submits that:

36.1. the applicant's review application should be dismissed

36.2. the Registrar's orders should be affirmed, and

36.3. the applicant should pay the respondent's costs of and pertaining to the review application, to be assessed in default of agreement in accordance with the Court's Costs Practice Note (GPN-COSTS).

Date: 7 November 2025



Marianne Peterswald

AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the Respondent

[23] See, eg, *Re Finlayson; ex parte Finlayson* (1997) 72 ALJR 73, 74 (Toohey J); *ACCC v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292, 297 [14] (French J).