

## NOTICE OF FILING

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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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**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**

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1. By interlocutory application dated 11 April 2025, the Respondent (**the Commissioner of Taxation**) seeks the summary dismissal of the entirety of this proceeding pursuant to s 31A of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and r 26.01 of the *Federal Court Rules 2011* (Cth) (**Rules**). In the alternative, the Commissioner seeks an order striking out the whole of the applicant's originating application and statement of claim pursuant to r 16.21(1). Leave to replead should be refused.
2. In support of its application, the Commissioner relies upon:
  - 2.1. the affidavit of Jordan Sullivan affirmed on 11 April 2025, and
  - 2.2. the affidavit of Michael Wright affirmed on 11 April 2025.
3. The applicant has commenced proceedings by way of an originating application accepted for filing on 31 October 2024 and by statement of claim accepted for filing on 11 March 2025. By his originating application, the applicant seeks damages under ss 25(1) and 25A(2) of the *Privacy Act 1988* (Cth) (**Privacy Act**) or under s 80 of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).<sup>1</sup> As detailed below, the primary source of the applicant's complaint is the respondent's use of his mobile telephone number (under

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<sup>1</sup> Originating application, proposed orders 1 and 2.

heading ‘Wrongdoing’ from SOC [124]), to contact him in response to a query he had raised (under heading ‘Chronology and Observations, from SOC [93]). By his statement of claim, the applicant adds an unparticularised common law claim as a further alternative basis for his claim for damages.<sup>2</sup> In addition to his claim for damages, the applicant seeks a civil penalty order against the Respondent under s 82(3) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**Regulatory Powers Act**).<sup>3</sup> The statement of claim includes allegations of wrongdoing (including criminal wrongdoing) against an officer of the respondent and the respondent’s legal representative, though the applicant does not appear to seek any relief in respect of these allegations.

4. In summary, the Commissioner submits that the proceeding should be dismissed pursuant to s 31A of the FCA Act because the applicant does not have reasonable prospects of successfully prosecuting the proceeding, for the following reasons.
5. *First*, there has been no interference with the applicant’s privacy. Contrary to the applicant’s claims, his mobile telephone number was used by an officer of the respondent for the same purpose for which it was collected: namely, for tax administration purposes. That conclusion does not depend on the outcome of any contest over factual matters. Indeed, there is no contest over the material facts. The difference between the parties is a difference in the proper characterisation of the purpose for which the applicant’s mobile telephone number was used. That is a legal question capable of being answered in the respondent’s favour on a summary basis; it need not be determined after trial.
6. *Second*, the applicant’s claims for ordinary and exemplary damages, based on various statutory provisions and common law, are entirely misconceived, because, leaving aside any questions about the merits of such claims (which might require further consideration, including evidence at a trial):

6.1. the statutory criteria for awards of compensation under ss 25(1) and 25A(2) of the *Privacy Act 1988* (Cth) (**Privacy Act**) in the case of misuse of personal

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<sup>2</sup> Statement of claim, at 190 and 198.

<sup>3</sup> Originating application, proposed order 3.

- information are directed towards credit reporting agencies - the respondent is not a credit reporting entity and the statutory criteria are therefore not met;
- 6.2. section 80 of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) does not provide a basis for an award of damages in this case; and
- 6.3. there is no common law cause of action (either pleaded, or in existence) which would entitle the applicant to damages in the circumstances of this case.
7. *Third*, the applicant cannot apply for a civil penalty order to be made against the respondent: that power is solely vested in the Australian Information Commissioner.<sup>4</sup>
8. Finally, the applicant's allegations that:
- 8.1. the ATO officer committed a criminal offence by contravening s 8WB of the *Taxation Administration Act 1953* (Cth) (**Administration Act**)<sup>5</sup> and
- 8.2. the respondent's legal representative contravened various statutes and denied the applicant a fair hearing by submissions made during a case management hearing on 3 March 2025,<sup>6</sup>
- have no proper basis.
9. In the alternative, for the reasons just summarised, the entirety of the applicant's originating application and statement of claim should be struck out under r 16.21(b), (d) and (e) of the Rules.
10. Costs should follow the event.

## PART II FACTS

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11. The material facts are not in dispute. They are set out below.
12. The respondent collected the applicant's mobile telephone number for tax administration purposes.<sup>7</sup> The respondent received an income statement pertaining to

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<sup>4</sup> Privacy Act, s 80U(2).

<sup>5</sup> See SOC [126]-[127]; [133].

<sup>6</sup> See SOC [142], [144]-[146].

<sup>7</sup> SOC, [100]. The respondent does not understand the applicant to allege that the respondent collected his mobile telephone number improperly. For the avoidance of doubt, the evidence is that the applicant provided his mobile telephone number to the ATO via the myGov platform managed

the applicant from the University of Melbourne. On 11 September 2024, the income statement was released to the applicant under the *Freedom of Information Act 1982* (Cth) (**FOI Act**).<sup>8</sup> The income statement recorded that the applicant had been paid by the University of Melbourne during the Financial Year ending 30 June 2024. The applicant considered the income statement to be incorrect. On 12 September 2024, the applicant applied to the respondent under section 48 of the FOI Act for the income statement to be amended or annotated to reflect the applicant's stated position that he had neither been employed nor paid by the University of Melbourne during FY24.<sup>9</sup>

13. 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 database (**the first impugned use**)<sup>10</sup> and used it to attempt to speak with him about the request (**the second impugned use**).<sup>11</sup>
14. 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.<sup>12</sup>
15. On 25 September 2024, the applicant sent an email to the first ATO officer, attaching a statutory declaration<sup>13</sup> in which he declared:

I have not done work for the University of Melbourne between 01 Jul 2023 and 31 June 2024 [sic].

I have not received payments from the University of Melbourne between 01 Jul 2023 and 31 Jun 2024 [sic].

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by Services Australia on 12 November 2022: see Affidavit of Jordan Sullivan affirmed 11 April 2025, at [7]-[11].

<sup>8</sup> Affidavit of Michael Wright, [7], Annexure MLW-2.

<sup>9</sup> Affidavit of Jan Marek Kant dated 29 October 2024, Annexure JMK-1, pages 7-8.

<sup>10</sup> Affidavit of Michael Wright, [9].

<sup>11</sup> Affidavit of Michael Wright, [9]-[10], and Annexure MLW-4.

<sup>12</sup> Affidavit of Michael Wright, [10], and Annexure MLW-4.

<sup>13</sup> Affidavit of Michael Wright, [11]-[12], Annexures MLW-5A and MLW-5B.

16. 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.”<sup>14</sup>
17. 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 request.<sup>15</sup> The applicant did not respond to these questions.
18. 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.<sup>16</sup> On 9 December 2024, the applicant withdrew his s 48 request, citing the email of 21 November 2024.<sup>17</sup>
19. 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.<sup>18</sup>

## **PART III ARGUMENT**

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### **SUMMARY JUDGMENT**

20. Pursuant to s 31A(2) of the FCA Act, the Court is empowered to give judgment against a party in relation to the whole or part of the proceeding if the Court is satisfied that the applicant has no reasonable prospect of successfully prosecuting the proceeding. Subsection 31A(3) provides that the proceeding need not be ‘hopeless’ or ‘bound to fail’ for it to have no reasonable prospect of success for the purposes of s 31A.
21. A party has a right to bring a summary judgment application pursuant to rule 26.01 of the *Federal Court Rules 2011* (Cth) (**Rules**). Rule 26.01(1) is in the following terms:

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<sup>14</sup> Affidavit of Michael Wright, [11]-[12], Annexure MLW-5A.

<sup>15</sup> Affidavit of Jan Marek Kant dated 29 October 2024, at JMK-1, pp 4-5.

<sup>16</sup> Affidavit of Michael Wright, [14], Annexure MLW-6.

<sup>17</sup> Affidavit of Michael Wright, [15], Annexure MLW-7.

<sup>18</sup> Affidavit of Michael Wright, [16]-[21], Annexure MLW-8.

- (1) 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; or
    - (b) the proceeding is frivolous or vexatious; or
    - (c) no reasonable cause of action is disclosed; or
    - (d) the proceeding is an abuse of process of the Court; or
    - (e) the respondent has no reasonable prospect of successfully defending the proceeding or part of the proceeding.
22. A proceeding is frivolous if, despite whatever attempts are made to discern a cause of action, it is still not arguable: *Pickering v Centrelink* [2008] FCA 561 at [27]. A matter is also frivolous if it is without substance or groundless.
23. The power to summarily dismiss a proceeding is not to be exercised lightly,<sup>19</sup> though the Court need not be satisfied that the proceedings are frivolous, untenable or groundless before it may exercise the power.<sup>20</sup> The critical question, as dictated by the text of s 31A(2), is whether the moving party has persuaded the court that the opposing party has no reasonable prospect of success.<sup>21</sup>
24. For the reasons set out below, the respondent submits the Court would find that the applicant has no reasonable prospect of successfully prosecuting any aspect of this proceeding.

### **No interference with applicant's privacy**

#### ***No contravention of APP 6.1***

25. 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

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<sup>19</sup> *Spencer v Commonwealth* (2010) 241 CLR 118 (**Spencer**), at 141 [60] per Hayne, Crennan, Kiefel and Bell JJ)

<sup>20</sup> *Spencer*, at 131-132 [24] (French CJ and Gummow J), [53]-[60] (Hayne, Crennan, Kiefel and Bell JJ).

<sup>21</sup> *Polar Aviation Pty Ltd v Civil Aviation Safety Authority (No 4)* (2011) 203 FCR 293, at 300 [17].

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.

26. The applicant characterises the impugned uses as having been for the purposes of dealing with requests made by the applicant under the FOI Act.<sup>22</sup> He says he had not consented to his information being used for this purpose.<sup>23</sup> On that basis, he alleges an interference with his privacy.
27. 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***

28. The applicant alleges that the email of 26 September 2024, referred to at paragraph 17 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.<sup>24</sup> 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.

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<sup>22</sup> SOC [98], [101]. Affidavit of Jan Marek Kant dated 29 October 2024, Annexure JMK-3,

<sup>23</sup> SOC, [124]-[125]; [129]-[130].

<sup>24</sup> SOC, [129]-[130].



### **Claim for damages relying upon the Privacy Act**

29. 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:
- 29.1. 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
- 29.2. 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.
30. 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.
31. 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**

32. 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.
33. 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.

34. The provision does not operate to confer upon the Court a power to order damages in respect of interferences with privacy.<sup>25</sup> 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.<sup>26</sup>

#### **Claim for damages in reliance upon the common law**

35. The applicant asserts an entitlement to damages based on common law.<sup>27</sup> 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 suggest that there is any cause of action at common law capable of being brought against the Respondent in respect of the material facts.

#### **The applicant’s claim for a civil penalty order**

36. 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”.<sup>28</sup> 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

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<sup>25</sup> Contrary to what is pleaded at paragraph 213 of the applicant’s SOC.

<sup>26</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 258 [132] (Gummow and Hayne JJ).

<sup>27</sup> See SOC, at 190 and 198.

<sup>28</sup> Regulatory Powers Act, s 82(1), read with s 80.

Commissioner.<sup>29</sup> 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.

### **Claims relating to case management hearing of 3 March 2025**

37. The applicant alleges that in oral submissions at a case management hearing on 3 March 2025, the respondent's representative referred to the content of the affidavit affirmed by the applicant on 7 November 2024 to the exclusion of an affidavit affirmed by the applicant on 29 October 2024. The applicant alleges that this amounted to conduct that was dishonest, in breach of the Public Service Act<sup>30</sup> and violated his right to a fair hearing.<sup>31</sup> The respondent relies on the affidavit of Mr Wright and submits these allegations are misconceived and without foundation.

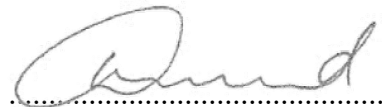
### **Conclusion in relation to summary judgment**

38. For the foregoing reasons, the Court should be persuaded that the applicant has no reasonable prospect of successfully prosecuting any aspect of this proceeding. It should dispose of the proceeding by giving summary judgment for the respondent.

### **Strike out, replead and costs**

39. The Respondent seeks an order, in the alternative, that the entirety of the applicant's statement of claim and originating application be struck out pursuant to r 16.21(1)(b) and (e) of the Rules. It submits that such relief is justifiable for the same reasons advanced in support of the respondent's application for summary judgment.
40. Leave to replead should be refused, having regard to the absence of any foundation for the applicant's claims.
41. If judgment is entered for the respondent, the applicant should pay the respondent's costs.

Dated: 11 April 2025



Marianne Peterswald

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

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<sup>29</sup> Privacy Act, s 80U(2).

<sup>30</sup> SOC, at [144]-[146].

<sup>31</sup> SOC, at [142].