

## NOTICE OF FILING

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A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

### Important Information

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No. VID 1173 of 2024

**JAN MAREK KANT**

Applicant

**COMMISSIONER OF TAXATION**

Respondent

**Applicant's submissions**  
(in the 11 April 2025 interlocutory application)

**SEMANTICS**

1. The *Australian Privacy Principles (APPs)* are those of Schedule 1 to *Privacy Act 1988 (Privacy Act)*.
2. **FCA Act** is *Federal Court of Australia Act 1976*. **FOI Act** is *Freedom of Information Act 1982*. The **Charter** is *Charter of Human Rights and Responsibilities Act 2006*. **APS Act** is *Public Service Act 1999*. **NACC Act** is *National Anti-Corruption Commission Act 2022*.
3. The **Covenant** in 3(1) *Australian Human Rights Commission Act 1986*, the English text of which is set out in Schedule 2 of that Act, is the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23) referred to in 12B(2)(a) *Privacy Act*.
4. The meaning of **dishonest** in APS Act is the ordinary meaning of the word repeated in 130.3 Criminal Code **(12-16)**<sup>1</sup>.
5. The meaning of **detriment** corresponds to that in NACC Act.
6. Distinction between the *Australian Tax Office*, staff of the *Australian Tax Office*, the *Commissioner of Taxation* and any lawyer acting for the Respondent in this proceeding is arbitrary **(69-74)**. References to the Respondent include references to persons who act for him **[3]**<sup>2</sup>.

**AFFIDAVIT MATERIALS**

**Affidavit of Michael Wright**

7. Identity information, contact information, *TFN*, and *TFN* information of an individual can be retrieved from the "*Siebel*" database by interrogating it with any of such information. *Siebel* is a "*national identification system*" in 7(1) *Privacy (Tax File Number) Rule 2015 (20,102-104)*.
8. **MLW-6** and **MLW-7** show the Respondent having confused the Applicant with tax jargon like "*income statement*" in leading him to believe that further processing of the 12 Sep 2024 request was unnecessary.

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<sup>1</sup> Numbers enclosed in ellipses are references to same-numbered items in the statement of claim

<sup>2</sup> Numbers enclosed in brackets are references to same-numbered items in the Respondent's 11 Apr 2025 submissions. Numbers preceded by "fn" are references to the same-numbered footnotes.

9. **MLW-8** shows the Applicant confirming he seeks damages, not also confirming he was required to file a statement of claim with his originating application.
10. Words in **MLW-8** are incorrect [37]. The correct words appear in "**JMK-9**".
11. The Respondent prior to the case management hearing [19] disclosed in correspondence ("**JMK-8**") his opinion that claims omitted from the "*application and accompanying affidavit*" are "*quite properly*" omitted. He then asserted a requirement the Applicant file a statement of claim before an application for summary dismissal be determined was not unreasonably burdensome because it only required doing what ought to have done at the outset (**MLW-8**). The correspondence was not produced on a "*without prejudice basis*"<sup>3</sup>. 79(1) *Evidence Act 1995* applies in proving omissions from the "*application and accompanying affidavit*" were properly made.
12. **MLW-8** shows the Respondent *dishonestly* gave to the Court information inconsistent with information he gave the Applicant ("**JMK-8**") [37]. s.77 *Evidence Act 1995* applies in proving *dishonesty*.

#### **Affidavit of Jordan Sullivan**

13. The full set (as at 01 Jun 2024) of *Services Australia's "Online Document Recordings and file notes"* which contain personal information about the Applicant is reproduced in "**JMK-5**". Among these is a record ("**JMK-5**" p.8) of the 12 Nov 2022 disclosure of the Applicant's phone number "*via myGov*" to one specified organisation not being the *Australian Tax Office*.
14. The Applicant's mobile phone number was, with other information, collected by the Respondent on 06 Sep 2024 for purpose of a "*Tax return*" ("**JMK-7**" p.59) [5,12, fn7]. It was not collected by the Respondent with a 12 Nov 2022 disclosure via the "*myGov platform*" of *Services Australia*.

#### **RESPONDENT'S SUBMISSIONS**

15. The source of the Applicant's grievance [3] includes the use of his mobile phone number (**94,96,97-102**) and attempt to procure his personal information under false pretences (**105-108**).
16. The Applicant does not, with his statement of claim, **add** to his application a common law claim [3]. *Rule 8.03* requires the provision of an **Act** under which relief is claimed to be stated in the originating application. The *Rules* do not also require any "provision" of common law under which relief is claimed be stated. *Expressio unis est exclusio alterius*. The originating application and statement of claim are compliant with *Rules 8.03 & 16.02*.

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<sup>3</sup> See: 18.2 in the 11 Apr 2025 affidavit of Michael Wright.

17. Any defect in the statement of claim can be corrected [35] by repleading<sup>4</sup>.
18. The scope of claims to a *civil penalty order* (199-202) against the Respondent includes also [36] contravention of ss.13G,13H Privacy Act.
19. The Respondent processing an FOI Act request in accordance with FOI Act should not be “surprising” [28].
20. More generally than put by the Respondent [28], it is alleged he contravened various laws in attempting to access and procure personal information about the Applicant (78-82,107,108,117,124-141).
21. The FOI Act request initiated on 12 Sep 2024 (MLW-3) was both a ss.49-50 amendment request and ss.51-51B annotation request. The 51A(d) FOI Act “*address in Australia*” appears in the statutory declaration (MLW-5B). A paragraph 15(2)(d) not existing makes sending an “*application for annotation*” to a 15(2A)(c) address sufficient for the purposes of 51A(e) FOI Act.

#### INTERFERENCE WITH PRIVACY

##### The Applicant’s phone number

22. Retrieving the Applicant’s phone number from the ATO database was a use of his *TFN* and *TFN information* contrary to *Privacy (Tax File Number) Rule 2015* [13,27].
23. “Income tax assessment” and “FOI Act amendment” are different purposes for which information might be used [25].
24. FOI Act not requiring a person who seeks amendment of documents provide his phone number makes using a phone number not provided for that purpose not reasonably expectable [27].

##### Amendment/annotation

25. Information sought by the Respondent on 26 Sep 2024 [17] (“JMK-1”) was surplus to requirements of amending the “1-13MLYOP8” records.
26. The Respondent requested the Applicant provide “*further information*” (without further specifying) [14] for purpose of amendment or annotation of “1-13MLYOP8” records (MLW-4). The Applicant produced [14,15] all “*further information*” requested (MLW-5B). 50(1) FOI Act then required the Respondent decide on the materials before him whether or not to amend the records.

#### TAX LAW

27. The Respondent apparently (MLW-6, MLW-7) treated the FOI Act (MLW-4) amendment or annotation of “1-13MLYOP8” documents as something that concerns an “*incorrect income statement*” and involves (or might involve):

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<sup>4</sup> See: *Gould and Birbeck and Bacon v. Mount Oxide Mines Ltd.* [1916] HCA 81; 22 CLR 490 at p.517 & *Three Rivers District Council v Governor and Company of The Bank of England* [2001] UKHL 16

- a. *"conducting some calculations"*
  - b. *"amendment to (an) incorrect account"* such that might *"impact (an) assessment"*
  - c. verification of the *"accuracy of (a) report"* requiring an employer be contacted
  - d. *"issues ... raise(d) for consideration"* resulting in an *"investigation"*
  - e. performance by the *Information Commissioner* of his 28A(1)(c) Privacy Act function.
  - f. *"investigation into ... issues ... raise(d)"* otherwise than as necessary *"to make a decision in relation to (the) request to amend/annotate your record"*
28. There is no *"income statement"* [12,18,25,27,28] among the *"1-13MLYOP8"* documents (*"JMK-6"*) that were subject of both the 11 Sep 2024 FOI outcome and the 12 Sep 2024 request for amendment/annotation of personal records under FOI Act (**MLW-3**).
29. The Applicant agreeing to withdraw his request (**MLW-7**), when it appeared to him the relevant records were destroyed, does not cause *"tax law"* [25,27] to apply to the FOI Act request.
30. Having reason to believe the Applicant will seek remedy in law against him (*"JMK-2"*, *"JMK-3"*), the Respondent sought to make of c.20-26 Sep 2024 use and attempted procurement of personal information something other than a privacy violation. In doing so he fabricated evidence which might suggest the amendment/annotation request under FOI Act was in fact a matter of *"tax law"* (**117**).
31. The Respondent relying [28] on evidence so fabricated in his application for summary judgment constitutes an attempt by him to pervert or defeat the course of justice in the matter. The circumstances require that a 100(2) *Evidence Act 1995* direction be made with respect to the application for summary judgement if the 22 Apr 2025 *Form 65* notice is unsatisfactory.

#### **ABUSE OF PROCESS**

32. The Respondent *dishonestly* (therefore unlawfully) seeks dismissal or striking out of the proceeding (**148-151**).
33. The Respondent's conduct is incompatible with a *human right* of *"fair hearing"* and therefore unlawful by effect of 38(1) Charter (**117**).
34. The Respondent's interlocutory application is wrong amounting to a breach of duties imposed on him by Charter, APS Act, NACC Act, Chapter 7 of the Criminal Code and Part III of *Crimes Act 1914*. The breach is actionable *per se*<sup>5</sup> and/or any amount of *"injury to feelings"*.
35. The Respondent's interlocutory application amounts to oppression.<sup>6</sup>
36. The Respondent's interlocutory application is an abuse of process.

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<sup>5</sup> See: *Cullen v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39 at [11, 16]

<sup>6</sup> See: *Kant v Principal Registrar of the Federal Court of Australia* [2025] FCA 274 at [41]

## PROSPECTS OF SUCCESS

37. The Respondent has not demonstrated [25-37] the Applicant is without reasonable prospect of successfully prosecuting any [24,38] aspect of this proceeding. He at best demonstrated that the Applicant may need to produce further evidence [35,37] and submissions [25-32,34-37] to prove his case.

### Privacy Act

38. Part VII of Privacy Act requires damages be recoverable (177-204) in respect of breach, by an *agency*, of an obligation of confidence w.r.t personal information [29-31]. If laws of the Commonwealth are otherwise insufficient [34] to provide adequate remedy, s.80 *Judiciary Act 1903* (s.80) requires a remedy exists in common law and by implication vests the Federal Court with unlimited jurisdiction in the matter<sup>7</sup>.
39. The Federal Court can award “damages” in 80UA(2) Privacy Act and “compensation” in 25(1),25A(2),26XH(2),55A(1),80T(1) Privacy Act [34]. 26XH(2),80T(1) Privacy Act are limited in scope to matters arising in certain circumstances in which the Commonwealth acquires property. 4(2) Privacy Act precludes prosecution of an agency [29.2] for any offence under Privacy Act, so 25(1),25A(2),55A(1),80T(1) Privacy Act (on their face) would each require some form of action (164-169,177-178,199-204) to be taken by the *Information Commissioner* [36] before a person can apply for compensation; however:
40. If damages in respect of interference with privacy by *agencies* were recoverable only in those circumstances specified in text of Privacy Act, the Respondent would have immunity of civil liability in all interferences with privacy except as pleases his mate at the Sydney office [29.1,34,36]. Empowering the *Information Commissioner* to choose who can (and who can’t) seek remedy in the Court is incompatible with a *human right* of “equality before the law (/courts)” and s.71 of the Constitution prohibits vesting him [7,31] with such power.
41. “credit reporting” (29-33) is an act or practice engaged in by a person, who is a *regulated entity* (e.g. commercial banks)<sup>8</sup>, in the course of “banking” (6) and/or “insurance” ordinarily done by the person. Privacy Act also has the effect it would have if its operation in relation to the Respondent were expressly **confined** (not: “limited”) to an operation like that which Part IIIA has in relation to *regulated entities* which ordinarily engage in “credit reporting”. (“JMK-10”) [6,29].
42. Every act [5] upon which the Applicant’s claims are based (93-102,105-121,123), including interrogation of the “Siebel database” and retrieval of the Applicant’s phone number<sup>9</sup>, is such an *act* as is done by a person, who is a *regulated entity* (e.g. the Australian Tax Office), and takes place using “postal, telegraphic, telephonic or other like

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<sup>7</sup> See: 5(2) & 19(1) FCA Act, 15C *Acts Interpretation Act 1901*

<sup>8</sup> See: 144(1) *Evidence Act 1995*

<sup>9</sup> See: affidavit of Michael Wright at [9]

*service(s)*". Privacy Act also has in relation to the Respondent the effect it would have if its operation were **expressly** confined to such *acts*.

## 80 Judiciary Act

43. By effect of s.80 (or otherwise), Privacy Act makes conduct that constitutes a violation of *privacy* or other *human rights* **(41-54)** actionable in common law ("**JMK-10**") **[35]** if it results in in "*injury to feelings*"<sup>10</sup> **(188-190)**. "*displeasure*" is an injury to feelings **(22-28)**.
44. By effect of s.80 (or otherwise), APS Act, NACC Act and Chapter 7 of the Criminal Code make conduct of a public official causing *detriment* actionable<sup>11</sup> in common law. "*injury to feelings*" is a *detriment*.

## Tort

45. The Applicant has a case<sup>12</sup> against the respondent in *breach of statutory duty* **(201-204)** **[8.1,37]**, or in *misfeasance in public office* **[8.2] (55-65)**, or in some other tort in common law (existing by effect of s.80 or otherwise) **[6.3]**. 5(1),5(2) FCA Act and s.71 of the Constitution require the Court innovate as necessary in the matter.
46. APS Act imposes on the Respondent a duty to "*behave honestly and with integrity*" and "*comply with all applicable Australian laws*". Breach of the statute is actionable<sup>13</sup> **(190,198)**.
47. NACC Act imposes on the Respondent a duty not to cause *detriment* to a person who seeks a remedy in law against him. Breach of the statute is actionable **(190,198)**.
48. Chapter 7 of the Criminal Code imposes on the Respondent a duty not to *dishonestly* seek a benefit or cause *detriment*. Breach of the statute is actionable **(190,198)**.
49. 2A(aa) Privacy Act requires **(55-65,180-185)** the common law now recognise a tort of privacy violation ("**JMK-10**") **[6.3,33,34,35]**.

## RELEVANT PRINCIPLES

### Modification of common law

50. Discussed in *Dietrich v The Queen*,<sup>14</sup> the requirement that "*the law be kept in logical order and form*" **[6.2,6.3,29]** is (and was always) a Constitutional requirement implicit to Chapter III. Laws made by the Parliament in accordance with s.51 of the Constitution must be "*read and construed subject to*"<sup>15</sup> this requirement.

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<sup>10</sup> See: ss.25,25A, 52 Privacy Act

<sup>11</sup> See also: *Watkins v Home Office* [2006] UKHL 17 at [8]

<sup>12</sup> See: Foster, N (2011) & Aronson, M (2011)

<sup>13</sup> Re: Crown liability, see especially: s.78A APS Act

<sup>14</sup> [1992] HCA 57 at [45 – 48]

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

51. The common law develops naturally from constitutional and statute law<sup>16</sup>. Absence of such processes of development of law in the Australian system was not remedied with words “*as modified*” in s.80.
52. The words “*as modified*” in s.80, as enacted, may have caused modification of English common law (as applicable in a matter before a court exercising federal jurisdiction) by Australian statute laws only as necessary to prevent incoherence of the law and so avoid illogical or inconsistent outcomes in the Australian context.
53. By exchanging the word “*Australia*” for “*England*” in s.80, the Parliament with 41(1) *Law and Justice Legislation Amendment Act 1988* intended to change the effect of words “*as modified*”. These words are now incapable of more than one meaning<sup>17</sup>
54. The words “*as modified*” in s.80 must now cause Australian common law (as applies in the relevant state or territory) **is modified**, by statute law in force in the relevant state or territory, as necessary to prevent incoherence of the law and so avoid illogical or inconsistent outcomes. Judicial development of the rules of common law is unnecessary to such modification; the enactment of a statute having force in any state or territory effects a corresponding change of Australian common law as applies to courts exercising jurisdiction in that state or territory.
55. If the Parliament had not intended the common law of Australia change with changes in Australian (including Commonwealth) constitutional and statute law, 41(1) *Law and Justice Legislation Amendment Act 1988* would also amend s.80 by also omitting references to the Constitution (and perhaps also by replacing “*statute law in force in*” with “*statute law of*”) or otherwise to similar effect.

**Without limiting its effect apart from this section, Privacy Act also has the effect:**

56. In *Re Kant* (2025)<sup>18</sup>, per Gleeson J, the High Court found it has jurisdiction to issue writs and injunctions against the *United Nations High Commissioner for Human Rights*, with 12B(2) Privacy Act relevantly providing the Act also has the effect if would have if its operation in relation to *regulated entities* were expressly confined to an operation to give effect to the Covenant.
57. In *Kant v Principal Registrar of the Federal Court of Australia* (2025) (***Kant-v-PRFCA***), per Murphy J, the Federal Court found<sup>19</sup>
  - a. it has jurisdiction in matters arising under the Covenant, not being matters remitted to the Federal Court in accordance with 44(2) *Judiciary Act 1903*.
  - b. there is a right, recognized in the Covenant, to a judicial remedy to violation of the rights and freedoms recognised in the Covenant<sup>20</sup>

<sup>16</sup> See: *Dietrich v The Queen* [1992] HCA 57 at [21]

<sup>17</sup> See: *Momcilovic v The Queen* [2011] HCA 34 at [36 – 39]

<sup>18</sup> [2025] HCASJ 16 at [6,7]

<sup>19</sup> See: *Kant-v-PRFCA* [48]

<sup>20</sup> Read together: *Kant-v-PRFCA* [31], *Kant-v-PRFCA* [48]



58. In *Kant-v-PRFCA*, per Murphy J, the Federal Court found s.12B Privacy Act (**s.12B**) does not operate to alter the text of the Act as the litigant in that proceeding asserted<sup>21</sup>, his argument reflecting a fundamental misunderstanding of the effect of that section.
59. The error<sup>22</sup> made by the litigant in *Kant-v-PRFCA* is clear on examination of the words of s.12B. No provision of Privacy Act has the effect it would have if that provision had particular, different, words in substitution of those appearing in the text of Privacy Act<sup>23</sup>; rather, Privacy Act also has the effect it would have if in its text existed additional words extending its operation as described in s.12B.
60. The ordinary meaning and grammatical construction of the words of s.12B is consistent with the purpose of the Privacy Act (**55-65**). No departure from grammatical rules to give unusual or strained meaning to the written words is justified; the Court must read additional words into Privacy Act as the clear words of s.12B require<sup>24</sup>
61. It is not the opinion of the Federal Court expressed in *Kant-v-PRFCA* that s.12B serves only to ensure the widest possible operation of the Privacy Act consistent with Commonwealth constitutional legislative power. If the Federal Court were to form such an opinion, 35A(a)(ii) *Judiciary Act 1903* would inevitably require differences between the opinion so formed by the Federal Court and opinion of the High Court in *Re Kant* (2025) be resolved by way of an appeal to the High Court.

#### **Responsibilities w.r.t human rights**

62. The Covenant and Art.56 *Charter of the United Nations* (**172-175**), on their own (**176**) or by force of legislation giving effect to the treaties (**41-65**), impose obligations on the Crown generally; because:
- The Covenant is *lex specialis* in Arts.55,56 *Charter of the United Nations*.
  - The *Charter of the United Nations* was necessary to “*terminate a war*” in meaning of *Chow Hung Ching v The King* (1948).
  - The Covenant confers rights upon the individual with “*the Commonwealth being subjected to a corresponding obligation towards the individual*” in meaning of *Simsek v Macphee* (1982).
  - The Executive compelled its officers obey in perpetuity<sup>25</sup> the provisions of the Covenant when causing Australia become a “*State Party*” to it.
  - A Constitutional guarantee of the rights and freedoms recognized in the Covenant derives from its text read with Chapter III of the Constitution.

<sup>21</sup> See: *Kant v Principal Registrar of the Federal Court of Australia* [2025] FCA 274 at [26 – 31]

<sup>22</sup> See: *Kant v Principal Registrar of the Federal Court of Australia* [2025] FCA 274 at [29]

<sup>23</sup> See: *Momcilovic v The Queen* [2011] HCA 34 at [581]

<sup>24</sup> See: *Momcilovic v The Queen* [2011] HCA 34 at [36-40,580]

<sup>25</sup> or for at least as long as Australia remains a “*State Party*”

63. The rights in Part 2 of Charter are, by effect of 32(2) Charter, s.3 Privacy Act, 4(1) *Australian Human Rights Commission Act 1986* and the Constitution, modified by Commonwealth and “international” laws including the Covenant<sup>26</sup>
64. 4(1) Charter and ss.15,16 *Constitution Act 1975* require 32(1),38(1) Charter apply *mutatis mutandis* to federal courts, when exercising jurisdiction in Victoria, and to *APS employees [13]* and *Agency Heads [30]* in meaning of APS Act. 13(4),14(1) APS Act and 79(1) *Judiciary Act 1903* ensure this effect<sup>27</sup>; therefore:
65. An “APS person” must not act in a way that is incompatible with a *human right* or, in making a decision, fail to give proper consideration to a relevant *human right*; and:
66. The Court must interpret<sup>28</sup> Privacy Act in a way compatible **(171-176)** with *human rights*<sup>29</sup> of effective remedy to violation of *human rights* by public officials<sup>30</sup>.

### Public Interest

67. Further to the “*public interest in protecting privacy*” in 2A(aa) Privacy Act, there is a public interest in protecting *human rights* generally. This public interest circumscribes the privileges the Crown enjoys under s.64 *Judiciary Act 1903*.<sup>31</sup> No proceeding before a court of competent jurisdiction can vex the Crown in any way that might require it be struck out or dismissed.
68. The Crown must know there will be remedy against it and *human rights* will be enforced if it fails to meet its obligations.<sup>32</sup> The Respondent must be punished and example must be made of him to deter similar misbehaviour **(179-187,191-204)**.
69. The public interest in protecting privacy and other (Constitutionally protected) *human rights* requires the Court not dismiss or strike out the proceeding.<sup>33</sup>

### COMPETENCE

70. The Federal Court is competent as stated **(68-73,152-157,209-228)** and/or because of 39B(1A) *Judiciary Act 1903* and/or ss.5,22,23,32 FCA Act and/or because of the Federal Court’s inherent and accrued jurisdiction and/or because of 15C *Acts Interpretation Act 1901* read with 12B(2)(a) Privacy Act and Article 2 of the Covenant.

### PLEADINGS

71. *Rule 16.51* allows all necessary amendments be made to enable the real questions between the parties to be decided and, by implication, precludes dismissal or striking

<sup>26</sup> See: *Ex parte McLean* [1930] HCA 12; 43 CLR 472 at p.483

<sup>27</sup> See: *Commonwealth of Australia v State of Western Australia* [1999] HCA 5 at [39,40], ss.15,16 *Constitution Act 1975*, ss.106-108 of the Constitution

<sup>28</sup> Refer to: ‘2.1 Guide to statutory interpretation under s 32(1)’ in the *Charter of Human Rights Bench Book*

<sup>29</sup> See: 3(4)(a) *Australian Human Rights Commission Act 1986*

<sup>30</sup> See especially: Articles 2.1, 2.3, 14.1, 17.1, 17.2 of the Covenant

<sup>31</sup> See: *Hughes Aircraft Systems International v Airservices Australia* [1997] 76 FCR 151 at [196]

<sup>32</sup> See: *R (UNISON) v Lord Chancellor* [2017] UKSC 51 at 71

<sup>33</sup> See: *Spencer v Commonwealth of Australia* [2010] HCA 28

out of the proceeding for reason of defective claims [38,39]. Leave to replead [40] is sought in the alternative.

72. *Rule 16.21* does not provide for striking out an originating application, and any striking out of the statement of claim should be limited to only those parts to which 16.21(1)(b), 16.21(1)(d) or 16.21(1)(e) apply [9]. The statement of claim contains as much material, none of it vexatious, as is reasonably necessary for narrowing the issues in dispute<sup>34</sup>.
73. No proceeding in the Court can be invalid by result of formal defect or an irregularity unless the defect or irregularity caused substantial injustice<sup>35</sup>. No defect or irregularity of the proceeding has caused substantial injustice to the Respondent.
74. An order that the proceeding **continue** on pleadings would require the filing of a statement of claim (**MLW-8**). Such an order was made in this proceeding on 3 Mar 2025.

### **COSTS**

75. *Legal Services Directions 2017* and *Australian Human Rights Commission Amendment (Costs Protection) Act 2024* (by consequence of s.80 or otherwise) require the Respondent pay the costs (**206**) of the interlocutory application irrespective of its outcome.
76. 37M(1)(a), 37M(2)(a), 37M(3), 37M(4)(b), 37N(1), 37N(4) FCA Act together require that the Court must, in exercising the discretion to award costs, take account of any failure of the Respondent to conduct the proceeding lawfully. 39(3) Charter does not preclude award of costs in accounting of unlawful conduct of the Respondent in the proceeding such that is unlawful because of Charter.
77. 37P(1), 37P(6)(e), 43(3)(g) FCA Act allows costs be awarded “*as between party and party*” or “*on an indemnity basis*” as per the *Rules*, or on other reasonable bases including punitive and/or exemplary basis.
78. The Applicant seeks costs of the interlocutory application, taking account of the Respondent’s conduct in connexion with the interlocutory application, awarded on punitive/exemplary bases in amount as is reasonably necessary to completely, perpetually and universally deter similar misbehaviour in judicial proceedings.

### **CONCLUSION**

79. The interlocutory application must be dismissed or otherwise refused.
80. The Respondent must be punished and example must be made of him to deter misconduct in judicial proceedings.

**Prepared by:** Jan Marek Kant, Applicant

**28 April 2025**

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<sup>34</sup> See: *Banque Commerciale SA v Akhil Holdings Ltd* [1990] HCA 11 at [18]

<sup>35</sup> See: s.51 FCA Act