

## NOTICE OF FILING

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### Important Information

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

NO. VID 829 OF 2023

JAN MAREK KANT

Applicant

AUSTRALIAN INFORMATION COMMISSIONER

Respondent

## RESPONDENT'S OUTLINE OF SUBMISSIONS

### PART I INTRODUCTION

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1. By amended originating application for relief under s 39B of the *Judiciary Act 1903* (Cth) dated 24 January 2024, the applicant seeks judicial review of the decision given by the respondent's delegate on 12 September 2023.<sup>1</sup>
2. These submissions address the facts and relevant legal principles applicable to the delegate's decision. The submissions also address why the applicant's associated damages claims are not made out.

### PART II BACKGROUND

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3. The factual background to this proceeding is set out at [3] to [7] of the respondent's submissions filed on 12 April 2024.
4. The grounds of review are as given in the applicant's correspondence with the Office of the Australian Information Commissioner (**OAIC**).<sup>2</sup> That correspondence, in summary, contends that:
  - 4.1. the applicant's request to the OAIC was a request, under s 12B(2) of the *Privacy Act 1988* (Cth) (the **Privacy Act**), to investigate interferences with the applicant's rights as prescribed by the International Covenant on Civil and Political Rights (**ICCPR**);<sup>3</sup>

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<sup>1</sup> Affidavit of Jan Marek Kant affirmed 26 February 2024, exhibit JMK-33.

<sup>2</sup> Amended originating application, particular (i).

<sup>3</sup> Respondent's bundle of documents (**RB**) 15 [2].

- 4.2. the ICCPR applies to the conduct of security agencies because any provisions excluding those agencies from the Privacy Act are void by virtue of s 12B(2) of the Act;<sup>4</sup>
- 4.3. the OAIC has the authority to investigate the actions and general conduct of the Australian Security Intelligence Organisation (**ASIO**).<sup>5</sup>

### **PART III THE PRIVACY ACT**

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- 5. Part V of the Privacy Act deals with complaints and investigations about acts or practices that may be an interference with the privacy of an individual. If a complaint is made in accordance with s 36(1) or (2), the respondent is required to investigate the act or practice except in certain circumstances.
- 6. Section 36(1) permits the making of an individual complaint about an “act or practice that may be an interference with” the privacy of the individual. That concept — interference with the privacy of an individual — is the subject of s 13 of the Act, which relevantly provides:

#### **13 Interferences with privacy**

- (1) An act or practice of an APP entity is an interference with the privacy of an individual if:
  - (a) the act or practice breaches an Australian Privacy Principle in relation to personal information about the individual; or
  - (b) the act or practice breaches a registered APP code that binds the entity in relation to personal information about the individual.

- 7. The acts and practices to which the Privacy Act applies or disapplies are clarified in s 7. Section 7(1) provides:

Except so far as the contrary intention appears, a reference in the Act (other than section 8) to an act or to a practice is a reference to:

- (a) ... an act done, or a practice engaged in, as the case may be, by an agency ... other than:
  - (i) an agency specified in any of the following provisions of the *Freedom of Information Act 1982*:
    - ...
    - (B) Division 1 of Part I of Schedule 2;
    - ...
  - (b) [paras (b) to (ee) specify certain acts or practices]

... but does not include a reference to an act done, or a practice engaged in, in relation to a record that has originated with, or has been received from:

- (f) an intelligence agency...

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<sup>4</sup> RB 15 [4].

<sup>5</sup> RB 15 [5].

8. ASIO is an “exempt agency” listed in Division 1 of Part 1 of Schedule 2 to the *Freedom of Information Act 1982* (Cth). ASIO is also an “intelligence agency” as defined in s 6(1) of the Privacy Act.
9. Section 7(1A)(a) of the Privacy Act provides that the Act (other than s 8) does not apply to acts or practices involving disclosure of information to certain agencies, including ASIO.
10. Section 7(2) provides for the application of the Act otherwise than in respect of the Australian Privacy Principles (**APPs**):

Except so far as the contrary intention appears, a reference in this Act (other than section 8) to an act or to a practice includes, in the application of this Act otherwise than in respect of the Australian Privacy Principles, ..., a reference to an act done, or a practice engaged in, as the case may be, by an agency specified in Part I of Schedule 2 to the *Freedom of Information Act 1982* or in Division 1 of Part II of that Schedule other than:

  - (a) an intelligence agency; ...
11. Section 12B(1) provides that, without limiting the effect of the Privacy Act apart from s 12B, the Privacy Act also has effect as provided by each of sub-ss 12B(2) to (8) in relation to an agency.<sup>6</sup> Relevantly, s 12B(2)(a) provides that the Privacy Act has the effect it would have if its operation in relation to an agency was “expressly confined to an operation to give effect to ... the [ICCPR], and in particular Articles 17 and 24(1) of the Covenant”.
12. Article 17 of the ICCPR states:
  1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
  2. Everyone has the right to the protection of the law against such interference or attacks.

#### **PART IV SUBMISSIONS CONCERNING THE DECISION UNDER REVIEW**

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##### **ASIO’s acts and practices are exempt from the Privacy Act**

13. The applicant contends that the decision is flawed as the respondent has narrowly interpreted his complaint, which did not involve disclosing information to ASIO.<sup>7</sup>
14. The delegate characterised the applicant’s complaint as being about ASIO’s handling of the applicant’s personal information.<sup>8</sup> The delegate considered that ASIO is an exempt agency for the purposes of the Privacy Act and referred to s 7(1A)(a) of the Act, which exempts acts or practices involving disclosure of information to ASIO.

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<sup>6</sup> “Agency” is defined in s 6(1) to relevantly mean “a body (whether incorporated or not), or a tribunal, established or appointed for a public purpose by or under a Commonwealth law...”. ASIO is established under a law of the Commonwealth.

<sup>7</sup> Applicant’s submissions dated 12 March 2024 (**AS**) [10].

<sup>8</sup> RB 14.

15. Several subsections together provide a comprehensive exemption for ASIO, covering its acts (s 7(1)(a)(i)(B)) (including in respect of the application of the Privacy Act otherwise than in respect of the APPs: s 7(2)(a)), information originating from ASIO (s 7(1)(f)), and information provided to ASIO (s 7(1A)(a)).
16. As a matter of principle, the delegate's ultimate assessment of whether the Privacy Act applies to acts or practices of ASIO was correct by reason of sub-ss 7(1)(a)(i)(B) and 7(2)(a). The applicant's complaint accordingly did not meet s 36(1) of the Act, because it did not relate to an act or practice to which the Privacy Act applies.
17. Any error of the delegate in referring to an incorrect sub-section was not material and did not constitute a jurisdictional error because the decision could not realistically have been any different had the correct section been referred to.<sup>9</sup>

### **The ICCPR does not provide an alternative avenue**

18. The applicant contends that despite ASIO's exemption from the Privacy Act under s 7, s 12B(2)(a) provides alternative jurisdiction for the respondent to investigate the conduct of ASIO.
19. Section 12B is titled 'Severability – additional effect of this Act'. A severability clause generally establishes "a presumption in favour of the independence, one from another, of the various provisions of an enactment, to which effect should be given unless some positive indication of interdependence appears from the text, context, content or subject matter of the provisions".<sup>10</sup> This is consistent with the explanation of s 12B in the explanatory memorandum to the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012*, which indicates that s 12B is intended to ensure that the Privacy Act is given the widest possible operation consistent with Commonwealth constitutional legislative power.<sup>11</sup>
20. The respondent advances two reasons for why s 12B does not empower it to investigate ASIO's acts or practices.

### ***ASIO's exemption from the Privacy Act is consistent with the application of the ICCPR***

21. On its face, s 12B(2) appears to provide some separate avenue for the conduct of an investigation into the conduct of ASIO. However, the Full Court of the Federal Court has considered the interaction between the ICCPR and the former Information Privacy Principles (IPPs) in a way that tends against the ICCPR overriding exemptions in the Act.

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<sup>9</sup> *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12 at [7] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ, with whom Beech-Jones J agreed, [38]).

<sup>10</sup> *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100 at 127 (Dixon J). See also *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 370 (Dixon J).

<sup>11</sup> Explanatory memorandum to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012, item 35.

22. In *AIT18 v Australian Information Commissioner* (2018) 267 FCR 93, the Court observed that the Act reflects Parliament’s concern to “recognise and protect individual privacy within the framework of a complex statutory regime” and it does so by “a series of statutory provisions which protect the privacy of individuals from unlawful or arbitrary interference but also by specifying circumstances (or “exceptions”) which reflect the Parliament’s concern to strike an appropriate balance between competing community interests.”<sup>12</sup> The Court accepted that:
- ...the exceptions [in the IPPs] should be interpreted carefully so as to preserve the balance which the legislation strikes between the competing community interests, noting also the relevance of the fact that Art 17(1) ICCPR is not expressed in unqualified terms. It does not confer an absolute “right to privacy”, but rather creates a right not to be subjected to arbitrary or unlawful interference with one’s privacy. The exceptions in the Privacy Act reflect the Parliament’s identification of circumstances in which interference with a person’s privacy is not arbitrary or unlawful.<sup>13</sup>
23. Section 2A(f) of the Privacy Act states that an object of the Act is “to implement Australia’s international obligation in relation to privacy.” The Act as a whole, including its exceptions, gives effect to Australia’s international obligation.
24. Just as the exceptions in specific privacy principles (whether the IPPs or APPs) reflect the Parliament’s identification of circumstances in which interference with a person’s privacy is not arbitrary or unlawful, so does the exemption of ASIO from the operation of the Act as a whole. The ICCPR right not to be subjected to arbitrary or unlawful interference with one’s privacy is only incorporated by the Act in relation to the entities that the Act otherwise applies to.

***Section 36(1) does not empower the investigation of ICCPR rights in respect of ASIO***

25. While the Privacy Act gives effect to certain ICCPR rights, the ICCPR does not confer any power on the respondent to investigate any alleged breach of privacy. The provision to “give effect” to an ICCPR right by way of investigation is still the power in s 36 of the Privacy Act.
26. Section 36(1) does not apply to complaints about acts or practices of ASIO *otherwise* than in respect of the APPs by reason of s 7(2)(a) of the Privacy Act. It follows that any complaint about acts or practices of ASIO breaching an ICCPR right are still excluded from the power in s 36(1) of the Privacy Act.

**PART V OTHER RELIEF SOUGHT**

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27. The applicant also seeks damages against the Commonwealth in respect of tortious conduct<sup>14</sup> and damages in lieu of costs.<sup>15</sup> His grounds for seeking these orders variously contend that:

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<sup>12</sup> *AIT18 v Australian Information Commissioner* (2018) 267 FCR 93 at [85].

<sup>13</sup> *Ibid.*

<sup>14</sup> Amended originating application, claim [4].

<sup>15</sup> Amended originating application, claim [5].

- 27.1. the respondent has manufactured this review application and is abusing the Court's processes by continuing to participate in the review;<sup>16</sup> and
- 27.2. the respondent has attempted to seriously interfere with the privacy of the applicant by continuing this proceeding.<sup>17</sup>
28. It is theoretically possible to seek damages in conjunction with a claim for relief under s 39B of the *Judiciary Act 1903* (Cth).<sup>18</sup> The claim would, in any event, fall within the Court's associated jurisdiction if it arises from the same substratum of facts.<sup>19</sup> However, the basis for the claims is misconceived and the respondent is not liable for those claims.

### **Damages for abuse of process**

29. The principles concerning the tort of collateral abuse of process are conveniently summarised in *Martin v Norton Rose Fulbright Australia* (2021) 289 FCR 369 at [190] to [195]. In summary, the tort of abuse of process involves using legal proceedings for a purpose beyond their intended scope, resulting in damage. This tort requires proving that the process was employed for a purpose other than achieving the claim in the action. Simply identifying an improper purpose is not enough; there must be evidence of an overt act or threat distinct from pursuing the proceedings themselves. The essence of the tort lies in abusing civil proceedings to obtain a wholly extraneous benefit not reasonably connected with the relief sought, such as using court processes as a tool of extortion.
30. There has been no abuse of process in this proceeding.
- 30.1. It was the applicant, not the respondent, who commenced this proceeding. The applicant can discontinue this proceeding at any time in accordance with rule 26.12 of the *Federal Court Rules 2011* (Cth) (the **Rules**).
- 30.2. The respondent became a party to the proceeding because her delegate was the original decision maker. There is no other respondent to the proceeding, so the respondent has taken the role of making submissions as to the facts and legal principles relevant to the delegate's decision. This is an appropriate role, consistent with the flexible application of the principle articulated in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13.
- 30.3. There is no substance to the applicant's allegation that this proceeding is being used by the respondent to obtain personal information about the applicant. The respondent has not sought orders requiring the applicant to produce documents or provide affidavit evidence.

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<sup>16</sup> Amended originating application, particulars (ii), (iv), (v)

<sup>17</sup> Amended originating application, particulars (vi), (vii) and (ix).

<sup>18</sup> See *Scott v Handley* (1997) 79 FCR 236; *Giddings v Australian Information Commissioner* [2017] FCAFC 225 at [40].

<sup>19</sup> *Federal Court of Australia Act 1976* (Cth), s 32.

30.4. The respondent indicated that she would seek her costs if the applicant did not discontinue the proceeding.<sup>20</sup> The applicant contends that this amounts to coercion: AS [24]. Liability for costs on discontinuance is the standard position reflected in rule 26.12(7) of the Rules. The applicant has not explained how invoking the standard position in the Court's rules can be an abuse of process and the respondent submits that it cannot.

### **Damages for interference with privacy**

31. The applicant contends his privacy has been or is being seriously interfered with by the respondent by "failing or refusing to allow him to access his own personal information when requested" (AS [34]) or intentionally procuring and using his personal information via this proceeding (AS [36]), and that this is actionable as a tort of 'disprivacy'.

32. Neither of these allegations establishes a basis for any award of damages in the circumstances of this case.

32.1. The complaints about the respondent generally failing or refusing to allow the applicant access to his own information (AS [34]) appear unconnected to the subject matter of the s 39B review application. The applicant does not claim that failure to investigate his complaint under the Privacy Act resulted in some interference with his privacy. The applicant may instead be referring to his other matters with the OAIC.<sup>21</sup> The lawfulness of the other matters is not challenged as part of this proceeding. The claim for damages is not properly 'associated' with the s 39B application because it does not arise out of the same substratum of facts.<sup>22</sup>

32.2. 'Disprivacy' is not a term that appears to have been used in jurisprudence and it is unclear what the applicant means by it. Interference with privacy is not firmly established as a tort.<sup>23</sup> In any event, the applicant has not established that the respondent has procured or used his personal information via this proceeding (see [30.3] above), nor has he established that anything done in this proceeding amounts to interfering with privacy.

32.3. The applicant's reliance on s 13G of the Privacy Act (serious and repeated interferences with privacy) is misplaced. Section 13G is a civil penalty provision. This is not a civil penalty proceeding against the respondent for breach of s 13G of the Privacy Act and the applicant is not an 'authorised applicant' to bring such a proceeding.<sup>24</sup>

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<sup>20</sup> Affidavit of Jan Marek Kant affirmed 5 January 2024, exhibit JMK-8.

<sup>21</sup> E.g. affidavit of Jan Marek Kant affirmed 31 January 2024, exhibit JMK-11, page 35-46 refers to an FOI request to the OAIC.

<sup>22</sup> *Fencott v Muller* (1983) 152 CLR 570 at 606-607.

<sup>23</sup> *Dye v Commonwealth Securities Limited* [2010] FCA 720 at [289]; *Kalaba v Commonwealth of Australia* [2004] FCA 763 at [6]; *Sands v State of South Australia* [2013] SASC 44 at [614]. The debate on whether a tort exists has been left open by the High Court: see *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at [48].

<sup>24</sup> The respondent is the authorised applicant for such a proceeding: s 80U of the Privacy Act.

## Damages in lieu of costs

33. For the reasons set out above, the applicant is not entitled to the relief he seeks in pleas [1] to [4] of his amended originating application. It follows that he is not entitled to any costs. But for completeness the respondent makes the following submissions about the availability of an order for damages in lieu of costs.
34. First, s 80 of the *Judiciary Act 1903* (Cth) does not apply in the way the applicant contends. That section provides:
- 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.
35. The conditions necessary to engage the operation of s 80 are not met. There are applicable laws of the Commonwealth providing for the award of costs in this Court. This Court's power to award costs derives from s 43 of the *Federal Court of Australia Act 1976* (Cth) . It confers jurisdiction "to award costs in all proceedings before the Court", and provides that "the award of costs is in the discretion of the Court," except as provided by any other Act. There is no need to resort to the common law.
36. Second, even if the common law is picked up, there is no common law rule that unrepresented litigants may claim damages in lieu of costs. A successful litigant who is not represented by a lawyer is not entitled to be recompensed for work done in the preparation and conduct of his or her case.<sup>25</sup> Costs are also unable to be recovered by way of damages.<sup>26</sup>
37. If the applicant is successful in this proceeding, he would be entitled to the ordinary costs recoverable by a litigant in person.

## PART VI COSTS

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38. The respondent seeks its costs if the amended originating application is dismissed.

Date: 16 April 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

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<sup>25</sup> *Cachia v Hanes* (1994) 176 CLR 403 at 417 (Mason CJ, Brennan, Deane, Dawson and McHugh JJ).

<sup>26</sup> *Gray v Sirtex Medical Ltd* [2011] FCAFC 40 at [15] and [16].