

NOTICE OF FILING

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| File Number: | VID528/2024 |
| File Title: | JAN MAREK KANT v THE AUSTRALIAN INFORMATION COMMISSIONER |
| Registry: | VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA |



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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No. VID528/2024

Federal Court of Australia
District Registry: Victoria
Division: General

JAN MAREK KANT

Applicant

THE AUSTRALIAN INFORMATION COMMISSIONER

Respondent

Date: 07 August 2024

Applicant's Submissions

Timeline

1. The judgment in respect of which the Applicant seeks *leave to appeal* was handed down on 11 Jun 2024.
2. The Applicant applied for *leave to appeal* pursuant to *Rule 35.12* on 12 Jun 2024.
3. The application was served on the Respondent pursuant to *Rule 35.15* on 14 Jun 2024.

Judgement

4. The trial Judge denied relief as sought with the 22 Nov 2023 interlocutory application because:
 - a. There was no *prima facie* case for the relief sought; and,
 - b. The balance of convenience was not such as might warrant the granting of relief without a *prima facie* case.
5. It is to be understood that if the trial Judge had not denied the sought relief for the above reasons, it would nonetheless be denied because:
 - a. the interlocutory application impermissibly recasts the originating application; and,
 - b. the interlocutory application is, in substance, an application for discovery impermissibly constituting a "fishing expedition".

Omissions

6. The trial Judge omitted to consider submissions concerning ss. 121 & 124 *Regulatory powers (Standard Provisions) Act 2014*.
7. The Respondent submitted on 12 Apr 2024 (footnotes removed):

[15] *Section 80W(1) is a part of the enforcement regime of the Act and confers power on this Court to enforce provisions of the Act by way of injunction. Section 80W is given operative effect by ss 118, 121 and 122 in Part 7 of the Regulatory Powers (Standard Provisions) Act 2014 (Cth) (the RP Act). Those provisions empower the Court to grant performance injunctions and interim injunctions in relation to provisions of an Act enforceable under the RP Act.*

8. The Applicant submitted on 16 Apr 2024 (references removed):

[34] *By extension of 80W(3) Privacy Act 1988, s.121 Regulatory Powers (Standard Provisions) Act 2014 empowers the Federal Court to grant the injunction sought by the Applicant. A prima facie case is unnecessary.*

[35] *In submitting that an injunction should not be granted, the Respondent proposes to deny the Applicant access to information about him under Schedule 1 of the Act; this enlivens “restraining” provisions of 121(1), 122(1) & 124(1) Regulatory Powers (Standard Provisions) Act 2014.*

[37] *By force of s.124 Regulatory Powers (Standard Provisions) Act 2014, a “relevant court” can, by injunction, require production of documents by an APP entity; the requisite access request is taken to be made on application for the injunction.*

9. The trial Judge omitted to consider:

- a. the effect of 124(1)(a), 124(1)(b), 124(2)(a) & 124(2)(b) *Regulatory Powers (Standard Provisions) Act* with respect to *prima facie* case requirements; and,
- b. the effect of 124(1)(c) & 124(2)(c) *Regulatory Powers (Standard Provisions) Act* on the *balance of convenience*; and,
- c. the injunction is not sought to preserve a *status quo*; and,
- d. the application for the sought injunction is in itself a request for access to personal information, made via the intermediary of the Federal Court and in accordance with APP12.

10. The trial Judge also omitted to consider submissions concerning orders sought by the Applicant on affirmation of dismissal of the 26 Nov 2023 interlocutory application.

11. The Applicant submitted on 12 Mar 2024:

[62] *The Applicant presently seeks declaratory suppression orders; including, an interlocutory order under Federal Court of Australia Act 1976:*

- a. *affirming dismissal of his 26 Nov 2023 application for suppression orders; and,*
- b. *declaring no information or document given or produced in this proceeding can become subject to a suppression order or non-publication order (however described), except as necessary to protect safety of natural persons otherwise identifiable.*

12. The Applicant submitted on 16 Apr 2024:

[28] *Documents filed in this proceeding, including affidavits filed by the Applicant after 26 Nov 2023, are presently accessible to the public. It is to be expected (and the Applicant must assume) that prejudice to the Applicant’s interests, as may result from public disclosure of information about this proceeding, is already caused.*

[29] *Limiting the dissemination of any information about this proceeding, to the benefit of the Commonwealth or any other person, after whatever prejudice may befall the Applicant is already caused, would be an injustice.*

Proposed appeal

13. By way of appeal from orders/judgement of the court below, the Applicant will seek:

- a. An order declaring no information about *VID829/2023* or an appeal arising out of *VID829/2023*, nor document filed in *VID829/2023* or an appeal arising out of *VID829/2023*, can become subject to a suppression or non-publication order (however described) that limits its dissemination otherwise than is necessary for protecting the safety of one or more natural persons who would otherwise be identifiable; and,
 - b. An injunction requiring the Respondent produce to the Appellant all information about the Appellant as is reasonably accessible to the *Office of the Australian Information Commissioner*; and,
 - c. An order reserving the costs of the interlocutory application originally filed 23 Dec 2023.
14. The Applicant proposes the following grounds of appeal:
- a. *Chapter III* of the Constitution guarantees the rights and freedoms recognised in the *International Covenant on Civil and Political Rights* while Australia remains a State Party to it.
 - b. *Australian Privacy Principle 12* extends a constitutional right to privacy.
 - c. *Australian Privacy Principle 12* may be invoked to undertake a “fishing expedition”.
 - d. Enforcement of *Australian Privacy Principle 12* with grant of injunction does not require a request for access to information be made before an injunction is sought.
 - e. Affirming dismissal of the application for suppression orders requires that declaratory orders are made.
15. The Applicant will also prove:
- a. *Stare decisis* does not apply to construction of the Constitution and all such authorities are non-binding; and,
 - b. Right of access to government information is implicit to *Chapter III* of the Constitution.

Australian Information Commissioner

- 16. The Respondent can cause laws to be changed; natural justice requires that only laws as in force on 22 Aug 2023 (the day of the original request) can apply in this proceeding and the subsequent appeal.
- 17. The *Public Service Act 1999* and the *Legal Services Directions* made under s. 55ZF *Judiciary Act 1903* bind the Respondent in this proceeding and the subsequent appeal.
- 18. The *Office of the Australian Information Commissioner* is a “lead protective security entity”, in the meaning of *Protective Security Policy Framework*, responsible for “whole-of-government information management policy and practice”; and,
- 19. The *Protective Security Policy Framework* is *lex specialis* in:
 - a. Part 5.2 *Criminal Code*; and,
 - b. *Australian Security Intelligence Organisation Act 1979*; and,
 - c. *National Security Information (Criminal and Civil Proceedings) Act 2004*; therefore,
- 20. The Respondent is appropriately qualified to make necessary submissions and the Court can adjudicate on all questions of national security in this proceeding and in the subsequent appeal without hearing from *intervenors* or *amicus curiae*.

21. The Respondent is aware of a substantial risk that his participation in these proceedings is conduct that will, if dissemination of information about the proceedings is artificially limited by *suppression orders* or *non-publication orders* (or otherwise), *influence a political process of the Commonwealth or a State or Territory* by withholding relevant information from voters; consequently, the Respondent commits an offence against 92.3 *Criminal Code* if aware that dissemination of information about these proceedings is (or will be) artificially limited in the ordinary course of events. *Leave to appeal* is required to prevent prejudice to the proper administration of justice.

Declaratory Orders

ultra vires

22. The proceeding in the court below is judicial review of a decision by the Respondent to not investigate an interference with human rights, by multiple organisations known to include both law enforcement and intelligence agencies, in conspiracy with one or more members of parliament with an aim of hiding evidence of corruption. Information about the proceeding is information of a kind that may inform the political judgments required for the exercise of constitutional functions by the Australian people.
23. A constitutional freedom of political expression may be curtailed by exigencies of defence or national security and contemporary risk to other interests which are in need of protection, but is otherwise protected from legislative or administrative decision-making;¹ however, there exists legislation which modifies the meaning of *national security* to include:
- a. protecting political and economic relations with foreign governments and international organisations; and,
 - b. protecting the Commonwealth and the several States and Territories from activities tending to promote the detention of persons who commit criminal offences by persons who don't commit criminal offences; and,
 - c. ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a government or government agencies.
24. Legislation that allows suppression or non-publication orders to be made for preventing prejudice to the interests of the Commonwealth or a State or Territory in relation to "*national security*" stands in excess of the legislative powers of the Parliament; despite this, it must be assumed that suppression and non-publication orders will be made under such legislation in respect of information about these proceedings.
25. To limit dissemination of information about these proceedings would be contrary to public interest. To limit the Applicant's right of political communication with orders made on legislation that is *ultra vires* the Constitution would be an injustice.
26. Justice and public interest in responsible government require that dissemination of information about these proceedings is not limited by "*national security*";² ensuring this requires *leave to appeal* be granted.

Discretion

27. In the present application for *leave to appeal*, the Court exercises federal jurisdiction in the state of Victoria. By effect of s. 79 *Judiciary Act* 1903, laws of the State of Victoria bind the

¹ see: *Nationwide News Pty Ltd v Wills* [1992] HCA 46 at [47]

² see also: *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 at [66 – 68] & [71]

Court except as otherwise provided by the Constitution or by the laws of the Commonwealth.

28. By extension of s. 80 *Judiciary Act 1903*, 37N(4) *Federal Court of Australia Act 1976*, modifies the *common law of Australia*. Absent logical reason for discrimination between similar cases, 37N(4) *Federal Court of Australia Act 1976* thus establishes a common law requirement on courts of Federal jurisdiction to exercise discretion subject to provisions of the statute law.
29. By necessary implication of 28(1) *Open Courts Act 2013*:
 - a. there is a *principle of open justice* which requires proceedings be heard in open court; and,
 - b. the *free communication and disclosure of information* also requires proceedings be heard in open court.
30. The same *principle of open justice* which requires proceedings be heard in open court also requires making declaratory orders as sought in the appeal. The *free communication and disclosure of information* also requires making declaratory orders as sought in the appeal.
31. The Court must exercise discretion subject to 28(1) *Open Courts Act 2013* and, in determining whether to grant the Applicant *leave* to commence the proposed appeal, have regard to the primacy of aforementioned *principle of open justice* and *free communication and disclosure of information*.³

Right of appeal

32. Read together with ss. 71 & 79 of the Constitution, s. 73 of the Constitution provides for appointment of as many judicial officers as required to settle all controversies of right. Every statutory or common law provision which requires *leave to appeal* to a court of Federal jurisdiction is therefore *ultra vires* the Constitution.
33. The Court must not refuse *leave to appeal* from judgement/orders of the court below because the Applicant has *right of appeal* in the matter.
34. Subsections 78A(1) & 78B(1) *Judiciary Act 1903* do not apply in this proceeding unless the Court would otherwise deny *leave to appeal*.

Interpretation of the Constitution

35. 39B(1A) *Judiciary Act 1903* and 5(2) *Federal Court of Australia Act 1976* require the proposed appeal be heard.⁴

Costs

36. The Applicant seeks his ordinary costs if the Respondent remains compliant in this proceeding with *Public Service Act 1999*, *Legal Services Directions 2017*, and the *overarching purpose* of the civil practice and procedure provisions.
37. 4.2 *Legal Services Directions 2017* requires the Respondent pay costs if either the present application for *leave to appeal* or the proposed appeal are a “test case in the public interest”.

Prepared by: Jan Marek Kant, Applicant

³ see also: 37AE *Federal Court of Australia Act 1976*

⁴ see also: *Chia Gee v. Martin* [1905] HCA 70; 3 CLR 649 at 653, *Dietrich v The Queen* [1992] HCA 57 at [19 – 20] & [45 – 48], 3(1) & 3(4) *Australian Human Rights Commission Act 1986*