

NOTICE OF FILING

Details of Filing

Document Lodged:	Submissions
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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



A handwritten signature in blue ink, reading "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.

The date of the filing of the document is determined pursuant to the Court's Rules.



No. VID528/2024

JAN MAREK KANT

Applicant

THE AUSTRALIAN INFORMATION COMMISSIONER

Respondent

Date: 31 August 2024

Applicant's Submissions in Reply

Judgment below

1. "**affirm**" means to *establish, confirm, or ratify*¹.
2. The Applicant sought orders affirming the dismissal of his application **(11, 12)**², not merely repeating it³. The primary Judge erred in finding that the only issue for determination was whether the registrar was right to dismiss the injunction application. **[4, 11]**⁴
3. The Court may, on application for the review of an exercise of a power of the Court by a Registrar, make such orders as it thinks fit with respect to the matter with respect to which the power was exercised⁵. **[10, 11]**
4. The primary Judge cites passages, of a judgement given in a "*defamation*" matter, dealing with grant of interlocutory injunctions in "*patent infringement*" cases⁶. In such matters, preventing harm before the matter is finally determined may require the preservation of a *status quo*, and grant of an interlocutory injunction may require the applicant prove sufficient likelihood of his claims succeeding. **[15]** An interlocutory injunction that enforces 12.1 of Schedule 1 *Privacy Act 1988* does not require the preservation of a *status quo*, and is therefore not an injunction of a kind contemplated in materials cited in the primary judgement.
5. Information that is "*reasonably accessible*" to the Respondent is information "*held*" by the Respondent⁷. **[16]** The Respondent admitted the truth of all facts in his *Chapter B: Key concepts* document in the proceeding in the court below.
6. The Applicant proving his claims in **(15)** will be a step **[17]** in proving his claims in **(14)**.

Australian Privacy Principle 12

7. The *Australian Information Commissioner* as officer, not a natural person with that job title, is the Respondent in this proceeding. Distinction between the Respondent and OAIC is arbitrary; the Respondent and OAIC are the same *APP entity*. **[16]**

¹ Item 2 in the definition of "*affirm*" in *The Macquarie Dictionary*, 1982 reprint.

² Digits enclosed in ellipses refer to same-numbered items in the Applicant's 07-Aug-2024 submissions

³ See: *Australian Coal and Shale Employees' Federation v Commonwealth* (1953) 94 CLR 621 at 627.

⁴ Digits enclosed in brackets refer to same-numbered items in the Respondent's 29-Aug-2024 submissions

⁵ 35A(6) *Federal Court of Australia Act 1976*

⁶ See: *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, 81-84 [65]-[72]

⁷ See: 6(1) *Privacy Act 1988*; B.84 *Chapter B: Key concepts*

8. If APP 12 can be invoked to undertake a fishing expedition (as the Respondent agrees), **[19]** the “*balance of convenience*” is irrelevant to the grant of injunctive relief sought by the Applicant and the primary judge erred by taking it into account⁸.
9. The Applicant claims remedy, in the proceeding in the court below, in respect of the Respondent mishandling his personal information in a manner constituting “*a system of conduct or pattern of behavior*”. Requesting the Respondent give him access to personal information, **[6, 16]** after claiming such remedy, would give rise to a claim against the Applicant under s.22 *Federal Court of Australia Act 1976*. The Federal Court may grant the sought injunction even if⁹ **[22]** the application for it was not itself **(9)** request for access to personal information made in accordance with APP 12.

Procedural matters

10. The Court taking submissions in the present application for *leave to appeal* means the application is proceeding to trial; the application isn’t dismissed **[27]** and it won’t be. **[2]**
11. The relevant constitutional issues are to be addressed in the appeal proceeding, not in the present application for *leave to appeal*. **[18 – 21]**

Costs

1. It is not in dispute that information about the proceeding in the court below is information of a kind that may inform the political judgments. **(22)** In submitting that *leave to appeal* should not be granted, the Respondent attempts¹⁰ to *influence the exercise of an Australian democratic right* **(13, 21, 24)** and so commits a crime under 92.3 *Criminal Code*. Committing a crime is unlawful.
2. The Respondent or his lawyer provided “*legal services* (or) *related services*”¹¹ to the Applicant in giving him “bogus” legal advice by email dated 13 August 2024. A party to a civil proceeding giving a counterparty bogus legal advice is *dishonest*¹², and therefore unlawful when done by a person to whom *Public Service Act 1999* applies. **(17)**
3. The Respondent acted dishonestly, when requesting an extension to file submissions, by giving the Court false information about the Applicant liaising with a “*Constitutional Law Unit*” on constitutional issues raised in his 07-Aug-2024 submissions; this is *dishonest* in the meaning of *Public Service Act 1999* and therefore unlawful. **(17)**
4. The Applicant seeks his costs, **(36)** assessed otherwise than on an indemnity basis, in accordance with 37P(6) *Federal Court of Australia Act 1976*. The Court must, in exercising the discretion to award costs, take account of the Respondent having acted unlawfully in the proceeding¹³.

Prepared by: Jan Marek Kant, Applicant

⁸ See: *Australian Coal and Shale Employees’ Federation v Commonwealth* (1953) 94 CLR 621 at 627

⁹ See: *Dietrich v The Queen* (1992) 177 CLR 292 at 364

¹⁰ See: 11.1 *Criminal Code*

¹¹ See: 55N(1) *Judiciary Act 1903*

¹² See: 130.3 *Criminal Code*

¹³ See: 37N(4) *Federal Court of Australia Act 1976*