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Sia Lagos

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Important Information

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MR LEVITAN'S SUBMISSIONS ON HIS INTERLOCUTORY APPLICATION
FILED ON 23 APRIL 2025

A Introduction

1. By Interlocutory Application filed on 23 April 2025, Mr Levitan seeks an order setting aside the subpoena to give evidence on 1 May 2025 issued to him on 22 April 2025 at the request of the Appellant (**Subpoena**). Mr Levitan relies on the affidavit of Natale Ilardo sworn 23 April 2024.

B Procedural context

2. The Subpoena requires Mr Levitan to attend to give evidence at the hearing of the Appellant's Interlocutory Application dated 27 March 2025.

3. The Appellant's Interlocutory Application relevantly seeks:

- a. leave to reopen the Appellant's case on the appeal;
- b. leave to file a draft Amended Notice of Appeal (**DANoA**);
- c. leave to adduce in the appeal the evidence specified in prayer 3 of the Interlocutory Application, being the affidavit of Monica Allen sworn 27 March 2025 and the exhibit thereto; and
- d. "[a]ny such further or other orders as are necessary to facilitate ... the reception of further evidence on the appeal; and ... the further hearing of the amended grounds of appeal".

4. The DANoA includes **Proposed Appeal Ground 17**:

That there has been a miscarriage of justice and denial of a fair trial to the Appellant in the proceedings below by reason of the Second Respondent's misconduct.

5. The proposed particulars to Proposed Appeal Ground 17 include:

- a. Proposed Particular 35:

The Second Respondent, Mr McKenzie, engaged in wilful misconduct in the proceedings below by improperly and unlawfully obtaining and retaining information concerning the Appellant's legal strategy concerning the trial that was confidential and privileged to the Appellant.

- b. Proposed Particular 37(b):

There is at least a real possibility that, had the Second Respondent not engaged in such misconduct, the result of the trial would have been different in that ... [b]y reason of the Respondents' improper access to the Appellant's confidential and legally privileged information, there is a real possibility that they made forensic decisions below, which they would not otherwise have been in a position to make, which were to the advantage of the Respondent and/or the disadvantage of the Appellant.

6. The DANoA and its particulars do not refer to Mr Levitan at all, let alone make any allegations of misconduct by him.
7. The Interlocutory Application does not seek an order that Mr Levitan's oral evidence be adduced in the appeal. The only evidence specified in that respect is Ms Allen's affidavit sworn 27 March 2025 and its exhibit.
8. The Subpoena was issued pursuant to a Request for Leave executed by Ms Allen and dated 1 May 2025 (**Request**).¹ The Request commences by stating that the Appellant seeks leave to issue the Subpoena "in connection with matters arising from the affidavit of Mr McKenzie affirmed on 14 April 2025". Mr McKenzie's affidavit was affirmed for the express purpose of responding to the Appellant's Interlocutory Application and Ms Allen's affidavits sworn 27 and 30 March 2025.²
9. It follows that:
 - a. the Appellant proposes to call Mr Levitan as a witness in the Appellant's Interlocutory Application "in connection with matters arising from" the McKenzie Affidavit;
 - b. the Appellant has not sought leave under s 27 of the *Federal Court of Australia Act 1974* (Cth) (**FCA Act**) that Mr Levitan's evidence be adduced in the appeal (if re-opened).

C Purported evidentiary basis for Proposed Particulars 35 and 37(b)

C1 Proposed Particular 35

10. The Appellant indicated at the hearing of 23 April 2025 that he relied on the following four pieces of evidence as the basis for the allegation in Proposed Particular 35:³
 - a. A reference in an email from Mr McKenzie to Mr Levitan and Mr Bartlett dated 12 March 2021 to a meeting between Person 29 and Ms Allen including a statement that "ERS has knowledge that BRS met with Person 29 and Monica on December 4 2019 to pass to him documents to help P29 prepare for his IGADF interview. Must discuss with ERS."⁴
 - b. A statement in an email from Mr McKenzie to Mr Levitan and Mr Bartlett dated 22 March 2021 that "D is adamant (150 %) sure that RS sought USBs from his SASR mates prior to his first visit to IGADF in around Early Dec 2018. D says that RS was sweating on the arrival of these USBs".⁵
 - c. A statement in the same email that "...on 31 July MOB sent RS an email about the Mick Keelty issue and that authorities wish to speak to him about misconduct involving a senior AFP officer...".⁶

¹ Affidavit of Natale Ilardo sworn 23 April 2025, Annexure NI1 p3.

² Affidavit of Nicholas David McKenzie affirmed on 14 April (**McKenzie Affidavit**) [2].

³ Transcript of the hearing of 23 April 2025 (T) 65.44-66.41.

⁴ Exhibit NM-1 to the McKenzie Affidavit (**Ex NM-1**) p 209.

⁵ Ex NM-1 p 215.

⁶ *ibid.*

- d. Mr McKenzie’s statement, in the Audio Recording (as defined in his affidavit), that “they’ve actively like briefing us on his legal strategy in respect of you like this...”.⁷

11. It is sufficient for present purposes to note that:

- a. only the third item refers in terms to a communication to or from a legal representative of the Appellant and in circumstances in which it was the subject of a text message sent by Ms Robert to Ms Scott;⁸
- b. in the Appellant’s Outline of Submissions in relation to his Interlocutory Application filed on 24 April 2025, the Appellant identifies⁹ only the third item as an alleged example that Mr McKenzie “had knowledge of or access to the Appellant’s privileged information”;
- c. it is not apparent how any of the first three items could be said to be “information concerning the Appellant’s legal strategy” as alleged in Particular 35; and
- d. the fourth item is limited to a statement about legal strategy in relation to Person 17 and does not identify any privileged communication.

C2 Proposed Particular 37(b)

- 12. Other than the Audio Recording, there is no evidence in or exhibited to Ms Allen’s affidavits sworn 27 or 30 March 2025 in support of the Appellant’s Interlocutory Application to suggest that any alleged privileged or confidential information of the Appellant was used by the Second Respondent in the conduct of the proceedings below.
- 13. Proposed Particular 37(b) alleges a “real possibility” that the Respondents made forensic decisions below on the basis of the alleged privileged information obtained by Mr McKenzie. There is no particularisation of the basis for the allegation of that “real possibility”. It appears to be alleged solely on the basis of an inference sought to be drawn from the four pieces of evidence identified in paragraph 10 above.

D The forensic purpose of the Appellant in requesting the Subpoena to be issued

D1 The Request

- 14. The Request summarised aspects of the McKenzie Affidavit, including that:

Mr McKenzie deposes that he received materials and information from Ms Scott and Ms Roberts, some of which were privileged to the Appellant. While Mr McKenzie claims to have believed that the material was not privileged, he does not identify the specific documents to which that belief applied, nor is there any evidence that belief was informed by legal advice or verified with the Respondent’s solicitors. His belief is vague, unsubstantiated, and unsupported by any reasonable steps of inquiry.

⁷ McKenzie Affidavit [9].

⁸ Ex NM-1 p 202.

⁹ At [3.19]. Mr Levitan will tender this document on the application.

15. The Request then referred to a meeting on 14 March 2021 that Mr McKenzie said in his affidavit had been attended by Ms Scott, Mr Bartlett, Mr Levitan and another person, a file note of that meeting, the fact that the Respondents did not produce the file note in response to a Notice to Produce issued in the proceedings below and continued to maintain privilege over it, and a dinner subsequent to 14 March 2021 that Mr McKenzie said he had attended with Ms Roberts, Ms Scott, and Mr Levitan.
16. As for the purpose of the examination of Mr Levitan, the Request only referred to:
 - a. “the necessity of oral evidence from Messrs Levitan and Bartlett to determine what occurred, what was said, and what was understood at the meeting [of 14 March 2021], particularly in relation to the handling of privileged material”; and
 - b. “the importance of testing Mr McKenzie’s evidence under cross-examination”.

D1 The hearing on 23 April 2025

17. On 23 April 2025, the Court heard the Respondents’ application to set aside a notice to produce and various subpoenas to produce documents, including a subpoena to produce documents issued to Mr Levitan.
18. Senior Counsel for the Appellant submitted that the Appellant’s case included the following propositions (emphasis added):

Thirdly, that [allegedly privileged] information **provided a basis for forensic decisions** and was information, as I said, given to the lawyers. Fourthly, that information was not limited to Person 17, but as the evidence will demonstrate, extended to matters other than person 17....
19. The third proposition went beyond Proposed Particular 37(b), which is framed in terms of “real possibility” of use of the allegedly privileged information. The third proposition involves an allegation of actual use of privileged information in the making of forensic decisions in the proceedings below.
20. It can be inferred from other submissions made on behalf of the Appellants on 23 April 2025 that the Appellant intends to examine Mr Levitan to seek to elicit evidence of actual misuse of the Appellant’s allegedly privileged information by both Mr McKenzie and his solicitors.
21. Senior Counsel for the Appellant submitted (emphasis added):¹⁰

But just to observe, your Honour, in terms of the rationale behind my friend’s submission about the date, what we’re looking for is what then occurred beyond that [recorded conversation between Mr McKenzie and Person 17] **in terms of the use or communication or otherwise of the revelations of the privileged communications** that had apparently taken place between Ms Scott – primarily Ms Scott, it would appear from the affidavit of Mr McKenzie, that is his communications with her primarily – and Mr McKenzie and what he was relaying to the lawyers about these matters.

And, your Honour, our friends go back to the amended not[ice] of appeal, but let’s be blunt about it: it doesn’t take a forensic expert to work out the relevance that once information is handed over to the lawyers concerning what has been said to Mr McKenzie by Ms Scott as to **whether they took any steps or did anything to follow that up with her in respect of those matters, in order to obtain further lines of inquiry.**

¹⁰ T47.20-.32.

...

Now, the lawyers acting for the respondents were told by Mr McKenzie were given everything that he considered relevant to them. They got it all. And somehow it's suggested that it's not relevant for us then to look at what communications they may have been having directly with Ms Scott, **as an example, to ascertain what use or otherwise was being made of that information...**"

22. It can also be inferred from submissions made on behalf of the Appellant on 23 April 2025 that the Appellant intends to examine Mr Levitan as to Mr Levitan's compliance with his professional obligations.¹¹
23. The Appellant's intention to examine Mr Levitan to seek to elicit evidence about:
 - a. alleged actual misuse by both the Second Respondent and his solicitors of allegedly privileged information of the Appellant;
 - b. Mr Levitan's compliance with his professional obligations,was not disclosed to the Court in the Request and is not within the scope of the DANoA.
24. Further, the submissions touching on Mr Levitan's professional integrity were completely unjustified in a context in which the highest the Appellant can put his case is to refer to a single email to Mr Levitan and Mr Bartlett containing a reference to a communication from a legal representative of the Appellant that has not been established to be privileged and without evidence of misuse by Mr Levitan of any privileged information of the Appellant.

E Applicable legal principles

25. The recipient of a subpoena to give evidence has standing to apply to set it aside to prevent an abuse of process,¹² including where the subpoena to give evidence has not been issued for a legitimate forensic purpose.¹³ However, the Court's power to regulate the issue of subpoenas to give evidence is not limited to refusing leave to issue or setting aside subpoenas that involve an abuse of process. In *Comcare v John Holland Rail Pty Ltd (No 5)* (2011) 195 FCR 43, Bromberg J held that the Court is not bound to permit a party to call whatever witness it may choose in its case.¹⁴ Rather, "the capacity to call a witness or adduce other evidence may be regulated by the court's power to control and supervise the proceeding and the requirement upon the court that it take into account case management considerations, including those required by s 37M of the [*FCA Act*]."¹⁵ Accordingly, even where a forensic purpose for the subpoena is established, the Court should undertake a balancing process "to weigh up the likely importance of the forensic purpose" against other matters including burden, prejudice and case management.¹⁶
26. In appellate proceedings, subpoenas to give evidence appear to be extremely rare as there is very little authority on the topic. However, it has been held that "the circumstances

¹¹ T41.22-36; T54.6-17.

¹² *Witness v Marsden* (2000) 49 NSWLR 429 at [51] to [60].

¹³ *R v Baines* [1909] 1 KB 258 at 261.

¹⁴ *Comcare* at [18].

¹⁵ *Comcare* at [18] to [20].

¹⁶ *Comcare* at [26] to [27].

will be exceptional indeed where an appellate Court is prepared to issue a subpoena for witnesses to give fresh oral evidence in the hearing of the appeal”.¹⁷

27. The principles governing applications to set aside subpoenas to produce documents are well-established. The Court will set aside a subpoena in order to prevent an abuse of the Court’s processes.¹⁸ The issuing party bears the onus of demonstrating that the subpoena has a legitimate forensic purpose.¹⁹ There must be precise and clear identification of what the asserted legitimate forensic purpose really is and “[t]he forensic purpose requires realistic consideration of the potential strategic and evidentiary use of the documents in the context of the legal and factual issues that are required to be determined.”²⁰ The legitimacy of the asserted forensic purpose will partly depend on whether the evidence sought by the subpoena has apparent relevance to the issues.²¹ The threshold of apparent relevance is not satisfied merely because the evidence “might permit a case to be made”.²² The issue of the subpoena must not be “seriously unfairly burdensome, prejudicial or damaging” and “productive of serious and unjustified trouble and harassment”.²³ The same principles have been applied where the Court has considered an application for leave to issue a subpoena to give evidence.²⁴

F The Court should set aside the Subpoena

28. The Appellant as the issuing party bears the onus of establishing that the Subpoena has a legitimate forensic purpose.²⁵ It is submitted that the Appellant also bears the onus more generally of establishing that leave to issue the Subpoena should have been granted in the exercise of the Court’s discretion (given that there is a residual discretion to refuse such leave even where a Court holds that there is a legitimate forensic purpose).²⁶
29. Mr Levitan submits that the Subpoena should be set aside for the following reasons.
30. First, as addressed in Part D above, the purposes set out in the Request do not align with the purposes that can be inferred from the submissions made on behalf of the Appellant on 23 April 2025. At least a substantial part of the purpose of the Subpoena is to elicit evidence in the course of the Interlocutory Application about actual misuse by Mr McKenzie and his solicitors of the Appellant’s allegedly privileged information, which is outside the scope of the DANoA and the Request.

¹⁷ *Fard v Secretary, Department of Immigration and Border Protection* [2016] FCA 1224 at [6].

¹⁸ *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 588 at [18].

¹⁹ *Seven Network (Operations) Limited v Fairfax Media Publications Pty Ltd* [2023] FCAFC 185 at [36] to [37] (citing *Wong v Sklavos* (2014) 319 ALR 378; [2014] FCAFC 120 at [12]).

²⁰ *Thomas v SMP (International) Pty Ltd (No 2)* [2010] NSWSC 870 at [19] (quoted with approval in *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 16)* [2021] FCA 584 at [31] and *Comcare* at [35] and [36]).

²¹ *Trade Practices Commission v Arnotts Ltd* (1989) 21 FCR 306 at 102-3.

²² *Cosco Holdings Pty Ltd v Commissioner for Taxation* (1997) 37 ATR 432; [1997] FCA 1504; *Kennedy v Administrative Appeals Tribunal* (2008) 168 FCR 566 at [27]; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 588 at [17]; *Comcare v John Holland Rail (Pty) Ltd (No 5)* (2011) 195 FCR 43 at [28].

²³ *Hamilton v Oades* (1989) 166 CLR 486 at 502; *Trade Practices Commission v Arnotts Ltd* (1989) 21 FCR 306 at 102-3.

²⁴ *Garvey v Australian National University* [2024] FCA 140 at [13] to [15].

²⁵ *Wong v Sklavos* at [12].

²⁶ *Comcare* at [18] to [27]. As to onus, it is submitted that the subpoenaed party is entitled to have a subpoena issued on an *ex parte* application set aside *ex debito justitiae* in order for the discretion to be re-exercised after all affected parties have been heard.

31. The contradiction means that the Appellant has failed to provide, as required, an “actual identifiable basis – reasonably precise and tolerably clear – that indicates what the legitimate forensic purpose really is.”²⁷ That failure has been exacerbated by the Appellant’s failure to provide an outline of Mr Levitan’s evidence despite having contemplated doing so in the Request and each of the Respondents’, Mr Levitan’s and Mr Bartlett’s solicitors requesting that occur on 24 April 2025.²⁸ It is further exacerbated by the serious nature of the allegations made against Mr McKenzie and his legal representatives that will form part of the proposed examination of Mr Levitan.
32. In the absence of a sufficiently clear identification of the true forensic purpose of the Subpoena, it should be set aside.
33. Secondly, Proposed Appeal Ground 17 is, at best, speculative and does not have a proper basis in the evidence served by the Appellant on the Interlocutory Application. The Appellant’s purpose in issuing the Subpoena involves an impermissible attempt to discover whether Mr Levitan may give evidence that would provide an evidentiary basis for Proposed Appeal Ground 17. That is not a legitimate forensic purpose for the Subpoena to be issued.
34. In order for Proposed Appeal Ground 17 to have any prospect of success, the Appellant would need to establish *inter alia* that:
- a. **privileged** information of the Appellant was obtained by Mr McKenzie;
 - b. Mr McKenzie was engaged in **wilful** misconduct in respect of that information, which depends on an awareness that information was privileged;
 - c. Mr McKenzie **actually used** the information in making forensic decisions in the proceedings below (which is the case that the Appellant seeks to, and must, advance despite it going beyond Proposed Particular 37(b)); and
 - d. that use would have **affected the outcome** below at least to some extent (although the parties to the appellate proceedings may dispute that threshold).
35. The evidence upon which the Appellant relies in respect of item (a) above is set out in Part C1 above. It is scant.
36. There is no evidence at all in respect of items (b) to (d) above in the affidavits of Ms Allen sworn 27 and 30 March 2025 and their exhibits served with the Interlocutory Application nor in Mr McKenzie’s affidavit. The Appellant instead seeks to adduce at least the evidence as to items (a) to (c) from Mr Bartlett and Mr Levitan and speculates that it may be helpful to the Appellant’s case.
37. The proposition that Mr McKenzie actually used any privileged information of the Appellant is not even pleaded or particularised in the DANoA (item (c) above). The Appellant’s attempt to examine Mr Levitan on this topic is an attempt to discover evidence to see if “it might permit a case to be made” and should therefore not be

²⁷ *Thomas v SMP (International) Pty Ltd (No 2)* [2010] NSWSC 870 at [19] (quoted with approval in *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 16)* [2021] FCA 584 at [31] and *Comcare* at [35]).

²⁸ Letter from Minter Ellison to BlackBay Lawyers dated 24 April 2025; letter from Lander & Rogers to BlackBay Lawyers dated 24 April 2025; letter from K&L Gates to BlackBay Lawyers dated 24 April 2025. These documents will be tendered at the hearing.

permitted.²⁹ Without that evidence, it is difficult to see how Proposed Appeal Ground 17 could possibly succeed even if items (a) and (b) were established.

38. As for the proposition that Mr Levitan may have told Mr McKenzie that information Mr McKenzie obtained from Ms Scott was privileged in the hands of the Appellant (item (b) above), the Appellant cannot establish that there are reasonable grounds for anticipating that the evidence sought to be led from Mr Levitan is evidence that is available³⁰ The only communication from a legal representative of the Appellant upon which the Appellant relies occupies a few lines in a single email sent over four years ago.
39. Finally, the proposition that any use by the Respondents of any privileged information of the Appellant – whatever that use or information may be – could have had any impact on the proceedings below (item (d) above) is simply a speculative assertion by the Appellant for which there is no evidentiary foundation at all.
40. When the speculative nature of all aspects of Proposed Appeal Ground 17, and the evidence that Mr Levitan might give about it, are considered together, the Appellant's purpose in issuing the Subpoena is properly characterised as an attempt to discover whether Mr Levitan can provide an evidentiary foundation for Appeal Ground 17 that would not otherwise exist. As such, permitting him to be called as a witness by the Appellant would not serve a legitimate forensic purpose.³¹ The Appellant cannot establish that oral evidence adduced from Mr Levitan would serve any legitimate purpose when given "a realistic consideration of the potential strategic and evidentiary use of the documents in the context of the legal and factual issues that are required to be determined."³²
41. Thirdly, part of the Appellant's purpose is to adduce evidence about:
 - a. the actual use made by Mr McKenzie and his solicitors of privileged information of the Appellant;
 - b. professional misconduct on the part of Mr Levitan and Mr Bartlett,both of which are matters outside the scope of the DANoA.
42. These are not legitimate forensic purposes for which the Subpoena could be issued to adduce evidence in the Interlocutory Application. These are matters that are directed to expanding the scope of the DANoA and any re-opened appeal. That tends against a finding that the Subpoena was issued for a legitimate forensic purpose.

²⁹ *Cosco Holdings Pty Ltd v Commissioner for Taxation* (1997) 37 ATR 432; [1997] FCA 1504; *Kennedy v Administrative Appeals Tribunal* (2008) 168 FCR 566 at [27]; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 588 at [17]; *Comcare v John Holland Rail (Pty) Ltd (No 5)* (2011) 195 FCR 43 at [28].

³⁰ *Comcare* at [50], [51], [57].

³¹ *Cosco Holdings Pty Ltd v Commissioner for Taxation* (1997) 37 ATR 432; [1997] FCA 1504; *Kennedy v Administrative Appeals Tribunal* (2008) 168 FCR 566 at [27]; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 588 at [17]; *Comcare v John Holland Rail (Pty) Ltd (No 5)* (2011) 195 FCR 43 at [28]

³² *ibid*.

Fourthly, the Court can infer that the Appellant's ultimate and therefore predominant³³ purpose in examining Mr Levitan is to seek leave to use the evidence elicited from Mr Levitan about those matters in the appeal itself (if re-opened) under s 27 of the *FCA Act*.

43. It is not presently possible for the Appellant to obtain leave that Mr Levitan's evidence be adduced in the appeal under s 27 of the *FCA Act* because the Appellant does not know what that evidence will be and therefore cannot argue that "very probably the result [below] would have been different"³⁴ had it been adduced.
44. It is an improper use of the subpoena power to adduce evidence through an application for leave to re-open the appeal, amend the Notice of Appeal, adduce specified evidence (being the affidavit of Ms Allen sworn 30 March 2025 and its exhibit) for the purpose of using the evidence adduced under subpoena in the appeal itself. Doing so would transform the Interlocutory Application into an evidence-gathering exercise for the appeal, which is not a proper purpose for the issue of the Subpoena. That conclusion is reinforced by the fact that the Appellant seeks to examine Mr Levitan on topics that go beyond the DANoA.
45. Fifthly, the submissions about the professional integrity of Mr Levitan that were made by Senior Counsel for the Appellant on 23 April 2025 tend against a finding that the true purpose of the Subpoena is a legitimate forensic purpose. They also tend against the exercise of the Court's discretion to require Mr Levitan to appear to give evidence in the Interlocutory Application, especially given the highly speculative nature of the entire exercise from the perspective of the Appellant.
46. Sixthly, the Appellant has available to him and has deployed his right to request that the Court issue subpoenas to produce documents. The Appellant has not established a legitimate forensic purpose for the Subpoena going beyond any purpose that could be achieved through the production of documents. Further or alternatively, the Court would not permit oral examination of Mr Levitan having regard to s 37M of the *FCA Act* in those circumstances. That is especially so in circumstances in which it is exceptional to permit oral evidence to be adduced in appellate proceedings.

G Conclusion

47. For the reasons set out above, the Court should set aside the Subpoena.

25 April 2025

N M Bender

Counsel for Mr Levitan

³³ Where an abuse of process arises from an improper or collateral purpose, the issue is one of predominant purpose, not sole purpose: *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 4)* [2010] FCA 398 at [44].

³⁴ *NASB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 24 at [42] (and the authorities cited there); *WAMB v Minister for Immigration and Multicultural and Indigenous Affairs* [2007] FCA 66 at [20]; *Moore v Minister for Immigration & Citizenship* [2007] FCAFC 134 at [6] to [7]; *Shannon v Commonwealth Bank of Australia* (2014) 318 ALR 420; [2014] FCAFC 108 at [126]. See also *Sami v Minister for Immigration and Citizenship* [2013] FCAFC 128; 139 ALD 1 at [7]; *CSF17 v Minister for Home Affairs* [2019] FCA 569 at [29]; *Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs v PDWL* (2021) 284 FCR 1 at [21]; *District Council of Streaky Bay v Wilson* (2021) 287 FCR 538 at [149(4)(i)].