

## NOTICE OF FILING

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### Important Information

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**JULIAN KNIGHT**

Applicant

**DEFENCE FORCE OMBUDSMAN**

Respondent

**RESPONDENT'S OUTLINE OF SUBMISSIONS**

**PART I INTRODUCTION**

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1. In 2013, the applicant (**Mr Knight**) made a submission to the Defence Abuse Response Taskforce (**DART**) and applied for a reparation payment in relation to abuse which occurred in 1987 when he was a Defence cadet (**2013 complaint**). In 2016, the DART advised that reparation would not be payable. It did not notify Mr Knight of a formal decision in respect of other potential DART outcomes, such as counselling.
2. On 16 March 2023, Mr Knight submitted to the respondent (**DFO**) a renewed complaint which was based on his original DART submission (the **excluded complaint**). On 21 March 2023, the DFO advised that the renewed complaint was an 'excluded complaint' under the *Ombudsman Regulations 2017* (Cth), because it was the same in substance as a complaint that had been 'dealt with' by the DART (i.e., the 2013 complaint). As a result, the DFO could not respond to the complaint by taking actions and making recommendations as set out in s 14(1)(a) of the Regulations. The DFO also advised that it could not 'consider the management of your submission to the DART.'
3. By previous application to the Federal Court filed on 24 May 2023 (and subsequently amended), Mr Knight sought (amongst other relief) a declaration that the DFO has the statutory function of investigating the excluded complaint; specifically, that the DFO had the statutory function of investigating how DART handled the 2013 complaint. On 9 May 2024, the Court (Button J) dismissed Mr Knight's amended originating application. In doing so, the Court held that s 14(1)(d) of the Regulations does not confer a function of 'investigating',<sup>1</sup> but did include the function of considering, in some way, the handling of a complaint that had been dealt with by the DART.<sup>2</sup>
4. By letter dated 23 May 2024, Mr Knight wrote to the DFO lodging a new complaint, under s 14(d) of the Regulations, regarding the way the 2013 complaint was dealt with

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<sup>1</sup> *Knight v Defence Force Ombudsman* (2024) 182 ALD 397 (**Knight v DFO**) at [100], [104].

<sup>2</sup> *Knight v DFO* at [107].



by the DART (the **fresh complaint**).<sup>3</sup> Mr Knight sought the following '**responses**' to the fresh complaint:

- 4.1. A referral for counselling through **Open Arms** – Veterans and Families Counselling;
  - 4.2. Participation in the DFO Restorative Engagement Program; and
  - 4.3. A recommendation for an ex gratia payment in lieu of a reparation payment.<sup>4</sup>
5. On 1 October 2024, a delegate of the DFO wrote to Mr Knight in response to the fresh complaint. In that letter, the delegate acknowledged that Mr Knight continues to seek 'outcomes' in relation to his 2013 complaint to the DART, but noted that the DART had 'dealt with' his 2013 complaint for the purposes of the DFO's functions with respect to s 14 of the Regulations. In the context of the fresh complaint about the way the DART handled his 2013 complaint, the delegate noted as follows in relation to each of the responses sought:
- 5.1. Mr Knight was able to seek to access counselling services without charge through Open Arms, and this did not require a referral from the DFO;
  - 5.2. any concerns about the way the DART handled the 2013 complaint are not matters that are appropriate for a restorative engagement conference, the purpose of which is to acknowledge abuse rather than address grievances about the way the DART 'dealt with' a complaint of abuse; and
  - 5.3. a recommendation for an ex-gratia payment is not appropriate in response to the matters Mr Knight raised concerning the DART's handling of his 2013 complaint.
6. After careful consideration of the fresh complaint about the DART, and noting the matters set out above, the delegate decided that no further action would be taken in relation to the fresh complaint, and finalised and closed the complaint (the **Decision**).
7. By originating application lodged on 14 October 2024, Mr Knight seeks the following relief:
1. The Applicant seeks from the Court a writ of **mandamus** ordering the Respondent to re-assess the Applicant's complaint dated 23 May 2024 about the way his previous complaint to the Defence Abuse Response Taskforce was handled, according to s.14(1)(d) of the *Ombudsman Regulations 2017* (Cth) (the Regulations), on the ground that the decision of the Respondent on 1 October 2024 constituted an error of law on the face of the record, in breach of s.5(1)(f) of the *Administrative Decisions Judicial Review Act 1977* (Cth) (the Act), in that the Respondent wrongly found:

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<sup>3</sup> CB 461-464. The letter was not sent to the DFO until 24 May 2024.

<sup>4</sup> CB 463.

- (a) that because the Applicant could seek counselling from Open Arms he was not required to decide whether he should make a referral for counselling;
  - (b) that a restorative engagement conference conducted now was limited to the Applicant's complaint about the way his complaint of abuse was 'dealt with' by the DART; &
  - (c) that he could not make a recommendation for an ex-gratia payment.
2. In the alternative, the Applicant seeks a declaration pursuant to s.21 of the *Federal Court of Australia Act 1976* (Cth) that in assessing a complaint made pursuant to s.14(1)(d) of the *Ombudsman Regulations 2017* (Cth), the Defence Force Ombudsman is not limited to recommending outcomes that were originally offered by the Defence Abuse Response Taskforce.

8. For the reasons that follow, the originating application should be dismissed.

## **PART II RELEVANT FRAMEWORK**

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9. The role and framework of the DART and DFO was conveniently summarised by Button J in *Knight v DFO* at [5]-[11]. The DFO adopts that summary.
10. Of particular relevance to this proceeding is s 14 of the Regulations, which provides:

### **14 Conferral of functions on Defence Force Ombudsman—new complaints etc.**

- (1) For the purposes of paragraph 19C(1)(a) of the Act, the Defence Force Ombudsman has:
- (a) the function of taking appropriate action to respond to a new complaint of abuse made by a complainant if the Defence Force Ombudsman is satisfied that the abuse is reasonably likely to have occurred, including any of the following actions:
    - (i) facilitating counselling for the complainant;
    - (ii) using a process to address or resolve the complaint, facilitated by the Defence Force Ombudsman or another person, such as an alternative dispute resolution process or a restorative engagement conference;
    - (iii) making a recommendation to the Defence Department in respect of the complaint;
    - (iiia) if the complaint is covered by subsection (1B)—making recommendations under section 14A in respect of the complaint;
    - (iv) deciding not to take, or to continue to take, action in response to the complaint; and
    - ...
  - (d) the function of dealing with any matter relating to complaints previously made to, and dealt with by, the Defence Abuse Response Taskforce.
- (1A) A complaint is a **new complaint** if:
- (a) the complaint is about abuse engaged in by a member of Defence; and
  - (b) either:
    - (i) the complaint is made to the Defence Force Ombudsman on or after the amendment day; or



- (ii) the complaint was made to the Defence Force Ombudsman on or after 1 December 2016 but before the amendment day and, immediately before the amendment day, the complaint had not been finally dealt with; and
- (c) the complaint is not an excluded complaint.

...

11. Whether a complaint to the DFO is a 'new complaint' turns on the following definition of 'excluded complaint' in s 5:

**excluded complaint** means a complaint that:

- (a) was previously made to, and dealt with by, the Defence Abuse Response Taskforce; or
- (b) is the same in substance as a complaint that was previously made to, and dealt with by, the Defence Abuse Response Taskforce.

12. The statutory provisions extracted above work together to preclude the DFO from taking any of the actions under s 14(1)(a) to address an abuse complaint which has previously been 'dealt with' by the DART (and is thus an excluded complaint).<sup>5</sup>
13. Section 14(1)(d) of the Regulations confers the function of 'dealing with any matter relating to complaints previously made to, and dealt with by, the [DART].' The only judicial consideration of s 14(1)(d) is that of Button J in *Knight v DFO*. Button J's judgment makes clear that s 14(1)(d) does not confer on the DFO a function of investigating or conducting an investigation into a complaint about the way DART dealt with a complaint.<sup>6</sup> As to what s 14(1)(d) *does* enable the DFO to do, her Honour observed (in obiter):

In my view, considering the handling of that complaint, in some way (and on the assumption that it had been 'dealt with' by the DART) falls within the 'function of dealing with any matter relating to complaints previously made to, and dealt with by, the [DART]' under s 14(1)(d) of the Regulations. Section 14(1)(d) does not limit how the Respondent may 'deal with' such a matter. In his letter of 21 March 2023, the Respondent did not say that he had no function to 'investigate' a complaint about the handling of Mr Knight's 2013 complaint. Rather, as noted, his response was that he had 'no authority to consider' that matter at all. I do not consider that he had no authority, as stated.<sup>7</sup>

### **PART III SUBMISSIONS**

#### **Ground 1(a) - Counselling**

14. Ground 1(a) proceeds from a misunderstanding of the Decision. The delegate did not find that, because Mr Knight could seek counselling from Open Arms, he was not required to decide whether he should make a referral for counselling, and nor did he

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<sup>5</sup> Note that the power in s 14B to recommend reparation payments for 'old complaints' has no application to the present case because it only relates to complaints made to the DFO on or after 1 December 2016 but before the 'amendment day' of 16 December 2017: see s 14B(2)(a).

<sup>6</sup> *Knight v DFO* at [99] and [103]-[104].

<sup>7</sup> *Knight v DFO* at [107].

refuse to exercise his jurisdiction.<sup>8</sup> Rather, the delegate chose to deal with the fresh complaint by considering each of the 'responses' Mr Knight sought to his fresh complaint (including counselling) and whether they were appropriate, and making a decision to take no further action.<sup>9</sup>

15. The delegate found that facilitating counselling was inappropriate was because Mr Knight was already able to access counselling services without charge through Open Arms, and did not require a referral from the DFO.<sup>10</sup>

16. Mr Knight contends that the Decision was wrong because his ability to self-refer to Open Arms is 'irrelevant' to how the delegate may deal with a complaint under s 14(1)(d).<sup>11</sup> However, the fact Mr Knight could self-refer to Open Arms was not irrelevant in the sense referred to in *Peko-Wallsend*, where Mason J explained:

Where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard.<sup>12</sup>

17. Section 14(1)(d) does not contain limitations on what the DFO may take into account in dealing with a complaint previously dealt with by DART. Whether an outcome sought by Mr Knight was something that he himself could seek is not an irrelevant matter in light of any expressed or any implied limitation in the Act or Regulations. Indeed, Mr Knight's ability to self-refer and access counselling services without charge through Open Arms was plainly relevant to how the DFO could 'deal with' his fresh complaint, and the specific 'response' that Mr Knight sought.

18. Accordingly, it was open to the DFO to take this matter into account.

### **Ground 1(b) – Restorative engagement conference**

19. Mr Knight submits that the delegate misunderstood what he was seeking and therefore made a 'factually wrong' decision.<sup>13</sup> He states he was not seeking a restorative engagement conference in relation to how DART dealt with his 2013 complaint; rather, he wanted a restorative engagement conference in relation to the substance of his 2013 complaint.

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<sup>8</sup> Cf Applicant's submissions (AS) [24].

<sup>9</sup> CB 472.

<sup>10</sup> CB 471.

<sup>11</sup> AS [24].

<sup>12</sup> *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Ltd & Ors* (1986) 162 CLR 24 at 39-40 (Mason J).

<sup>13</sup> AS [25].



20. Mr Knight submits that the delegate misunderstood what he was seeking and therefore made a 'factually wrong' decision.<sup>14</sup>
21. It is now uncontroversial that the DART had 'dealt with' Mr Knight's excluded complaint,<sup>15</sup> and it was thus an excluded complaint as defined in s 5 of the Regulations. The Decision acknowledged that Mr Knight continued to seek 'outcomes' in relation to his excluded complaint; however, considered that that excluded complaint had been dealt with.<sup>16</sup> This did not misunderstand what Mr Knight sought and was accordingly not factually wrong.
22. Even if the delegate misunderstood what Mr Knight was seeking (which is denied, for reasons set out above), it does not follow that the Decision is affected by error. Mr Knight's contention misunderstands the DFO's function under s 14(1)(d). That function does not extend to dealing with the 2013 complaint itself. It is not a 'reconsideration' or internal review of the 2013 complaint.
23. There are five reasons why this is so:
24. *First*, as Button J found in *Knight v DFO*, s 14(1)(d) does not confer the function of investigating or conducting an investigation into the handling of an excluded complaint by the DART.<sup>17</sup> It follows that there is no function in s 14(1)(d) to investigate the excluded complaint and offer outcomes in respect of it.
25. *Second*, the power under s 14(1)(d) does not allow the DFO to undertake functions in s 14(1)(a) in relation to an excluded complaint. Given its context in s 14(1), s 14(1)(d) must be intended to serve a purpose which supplements (in the sense that it does not confound or merely replicate) the other functions in the preceding paragraphs of s 14(1), namely the 'appropriate action' function in paragraph (a), the 'ancillary or incidental' function in paragraph (b) and the 'inquiring into' function in paragraph (c). Section 14(1)(d) must therefore be read in a way that does not empower the DFO to undertake the function in s 14(1)(a) in relation to an excluded complaint, such as using a process to address or resolve the excluded complaint.
26. *Third*, the outcomes referred to in s 14(1)(a) are carefully worded so as to be available in specific circumstances. To consider that 'dealing with' any matter relating to an excluded complaint pursuant to s 14(1)(d) could apply more generally is not consistent with the statutory scheme and defeats the carefully drawn limitations in s 14(1)(a).
27. *Fourth*, if 'dealing with' a matter arising from an excluded complaint permitted taking the 'appropriate action' under s 14(1)(a) of the Regulations, this would circumvent the intention of introducing the distinction between a 'new complaint' and 'excluded complaint'. That is, a s 14(1)(d) complaint could effectively achieve the same outcomes as a 'new complaint', rendering the delineation between an 'excluded

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<sup>14</sup> AS [25].

<sup>15</sup> *Knight v DFO* at [74].

<sup>16</sup> CB 471.

<sup>17</sup> *Knight v DFO* at [100] and [104].



complaint' and a 'new complaint' nugatory, contrary to the apparent legislative intention of limiting the DFO's role to responding to new complaints of abuse.

28. *Fifth*, s 14(1)(d) refers to functions that involve matters 'relating to' excluded complaints, rather than the handling or resolution of the excluded complaints themselves. The phrase 'relating to'<sup>18</sup> indicates a connection or association with these complaints, but it stops short of authorising direct engagement with them.
29. The delegate was correct to understand that the DFO's functions under s 14(1)(d) to deal with matters relating to previous complaints did not extend to dealing with the excluded complaint (here the 2013 complaint), and providing a response to that complaint. Accordingly, the delegate did not make a 'factually wrong' decision; rather, Mr Knight's understanding was misconceived.

### **Ground 1(c) – Ex-gratia payment**

30. Similar to Ground 1(b), Mr Knight contends that his request for an ex-gratia payment was misunderstood because he was not seeking a payment based on how DART dealt with his 2013 complaint, but a replacement payment for what he should have received from DART before being deemed ineligible by a Ministerial directive.<sup>19</sup>
31. Once again, this response sought by Mr Knight in his fresh complaint was directed to the 2013 complaint, not the way DART dealt with his 2013 complaint. For the same reasons as those given at [23]-[29] above, this misunderstands the DFO's function under s 14(1)(d).
32. Further, Mr Knight's refers to the DFO making recommendations where an action is contrary to law, unjust, oppressive or improperly discriminatory, unreasonable (including unreasonable delay, procedural deficiencies, flawed processes), based wholly or partly on a mistake of law or fact, or otherwise, in all the circumstances, wrong.<sup>20</sup> This appears to refer to s 15 of the *Ombudsman Act 1976* (Cth). However, s 15 is only engaged 'after an investigation under [the] Act' which, as *DFO v Knight* makes clear, is not a function conferred under s 14(1)(d) of the Regulations. Section 15 is also only available with respect to a complaint made about the actions of a Department or a prescribed authority: the DART is neither of these.<sup>21</sup>

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<sup>18</sup> Ordinarily, 'relates to' is a wide term, and that it will depend upon context whether it is necessary that the relationship be direct or substantial, or whether an indirect or less than substantial connection will suffice: see *Re Dingjan*; *Ex parte Wagner* (1995) 183 CLR 323 at 338 (Brennan J), 347 (Dawson J), 354 (Toohey J) and 370 (McHugh J); *PMT Partners Pty Ltd (in liq) v Australian National Parks & Wildlife Service* (1995) 69 ALJR 829 at 835–836 (Brennan CJ, Gaudron and McHugh JJ) and at 845–846 (Toohey and Gummow JJ); *Re Jarman*; *Ex parte Cook* (1996) 70 ALJR 550 at 553 (Brennan CJ and Gaudron J) and 556 (Kirby J).

<sup>19</sup> AS [26].

<sup>20</sup> AS [27].

<sup>21</sup> *Ombudsman Act 1976* (Cth), s 3.



## Conclusion on Ground 1

33. Ultimately, Ground 1 proceeds from a misunderstanding of the DFO's function under s 14(1)(d) of the Regulations, and should be dismissed.

## Ground 2

34. By ground 2, Mr Knight seeks a declaration that the DFO is not limited to recommending only those outcomes that were able to be provided by the DART. In his submissions, he appears to argue that, because the DFO could 'deal with' his complaint by recommending other outcomes, but did not do so, his fresh complaint has not been 'dealt with'.<sup>22</sup>

35. It is unnecessary to determine whether the DFO's power under s 14(1)(d) extends to recommending other outcomes. This is because:

35.1. The DFO, by the Decision, has discharged the function of dealing with the fresh complaint; and

35.2. The declaratory relief Mr Knight seeks is inappropriate.

### ***The DFO has 'dealt with' the fresh complaint***

36. The meaning of 'dealt with' was extensively considered by Button J in *Knight v DFO* in relation to both whether Mr Knight's 2013 complaint had been 'dealt with' by the DART<sup>23</sup> and how the DFO may 'deal with' a matter pursuant to s 14(1)(d).<sup>24</sup> In that proceeding, Mr Knight submitted that the expression 'dealing with' a matter pursuant to s 14(1)(d) of the Regulations was broad enough to allow the DFO to recommend that Mr Knight receive one or more of the outcomes specified by s 14(1)(a).<sup>25</sup>
37. Button J observed that, as a matter of ordinary language, 'when the expression 'dealt with' is used in respect of an item, it means that item has been addressed or handled by the body charged with dealing with it.'<sup>26</sup> Her Honour did not need to precisely set the limits of s 14(1)(d) because she concluded that it did not involve an investigative function.<sup>27</sup> However, her Honour observed that 'considering the handling of a prior complaint in some way ...falls within the 'function of dealing with any matter relating to complaints previously made to, and dealt with by, the [DART]' under s 14(1)(d) of the Regulations'.<sup>28</sup>

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<sup>22</sup> AS [36].

<sup>23</sup> *Knight v DFO* at [55]-[74].

<sup>24</sup> *Knight v DFO* at [104], [107].

<sup>25</sup> *Knight v DFO* at [83].

<sup>26</sup> *Knight v DFO* at [59].

<sup>27</sup> *Knight v DFO* at [100], [104].

<sup>28</sup> *Knight v DFO* at [107].

38. Similar to her Honour, this Court does not need to precisely define the limits of s 14(1)(d) of the Regulations. Whatever those metes and bounds are, it cannot extend to considering, and responding to, the substance of an excluded complaint.
39. The DFO has, in this case, done what was required to 'deal with' the fresh complaint. The DFO expressly considered each of the responses that Mr Knight sought from the DFO in response to his fresh complaint. It did so through the lens of considering the handling of the 2013 complaint by DART, not the substance of his 2013 complaint, consistent with the definition of excluded complaint in s 5 of the Regulations and *Knight v DFO*. It then actively engaged with each of the responses Mr Knight sought from the DFO in relation to the fresh complaint, and whether or not they were appropriate. That constituted 'dealing with' the 'matter' (i.e., the fresh complaint), and nothing further was required by s 14(1)(d) of the Regulations.

***The declaration relates to outcomes not sought***

40. Mr Knight seeks a declaration that, under s 14(1)(d), the DFO, is not limited to offering the same 'outcomes' as the DART in response to a complaint. Put another way, Mr Knight seeks a declaration that 'dealing with' for the purposes s 14(1)(d) is not limited to an outcome involving 'a one-off reparation payment of up to \$50,000; referral for free counselling; participation in the restorative engagement program; referral of matters to civilian police; and referral to the Chief of the Defence Force (CDF) for administrative and/or disciplinary sanction or management action.'<sup>29</sup>
41. Mr Knight does not identify what those other 'outcomes' the DFO may recommend are, or even what they could be. Rather, the broadly drafted declaration seeks relief of an open-ended nature.
42. More significantly, however, the fresh complaint sought three responses, and those responses were considered. Whether other responses (whatever they may be) could be considered in dealing with any matter relating to a previous complaint did not arise from the fresh complaint. Each of the responses sought by Mr Knight was considered by the DFO and thus there is no legal controversy to be quelled by the issuing of a declaration.<sup>30</sup> It is a hypothetical question, that goes to what might be done by the DFO in dealing with a different matter relating to a complaint previously made to and considered by DART, and which might arise in an entirely different set of circumstances.<sup>31</sup> What s 14(1)(d) permits, or requires, cannot be considered in a vacuum. It must be considered in the specific context of the 'matter' which the DFO is tasked with dealing with, which is why such a broad declaration is inappropriate.

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<sup>29</sup> *Knight v DFO* at [7].

<sup>30</sup> *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-357; *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 24.

<sup>31</sup> For example, it is conceivable that a 'matter relating to complaints previously made to, and dealt with by, the [DART]' is a freedom of information request for a DART record. The DFO, who hold the records of DART, in dealing with that 'matter' (i.e., freedom of information request) would likely be the 'agency' required to respond under the relevant legislation.



## PART IV OTHER MATTERS

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### Jurisdiction

43. This proceeding is brought under s 39B of the *Judiciary Act 1903* (Cth) and the Court plainly has jurisdiction to hear the matter on this basis.
44. For completeness, and to ensure no error as to jurisdiction, the DFO notes that ground 1 refers to the *Administrative Decisions Judicial Review Act 1977* (Cth) (**ADJR Act**). To the extent that the ADJR Act is referred to by way of illustrative particulars, no issue of competency arises.<sup>32</sup> However, should Mr Knight rely on jurisdiction arising under the ADJR Act, the DFO contends that the Decision is not a decision to which the ADJR Act applies. This is because the action available to the DFO under s 14(1)(d) of the Regulations is not an action which would confer, alter or otherwise affect legal rights or obligations: such action only involves non-binding and non-enforceable recommendations.<sup>33</sup>

## PART V CONCLUSION

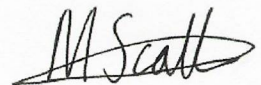
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45. For the reasons explained in these submissions, the application should be dismissed. The DFO does not seek costs in view of Mr Knight's ongoing incarceration.
46. As noted in the Decision, it is acknowledged that Mr Knight continues to seek a 'payment' arising from the matters in the 2013 complaint. The DFO notes that other Commonwealth schemes may be available to Mr Knight, and he may wish to explore those. Relevantly, the endorsement, or a recommendation, of the DFO is not required.

Date: 12 May 2025

**KYLIE MCINNES**

Counsel for the Respondent



For and on behalf of the  
Australian Government Solicitor  
Solicitor for the Respondent

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<sup>32</sup> Similarly to how Button J conceived of the application before her Honour: see *Knight v DFO* at [118].

<sup>33</sup> *Griffith University v Tang* (2005) 221 CLR 99 at [80], [89]; *Fitzwarryne v Commonwealth Ombudsman* [2023] FCA 175 at [39]-[40].