

NOTICE OF FILING

Details of Filing

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File Title: MOIRA DEEMING v JOHN PESUTTO
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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Form 59
Rule 29.02(1)

Affidavit of Jeremy Joseph Marel

VID 1023 of 2023

Federal Court of Australia
District Registry: Victoria
Division: General

Moira Deeming

Applicant

John Pesutto

Respondent

Affidavit of: **Jeremy Joseph Marel**
Address: Level 7, 135 King Street Sydney NSW 2000
Occupation: Solicitor
Date: 27 August 2024

I, Jeremy Joseph Marel, Level 7, 135 King Street Sydney NSW 2000, say on oath:

Introduction

- I am a solicitor employed by Giles George Pty Ltd (**Giles George**), the solicitors on the record for the Applicant, Moira Deeming MP, in this proceeding. I work under the supervision of Patrick George, a Principal of Giles George and the solicitor on the record for Mrs Deeming.
- This affidavit is sworn in support of Mrs Deeming's Interlocutory Application filed on 27 August 2024, which seeks an order setting aside the Respondent's Notice to Produce dated 21 August 2024.

Exhibit JJM-1

- Exhibited to this affidavit is a paginated bundle of documents marked '**Exhibit JJM-1**'.

Filed on behalf of (name & role of party)	Moira Deeming, Applicant
Prepared by (name of person/lawyer)	Patrick George, Solicitor
Law firm (if applicable)	Giles George
Tel 1300 163 662	Fax
Email	patrick.george@gilesgeorge.com.au jeremy.marel@gilesgeorge.com.au petar.strkall@gilesgeorge.com.au
Address for service (include state and postcode)	Level 7, 135 King Street Sydney NSW 2000

[Form approved 01/08/2011]

Correspondence

4. On 7 December 2023, Giles George received a letter from the solicitors for the Respondent (**Minter Ellison**) in which it was alleged that Mrs Deeming (or someone on her behalf) had provided a copy of the Statement of Claim to the media prior to serving it. A copy of that letter is at pages 1-2 of Exhibit JJM-1.
5. On 21 December 2023, Giles George sent a letter to Minter Ellison in reply to Minter Ellison's letter of 7 December 2023. A copy of Giles George's letter of 21 December 2023 is at pages 3-4 of Exhibit JJM-1 and a copy of its enclosure is at page 5 of Exhibit JJM-1.
6. On 14 June 2024, Giles George received a letter from Minter Ellison, a copy of which is at pages 6-8 of Exhibit JJM-1.
7. On 17 June 2024, Giles George sent a letter to Minter Ellison in reply to Minter Ellison's letter of 14 June 2024. A copy of Giles George's letter of 17 June 2024 at pages 9-11 of Exhibit JJM-1.
8. On 28 June 2024, Giles George filed and served Mrs Deeming's first List of Documents.
9. On 5 July 2024, Giles George received a letter from Minter Ellison about Mrs Deeming's discovery. A copy of that letter is at pages 12-18 of Exhibit JJM-1.
10. On 31 July 2024, Giles George sent a letter to Minter Ellison in response to Minter Ellison's letter of 5 July 2024. A copy of Giles George's letter of 31 July 2024 is at pages 19-22 of Exhibit JJM-1.
11. On 8 August 2024, Giles George:
 - (a) filed and served Mrs Deeming's second List of Documents; and
 - (b) received a letter from Minter Ellison which enclosed a Notice to Produce dated 8 August 2024 (**first Notice to Produce**). A copy of Minter Ellison's letter of 8 August 2024 is at pages 23-25 of Exhibit JJM-1 and a copy of its enclosure (the first Notice to Produce) is at page 26-28 of Exhibit JJM-1.
12. On 13 August 2024, Giles George sent a letter to Minter Ellison in reply to Minter Ellison's letter of 8 August 2024. A copy of Giles George's letter of 13 August 2024 at pages 29-30 of Exhibit JJM-1.
13. On 21 August 2024, Giles George received a letter from Minter Ellison which withdrew the first Notice to Produce but enclosed a second Notice to Produce (**second Notice to Produce**). A copy of Minter Ellison's letter of 21 August 2024 is at pages 31-34 of Exhibit JJM-1 and a copy of its enclosure (the second Notice to Produce) is at pages 35-37 of Exhibit JJM-1.




14. On 27 August 2024, Giles George sent a letter to Minter Ellison in reply to Minter Ellison's letter of 21 August 2024. A copy of Giles George's letter of 27 August 2024 is at pages 38-40 of Exhibit JJM-1.

Sworn by the deponent
at Sydney
in New South Wales
on 27 August 2024
Before me:

)
)
)
)
)



Signature of deponent



Signature of witness

Petar Strkalj

Petar Strkalj, Solicitor

Exhibit "JJM-1"
To the Affidavit of Jeremy Joseph Marel
Dated 27 August 2024

VID 1023 of 2023

Federal Court of Australia
District Registry: Victoria
Division: General

MOIRA DEEMING

Applicant

JOHN PESUTTO

Respondent

This is the exhibit marked "**Exhibit JJM-1**" produced and shown to Jeremy Joseph Marel at the time of swearing his affidavit on 27 August 2024.

Before me:



.....
Petar Strkalj, Solicitor

MinterEllison

7 December 2023

Mr Patrick George
Principal
Company Giles
Level 13
111 Elizabeth Street
SYDNEY NSW 2000

Dear Patrick

John Pesutto and Moira Deeming

We refer to your letter of 6 December 2023.

For the reasons set out below, your letter is, with respect, absurd.

First, as your letter correctly notes, you sent us an email at 8:22pm on 5 December 2023 asking whether we have instructions to accept service on behalf of Mr Pesutto.

Your letter, however, omits the following:

- At 6:31pm, The Australian published an article online titled "Moira Deeming lodges defamation case against John Pesutto". The Australian article contains substantial extracts from the Statement of Claim.
- At 7:21pm, the ABC published an article online titled "Victorian MP Moira Deeming lodges defamation suit against Liberal leader John Pesutto". The ABC article also cites directly from the Statement of Claim.
- Several other national media outlets had published articles by no later than 7:40pm on 5 December 2023 in relation to the fact that Ms Deeming had commenced proceedings.

Self-evidently, your client (or someone on her behalf) provided a copy of the Statement of Claim to the national media hours before you even contacted us to ask whether we had instructions to accept service.

It is extraordinary that you have issued a letter lecturing us about our conduct and our client's conduct in relation to accepting service without even a reference to the fact that your client caused for a court document to be leaked to the media before you even contacted us.

Second, your letter accuses Mr Pesutto of lying in his press conference about whether he had been served with the Statement of Claim. Mr Pesutto's answer was honest and accurate.


The only reason Mr Pesutto was even asked a question about the Statement of Claim at his press conference is because Ms Deeming elected to provide copies to her favoured media outlets before even attempting to serve the Statement of Claim on Mr Pesutto.

Finally, we request that Ms Deeming retain all copies of communications in which she provided a copy (or parts thereof) of the Statement of Claim to various media outlets. We reserve our right to issue notices to



produce for those communications at the appropriate time. We also reserve our right to provide a copy of this letter, and your letter of 6 December 2023, to the Court.

Yours faithfully
MinterEllison

A handwritten signature in black ink, appearing to read 'P. Bartlett', with a long horizontal flourish extending to the right.

Contact: Dean Levitan
T: +61 3 8608 2152 E: dean.levitan@minterellison.com
Partner: Peter Bartlett
T: +61 3 8608 2677 E: peter.bartlett@minterellison.com
OUR REF: PLB / DYL 1355973



(Your ref)

(Our ref) PG::23RRG0495
(Date) 21 December 2023
(Sent by) Email

Company (Giles)

By email: peter.bartlett@minterellison.com

Mr Peter Bartlett
Minter Ellison
Level 20
Collins Arch
447 Collins Street
Melbourne VIC 3001

Dear Mr Bartlett

MOIRA DEEMING V JOHN PESUTTO (PROCEEDINGS NUMBER VID:1023/2023)

- 1 We refer to your letter dated 7 December 2023.
- 2 In your letter you refer to various media reports referring to the Statement of Claim in these proceedings and assert our (second) letter dated 6 December 2023 'omitted' them.
- 3 However, our (second) letter of 6 December 2023 concerned the fact that there had been no response to our formal request on 5 December 2023 for confirmation whether your client had instructed you to accept service of the court documents filed that day and that there had been no response to our (first) letter dated 6 December 2023 attaching the court documents and seeking confirmation of our assumption that you had those instructions.
- 4 There is no apparent reason in practice why reference to media reports referring to court documents would or should be made in relation to the service of the court documents.
- 5 Your letter of 7 December 2023 however, having asserted the omission of reference to the media reports of the Statement of Claim in our letter, proceeded to state '*Self-evidently, your client (or someone on her behalf) provided a copy of the Statement of Claim to the national media hours before you even contacted us to ask whether we had instructions to accept service. It is extraordinary that you have issued a letter lecturing us about our conduct and our client's conduct in relation to accepting service without even a reference to the fact that your client caused for a court document to be leaked to the media before you even contacted us*'.
- 6 Our client considers that Mr Pesutto's assertion was precipitate and improper, made without any investigation of the facts, high handed and unjustifiable. His conduct entitles her to aggravated damages.
- 7 It is consistent with Mr Pesutto's conduct in making the defamatory accusations published in the various matters complained of about Ms Deeming in the first place without a proper basis or careful consideration.
- 8 The court documents were filed on 5 December 2023 at 4.17pm. They were not returned to our firm from the court with the court seal until 4.57pm. We understand they were distributed to the media by the Director Public Information, Federal Court of Australia at 5.05pm. Please see for example the email from the Director Public Information to the ABC attached.
- 9 The court documents were not provided 'on behalf of' our client to the national media by the Federal Court.
- 10 Your letter also sought to respond to Mr Pesutto's misleading and deceptive statement at the media conference on 6 December saying - "*I checked a little while ago and neither I nor my lawyers have been served...as in the last 20 minutes or so*" - that the court documents had not been served on him or his lawyers.



- 11 This statement was made despite the fact that we had asked the previous evening whether you had his instructions to accept service. In that context, his suggestion that he had checked whether they had been served 20 minutes before the media conference is Pythonesque.
- 12 Your letter however states '*The only reason Mr Pesutto was even asked a question about the Statement of Claim at his press conference is because Ms Deeming elected to provide copies to her favoured media outlets before even attempting to serve the Statement of Claim on Mr Pesutto*'.
- 13 The statement is obviously false, and in view of the fact that the court documents were distributed to the media generally by the Federal Court itself, highly aggravating to Ms Deeming.
- 14 Your letter of 7 December 2023 still did not provide any proper response to our requests for formal confirmation that your client had instructed you to accept service of the court documents. Instead, you sent a later email at 10.57am on 7 December 2023 to confirm you 'now' had those instructions and we duly served the court documents on you at 11.49am, less than an hour later.
- 15 Mr Pesutto has given no explanation for the delay in providing those instructions in the circumstances.
- 16 Our client proposes to rely upon the correspondence referred to at the appropriate time in support of her claim for aggravated damages.

Yours faithfully
COMPANY GILES



Patrick George
(Principal)

From: Bruce Phillips
<Bruce.Phillips@fedcourt.gov.au>
Sent: Tuesday, December 5, 2023 5:05 PM
To: Freya Michie <Michie.Freya@abc.net.au>
Subject: Deeming V Pesutto [SEC=OFFICIAL]

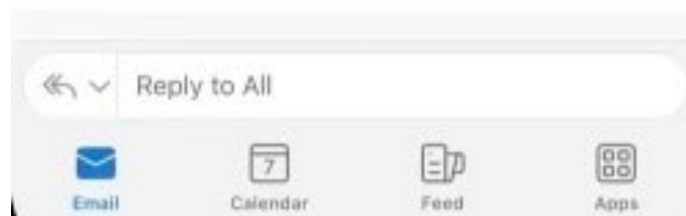
OFFICIAL

Freya,

See comcourts link. Filed late today

<https://www.comcourts.gov.au/file/Federal/P/VID1023/2023/actions>

Bruce Phillips,
Director Public Information,
Federal Court of Australia
[0419341506](tel:0419341506)



14 June 2024

Private and confidential
Not for publication

By email: patrick.george@gilesgeorge.com.au

Mr Patrick George
Giles George
Level 7, 135 King St
Sydney NSW 2000

Dear Mr George

VID1023/2023 Moira Deeming v John Pesutto (the Proceeding)

1. We refer to the article published in the *Herald Sun* at 8:08pm on 12 June 2024 titled, '*Sources familiar with Moira Deeming's defamation case say there is now virtually no prospect of the parties reaching a private settlement*' (the **Herald Sun Article**) (**Annexure A**).
2. We are highly concerned by the statements made in the Herald Sun Article, including the quote provided by your client, which continue a pattern of your client litigating this matter through the media.

Breach of the implied Harman undertaking

3. The Herald Sun Article states that "sources have told the Herald Sun Mr Pesutto's former chief of staff, Rodrigo Pintos-Lopez, urged him to sleep on a decision to make public plans to move a motion to expel Mrs Deeming hours after she attended a Let Women Speak rally on the steps of parliament in March last year."
4. That statement is a clear reference to the evidence contained at paragraph [17] of the affidavit of Rodrigo Pintos-Lopez dated 27 May 2024 (the **Pintos-Lopez Affidavit**).
5. As you are aware, the common law doctrine established in *Harman v Secretary of State for Home Department*¹ summarised by the High Court in *Hearne v Street*² is as follows:

*Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, **the party obtaining disclosure cannot, without leave of the court, use it for any other purpose other than that for which it was given unless it is received into evidence.***³
6. The Herald Sun Article does not state the source of the information provided. However, we wish to confirm that at the time of publication of the Herald Sun Article, for our part, the only persons with a copy of the Pintos-Lopez Affidavit were the Respondent's legal representatives, counsel and Mr Pintos-Lopez. The information provided to the Herald Sun was not and could not have been provided by Mr Pesutto. We have also been informed that Mr Pintos-Lopez is not the source for the Herald Sun Article.
7. The Pintos-Lopez Affidavit was provided to your client and firm pursuant to paragraph 2 of Justice Wheelahan's orders made 2 February 2024, as extended by paragraph 2 of his Honour's orders made 28 March 2024. It is clearly a document protected by the implied Harman undertaking and the disclosure of a part of its contents is in breach of the undertaking.
8. We request that you urgently investigate the source of this breach with a view to ensuring it was not caused by your client or any of Mrs Deeming's witnesses to ensure that no further breach occurs. If your investigations identify that the disclosure was caused by your client or witnesses, we request a full explanation of the circumstances of such disclosure. Further, if a contempt has

¹ [1983] 1 AC 280.

² (2008) 235 CLR 125 (at [96]).

³ *Ibid* (at [96]) (emphasis added).

been committed, then we would expect your client and/or the responsible person to inform the Court and take appropriate steps to purge the contempt.

Settlement negotiations

9. The Herald Sun Article states:

"Sources familiar with the case say there is now virtually no prospect of the parties reaching a private settlement, after further unsuccessful attempts over the past fortnight.

Asked if the matter was now certainly headed for court, Mrs Deeming said: 'It appears so, unfortunately'."

10. It is clear that your client has provided a quote to the Herald Sun in relation to the status of settlement negotiations. This is highly inappropriate and not conducive to proper and efficient conduct of the Proceeding. Correspondence regarding the litigation, and in particular concerning a potential settlement, is confidential and not for publication. Breaching that confidence will make it difficult for us and our client to continue to comply with the overarching obligations contained in s 37N of the *Federal Court of Australia Act 1976 (Cth)* (**FCA**).
11. In particular, our client has engaged in these settlement discussions in good faith and with a genuine willingness to try to resolve this dispute. In the circumstances, we consider that your client's conduct in commenting on those discussions is contrary your client's obligations in s 37N of the FCA.
12. Given this is not the first time your client has leaked this kind of information to the media, we therefore require that you impress on your client the importance that all settlement negotiations remain confidential in order to allow the parties to continue to comply with their obligations to engage in genuine good faith efforts to resolve the dispute.

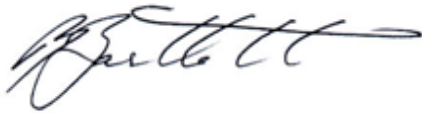
Maintenance of confidentiality in relation to discovery

13. Discovery in the Proceeding is to be exchanged on 17 June 2024. Given the matters outlined above, we are particularly concerned that your client may misuse the documents provided in discovery (or the information contained within them) and/or that there will be further breaches of the implied undertaking. Should she do so, we will not hesitate to bring this to the attention of the Court.

Conclusion

14. In light of the concerns raised above, we seek that you make inquiries of your client and confirm to us in writing:
- (a) that your client did not provide any affidavits to any person; and
 - (b) that your client was not aware of any affidavits (or parts thereof) being provided to journalists, or
- alternatively, explain what your client and/or witnesses did do and thereafter inform the Court regarding the same.
15. We further require that your client retain any messages exchanged between herself and journalists regarding the Proceeding and refrain from using any device or application that automatically deletes any such messages, which might result in the destruction of relevant evidence.
16. Please provide the required confirmation, or alternatively a full explanation of the circumstances of any disclosure, by **3:00pm** on **17 June 2024**, in advance of the discovery deadline. Our client otherwise reserves his rights.

Yours faithfully
MinterEllison

A handwritten signature in black ink, appearing to read 'Bartlett', with a long horizontal flourish extending to the right.

Contact: Dean Levitan T: +61 3 8608 2152
dean.levitan@minterellison.com
Partner: Peter Bartlett T: +61 3 8608 2677
OUR REF: PLB 1291252

Your ref /

Our ref / 23RRG0495
Date / 17 June 2024
Sent by / Email**Giles / George****By Email:** peter.bartlett@minterellison.comPeter Bartlett
Minter Ellison
Level 20
Collins Arch
447 Collins Street
Melbourne VIC 3001

Dear Mr Bartlett

**MOIRA DEEMING v JOHN PESUTTO
FEDERAL COURT OF AUSTRALIA PROCEEDING: VID 1023/2023**

- 1 We refer to your letter of 14 June 2024 (**your letter**).
- 2 We are instructed to reject the assertions made in your letter against Mrs Deeming.
- 3 The statement in 'the Herald Sun Article' to which you refer at paragraph 3 of your letter said "Mr Pesutto's former chief of staff, Rodrigo Pintos-Lopez, urged him to sleep on a decision to make public plans to move to expel Mrs Deeming hours after she attended a Let Women Speak rally on the steps of parliament in March last year".
- 4 The Herald Sun Article does not make reference to any affidavit in these proceedings or make reference to paragraph 17 of Mr Pintos-Lopez's affidavit in particular.
- 5 Mrs Deeming did not disclose the Respondent's affidavits to Mr Deery and she denies she has breached the Harman implied undertaking.
- 6 More to the point, Mrs Deeming was not the source for the Herald Sun Article.
- 7 On Wednesday evening, 12 June 2024, Mr Deery informed Mrs Deeming that he planned to run an article the next day detailing claims that Mr Pesutto was 'counselled by his chief of staff not to move an expulsion motion against her so quickly'. He did not refer to Mr Pintos-Lopez's affidavit or any other affidavit served by the Respondent and did not say he had access to them.
- 8 However, Mr Deery had previously informed Mrs Deeming, some months ago, that he had 'very reliable' sources who had told him that Mr Pintos-Lopez had warned Mr Pesutto not to act hastily, and not to make a decision on Sunday 19 March 2023 about moving for Mrs Deeming's expulsion.
- 9 This demonstrates that there were sources who had already provided Mr Deery with the claims he reported in the Herald Sun Article, before Mr Pintos-Lopez's affidavit was served.
- 10 Mrs Deeming has not provided any of the Respondent's affidavits served in these proceedings to any person and is not aware of them being provided to any journalist.
- 11 The statement in the Herald Sun Article to which you refer at paragraph 9 of your letter - that said "Sources familiar with the case say there is now virtually no prospect of the parties reaching a private settlement, after further unsuccessful attempts over the past fortnight" was not made by Mrs Deeming to Mr Deery.



12 It was put to her by Mr Deery on 12 June 2024 that there were claims (from his sources) that the case was 'now unable to be resolved amid recent settlement attempts and will certainly go to court' and she responded "It appears so, unfortunately".

13 Mrs Deeming's response did not refer to or reveal the substance of any settlement negotiations. She did not know the information the journalist had and did not seek to establish the extent of information he had when he referred to 'recent settlement attempts'. He did not provide any more detail.

14 As you know, as of 12 June 2024, Mrs Deeming had made an indicative offer to Mr Pesutto in our letter of 31 May 2024, to which there has been no response. She made no reference to that. Likewise, she did not refer to Mr Pesutto's offer in your letter of 3 June 2024 and her response in our letter of 11 June 2024.

15 Mrs Deeming does not know the sources of Mr Deery's information about the settlement negotiations as the statements were not made to him with her authority, self-evidently from the fact that he was seeking comment from her about the claims made by his sources. The timing of his request indicates that he may have been informed of our letter of 11 June 2024, and that was certainly not disclosed by her.

16 In respect of the assertions in paragraphs 9-12 of your letter, we note that Mr Pesutto and others acting on his behalf have provided comments to journalists about the substance of settlement negotiations with Mrs Deeming since this dispute arose, contrary to his obligations under the relevant provisions of the *Civil Disputes Resolution Act 2011* (Cth) and s 37N of the *Federal Court of Australia Act 1976* (Cth). For example:

- (a) The article published by The Age on 20 November 2023 entitled 'Deeming vows to sue Liberal leader Pesutto for defamation after mediation fails', which, after reporting that "Deeming refused to provide details of the mediation talks", stated:

Four sources familiar with the negotiations confirmed to The Age that the 25-minute meeting with Pesutto, Deeming and Liberal Party president Phil Davis ended over Pesutto's refusal to help reverse Deeming's expulsion from the parliamentary team, despite the pair making some progress on a draft statement.

...

One senior Liberal source, speaking on condition of anonymity to discuss the dispute, claimed Deeming was also seeking \$1 million from the opposition leader – a claim she denies.

- (b) The article published by The Age on 6 December 2023 entitled 'Pesutto claims he exhausted every effort with Deeming', which stated:

He (Pesutto) said he had put forward multiple proposals to settle that were not accepted by Deeming, but that they had constructive conversations during mediation.

"I exhausted every effort I possibly could to resolve the matter. I've been very reasonable in that. But if another party doesn't want to settle, that's a matter for them," he said.

Three sources with knowledge of the discussion, unable to speak publicly, told The Age that Pesutto had proposed to appoint a five-person panel to consider whether Deeming deserved to be returned to the parliamentary team and make a recommendation to the party room.

17 We therefore similarly require that you impress on your client his obligations in respect of the confidentiality of settlement negotiations for the same reasons set out in paragraph 12 of your letter.



18 In relation to paragraph 13 of your letter, Mrs Deeming has the same concerns about your client and we are instructed to issue the same warning in respect of any misuse of the documents provided by her in discovery in breach of the Harman implied undertaking.

19 Our client otherwise reserves her rights.

Yours faithfully

GILES GEORGE



Patrick George
Principal



5 July 2024

By email: Patrick.George@gilesgeorge.com.au

Mr Patrick George
Giles George
Level 7, 135 King St
Sydney NSW 2000

Dear Mr George

VID1023/2023 Moira Deeming v John Pesutto (the Proceeding)

1. Introduction

1.1 We refer to the orders of 2 February 2024, and extended by the orders made on 28 March 2024, 27 May 2024 and 24 June 2024 requiring the parties to give standard discovery (**Discovery Orders**). We also refer to the List of Documents served on behalf of the Applicant on 28 June 2024 and the documents discovered therewith (together, the **Applicant's Discovery**).

1.2 For the reasons set out in this letter, we consider the Applicant's Discovery is deficient in several respects.

1.3 We adopt the terms defined in the pleadings and the affidavits filed in the Proceeding.

2. Scope of discovery in the Proceeding

2.1 As you are aware, pursuant to r 20.14 of the *Federal Court Rules 2011 (the Rules)*, the parties must give discovery of documents that are directly relevant to the issues raised in the pleadings or affidavits. Relevantly, these include documents that adversely affect the party's own case or support another party's case.

2.2 Mr Pesutto's defence filed on 29 January 2024 (the **Defence**) pleads, among a number of other defences, a defence of substantial truth pursuant to s 25 of the *Defamation Act 2005 (Vic)* (**truth defence**) and a defence of contextual truth pursuant to s 26 of the *Defamation Act 2005 (Vic)* (**contextual truth defence**), including 89 particulars of truth (see Annexure A to the Defence).

2.3 The particulars of truth broadly relate to the following matters:

- (a) Ms Keen's extensive public associations with white nationalists and far-right extremists,
- (b) Ms Jones' extensive public vile anti-trans activism and rhetoric;
- (c) Mrs Deeming's relationship with and/or knowledge of Ms Keen and with Ms Jones, both prior to and after the Rally;
- (d) The Rally;
- (e) Mrs Deeming's level of involvement in organising and promoting the Rally; and
- (f) Mrs Deeming's conduct after the Rally.

2.4 Material relating to those broad topics are squarely relevant in the Proceeding.

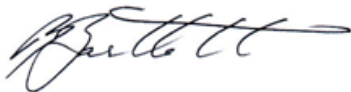
- 2.5 Mrs Deeming's Statement of Claim also pleads that the publication of the matters complained of each caused serious harm to her reputation, which our client has denied. However, it appears to us based on publicly available documents that Mrs Deeming's attendance at the Rally at which neo-Nazi's attended, Mrs Deeming's associations with Ms Keen and Ms Jones and LWS, and her response to the events at the Rally (and other matters, such as her threats to sue the Liberal Party and Mr Pesutto, and her own publications misstating what she had been accused of), have caused harm to her reputation. In the circumstances, we are concerned that your client does not appear to have made discovery of documents relating to most of those issues.
- 2.6 Further, Mrs Deeming's Statement of Claim pleads a number of matters in relation to aggravated damages. Mrs Deeming is required to discover material that may adversely affect her aggravated damages claim. By way of example, Mrs Deeming alleges that she has suffered harm by reason of a Mr Pesutto's "calculated and purposeful media campaign". In order for Mr Pesutto to test the harm caused by any alleged media campaign, Mrs Deeming must discover documents recording or relating to her communications with the media (directly or indirectly) insofar as those communications relate to the Rally (and those involved in the Rally), the suspension and the expulsion. Given the nature of your client's allegations and the inferences both parties are likely to ask the Court to draw concerning media campaigns, this should include:
- (a) Mrs Deeming's own publicity and social media posts concerning the proceeding (or her coordination of same with Ms Keen, Ms Jones and others), which appear to have republished the imputations complained of or kept these issues in the public spotlight; and
 - (b) communications your client has had with others regarding her media strategy.

3. Deficiencies in the Applicant's discovery

- 3.1 Having reviewed the Applicant's Discovery, it is plain that:
- (a) a number of the documents discovered by the Applicant are incomplete; and
 - (b) there is an obvious absence of relevant and discoverable material.
- 3.2 **Annexure A** to this letter contains a non-exhaustive list of the apparent deficiencies in the Applicant's Discovery even on a preliminary review. We anticipate it is likely further deficiencies will be identified and we will write to you regarding any such matters in due course.
- 3.3 Our client is troubled by the manifest inadequacy of Mrs Deeming's discovery, which raises further questions about Mrs Deeming's compliance with her obligations to the Court in this proceeding.
- 3.4 Annexure A reveals a series of instances of non-disclosure of relevant material. Our client is materially prejudiced by not having copies of relevant documents to defend the claim brought by Mrs Deeming.
- 3.5 We request that the Applicant remedy these deficiencies by no later than 4:00pm on **19 July 2024**.
- 3.6 We note that the issues set out at Annexure A only reflect the deficiencies we have currently identified from reviewing the Applicant's discovery. Accordingly, we invite the Applicant to conduct a meaningful review of other material in her possession, custody or control to ensure she is compliant with her discovery obligations.

Yours faithfully

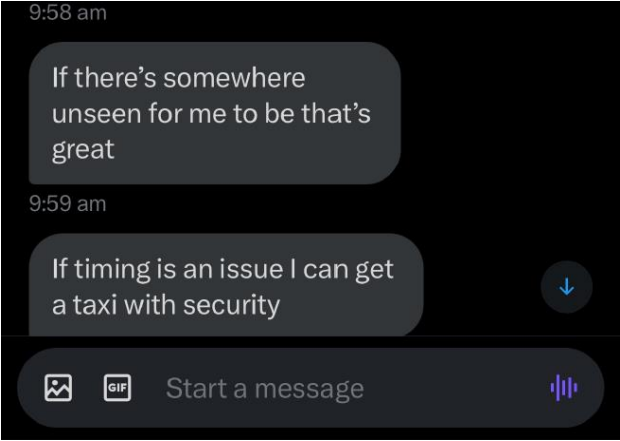
MinterEllison



Contact: Dean Levitan
 T: +61 3 8608 2152 E: dean.levitan@minterellison.com
 Partner: Peter Bartlett T: +61 3 8608 2677
 OUR REF: DAL PLB 1447570

ANNEXURE A

	Document / category of document	Deficiency
Incomplete or defective documents		
1.	Document 5 - Copy of screenshots of private messages on X between Moira Deeming and Kellie-Jay Keen	<p>There are a number of issues with this document.</p> <ul style="list-style-type: none"> • <i>First</i>, the document appears to show communications beginning on X on a date before 27 January 2023. However, the date of the first message is not visible on the screenshot. <p>The first message from Ms Keen to Mrs Deeming strongly suggests that there exist communications between Ms Keen and Mrs Deeming prior to the first visible message sent by Ms Keen in the screenshot provided.</p> <p>In circumstances where the relationship between Ms Keen and Mrs Deeming is squarely relevant to the truth defence, and our client's other defences, all communications between Ms Keen and Mrs Deeming are discoverable, including communications that may not relate to the LWS Rally. We note that Mrs Deeming deposes at [68] of her affidavit sworn on 28 June 2024 that she told the Leadership Team that she met Ms Keen the day before the Rally. The period of time that Ms Keen and Mrs Deeming have been in contact, the frequency of their contact and the topics discussed in their communications are relevant to the truth defence.</p> <ul style="list-style-type: none"> • <i>Second</i>, page 8 to page 9 of the document is not a continuous message. It appears as though certain messages between the last message on page 8 and the first message on page 9 have been excluded from the screenshot. • <i>Third</i>, page 20 to page 21 of the document is not a continuous message. It appears as though certain messages between the last message on page 20 and the first message on page 21 have been excluded from the screenshot.

		<ul style="list-style-type: none"> • <i>Fourth</i>, it appears there are messages after the final message on page 31 that have been excluded from production. The downward arrow indicates that the message chain continues beyond what is shown in the screenshot (see below). 
2.	Document 113 - Copy of WhatsApp message from Sarah Henderson John Pesutto	This is a message between Mr Pesutto and Ms Henderson. The only available inference is that the screenshot was provided by Ms Henderson to Mrs Deeming. The communications relating to and surrounding the communication in which the screenshot was provided by Ms Henderson to Mrs Deeming are discoverable.
3.	Document 146 - Copy of statement published by Kellie-Jay Keen	The statement 'published' by Ms Keen does not appear to be publicly available. Mrs Deeming is required to discover communications relating to Ms Keen's statement, including (but not limited to) the communication via which Ms Keen's statement was provided to Mrs Deeming.
Absence of apparently discoverable material		
4.	Documents referred to in the Facebook messages between Ms Jones and Mrs Deeming	<ul style="list-style-type: none"> • On 14 March 2023 at 17:39, Mrs Deeming says to Ms Jones that she has "sent that [the SWF press release] to everyone". However, Mrs Deeming has not discovered any communications in which she has "sent" the press release. The extent to which Mrs Deeming was involved in organising and promoting the Rally is plainly relevant. • On 16 March 2023 at 18:12, Mrs Deeming asked Ms Jones whether she is "coming to the security run through". This message seems to indicate that Mrs Deeming expected Ms Jones to know that there was in fact a security run through, thereby suggesting that there must exist other communications relating to the planning of the Rally which have not been discovered. Mrs Deeming has not discovered any material relating to a "security run through", nor has she discovered any documents relating to other meetings or discussions about the planning /

organising of the Rally. The extent to which Mrs Deeming was involved in organising and promoting the Rally is plainly relevant in the proceeding.

- *Fourth*, the Facebook messages between Ms Jones and Mrs Deeming appear to end on 17 March 2023 at 20:27. The nature of Mrs Deeming's relationship with Ms Jones is squarely relevant to the truth defence and our client's other defences. The Respondent is entitled to assess the nature of the relationship between Mrs Deeming and Ms Jones, who, on the Respondent's case has engaged in vile anti-trans activism and rhetoric. To the extent Ms Jones and Mrs Deeming communicated at any point after 17 March 2023, those communications are also discoverable.

5. Documents referred to in the messages on X between Ms Keen and Mrs Deeming

- At about 8:01am on 16 February 2023 (page 13 of document #5), Mrs Deeming refers to "a table of legal info". Any documents in Mrs Deeming's possession relating to the Rally, and in particular the extent to which she was involved in organising and planning the Rally, are discoverable.
- At 10:15am on 16 February 2023 (page 15 of document #5), Mrs Deeming refers to "our meeting". She has not discovered any material relating to that particular meeting or any other meeting relating to the planning of the Rally. As a matter of logic, there must exist communications relating to the planning or diarising of that meeting and other meetings attended by Mrs Deeming in relation to the Rally (e.g. an agenda, a calendar invitation). Further, Mrs Deeming's message says that she incorrectly wrote down Ms Keen's email at the meeting, which indicates that Mrs Deeming took notes during that meeting.
- At about 7:33pm on 18 February 2023 (page 17 of document #5), Mrs Deeming says to Ms Keen, "did you get the quote & the two information tables about the laws in each state?" Quite plainly there exists a communication in which Mrs Deeming provided material to Ms Keen in relation to the logistics of the Rally. Based on the previous messages, it appears as though this information was sent by Mrs Deeming to Ms Keen via email. Mrs Deeming has not discovered the communication, nor the underlying material – both of which are plainly relevant and discoverable.
- At about 11:49pm on 28 February 2023 (page 20 of document #5), Ms Keen refers to the "the doc", which is an apparent reference to a document that contains relevant information about the Rally. Given the discovered document excludes the next message in the chain, it is unclear to us whether Mrs Deeming was sent a copy of "the doc". In the event that she was, "the doc" ought to have been discovered.

		<ul style="list-style-type: none"> At 9:18pm on 10 March 2023, Mrs Deeming refers to "the invoice I forwarded to you originally". Neither the invoice nor the communication in which the invoice was forwarded has been discovered. On page 28 of the document, Mrs Deeming refers to being able to text Ms Keen "on the day & in emergencies". Please confirm that there are no text messages between Ms Keen and Mrs Deeming.
6.	Messages between Renee Heath and Mrs Deeming	Document 11 of discovery is a screenshot of text messages between Ms Heath and Mrs Deeming between 20 February 2023 and 20 March 2023. Can you please confirm that Mrs Deeming and Ms Heath did not communicate via text message after that date, and in particular in relation to the 27 March meeting.
7.	Communications involving Mrs Deeming's staff	<p>Mrs Deeming has not discovered any communications sent or received by members of her staff.</p> <p>We would, at a minimum, anticipate that Mrs Deeming communicated with her staff (whether by email, text or other means) in relation to relevant matters, including, for example:</p> <ul style="list-style-type: none"> organisational matters related to the Rally and to the meeting Mrs Deeming states had been organised with Mr Pesutto's office for 18 March 2023 and which she states was cancelled on 16 March 2023; a media / public response to her expulsion and/or suspension; her attendance or non-attendance at the relevant party room meetings; and/or the "compromise" reached at the 27 March meeting. <p>We would also expect that Mrs Deeming's staff communicated with third parties, including journalists or staff members of other MPs, in relation to the abovementioned matters. Documents of this kind are in Mrs Deeming's custody or control even if she is not a participant in the communication.</p>
8.	Communications with journalists	<p>With the exception of two discovered, Mrs Deeming has not discovered any communications with journalists in relation to the Rally, the suspension, the expulsion or her threats to sue Mr Pesutto. We wish to again record our disbelief about Mrs Deeming's continuing position that she has not (directly or indirectly) communicated with any journalists about matters that are relevant to her claim against Mr Pesutto.</p> <p>For the avoidance of doubt, where Mrs Deeming is the original source of a document provided to a journalist (in other words, she has indirectly provided that document), we consider that Mrs Deeming is required to discover copies of any such communications. For example, if Mrs Deeming has provided a copy of her concerns notices to a colleague or a staff member with the knowledge or intention that the</p>

concerns notice is to be provided to a journalist, Mrs Deeming must discover a copy of the communication in her possession. This will be plainly relevant to Mrs Deeming's aggravated damages claim.

Your ref /

Our ref / 23RRG0495
Date / 31 July 2024
Sent by / Email**Giles / George****By Email:** peter.bartlett@minterellison.comPeter Bartlett
Minter Ellison
Level 20
Collins Arch
447 Collins Street
Melbourne VIC 3001

Dear Mr Bartlett

**MOIRA DEEMING v JOHN PESUTTO
FEDERAL COURT OF AUSTRALIA PROCEEDING: VID 1023/2023**

- 1 We refer to your letter of 5 July 2024 (**your letter**), in relation to Mrs Deeming's discovery provided on 28 June 2024.
- 2 Prior to responding to the matters you have raised in 'Annexure A' to your letter, we make the following general observations.
- 3 First, paragraph 2.2 of your letter states that Mr Pesutto's Defence filed on 29 January 2024 pleads, amongst other defences, 'a defence of substantial truth pursuant to s 25' of the *Defamation Act 2005* (Vic) (**the Act**). That is not correct. Mr Pesutto pleads a defence of contextual truth under s 26 of the Act (at [49]-[65]). No defence is pleaded under s 25.
- 4 Secondly, paragraph 2.2 of your letter refers to '89 particulars of truth' pleaded at 'Annexure A' to the Defence. We repeat paragraph 3 above. As we understand it, the particulars in Annexure A to the Defence are intended to support:
 - (a) Mr Pesutto's defence of honest opinion pleaded under 31 of the Act, in that they are intended to seek to prove the substantial truth of:
 - i. the material set out in [44.3(iii)] of the Defence (being the material said to have been set out in the Media Release);
 - ii. the material set out in [45.3(iii)] of the Defence (being the material said to have been set out in the 3AW Interview);
 - iii. the material set out in [46.3(iii)] of the Defence (being the material said to have been set out in the ABC Interview);
 - iv. the material set out in [47.3(iii)] of the Defence (being the material said to have been set out in the Press Conference); and
 - v. the material set out in [48.3(iii)] of the Defence (being the material said to have been set out in the Expulsion Motion and Dossier); and
 - (b) Mr Pesutto's defence of contextual truth pleaded under s 26 of the Act, in that they are intended to seek to prove the substantial truth of:
 - i. the 'Media Release Imputation' (see [50]);



- ii. the '3AW Imputations' (see [53]);
- iii. the 'ABC Imputation' (see [56]);
- iv. the 'Press Conference Imputations' (see [59]); and
- v. the 'Expulsion Motion Imputations' (see [63]).

5 At paragraph 2.3 of your letter, you say that the particulars in Annexure A of the Defence 'broadly relate' to the six matters referred to at subparagraphs 2.3(a)-(f) of your letter.

6 We agree that the particulars in Annexure A to the Defence could be said to 'broadly relate' to the matters to which you referred at subparagraphs 2.3(a) ('Ms Keen's extensive public associations with white nationalists and far-right extremists'), 2.3(b) ('Ms Jones' extensive public vile anti-trans activism and rhetoric'), 2.3(d) ('the Rally'), and 2.3(e) ('Mrs Deeming's level of involvement in organising and promoting the Rally') of your letter.

7 In relation to subparagraph 2.3(c) of your letter ('Mrs Deeming's relationship with and/or knowledge of Ms Keen and with Ms Jones, both prior to and after the Rally'), we do not agree that this is directly raised by Annexure A of the Defence. Annexure A of the Defence makes various allegations about Ms Keen and Ms Jones. It does not allege that Mrs Deeming had a 'relationship' with Ms Keen or Ms Jones. It also does not allege explicitly that Mrs Deeming had 'knowledge' of any of the matters relating to Ms Keen or Ms Jones which are particularised (other than allegations that certain of the matters relating to Ms Keen or Ms Jones were 'notorious'). Instead, what is alleged is that Mrs Deeming had 'associations' with Ms Keen and/or Ms Jones. But the scope of those 'associations' is limited by the pleading. The associations which are pleaded are as follows:

- (a) It is alleged at [20] that Mrs Deeming 'associated herself' with Ms Keen by the conduct referred to in [16]-[19] (which was specific conduct prior to the LWS Rally).
- (b) It is alleged at [33] that Mrs Deeming 'publicly associated herself' with Ms Jones by the particular conduct referred to at [33] – namely, 'co-hosting the Rally with Jones', 'speaking at the Rally with Ms Jones', and 'featuring in' the 'Video' (referred to at [36]-[39]).
- (c) It is alleged at [57] that Mrs Deeming 'associated herself' with Ms Keen and Ms Jones by the conduct described in Parts B and C'. The conduct pleaded in Parts B and C relate to conduct prior to the LWS Rally ([16]-[20]), conduct during the Rally ([21]-[27]), and the specific conduct after the LWS Rally which is pleaded at [28]-[56].

8 We do not agree that Mrs Deeming was or is required, under the 'Discovery Orders' (as defined at paragraph 1.1 of your letter), to discover documents which broadly relate to 'Mrs Deeming's relationship with and/or knowledge of Ms Keen and with Ms Jones, both prior to and after the Rally'. Rather, she is required to discover documents which are directly relevant to the particular issues which are raised by the pleading. That relevantly includes the alleged associations between her and Ms Keen and/or Ms Jones *which have been raised in the Defence*.

9 Similarly, in relation to subparagraph 2.3(f) of your letter ('Mrs Deeming's conduct after the Rally'), the Defence pleads specific alleged conduct of Mrs Deeming after the LWS Rally. Again, we do not agree that Mrs Deeming was or is required, under the Discovery Orders, to discover documents which broadly relate to all of her 'conduct after the Rally'. Rather, she is required to discover documents which are directly relevant to the particular issues which are raised by the pleading. That relevantly includes the alleged conduct of Mrs Deeming *which has been raised in the Defence*.

10 Thirdly, in relation to paragraph 2.5 of your letter, you seem to suggest that Mrs Deeming has 'caused harm to her reputation' and that this may be relevant to whether the publications sued upon have caused or are likely to cause serious harm to her reputation. We do not agree that any of the 'issues' you have raised at paragraph 2.5 of your letter could be relevant to whether Mrs Deeming will be found to have satisfied s 10A of the Act, and at any rate none of these issues are pleaded.



- 11 Fourthly, in relation to paragraph 2.6 of your letter, we agree that Mrs Deeming was required to discover documents that are directly relevant to the issues raised by her Statement of Claim including her particulars of aggravated damages. You give the example of Mrs Deeming's allegation (at [38.6(a)] of her Statement of Claim) that Mr Pesutto engaged in a 'calculated and purposeful media campaign'. We reject the suggestion that Mrs Deeming would, by reason of this claim, be required to discover 'documents recording or relating to her communications with the media'. Paragraph [38.6(a)] of the Statement of Claim refers to a campaign by Mr Pesutto (on 19 and 20 March 2023). This directly raises the question of Mr Pesutto's communications with journalists (which should have been discovered by Mr Pesutto); not any communications by Mrs Deeming to journalists.
- 12 In relation to 'Annexure A' to your letter:
- (a) In response to row 1 of your table, for the reasons we have given at paragraphs 8 and 9 above, we do not agree that 'all communications between Ms Keen and Mrs Deeming are discoverable'. Mrs Deeming has sought to discover all communications between herself and Ms Keen (of which, after a reasonable search, she is aware) which either relate to any of the allegations about Ms Keen which are pleaded or which relate to the LWS Rally. Having said that, prompted by your letter, Mrs Deeming has undertaken further searches as a result of which she is now aware of additional communications between herself and Ms Keen which should be discovered. We will provide a copy of these documents shortly, by way of a Supplementary List of Documents.
 - (b) In response to row 2 of your table, we took the approach of discovering documents which we had obtained in the course of our retainer with Mrs Deeming which fell within the scope of the Discovery Orders, on the basis that those documents might be said to be in Mrs Deeming's 'control' (as defined in Schedule 1 of the *Federal Court Rules (2011) (Cth) (FCR)*). It therefore does not follow that Document 113 'was provided by Ms Henderson to Mrs Deeming', as you suggest. At any rate, it is also not clear why 'communications relating to and surrounding the communication in which the screenshot was provided by Ms Henderson' would be discoverable. Document 113 itself fell within the scope of the Discovery Orders; it does not follow that any other communications relating to or surrounding that document would also be discoverable.
 - (c) In response to row 3 of your table, we will be including additional communications in Mrs Deeming's Supplementary List of Documents.
 - (d) In response to row 4 of your table, we do not agree with your suggestion that, '[t]o the extent Ms Jones and Mrs Deeming communicated at any point after 17 March 2023, those communications are...discoverable'. Mrs Deeming has sought to discover all communications between herself and Ms Jones (of which, after a reasonable search, she is aware) which either relate to any of the allegations about Ms Jones which are pleaded (including in relation to the 'Jones Tweet') or which relate to the LWS Rally. Having said that, prompted by your letter, Mrs Deeming has undertaken further searches as a result of which she is now aware of additional communications between herself and Ms Jones which should be discovered. We will provide a copy of these documents shortly, by way of a Supplementary List of Documents.
 - (e) In response to row 5 of your table, we repeat paragraph 12(a) above.
 - (f) In response to row 6 of your table, we will be including additional communications in Mrs Deeming's Supplementary List of Documents.
 - (g) In response to row 7 of your table, Mrs Deeming is not aware, after a reasonable search, of any additional documents which fall within the scope of the Discovery Orders which have not already been discovered.
 - (h) In response to row 8 of your table, we repeat paragraph 11 above.



Yours faithfully
GILES GEORGE

A handwritten signature in black ink, appearing to read 'P. George', written on a light-colored background.

Patrick George
Principal



8 August 2024

By email: Patrick.George@gilesgeorge.com.au

Mr Patrick George
Giles George
Level 7, 135 King St
Sydney NSW 2000

Dear Mr George

VID1023/2023 Moira Deeming v John Pesutto (the Proceeding)

1. Introduction

- 1.1 We refer to our letter of 5 July 2024 and your response of 31 July 2024. We adopt the terms defined therein.
- 1.2 In our letter of 5 July, we set out a number of deficiencies in the Applicant's discovery. However, the following categories of documents appear to remain in dispute:
- (a) Mrs Deeming's relationship with Ms Keen;
 - (b) Matters causing harm to Mrs Deeming's reputation; and
 - (c) Mrs Deeming's communications with journalists (either directly or indirectly).

2. Mrs Deeming's relationship with Ms Keen

- 2.1 Rule 20.14 of the *Federal Court Rules 2011* (**the Rules**) requires that the parties give discovery of documents that are directly relevant to the issues raised in the pleadings or affidavits.
- 2.2 At paragraphs 8 and 9 of your 31 July letter, it is clear that your assessment as to what is discoverable is limited to matters "*which have been raised in the Defence*". That approach is plainly misconceived, and appears to have infected the position adopted in relation to the categories set out in paragraph 1.2 above.
- 2.3 Mrs Deeming's First Affidavit makes a number of references to her relationship with Ms Keen, how long she has known her and the extent to which she is aware of allegations concerning Ms Keen, including (but not limited to) the following:
- (a) At paragraph 68, Mrs Deeming deposes that during the meeting with the Leadership Team on 19 March 2023, she said that she met Ms Keen "yesterday".
 - (b) At paragraph 69, Mrs Deeming states, *inter alia*, that she told the Leadership Team that she was "shocked" when Mr Pintos-Lopez read out content about Ms Keen's associations because Mrs Deeming "had never heard or seen such allegations before".
 - (c) At paragraph 72, Mrs Deeming says that she did not believe the allegations about Ms Keen to be true because she had "been following her on mainstream TV for a decade and I had never heard such an accusation raised."

- (d) At paragraph 77, Mrs Deeming states that she told the Leadership Team that she shouldn't be held responsible "for things I did not say or do and had never heard of or seen..."
- 2.4 Mr Pesutto's First Affidavit raises the following matters in relation to Mrs Deeming's relationship with Ms Keen and knowledge about Ms Keen's background:
- (a) At paragraph 85, Mr Pesutto says that at the meeting with Mrs Deeming and the Leadership Team on 19 March 2023, he asked Mrs Deeming to explain, amongst other things, "her connection with Ms Jones and Ms Keen";
- (b) At paragraph 124, Mr Pesutto states that during the press conference he intended to convey, believed to be true, and it was his opinion that (amongst other things):
- (i) Mrs Deeming worked with the organisers of a rally with "known and established links with people who have Nazi sympathies and who promote white supremacists and ethno-fascist views..." [paragraph 124(a)]; and
- (ii) Mrs Deeming "knowingly associated with people who share a platform with neo-Nazis who peddle hate and division and attack people for who they are" [paragraph 124(d)].
- 2.5 At paragraph 28 of Mr Bach's First Affidavit, he states that during the meeting with the Leadership Team, Mrs Deeming said, in effect, "that she was not aware of Keen's or Jones's background or associations before the rally", in response to which Mr Bach said, in substance, "that cannot be right – you have relationships with them, you took them into the precinct, you shared a stage with them, you can't not have known about their backgrounds."
- 2.6 At paragraph 42 of Mrs Deeming's affidavit sworn on 23 July 2024 (**Deeming's Second Affidavit**), she states that "at some stage after this (I cannot recall precisely when), I reached out to Ms Keen to introduce myself and ask if there was anything I could do to help." [our emphasis added].
- 2.7 At paragraph 46-47 of Deeming's Second Affidavit she directly deposes to her prior knowledge of Ms Keen, stating that she was "unaware, prior to the LWS Rally, of any allegations that Ms Keen was or ever had been associated with Nazis, Nazi sympathisers, far right extremists, or white supremacists."
- 2.8 It is undeniable that Mrs Deeming's knowledge about Ms Keen and her background is an issue raised in the affidavits filed on behalf of both parties.
- 2.9 Communications passing between Ms Keen and Mrs Deeming are relevant in order to enable our client to test, and the Court to assess, the whole of that relationship, and to determine whether Mrs Deeming's denial of any knowledge about Ms Keen's background is credible and plausible.
- 3. Harm to Mrs Deeming's reputation**
- 3.1 Mrs Deeming has claimed that the publications have caused, or are likely to cause, serious harm to her reputation. In the Defence, Mr Pesutto has denied that the publications have caused serious harm to Mrs Deeming's reputation. The onus will be on Mrs Deeming to discharge that onus.
- 3.2 The Court will be required to assess whether there is a causal connection between any harm to Mrs Deeming's reputation and the publications. As part of that analysis, the Court will consider whether there were other factors that caused the harm to Mrs Deeming's reputation.
- 3.3 We note that r 20.14(2)(b) of the Act requires documents to be produced if they adversely affect the party's own case. Mrs Deeming's "case", for present purposes, is her claim of serious harm. If Mrs Deeming has documents in her custody or control that would adversely affect her claim that it is the publications (as distinct from any other factors) that have caused her serious harm, she must discover them.

4. Communications with journalists

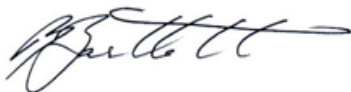
- 4.1 We do not agree with your assertion that documents recording or evidencing Mrs Deeming's contact with journalists is irrelevant to Mrs Deeming's aggravated damages claim.
- 4.2 Nevertheless, it is undeniable that Mrs Deeming's communications with journalists is relevant to a number of the assertions made in Mrs Deeming's affidavits in relation to the harm she claims to have suffered by reason of the publications.
- 4.3 By way of example, paragraph 157 to 172 of the First Affidavit relate to the "Combined Impact of the Publications". In that section, at paragraph 171, Mrs Deeming deposes the following:
- "This made me feel powerless because Mr Pesutto was out there day and night controlling the narrative while I was forced to wait and trust that the issue could be resolved privately once it was realised that what Mr Pesutto was saying was wrong. Other people kept telling me I was dumb for not dealing with the media. I was being told by journalists that Mr Pesutto or his office were backgrounding them; some of these journalists were mocking me, saying I was naïve for not responding through the media and staying silent."*
- 4.4 Documents evidencing or recording Mrs Deeming's communications with journalists will provide a legitimate basis for cross-examination in relation to the impact that Mrs Deeming alleges has been caused by the publications, and the harm she claims to have suffered.
- 4.5 Additionally, in *inter-partes* correspondence, Mrs Deeming has denied being the source of various leaks to the media, including the leaking of court documents and without prejudice correspondence. Accordingly, the Respondents are entitled to test whether Mrs Deeming was in fact the source of those leaks (either directly or indirectly).
- 4.6 In order to avoid an ongoing dispute as to whether Mrs Deeming's communications with journalists are discoverable, please find the **enclosed** a Notice to Produce dated 7 August 2024 (**Notice**), which is returnable on Wednesday 14 August 2024.
- 4.7 Documents captured by a Notice to Produce will have a legitimate forensic purpose if they are "arguably relevant or capable of providing a legitimate basis for cross-examination on credit matters..."¹ In circumstances where Mrs Deeming has asserted that her non-engagement with the media contributed to her harm, and where she has repeatedly denied leaking to the media in the course of these proceedings, the documents captured by the Notice are likely to be squarely relevant to cross-examination.

5. Next steps

- 5.1 We look forward to receiving the Applicant's further supplementary list of documents.
- 5.2 In the event that the Applicant applies to set aside the Notice, our client will rely on this letter on the question of costs. Similarly, if the Applicant fails to file a further supplementary list of documents to address the defects identified at paragraphs 2 and 3 of this letter, such that we are required to issue a notice to produce in relation to those categories of documents, we will again rely on this letter on the question of costs.

Yours faithfully

MinterEllison



Contact: Dean Levitan
 T: +61 3 8608 2152 E: dean.levitan@minterellison.com
 Partner: Peter Bartlett T: +61 3 8608 2677
 OUR REF: DAL PLB 1447570

¹ *Brand v Digi-Tech (Australia) Ltd* [2001] NSWSC 425 at [36].

NOTICE OF FILING AND HEARING**Filing and Hearing Details**

Document Lodged: Notice to Produce - Form 61 - Rule 30.28(1)
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 8/08/2024 4:35:03 PM AEST
Date Accepted for Filing: 8/08/2024 4:48:46 PM AEST
File Number: VID1023/2023
File Title: MOIRA DEEMING v JOHN PESUTTO
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing: To Be Advised
Time and date for hearing: To Be Advised
Place: To Be Advised



A handwritten signature in blue ink that reads '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.



Form 61
Rule 30.28(1)

Notice to produce

No. VID1023 of 2023

Federal Court of Australia
District Registry: Victoria
Division: General

MOIRA DEEMING

Applicant

JOHN PESUTTO

Respondents

To the Applicant:

The Respondents require you to produce the following documents before the Court at 2:15pm on 14 August 2024:

1. One copy of any document, created between 18 March 2023 and the date of this Notice to Produce, evidencing or recording communications between the Applicant and any journalist insofar as the communications refer or relate to Mr Pesutto and / or these proceedings.
2. One copy of any document, created between 18 March 2023 and the date of this Notice to Produce, evidencing or recording communications between the Applicant and any other person made for the purpose of leading to or contributing to a media publication regarding Mr Pesutto and / or these proceedings.

Date: 8 August 2024

Signed by Peter Bartlett
Lawyer for the Respondent

Filed on behalf of (name & role of party)	John Pesutto, the Respondent
Prepared by (name of person/lawyer)	Dean Levitan, Lawyer for the Respondent
Law firm (if applicable)	MinterEllison
Tel	03 8608 2152
Fax	-
Email	dean.levitan@minterellison.com
Address for service (include state and postcode)	Collins Arch, 447 Collins St Melbourne, VIC 3000

Note: If this notice specifies a date for production, and is served 5 days or more before that date, you must produce the documents or things described in the notice, without the need for a subpoena for production.

If you fail to produce the documents or things, the party serving the notice may lead secondary evidence of the contents or nature of the document or thing and you may be liable to pay any costs incurred because of the failure.

Your ref /

Our ref / 23RRG0495
Date / 13 August 2024
Sent by / Email

Giles / George

By email: peter.bartlett@minterellison.com

Peter Bartlett
Minter Ellison
Level 20
Collis Arch
447 Collins Street
Melbourne VIC 3001

Dear Mr Bartlett

**MOIRA DEEMING v JOHN PESUTTO
FEDERAL COURT OF AUSTRALIA PROCEEDINGS: VID 1023/2023**

- 1 We refer to your client's Notice to Produce dated 8 August 2024 (**NTP**) and the covering letter dated 8 August 2024 (**Your Letter**).
- 2 It is well established principle that "*a notice to produce cannot be used as an alternative to an application for discovery or for further and better discovery*" (see *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* [2012] FCA 61 at [6], [11]-[12]). On 2 February 2024, standard discovery was ordered by Justice Wheelahan in these proceedings. Mrs Deeming has, following reasonable searches, discovered all documents that are directly relevant to the issues raised by the pleadings and the evidence in accordance with rule 20.14 of the *Federal Court Rules 2011*.
- 3 The NTP attempts to go behind Mrs Deeming's affidavit of discovery served on 28 June 2024 and Mrs Deeming's affidavit of supplementary discovery served on 8 August 2024. Indeed, Your Letter states in effect at paragraph 4.6 that the NTP has been issued in lieu of your client making an application for further and better discovery.
- 4 The NTP does not however seek production of identified relevant documents known to exist where no evaluation or judgment is required, which might constitute an exception to the well-established principle above, but broad categories of documents where such an evaluation is required. The terms of the NTP are so broad that it cannot serve a legitimate forensic purpose:
 - (a) First, the documents sought under the NTP are not reasonably limited by timeframe. Both paragraphs 1 and 2 of the NTP seek the production of documents that were created from 18 March 2023 to 8 August 2024, being a period in excess of 16 months.
 - (b) Second, with the exception of Mrs Deeming, the NTP fails to specify with precision the identities of the parties involved in the communications sought under the NTP. Paragraph 1 of the NTP simply seeks the production of communications between Mrs Deeming and



unspecified journalists. Paragraph 2 is even broader, seeking communications between Mrs Deeming and “any other person”.

- (c) Third, the subject matter of the communications sought under the NTP, being A) Mrs Deeming’s communications with (unspecified) journalists to the extent that they either “*refer or relate to Mr Pesutto and / or these proceedings*” and B) Mrs Deeming’s communications with “*any person made for the purpose of leading to or contributing to a media publication regarding Mr Pesutto and / or these proceedings*” are broad and imprecise.

5 If the NTP sought documents relevant to cross-examination its terms could be directed to specific paragraphs in Mrs Deeming’s affidavit or her pleading or their content and be limited in time by reference to her evidence or the pleadings. That documents are sought over a much larger time period without reference to Mrs Deeming’s pleaded allegations or evidence suggests that NTP is “fishing” or “trawling” for documents on collateral credit issues that do not arise from the pleadings or the evidence. The Respondent’s Defence does not at any stage make any allegations about Mrs Deeming’s correspondence with media. The mere claim that a category might produce documents relevant to credit does not establish a legitimate forensic purpose for the NTP: see the principles outlined in *Thomas v SMP (International) Pty Ltd (No 2) [2010] NSWSC 870* at [19] per Pembroke J. It is not appropriate for a Court to permit a NTP to “*stand which does little more than trawl for documents which may be used to impugn the credit of a particular witness*”: see *Fried v National Australia Bank (2000) 175 ALR 194, [2000] FCA 911* at [29] per Weinberg J.

6 The unduly broad terms of the NTP suggest that the Respondent has no basis, beyond mere speculation, for seeking the production of the document sought under the NTP. Accordingly, a reasonable inference can be drawn that the NTP is little more than a “fishing” expedition. This is improper and a plain abuse of process. We therefore invite the Respondent to withdraw the NTP without delay and by **12pm on 14 August 2024**. If he fails to do so, we will seek Mrs Deeming’s instructions to file an interlocutory application to have the NTP set aside and seek an order for costs.

7 Our client reserves her rights.

Yours faithfully
GILES GEORGE



Patrick George
Principal



21 August 2024

By email: Patrick.George@gilesgeorge.com.au

Mr Patrick George
Giles George
Level 7, 135 King St
Sydney NSW 2000

Dear Mr George

VID1023/2023 Moira Deeming v John Pesutto (the Proceeding)

1. We refer to your letter of 13 August 2024 and the previous correspondence between the parties in relation to deficiencies in your client's discovery and our client's previous Notice to Produce.

Discovery / Notice to Produce

2. At paragraphs [2] and [3] of your letter of 13 August 2024, you assert that a notice to produce cannot be used as an alternative to an application for discovery and that it is an abuse of because "*it attempts to go behind Mrs Deeming's affidavit of discovery served on 28 June 2024*". With respect, the former complaint is wrong at law¹ and the second principle has no application in the present circumstances where you have openly stated that you do not consider the documents captured by the Notice to Produce to be discoverable by your client pursuant to the standard discovery order.
3. We further note that technical objections such as these have generally only been raised in recent years in situations where a notice to produce is clearly inappropriate because it seeks to circumvent a previous ruling; or where there is some inconvenience to the Court (eg. a risk of privileged documents being produced to the trial judge); or where it is issued so late that it may disrupt a trial.² That is plainly not the case here.
4. Our client is seeking prompt production of specified categories of documents which are relevant to the issues in the case, at the earliest appropriate time in the most efficient way possible, noting your client previously took almost a month to respond to our letter of 5 July 2024 criticising her discovery and, even then, justified her failures by misconstruing her discovery obligations.³
5. Our client does not want an unnecessary dispute concerning the scope of standard discovery to jeopardise the preparation of the Court Book and objections. In the circumstances, the issuing of a notice to produce was a "*convenient tool to seek the production of documents which [your client was] not willing to produce voluntarily*".⁴

¹ *McGrath v HNSW Pty Ltd* (2015) 232 FCR 532; [2015] FCA 442 (**McGrath**), [22]-[33], which explains past cases like *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* [2012] FCA 61 (**CFMEU**) and makes clear that obtaining documents from a party via a Notice to Produce is permissible, even though those same documents could have been the subject of an order for discovery, unless there is some reason it is inappropriate. See also *Jack v CoreStaff NT Pty Ltd* [2020] FCA 973 (**Jack**), [8].

² See the cases, including *CFMEU*, [12]-[13], explained in *McGrath*, [22]-[27]; See also *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 19)* [2018] VSC 798 (**Cargill**), [9]-[12], [40].

³ See our letter of 8 August 2024, which explained why the discovery approach your letter of 31 July 2024 advocated for, based solely on the positive allegations in the Defence, was wrong.

⁴ *McGrath*, [33]; *Jack*, [8], [13]. We consider that this approach was not only permissible but also consistent with the overarching purpose in s 37M of the *Federal Court of Australia Act 1976*, as it will ensure that relevant documents are available to the parties and the Court as promptly as possible: see eg. *Cargill*, [37] (applying the CPA (Vic) equivalent).

6. Given a Notice to Produce has been issued, the proper approach is to consider whether the documents sought will serve a legitimate forensic purpose, in that they are “apparently relevant” to “the issues” which will arise in the trial.⁵

Relevance of documents sought in the Revised Notice to Produce

7. We do not agree with the complaint raised in paragraph [4] of your letter about the scope of the categories in the Notice to Produce dated 8 August 2024.
8. However, in order to avoid an unnecessary dispute, we have withdrawn the Notice to Produce dated 8 August 2024 and **attach** a revised Notice of Produce (**Revised NTP**).
9. The Revised NTP is limited to:
- (a) Communications between Mrs Deeming and journalists in relation to specific and undeniably relevant topics;
 - (b) Communications between Mrs Deeming and Ms Keen prior to the Rally (other than documents which have already been discovered); and
 - (c) Communications with Ms Keen since the Rally in relation to specific and undeniably relevant topics.
10. We note that an issuing party need not establish that the documents being sought will definitely advance his or her case and it is sufficient if the documents could possibly throw light on the issues in the case or it appears to be “on the cards” that they will do so.⁶

Communications with journalists

11. We repeat and rely on paragraphs 4.2-4.5 of our letter of 8 August 2024 in relation to the relevance of documents captured by this category of the Revised NTP.
12. For completeness, we again note that Mrs Deeming baldly claims in her sworn affidavit to have felt “powerless” because, in effect, she did not engage with the media. The documents sought in category 1 of the Revised NTP are directly relevant to Mrs Deeming’s evidence in that respect. They are also relevant to a proper assessment of the reasonableness or *bona fides* of our client’s own communications with the media, alleged “media campaign” and subsequent conduct, each of which your client seeks to impugn, either in Reply to our client’s *Lange* and public interest defences or in support of Mrs Deeming’s claim for aggravated damages.
13. Further, the assertion in your letter of 13 August that the Defence does not make allegations about Mrs Deeming’s communications with the media is incorrect. We refer you to Defence [68.4] and Annexure D, as well as other paragraphs (eg. [22.2] and Annexure B, [7]), read in light of the affidavit evidence.
14. Category 1 and 2 of the Revised NTP is sufficiently targeted to the topics in sub-paragraph (a)-(i). The extent to which Mrs Deeming has communicated with journalists in relation to those topics (either directly or indirectly) will be plainly relevant to her claims that (a) she did not engage with journalists, and (b) that she felt powerless because she refrained from doing so.
15. In the circumstances, it cannot be credibly maintained that category 1 and 2 of the Revised NTP relate to “collateral credit issues”.
16. It also cannot seriously be disputed that our client has a proper basis beyond fishing to believe your client has regularly spoken to, leaked to, or otherwise put her position regarding various issues she has raised in this case through the media (whether directly or through others). Further, there are numerous references to concerns about your client’s leaks/communications in respect of

⁵ *Seven Network (Operations) Limited v Fairfax Media Publications Pty Limited* [2023] FCAFC 185 (**Seven Network**), [35]-[40]; *McGrath*, [34], [37]-[38], noting that, in any event, we still do not accept that to obtain discovery our client was required to establish every document sought was directly relevant to a positively pleaded allegation in our client’s Defence.

⁶ *Seven Network*, [36]; *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 42)* [2023] FCA 750; *Trade Practices Commission v Arnotts Ltd (No 2)* [1989] FCA 340.

each of Categories 1(a)-(i) referred to in the pleadings,⁷ affidavit evidence⁸ and *inter parties* correspondence.⁹ There are even text messages from your client's own witnesses expressing disillusionment with her leaking of confidential documents to the media.¹⁰

Communications with Ms Keen prior to 18 March 2023

17. We repeat and rely on paragraph 2 of our letter dated 8 August 2024, which established that Mrs Deeming's relationship with Ms Keen prior to the Rally is squarely in issue in the proceeding.
18. The degree to which Mrs Deeming knew Ms Keen, and had a relationship with her prior to the Rally, is raised at least four times in Mrs Deeming's First Affidavit, twice in Mr Pesutto's First Affidavit, once in Dr Bach's affidavit and at least twice in Mrs Deeming's Second Affidavit.

Communications with Ms Keen since 18 March 2023

19. We have confined this category to two very discrete matters.
20. *First*, in her Supplementary List of Documents, Mrs Deeming discovered an email from Ms Keen to Mrs Deeming on 20 March 2023 entitled 'Statement', which contained a statement by Ms Keen in relation to the Rally. The email is otherwise blank and there is no apparent connected email chain. It is curious that Ms Keen would send Mrs Deeming an unprompted or unsolicited email containing a statement about the Rally on 20 March 2023. Accordingly, the Revised NTP seeks to obtain any communications that may have prompted Ms Keen to send Mrs Deeming the statement about the Rally.
21. To this end, we note that in Part 2 of her Supplementary List of Documents, Mrs Deeming has referred to a confidential communication with a "third party" on 20 March 2023. If the communication is not with a legal representative, it is difficult to conceive of a scenario where Mrs Deeming has created a legally privileged communication with a third party 3 months before the first Concerns Notice is even issued. In any event, the document set out in Part 2 is not properly described because it deprives our client of the ability to assess whether the document is properly the subject of a privilege claim. The Supplementary List of Documents must, at a minimum, identify the name of the person with whom Mrs Deeming communicated. Mrs Deeming cannot possibly be concerned about waiving privilege merely by identifying the name of third party that she communicated with.
22. *Second*, our client is seeking communications between Ms Keen and Mrs Deeming in relation to the specific factual matters raised in our client's Defence. The paragraphs set out in the Revised NTP relate to facts alleged about Ms Keen. It is plainly 'on the cards' that communications between Ms Keen, who is a central figure on our client's pleading, and Mrs Deeming about those facts will be relevant to our client's contextual truth defence.

⁷ See, for example, our client's denial of your client's allegations concerning serious harm in respect of each matter complained of, informed further by his positive plea at [68.4] of the Defence that "*Deeming has repeatedly made or acceded to public statements falsely asserting that Pesutto has said that she is a Nazi or has Nazi associations or is a Nazi sympathiser, when he has never done anything of the sort, and has thereby acted in a manner that is likely to have caused damage to her own reputation by putting into the public domain false assertions that she has been branded a Nazi, a person with Nazi associations, or a Nazi sympathiser by the Victorian Leader of the Opposition*", and the references to your client's leaking of both the First and Second Concerns Notices pleaded in Annexure D to the Defence.

⁸ See, for example: Deeming at [143], Andrew Deeming at [62], Hodgett at [12], Concerns Notice at [3(b)], [22(e)] where your client and her witness have suggested that our client leaked the Expulsion Motion and Dossier and this was inappropriate and/or designed to hurt her; Our client's affidavits (eg. Pesutto at [109], [131], [138]-[141], Johnston at [38] to [39], Woff at [24]-[25],) where our client's witness explain the leaking or potential leaking by your client informed his decision to publish the matters complained of (including his decision to authorise distribution of the Expulsion Motion and Dossier to the rest of the press), and informed some of his media strategy and actions thereafter, which your client claims aggravated damages for. See also your client's email to her parliamentary colleagues at 6:29am on 27 March 2023 where she attempted to justify the lateness of her response/concessions in response to the Expulsion Motion as being in the "party's best interests" because of the "leaking in relation to the issue"; The dispute/furore surrounding the leaking of the Party Room Minutes, which is touched on in various affidavits (eg. Renee Heath at [49]; Pesutto Reply at [34]-[40], [57]); The furore in response to your client's leaking of her email to Mr Pesutto on 4 May 2023 (Pesutto Reply [51(b)], [72(k)], Southwick [80]-[84], and Southwick Reply [71]) which informed the motion to expel her (which your client relies on for aggravated damages); and the Leadership Team's belief thereafter that your client was not engaging in good faith but rather engaging in media stunts.

⁹ See, for example, our letters to your firm complaining about leaks of the Concerns Notices, details from the mediation, details in the Pintos-Lopez affidavit and the recent article in *The Australian* suggesting your clients claim was worth \$2m.

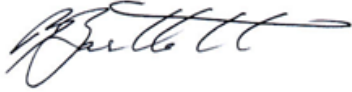
¹⁰ See the text messages between Mr Southwick and Mr Wells at DS-13 at p74.

Next steps

23. We look forward to your client's prompt production in accordance with the Revised NTP and urge your client to comply as promptly as possible to facilitate compliance with the existing timetable.
24. If Mrs Deeming applies to set aside the Revised NTP, we will rely on this letter, and our previous correspondence relating to Mrs Deeming's discovery, in relation to costs.

Yours faithfully

MinterEllison

A handwritten signature in black ink, appearing to read 'Peter Bartlett', written in a cursive style.

Contact: Dean Levitan
T: +61 3 8608 2152 E: dean.levitan@minterellison.com
Partner: Peter Bartlett T: +61 3 8608 2677
OUR REF: DAL PLB 1447570

NOTICE OF FILING AND HEARING**Filing and Hearing Details**

Document Lodged: Notice to Produce - Form 61 - Rule 30.28(1)
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 21/08/2024 2:31:50 PM AEST
Date Accepted for Filing: 22/08/2024 9:32:18 AM AEST
File Number: VID1023/2023
File Title: MOIRA DEEMING v JOHN PESUTTO
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing: To Be Advised
Time and date for hearing: To Be Advised
Place: To Be Advised



A handwritten signature in blue ink that reads '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.



Form 61
Rule 30.28(1)

Notice to produce

No. VID1023 of 2023

Federal Court of Australia
District Registry: Victoria
Division: General

MOIRA DEEMING

Applicant

JOHN PESUTTO

Respondents

To the Applicant:

The Respondents require you to produce the following documents before the Court at 2:15pm on 28 August 2024:

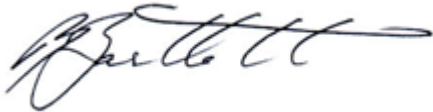
1. One copy of any communication in the period between 19 March 2023 and the date of this Notice to Produce, passing between Mrs Deeming and any journalist referring or relating to:
 - a. Mrs Deeming's meeting with the Leadership Team on Sunday 19 March 2023;
 - b. The matters complained of in this proceeding;
 - c. Mrs Deeming's speech to the Liberal party room on 27 March 2023;
 - d. Minutes of the party room meeting on 27 March 2023;
 - e. The outcome of the party room meeting on 27 March 2023;
 - f. An email sent by Mrs Deeming to Mr Pesutto on 4 May 2023;
 - g. The Concerns Notices issued on behalf of Mrs Deeming to Mr Pesutto;
 - h. The mediation conducted between Mrs Deeming and Mr Pesutto on 5 September 2023; and
 - i. The affidavits filed on behalf of the parties in this proceeding.
2. One copy of any communication, in the period between 19 March 2023 and the date of this Notice to Produce, passing between Mrs Deeming and any other person made for the purpose of leading to or contributing to a media publication referring or relating to the matters set out in sub-paragraphs (a)-(i) of the abovementioned paragraph.
3. One copy of any communication between Mrs Deeming and Ms Kellie-Jay Keen prior to 18 March 2023 (excluding documents already discovered by Mrs Deeming in this proceeding).
4. One copy of any communication between Mrs Deeming and Ms Keen since 18 March 2023 referring or relating to:

Filed on behalf of (name & role of party)	<u>John Pesutto, the Respondent</u>
Prepared by (name of person/lawyer)	<u>Dean Levitan, Lawyer for the Respondent</u>
Law firm (if applicable)	<u>MinterEllison</u>
Tel	<u>03 8608 2152</u> Fax <u>-</u>
Email	<u>dean.levitan@minterellison.com</u>
Address for service (include state and postcode)	<u>Collins Arch, 447 Collins St Melbourne, VIC 3000</u>

[Form approved 01/08/2011]

- a. A statement by Ms Keen on about 20 March 2023 in relation to the Rally; and
- b. The facts pleaded in the following paragraphs of Annexure A to the Defence:
 - i. 9-10;
 - ii. 15;
 - iii. 37-39; and
 - iv. 58-81.

Date: 21 August 2024



Signed by Peter Bartlett
Lawyer for the Respondent

Note: If this notice specifies a date for production, and is served 5 days or more before that date, you must produce the documents or things described in the notice, without the need for a subpoena for production.

If you fail to produce the documents or things, the party serving the notice may lead secondary evidence of the contents or nature of the document or thing and you may be liable to pay any costs incurred because of the failure.

Your ref /

Our ref / 23RRG0495
Date / 27 August 2024
Sent by / Email

Giles / George

By Email: peter.bartlett@minterellison.com

Peter Bartlett
Minter Ellison
Level 20
Collins Arch
447 Collins Street
Melbourne VIC 3001

Dear Mr Bartlett,

**MOIRA DEEMING v JOHN PESUTTO
FEDERAL COURT OF AUSTRALIA PROCEEDING: VID 1023/2023**

- 1 We refer to previous correspondence in relation to Mrs Deeming's discovery – namely:
 - (a) your letter of 5 July 2024 (**your 5 July letter**) in relation to Mrs Deeming's discovery provided on 28 June 2024 (**Mrs Deeming's June discovery**);
 - (b) our letter in reply of 31 July 2024 (**our 31 July letter**);
 - (c) Mrs Deeming's supplementary discovery provided to you by email at 3.43pm on 8 August 2024 (**Mrs Deeming's August discovery**);
 - (d) your letter of 8 August 2024 sent to us by email at 5.07pm on 8 August 2024 (**your 8 August letter**) which served a Notice to Produce (**First NTP**);
 - (e) our letter in reply of 13 August 2024 (**our 13 August letter**); and
 - (f) your letter of 21 August 2024 (**your 21 August letter**) which served a second Notice to Produce (**Second NTP**).
- 2 Given we are now less than 21 days from the start of the trial on 16 September 2024, we do not see it as a productive use of our time or resources to respond to each and every assertion made in your 8 August letter and your 13 August letter. Where we have not responded to a particular assertion, however, this is not intended to be, and should not be taken by your client as, an acceptance of any of those assertions to which we do not respond.
- 3 We note that, following our 13 August letter, you have withdrawn the First NTP.
- 4 The Second NTP is listed at 10am on 28 August 2024 before National Judicial Registrar Luxton.
- 5 The First NTP had sought, and the Second NTP now seeks, broad categories of documents dating over a more than 17 month period, both before and after publication of the matters in question. Compliance with the Second NTP will require, in effect, a second discovery process, in that it will require reasonable searches, review and determination over the entire period that discoverable documents might conceivably have existed.
- 6 Mrs Deeming was required, pursuant to r 20.14 of the *Federal Court Rules 2011* (Cth) (**FCR**), to give discovery of documents:
 - (a) that are directly relevant to the issues raised by the pleadings or in the affidavits; and



- (b) of which, after a reasonable search, she is aware; and
- (c) that are, or have been, under her control.

- 7 Mrs Deeming has sworn two affidavits of discovery, that she has discovered all documents (of which, after a reasonable search, she is aware) that are directly relevant to the issues raised by the pleadings or in the affidavits.
- 8 Contrary to your claim at paragraph 2 of your 21 August letter, it has never been our client's contention that documents that might fall within the broad categories in the First NTP or Second NTP are not discoverable and were not discovered: see, for example, document 175 in Mrs Deeming's List of Documents dated 28 June 2024. Our client's objection is that the First NTP and Second NTP in effect, due to their form and breadth, seek to fish for documents and/or go behind Mrs Deeming affidavits of discovery and/or seek better and further discovery by new categories without satisfying the strictures under the FCR and Central Practice Note: National Court Framework and Case Management (CPN-1) (see paragraphs 10.1-10.12).
- 9 Any documents that your client seeks that do not fall within the scope of r 20.14 of the FCR could not be said to be reasonably likely to add, in the end, in some way or other, to the relevant evidence in the proceeding: see *McGrath v HNSW Pty Limited (No 2)* [2015] FCA 442; 232 FCR 532 at [21].
- 10 Your clients do not in the Second NTP seek the production of specifically identified existing documents (c.f. *McGrath* at [29]) and have not established a defect or failing (c.f. *Jack v Corestaff NT Pty Ltd* [2020] FCA 973 at [13]) to discover an admitted relevant class of documents where the notice might be seen as the quick, inexpensive and efficient solution. The Second NTP falls within the cases Gleeson J described in *McGrath* at [22]-[27] where subpoenas or notices to produce were set aside shortly before trial.
- 11 In paragraphs 1, 2, and 4 of the Second NTP, your client seeks orders that would require Mrs Deeming to undertake searches to determine whether documents exist in her possession which fall within the scope of those paragraphs and then decide whether any such documents should be produced because they relate to nominated topics, over a lengthy time period. That is a form of further discovery: c.f. *McGrath* at [30].
- 12 These paragraphs in the Second NTP are drafted in such a broad and ambiguous way, requesting all communications of a class relating to broad topics over a lengthy period of time, such that it operates an oppression on Mrs Deeming in both searching and, depending on those searches, determining whether or not a document over that extended date range may fall within the scope of the Second NTP. In circumstances where standard discovery has been given, these paragraphs are inherently a fishing exhibition and/or an abuse of process and contrary to the quick, inexpensive and efficient determination of the real issues in these proceedings.
- 13 Paragraph 3 of the Second NTP seeks a category only restricted by date and party but despite acknowledging in its terms that documents in this category have been discovered you have not identified any proper basis to go behind Mrs Deeming's affidavits of discovery or why this category is a quick, inexpensive and efficient solution to an identified, let alone established, defect in discovery save in effect a bare allegation from your client that he is entitled to better and further discovery. Compliance with this category will also require Mrs Deeming to repeat part of her discovery. This category is also liable to be set aside.

Next Steps

- 14 Notwithstanding the above, our client is cognisant of her duty of ongoing discovery, and will obviously discover any additional documents she finds in the course of preparing for trial. We invite your client to withdraw the Second NTP.
- 15 At any rate, even if your client refuses to withdraw the Second NTP, our client will not be in a position to answer the Second NTP on 28 August 2024 given the breadth of the categories sought.

- 16 Further, if there is to be an application and argument about the Second NTP, then it is our strong view this will need to be heard before Justice O'Callaghan on 3 September 2024.
- 17 In these circumstances, and to allow your client time to consider this letter, we request that the Second NTP be relisted before Justice O'Callaghan on 3 September 2024, at the same time as Mrs Deeming's Interlocutory Application seeking to set aside the Second NTP (if required).

Yours faithfully
GILES GEORGE

A handwritten signature in black ink, appearing to read 'P. George', is written over a light grey rectangular background.

Patrick George
Principal