

## NOTICE OF FILING

### Details of Filing

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### Important Information

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



**MOIRA DEEMING**

Applicant

**JOHN PESUTTO**

Respondent

**RESPONDENT'S SUBMISSIONS**

**Application pursuant to s 47A(4)(a) of the *Federal Court of Australia Act 1976 (Cth)***

**1. Introduction**

- 1.1. The respondent (**Mr Pesutto**) applies under s 47A(4)(a) of the *Federal Court of Australia Act 1976 (Cth)* (**Act**) for an order pursuant to s 47A(1) of the Act that Dr Matt Bach be permitted to give testimony by audio-visual link (**AVL**) should he be required to attend for cross-examination.
- 1.2. The application is opposed by the applicant (**Mrs Deeming**).
- 1.3. Mr Pesutto relies on the affidavit of Peter Llewellyn Bartlett sworn on 16 August 2024 (**Bartlett Affidavit**).

**2. Applicable principles**

- 2.1. Section 47A(1) confers a broad discretionary power.<sup>1</sup> The power must not be exercised unless the Court is satisfied the conditions prescribed by s 47C(1)-(4) are met. Those sub-sections are directed at ensuring that sufficient technological and other facilities are in place to ensure the Court, eligible persons, and the witness, are able to see and hear each other. Subject to satisfaction of those matters, the determinative consideration is the interests of justice.<sup>2</sup> The power must be exercised in a way that best promotes the overarching purpose.<sup>3</sup> As a party seeking the favourable exercise of the discretion, Mr Pesutto must demonstrate a reason for the exercise of the discretion in his favour.<sup>4</sup>

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<sup>1</sup> *Director of the Fair Work Building Industry Inspectorate v CFMEU* (2015) 231 FCR 531, 536 [16].

<sup>2</sup> *Ibid*; *Kirby v Centro Properties Ltd* (2012) 288 ALR 601, 605 [11] ('*Kirby*').

<sup>3</sup> Act s 37M; *Palmer v McGowan (No 2)* (2022) 398 ALR 524, 531-532 [40] ('*Palmer*').

<sup>4</sup> *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 3)* (2009) 181 FCR 152, 171 [78] ('*Campaign*'); *Southernwood v Brambles Ltd (No 2)* [2022] FCA 973 [44(a)] ('*Southernwood*'); *Palmer* (2022) 398 ALR 524, 532 [40].

2.2. The exercise of the discretion will be guided by the facts and circumstances of the particular case.<sup>5</sup> However, relevant considerations include:

- (a) the employment commitments of an overseas witness;<sup>6</sup>
- (b) whether credibility will be in issue;<sup>7</sup>
- (c) whether the witnesses' evidence is 'centrally important' to the case or whether it is 'more tangential to those matters of real dispute';<sup>8</sup>
- (d) the relevance of the evidence the subject of the proposed cross-examination: 'the more limited the cross-examination and the more questionable the relevance of the evidence the more limited may be the prejudice to the cross-examiner';<sup>9</sup>
- (e) whether the use of AVL will hamper the management of documents in cross-examination;<sup>10</sup> and
- (f) whether costs can be minimised by permitting a witness – particularly one who is not a party – to give evidence by AVL.<sup>11</sup>

2.3. While benefits of cross-examination in person have been described to include solemnity, immediacy, and a more satisfactory environment for assessment of the witness,<sup>12</sup> 'times have significantly moved on'.<sup>13</sup> Judges and practitioners are now accustomed to cross-examination by AVL,<sup>14</sup> and have experienced its benefits,<sup>15</sup> including the proximity to a witness it affords.<sup>16</sup> The wariness expressed in pre- COVID-19 pandemic authorities may reflect 'less secure and reliable technology'.<sup>17</sup>

### 3. Application

#### 3A. *Satisfaction of s 47C(1)-(4)*

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<sup>5</sup> Kirby 605 (2012) 288 ALR 601, 605 [11].

<sup>6</sup> Kirby (2012) 288 ALR 601, 605 [10].

<sup>7</sup> Ibid.

<sup>8</sup> *ACCC v Pirovic Enterprises Pty Ltd* [2014] FCA 544 [11]; noting there is a distinction between evidence that is 'crucial' and that which is 'contentious': *ACCC v World Netsafe Pty Ltd* (2002) 119 FCR 303, 306 [10]-[11].

<sup>9</sup> *ACCC v Pirovic Enterprises Pty Ltd* [2014] FCA 544 [11].

<sup>10</sup> Kirby (2012) 288 ALR 601, 604-605 [10].

<sup>11</sup> Ibid 605 [11].

<sup>12</sup> For example, *Campaign* (2009) 181 FCR 152, 171 [78].

<sup>13</sup> *Auken Animal Husbandry Pty Ltd v 3<sup>rd</sup> Solution Investment Pty Ltd* (2020) 147 ACSR 521, 530 [48] ('*Auken*').

<sup>14</sup> *Palmer* (2022) 398 ALR 524, 530 [32].

<sup>15</sup> *ASIC v Wilson (No 2)* [2021] FCA 808 [34], [44] ('*Wilson*'); *Tetley v Goldmate Group Pty Ltd* [2020] FCA 913 [16]; although noting that individual judges have formed different views: *Southernwood* [2022] FCA 973 [38]-[42].

<sup>16</sup> *Auken* (2020) 147 ACSR 521, 530 [49]; *Capic v Ford Motor Company of Australia Ltd* [2020] FCA 486 [19].

<sup>17</sup> *Palmer* (2022) 398 ALR 524, 531 [38].

3.1. The Bartlett Affidavit identifies the facilities and assistance that can be provided to Dr Bach to ensure the Court's technological requirements are met.<sup>18</sup> The Court can be satisfied that the requirements of s 47C(1)-(4) will be met. Further, the assistance that will be made available to Dr Bach through the solicitors' London office can give the Court a high degree of confidence in the efficient and reliable conduct of the AVL;<sup>19</sup> and impose a measure of formality and solemnity upon Dr Bach.<sup>20</sup> Dr Bach is a former member of the Legislative Assembly. He can be taken to understand the formality and solemnity involved in giving evidence. That is a matter that will be reinforced by Mr Pesutto's legal team.

**3B. *Dr Bach's personal circumstances***

3.2. Dr Bach is an Assistant Headmaster and Head of the Lower School at Brighton College, England.<sup>21</sup> The school year commences on 28 August 2024. Dr Bach is responsible for the pastoral care of 100 students, including 55 who will be entirely new to the school.<sup>22</sup> He is scheduled to teach every day (other than during the period 13-23 September, when he will be on a work trip to China), and will teach approximately 80 students across four classes, including two year 12 classes.<sup>23</sup> His absence will cause significant inconvenience to his employer, and to his students.<sup>24</sup>

3.3. Dr Bach is also a father of two children, aged 2 and 6. He shares caring responsibilities with his wife, who also works part-time. Should he be required to attend in person, his wife will be required to take time off from work in order to care for their children.<sup>25</sup>

3.4. The Bartlett Affidavit also identifies the expenses that will be incurred by requiring Dr Bach's travel to and stay in Melbourne,<sup>26</sup> which might otherwise be avoided. Those costs are material in the context of a defamation proceeding between two individuals without, for example, the resources that might be available in a case involving a media respondent.

**3C. *The nature of Dr Bach's evidence***

3.5. Mr Pesutto has filed two affidavits from Dr Bach.<sup>27</sup> His first affidavit broadly addresses:

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<sup>18</sup> Bartlett Affidavit [12]-[15].

<sup>19</sup> *Auken* (2020) 147 ACSR 521, 532 [59].

<sup>20</sup> *Ibid* 531 [51].

<sup>21</sup> *Ibid* [7(a)]

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid* [7(d)].

<sup>24</sup> *Ibid* [7(f)]

<sup>25</sup> *Ibid* [7(b)].

<sup>26</sup> Bartlett Affidavit [8]-[10]; Exhibits PLB-1-PLB-3.

<sup>27</sup> Affirmed 26 May 2024 and 16 July 2024 respectively.

- (a) his relationship and dealings with Mrs Deeming (paragraphs [6]-[11]);
  - (b) how he became aware of the events of 18 March 2023 and his preliminary opinions on those matters (paragraphs [12]-[16]);
  - (c) the events of 19 March 2023, and a meeting between the then Leadership Team (of which he was a member) and Mrs Deeming (**19 March meeting**) (paragraphs [19]-[37]); and
  - (d) at a high level, events and meetings between 20 March 2023 and 12 May 2023.
- 3.6. The first affidavit exhibits two emails Dr Bach (and his colleagues) received from Mrs Deeming.
- 3.7. Dr Bach's second affidavit responds to Mrs Deeming's account of the 19 March meeting, and to comments attributed to him by Mrs Deeming during a 27 March 2023 meeting (**27 March meeting**). No documents are exhibited to the second affidavit.
- 3.8. Dr Bach is not a party to the proceeding.<sup>28</sup> Aspects of his evidence – particularly those concerning what occurred during the 19 March and 27 March meetings – might be contentious, but it cannot, in our submission, fairly be said that they will be crucial or determinative of any issues in dispute.<sup>29</sup> Dr Bach is one of six witnesses who will give evidence regarding what occurred during the 19 March meeting.<sup>30</sup> Dr Bach is one of four of Mr Pesutto's witnesses who will give evidence regarding the 27 March meeting. Mrs Deeming has filed evidence from seven witnesses regarding the 27 March meeting.<sup>31</sup>
- 3.9. Mrs Deeming's position is one of not consenting to the application, '[g]iven that we think there will be a real dispute about Dr Bach's evidence, particularly in relation to his evidence as to what occurred at the meetings on 19 March 2023 referred to at [19]-[37] of his affidavit, and that his credit will likely be the subject of challenge, and in light of his Honour's comments at the case management hearing (at T3.21-28)'.<sup>32</sup>
- 3.10. There is and could be no suggestion Dr Bach's evidence will be critical or decisive; that his cross-examination will be lengthy; or that his cross-examination will be hampered by it occurring via AVL. That his evidence is contentious and may be the subject of challenge does

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<sup>28</sup> Cf *Palmer* (2022) 398 ALR 524.

<sup>29</sup> Cf *Deputy Commissioner of Taxation v Binetter* (2017) 104 ATR 858, 863 [7]-[8].

<sup>30</sup> The others being the Mrs Deeming, Mr Pesutto, Ms Crozier, Mr Southwick, and Mr Pintos-Lopez.

<sup>31</sup> Mrs Deeming, Mr Hodgett, Ms Heath, Mr McCracken, Mr Wells, Mr Riordan and Mr Smith.

<sup>32</sup> Bartlett Affidavit [16], Exhibit PLB-4.

not mean it is key or warrants the expenditure and inconvenience caused by requiring Dr Bach's attendance in person.

**4. Conclusion**

- 4.1. Having regard to the specific facts and circumstances of the case and the overarching purpose, Mr Pesutto respectfully requests that an order permitting Dr Bach to give evidence by AVL be made.

**Date: 16 August 2024**

**M J COLLINS**

**H JAGER**

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**MinterEllison**

Solicitors for the Respondent