HIGH COURT OF AUSTRALIA

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# SUPREME COURT OF VICTORIA
## COURT OF APPEAL

S EAPCI 2024 0088

AUNTY ALMA THORPE — First Applicant

and

UNCLE ROBBIE THORPE — Second Applicant

and

ROD RATCLIFFE, PROTHONOTARY — First Respondent

and

ATTORNEY-GENERAL OF VICTORIA — Second Respondent

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| **JUDGES:** | WALKER JA |
| **WHERE HELD:** | Melbourne |
| **DATE OF HEARING:** | Determined on the papers |
| **DATE OF JUDGMENT:** | 17 December 2025 |
| **MEDIUM NEUTRAL CITATION:** | [2025] VSCA 332 |
| **JUDGMENT APPEALED FROM:** | *Thorpe v Prothonotary* [2024] VSC 360 (O'Meara J) |

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PRACTICE AND PROCEDURE – Applicants sought to file document headed 'Writ' – Prothonotary refused to accept document for filing – Applicants did not seek that the Court exercise its power pursuant to r 28.04(5) – Primary judge did not decide whether to direct First Respondent to accept document for filing – No determination capable of being appealed – Leave to appeal refused.

*Supreme Court (General Civil Procedure) Rules 2025*, rr 28A.04(2), 28A.04(5), 64.15(5)(iv); *Supreme Court Act 1986*, s 14D(3).

*Re Thorpe* [2024] VSCA 172; *O'Bryan v Lindholm* (2024) 74 VR 496, considered.

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**Counsel**

| | |
|---|---|
| First Applicant: | Not applicable |
| Second Applicant: | In person |
| First Respondent: | Not applicable |
| Second Respondent: | Not applicable |

**Solicitors**

| | |
|---|---|
| First Applicant: | Not applicable |
| Second Applicant: | Not applicable |
| First Respondent: | Not applicable |
| Second Respondent: | Not applicable |

WALKER JA:

1 On 25 April 2024, the applicants sought to file a document headed 'Writ' against the State of Victoria (the 'proposed Writ'). The proposed Writ sought the following relief:

> 1. A declaration that there is no internationally-supervised agreement between First Peoples and the defendant whereby First Peoples gave free, informed prior consent without coercion or manipulation to the occupation of Our Lands and usurpation of Our Law by the defendant.
>
> 2. A declaration that the defendant conducted a premeditated calculated undeclared war of invasion against First Peoples, Our Lands and Our Laws and that the war involved atrocities by the defendant against First Peoples and acts by the defendant against First Peoples contrary to Our Law and contrary to international law including genocide, crimes of aggression and crimes against humanity.
>
> 3. A declaration that the only basis for the jurisdiction claimed by the State of Victoria is the said genocidal military invasion.
>
> 4. A declaration that First Peoples' Sovereignty was never ceded.
>
> 5. An order that the defendant forthwith declare an end to hostilities and an end to the war against First Peoples.
>
> 6. An order that the defendant forthwith take all necessary steps to obtain an advisory opinion from the International Court of Justice as to whether Our Law governs all people within the purported boundaries asserted by the defendant and as to whether Our Lands belong to Us under Our Law.
>
> 7. An order that the defendant take all necessary measures to secure an investigation by the Office of the Prosecutor of the International Criminal Court into genocide by the defendant and officers of the defendant against We First Peoples.

2 On 1 May 2024, the Prothonotary rejected the proposed Writ for filing, pursuant to r 28A.04(2) of the *Supreme Court (General Civil Procedure) Rules 2015* (the '2015 Rules').[1] The Prothonotary gave written reasons for his decision.

3 On 5 May 2024, the applicants sought to file a document entitled 'Originating Motion' (the 'First Originating Motion'), in which the Prothonotary and the Attorney-General of Victoria were named as defendants. The First Originating Motion sought to have the proposed Writ filed by the Prothonotary and allocated a proceeding number.

4 On 22 May 2024, the second applicant filed a summons seeking to have the trial of the First Originating Motion listed for one day on 19 July 2024 before the Chief Justice,

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[1] I note that the *Supreme Court (General Civil Procedure) Rules 2025* (the '2025 Rules') came into operation on 8 September 2025. The 2025 Rules apply 'to every civil proceeding commenced in the Court whether before, on or after the commencement date' (r 1.05(1)). The 2025 Rules are relevantly unchanged from the 2015 Rules.

together with a different proposed judicial review proceeding lodged on 16 April 2024 concerning a separate matter.

5 On 24 May 2024, the applicants again sought to file an Originating Motion dated 5 May 2024 (the 'Second Originating Motion'). The Second Originating Motion was identical to the First Originating Motion.

6 On 3 June 2024, the Court sent an email to the second applicant concerning the various documents he had sought to file. The email said as follows:

> We note that your Originating Motion filed on 5 May 2024 and refiled on 24 May 2024 named the Prothonotary as a defendant. The Prothonotary considered that it was, therefore, inappropriate for him to be assessing the proposed documents pursuant to r 28A.04(2). The documents were forwarded to a senior deputy Prothonotary for independent consideration. Unfortunately, that person has had to take extended unexpected leave and as yet has not returned to work.
>
> We believe that a more practical solution is to refer the matter directly to a Judge in the Practice Court.
>
> Please confirm whether you agree that your writ dated 25 April, refused by the Prothonotary on 30 April, and your originating motion filed on 5 May and 24 May be referred forthwith to a Judge of the Court for consideration pursuant to r 28A.04(5). This will allow a Judge to consider whether they will direct the Prothonotary to issue any or all of the proposed documents.

The final paragraph is the paragraph relevant to the present application for leave to appeal, and I will refer to it as 'the relevant paragraph'.

7 Rule 28A.04(5) provides that a judge of the Court may direct the Prothonotary to seal a document with a filing date.

8 On 4 June 2024, the second applicant replied to the Court's email of 3 June 2024. His email commenced with the following statement:

> Please respond forthwith to my numbered notes inserted in your email seeking my consent to your proposed agreement.

9 The second applicant's email then responded to the various paragraphs in the Court's email by inserting responsive text in italics. His response to the relevant paragraph was as follows:

> Please confirm whether you agree that your writ dated 25 April, refused by the Prothonotary on 30 April, and your originating motion filed
>
> *9. not "filed" but only submitted for filing*
>
> on 5 May and 24 May be referred forthwith to a Judge of the Court for consideration pursuant to r28A.04(5). This will allow a Judge to consider whether they will direct the Prothonotary to issue any or all of the proposed documents.

10 There was no further text in the second applicant's email directed to the relevant paragraph.

11 The second applicant did not point to any other correspondence in which he sought to have a judge of the Court exercise the r 28.04(5) power.

12 On 25 June 2024, the primary judge dealt with the question whether the First Originating Motion, the Second Originating Motion and the Summons should be accepted for filing. His Honour directed that each of those documents should not be accepted for filing. In the course of his decision, the judge made the following remarks about the proposed Writ:

> The second applicant did not subsequently seek, pursuant to r 28A.04(5), that the Prothonotary be directed by the Court to seal the document with a filing date. If that had occurred, such a direction would not have been made, largely for the reasons earlier identified in the written reasons of the Prothonotary.
>
> That said, the overwhelming problem with the 'Writ' is that it is laden with vague and tendentious terms and apparent concepts that are essentially political and polemical. In that regard, many terms are assigned capitalised first letters indicative of a wider (and unexplained) meaning.
>
> Albeit that the jurisdiction by which the Court might make declarations has long been recognised as attended with a degree of width, such relief may only be exercised for the purpose of settling or determining controversies of a legal character and not for the answering of abstract and ill-defined questions.
>
> In the present instance, for a host of reasons, the document concerned is not in a form appropriate to enable a civil and justiciable controversy to be discerned and determined. That is, of course, not to say that buried within the vague verbiage deployed in the 'Writ' there might not conceivably be some point appropriate for judicial determination. However, the present form of the 'Writ' is such that that cannot be discerned. In short, the 'Writ' is substantially irregular and an abuse of process.[2]

13 The applicants have not sought leave to appeal the primary judge's decision that the First Originating Motion, the Second Originating Motion and the Summons not be accepted for filing. Rather, they have sought leave to appeal against the part of the judge's decision concerning the proposed Writ extracted above. Their proposed grounds of appeal are as follows:

> 1. The judge erred in ruling that Our Aboriginal genocide writ is:
>
> (i) 'political ... polemical... tendentious ... vague ... verbiage'; and
>
> (ii) 'not in a form appropriate to enable a civil and justiciable controversy to be discerned and determined'.
>
> (iii) 'substantially irregular and an abuse of process.

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2 *Thorpe v Prothonotary* [2024] VSC 360, [10]–[13] (citations omitted) ('Reasons').

> 2. The judge erred in bad faith:
>
> (i) in ruling that Our Aboriginal email on 4 June 2024 seeking clarifications and information from the Prothonotary 'did not answer' the Prothonotary's request by email on 3 June 2024 for Our consent and agreement to the Prothonotary's proposal — when We clearly needed those clarifications and that information in order to decide whether to make a free, voluntary, informed consent to the Prothonotary's proposed agreement; and
>
> (ii) in failing to rule that the Prothonotary 'did not answer' Our said Aboriginal email on 4 June 2024 seeking the said clarifications and information — and make consequential rulings.
>
> (iii) in failing to rule that the Prothonotary deliberately misled the applicants into thinking that Our consent actually mattered rather than it being a mere formality to go through the motions of asking for Our consent only for such consent to be irrelevant to the procedure and powers of the Court — and make consequential rulings arising from that misleading conduct.

14 The applicants sought an order that the Prothonotary seal the proposed Writ for filing.

15 On 18 November 2025, the Registrar of the Court of Appeal referred the applicants' application for leave to appeal to me to determine pursuant to r 64.15(1) of the 2025 Rules. Having considered the materials filed by the applicants, I have determined, pursuant to s 14D(3) of the *Supreme Court Act 1986* and r 64.15(5)(iv) of the 2025 Rules, that the application for leave to appeal is totally without merit. The application must thus be refused. My reasons are set out below.

### *No determination capable of being appealed*

16 As McLeish JA explained in *Re Thorpe*, an appeal to the Cout of Appeal lies only where a party has a right of appeal:[3]

> In order to determine if a party has a right to appeal, it is necessary to identify whether any legislation confers that right to appeal, or whether the *Rules of the Supreme Court* do so. The scope of the right, that is, the range of decisions from which an appeal can be brought, is to be determined by reference to the particular Act which confers the right.[4] The scope of the right to appeal from a decision of a judge of the Trial Division is generally determined by reference to s 17(2) of the *Supreme Court Act 1986*.[5] No other source of the right is relevant in this case.
>
> Section 17(2) provides that, unless otherwise expressly provided by any Act, 'an appeal lies to the Court of Appeal from any determination of the Trial Division constituted by a Judge of the Court'.

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3 *Re Thorpe* [2024] VSCA 172, [9]–[12] (citations in original).

4 *O'Bryan v Lindholm* (2024) 74 VR 496, 509 [66] (Kennedy, Walker and Macaulay JJA); [2024] VSCA 130) ('*O'Bryan*'), citing *Moorabbin Transit Pty Ltd v Bekhit* (2016) 50 VR 563, 572 [37] (Tate, Ferguson and McLeish JJA); [2016] VSCA 70.

5 *O'Bryan* (2024) 74 VR 496, 510 [68] (Kennedy, Walker and Macaulay JJA); [2024] VSCA 130.

> The word 'determination' in s 17(2) is not to be given any narrow construction, but is to be construed with all the amplitude that its ordinary meaning permits.[6] Nonetheless, it has been held that the determinations in question are those made by some order or declaration which is sufficient in its own terms to resolve a matter, being a controversy or dispute between parties.[7] The 'determination' in s 17(2) is the same 'determination' which is the subject of s 17(1), which provides that the 'Trial Division constituted by a Judge of the Court may hear and determine all matters, whether civil or criminal, not required by or under any other Act or the Rules to be heard and determined by the Court of Appeal'. In other words, a 'determination' in s 17(2) is a determination which resolves a 'matter'.[8]

17 In *O'Bryan,* to which McLeish JA referred, the Court said this:

> Having regard, then, to the text, context and purpose, together with the relevant authorities, we consider that a 'determination' connotes the finalisation of a matter or other operative decision that affects rights, duties or liabilities. It would not include the making of findings of fact prior to the making of an operative decision of that kind. It is otherwise unnecessary to explore the precise parameters of a 'determination'. Whatever its precise scope, it does not extend to the findings made in the relevant paragraphs that the applicant seeks to challenge.[9]

18 In the present case, the judge did not decide whether to direct the Prothonotary to accept the proposed Writ for filing because his Honour did not consider that question to be before him.[10] There was thus no operative decision by the judge to refuse to direct the Prothonotary to accept the proposed Writ for filing. Rather, his Honour made some remarks in passing[11] setting out his views about the proposed Writ. Thus there was no determination concerning the proposed Writ from which the applicants could appeal, if given leave.[12] An attempt to seek leave to appeal from the judge's passing remarks must fail for the reasons set out in this Court's decision in *O'Bryan.*

19 None of the applicants' proposed grounds of appeal affect this conclusion. Ground 1 is directed to the substance of the judge's passing remarks. Ground 2 contends that the judge erred in concluding that the second applicant's email of 4 June 2024 'did not answer' the Court's inquiry on 3 June asking whether the second applicant agreed that the proposed Writ be referred to a judge. Regardless of the correctness of the latter

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6 *O'Bryan* (2024) 74 VR 496, 511 [71]–[72] (Kennedy, Walker and Macaulay JJA); [2024] VSCA 130, citing *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72, 78 [10]–[11] (Gaudron, Gummow, Hayne and Callinan JJ, Kirby J agreeing at 87 [40]); [2001] HCA 49.

7 *O'Bryan* (2024) 74 VR 496, 511–3 [73]–[79] (Kennedy, Walker and Macaulay JJA); [2024] VSCA 130, citing *City of Camberwell v Camberwell Shopping Centre Pty Ltd* [1994] 1 VR 163, 169 (Fullagar J) and *TGIO v Viney* (1995) 4 Tas R 236, 242, 243 (Underwood J).

8 *O'Bryan* (2024) 74 VR 496, 514 [87]–[88] (Kennedy, Walker and Macaulay JJA); [2024] VSCA 130.

9 *O'Bryan* (2024) 74 VR 496, 517 [96] (Kennedy, Walker and Macaulay JJA); [2024] VSCA 130.

10 Reasons, [10].

11 Often referred to by the Latin phrase '*obiter dicta*'.

12 I note that there is a question whether a decision by a judge of the Trial Division not to direct the Prothonotary to accept a document for filing, or to direct that a document be rejected for filing, is a determination of a kind capable of engaging this Court's appellate jurisdiction. It is not necessary for me to determine that question in the present case.

conclusion, it remains the case that the judge did not make a determination in relation to whether the Prothonotary should be directed to accept the proposed Writ for filing.

20 In any event, it is apparent from a review of the correspondence that the judge was correct — the second applicant had not answered that aspect of the Court's email. The applicants did not point to any other correspondence in which they had sought to have a judge direct the Prothonotary to accepted the proposed Writ for filing.

***Conclusion***

21 For the reasons given above, I consider that the application for leave to appeal has no prospects of success and must be refused.

22 I note, for completeness, that if the judge were to be regarded as having constructively made a determination not to direct the Prothonotary to accept the proposed Writ for filing, his Honour would have been correct to do so, for the reasons he gave.

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