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Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	6/03/2023 7:38:48 PM AEDT
Date Accepted for Filing:	6/03/2023 7:38:54 PM AEDT
File Number:	VID519/2021
File Title:	REX PATRICK v AUSTRALIAN INFORMATION COMMISSIONER
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

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Federal Court of Australia
District Registry: Victoria
Division: General

No. VID 519 of 2021

REX PATRICK
Applicant

AUSTRALIAN INFORMATION COMMISSIONER
Respondent

RESPONDENT'S SUPPLEMENTARY OUTLINE OF SUBMISSIONS ON SEPARATE QUESTION

A. INTRODUCTION

1. This supplementary outline of submissions is filed pursuant to the orders made on 24 November 2022. It addresses the new issues raised by the applicant in his Second Further Amended Originating Application (**SFAOA**) and Second Further Amended Concise Statement filed 12 October 2022 (**SFACS**) and should be read with the Respondent's Outline of Submissions on Separate Question dated 8 September 2022 (**RS**).

2. The applicant seeks relief pursuant to the ADJR Act on two bases.

3. First, he contends that the respondent is subject to a duty pursuant to s 55(4)(c) and s 55K(1) of the FOI Act "to conduct a review" of each of his relevant IC reviews "by making a decision", and that the respondent has failed to do so. The applicant contends that there has been unreasonable delay in making a decision on each IC review for the purpose of s 7 of the ADJR Act. He seeks declaratory relief and an order pursuant to s 16(3)(a) or (c) of the ADJR Act requiring the respondent to make a decision in respect of each of the relevant IC reviews by a time and date fixed by the Court (SFAOA [1] and [2]).

4. Secondly, the applicant contends that in each IC review, the respondent has engaged in "conduct for the purpose of making a decision" pursuant to s 55K(1) of the FOI Act, which is conduct for the purpose of s 6 of the ADJR Act. The applicant seeks an order of review in respect of the conduct on the ground that the making of the proposed decision under s 55K(1) would be an improper exercise of the power, because it would be an exercise of the "review powers" conferred by Div 5 of Pt VII of the FOI Act and the "decision power" under s 55K(1) in such a way that the result of the exercise of the power would be uncertain: s 6(1)(e) and 6(2)(h) of the ADJR Act (SFAOA [3]).

5. In relation to the applicant's claim under s 7 of the ADJR Act, the respondent relies on the earlier submissions, and the additional submissions in Part B of this outline. The respondent's submissions in relation to the claim under s 6 of the ADJR Act are outlined in Part C below.

6. The respondent relies on four affidavits: the affidavit of Elizabeth Hampton affirmed 5 August 2022, and affidavits of Rocelle Dowsett affirmed 22 August 2022 (**First Dowsett Affidavit**);

8 September 2022 (**Second Dowsett Affidavit**) and 6 March 2023 (**Third Dowsett Affidavit**).

B. SECTION 7(1) OF THE ADJR ACT

B1. Threshold question — competency

7. As reformulated in the SFACS, the applicant contends that ss 55(4)(c) and 55K(1) together create a duty on the respondent to decide an application for IC review by conducting a "timely" IC review which "culminates in a decision under s 55K(1) and absent an intervening method of disposal which permits the IC review to be discontinued prior to the making of a decision under s 55K(1)" under either ss 54W, 54R or 55F(2): SFACS [13]. The applicant contends that the duty to make a decision pursuant to s 55K(1) arises as soon as the respondent decides to undertake a review, and requires the respondent to conduct the review "to the endpoint of making a decision": Applicant's Supplementary Submissions dated 6 February 2023 (**AS**) [15], see also [8], [16].

8. Alternatively, the applicant contends that a duty to make a decision arises by implication: SFACS [14]. Although not clear, it appears that the applicant contends that an implied duty arises from an "inherent assumption" in Part VII of the FOI Act that an IC review will be undertaken upon the making of a decision to undertake the review, unless the respondent exercises the discretion not to conduct the review in whole or part, and that "the outcome will be a decision in accordance with Division 7": AS [7]–[10], [14(e)].

9. The applicant's contentions should not be accepted.

10. There is no dispute that s 55K(1) imposes a duty on the respondent; the issue is when the duty arises. To construe s 55K(1) and s 55(4)(c) as giving rise to a duty to make a decision on an IC review, which duty exists from the moment an IC review is commenced, is inconsistent with the plain words of s 55K(1) and unsupported by the scheme of Pt VII of the FOI Act.

11. Pt VII of the FOI Act imposes distinct duties on the respondent: the duty under s 55(4)(c) to conduct an IC review in as timely a manner as possible, having regard to (inter alia) the requirements of the FOI Act and the need to give proper consideration to the matters before the respondent, and a duty to make a decision under s 55K(1). Those duties are apt to ensure that the respondent performs the distinct functions of undertaking an IC review and, if necessary, making a decision under s 55K(1). Pt VII of the FOI Act contemplates that, in the course of an IC review, the review may be brought to an end otherwise than by a decision under s 55K(1): see ss 54R, 54W and 55F; RS [19].

12. It is not necessary to imply a duty, or to give a strained construction to Pt VII of the FOI Act, in order to avoid a "lacuna" by identifying a duty that engages s 7(1) of the ADJR Act: *cf* AS [14(a)].[1] Although the duty to conduct an IC review in as timely a manner as possible having regard to the

[1] *Cf Yasmin v Attorney-General* (2015) 236 FCR 169, 190 [89], 191 [94], 195–6 [113] (the Court).

relevant matters is not a duty to make a decision to which the ADJR Act applies,[2] in an appropriate case, a failure or refusal to perform that duty might be rectified by an order in the nature of mandamus to compel the respondent to take the steps required for the performance of the duty, relying on the Court's jurisdiction under s 39B(1) of the *Judiciary Act 1903* (Cth).[3] That is not the relief sought by the applicant.

B2. Allegations of unreasonable delay

13. If the Court finds that the respondent has a duty to make a decision on an IC review pursuant to s 55K(1) of the FOI Act, because it is not necessary that an IC review has been completed in order to engage the duty,[4] then the respondent accepts that this application for review is otherwise competent: RS [23]. The Court's task in this proceeding is then to determine whether there has been "unreasonable delay" in making a decision on each IC review.

14. The respondent's earlier submissions outline the general principles regarding the assessment of unreasonable delay, and identify the features of the FOI Act that are relevant to the assessment of the reasonableness of any delay: RS [24]–[34]. Further to RS [33], as a result of amendments to the AIC Act which came into effect on 13 December 2022, the respondent may now delegate the decision-making power in s 55K(1) of the FOI Act, and has delegated this power to the Assistant Commissioner, Freedom of Information.[5]

15. The applicant contends that the evidence reveals "many failures of process", which are said to be contrary to the requirements in s 55(4) of the FOI Act, and taken individually or together, are said to constitute both unreasonable delay for the purpose of s 7 of the ADJR Act and "relevant conduct" for the purpose of s 6 of the ADJR Act: AS [31]. Notably, the focus of the applicant's case is not limited to periods of inactivity in the conduct of the relevant IC reviews. Rather, the applicant makes a number of broad criticisms of the respondent's processes for the conduct of IC reviews under Div 6 of Pt VII, and the approach to exercising the information-gathering powers under Div 8 of Pt VII: AS [24]–[30], [33]–[40]. Before addressing the specific criticisms that the applicant makes regarding the conduct of the relevant IC reviews, it is useful to make two observations.

16. First, the assessment of whether there has been unreasonable delay in making a decision does not involve the Court undertaking a broad evaluation of the merit of the processes adopted by the respondent. The prism through which the conduct of each IC review is assessed is that of unreasonableness; a step taken by the respondent in the conduct of an IC review cannot be seen as

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2 ADJR Act, s 3 (definition of ***decision to which this Act applies***); *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337 (Mason CJ).

3 As to mandamus being the appropriate remedy, see *Commonwealth v AJL20* (2021) 273 CLR 43, 74 [53], 81 [73] (Kiefel CJ, Gageler, Keane and Steward JJ); *BHL19 v Commonwealth (No 2)* [2022] FCA 313, [180]–[186] (Wigney J).

4 The applicant does not appear to contend that the precondition in s 55K(1) has been satisfied in any of the relevant matters.

5 Third Dowsett Affidavit, [22]–[23].

contributing to unreasonable delay unless it is regarded objectively as "capricious and irrational",[6] being "conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt".[7] Any criticism of the respondent's processes (AS [28]) is irrelevant, unless those criticisms demonstrate that the conduct would objectively be regarded as unreasonable, which is an "exacting standard".[8]

17. Secondly, in assessing whether the processes employed by the respondent should be characterised as unreasonable in the legal sense, it is relevant that the manner in which an IC review is conducted is left by the legislature for the respondent to determine: s 55(2) of the FOI Act. The respondent must exercise the broad power to determine the IC review process lawfully, including within the bounds of the implied obligation of reasonableness.[9] It is for the respondent to determine the appropriate IC review process, having regard to the objects of the FOI Act stated in s 3 and as ascertained from the text and structure of the FOI Act.[10] In determining the process, it is relevant that the FOI Act does not pursue a single purpose at all costs,[11] rather it seeks to balance a number of competing objectives (see RS [34]). The assessment of the reasonableness of the respondent's processes is informed by the resolution of those competing objectives struck by the FOI Act, and is not assisted by descriptions of the respondent's function in extrinsic material (*cf* AS [2]).[12]

18. Within that general context, we turn to the nine specific alleged "failures of process" raised by the applicant. We do not address the "failures of process" alleged in relation to IC Review MR20/00544, because that review has been determined.[13]

19. **Applicant's first issue**. The first point made by the applicant, said to apply to each of the eight relevant IC reviews, is that there have been long periods of delay waiting for allocation of relevant IC reviews to a Review Adviser in the SSR team (AS [32]). The respondent's earlier submissions identified and addressed those periods of inactivity in each relevant IC review: RS [40], [45]–[51]. The applicant also complains about various shorter periods of inactivity, which are said to be unexplained (AS [32]). However, a reasonable process does not require continuous activity as though each matter was the only matter under consideration by the respondent.[14] Short periods of

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6 *Thornton v Repatriation Commission* (1981) 52 FLR 285, 291 (Fisher J).

7 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1064 (Diplock LJ), referred to in *Davis v Military Rehabilitation and Compensation Commission* [2021] FCA 1446, [15] (Logan J) (***Davis***).

8 *Davis* [2021] FCA 1446, [14] and [33] (Logan J). The long-standing approach to the concept of unreasonableness in s 7 of the ADJR Act is that it imposes a high threshold: see *Thornton* (1981) 52 FLR 285, 291–2 (Fisher J); *ASP15 v Commonwealth* (2016) 248 FCR 372, 379 [21] (the Court).

9 *Minister for Home Affairs v DUA16* [2020] 95 ALJR 54, [26]–[27] (the Court).

10 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 592 [44].

11 *Carr v Western Australia* (2007) 232 CLR 138, [5] (Gleeson CJ), approved in *Ryan v Commissioner of Police (NSW)* (2022) 290 FCR 369, 386 [110] (the Court).

12 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46-7 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Country Carbon v Clean Energy Regulator* (2018) 267 FCR 126, 154 [113]–[115] (Mortimer J); *Harrison v Melhem* (2008) 72 NSWLR 380, 402 [182]–[184] (Mason P).

13 Third Dowsett Affidavit, [75]–[76].

14 *ASP15* (2016) 248 FCR 372, 396 [140]; see also *Davis* [2021] FCA 1446, [33]: unreasonableness is an "exacting standard", which has particular stringency in claims of failure to make a decision.

inactivity, even if unexplained, do not indicate unreasonable delay. Further, any delay caused by resignation of personnel within the FOI branch should not be considered unreasonable, given that staff turnover is not a matter within the respondent's control, and any delay associated with the need to reallocate an IC review to a different Review Adviser following a resignation cannot be avoided.

20. **Applicant's second issue**. The applicant contends that the progress of all except two of the relevant IC reviews has been affected by the granting of "repetitive" extensions of time to the IC review respondents (AS [33]). The applicant's submissions have not sought to grapple with the circumstances in which each extension of time was granted: AS [33]. A conclusion of unreasonableness cannot be reached without "a close focus upon the particular circumstances" of each decision.[15] Having regard to the explanation provided at the time in support of each request for an extension of time, which in many cases included resource constraints associated with the COVID-19 response,[16] or the need to consult with other agencies or externally,[17] it cannot be said that any of the extensions of time granted were unreasonable in the relevant sense. Having regard to the large case load of the relevant team within the FOI Branch, and the limited number of staff, the failure to diligently follow up every due date is not a circumstance that has unreasonably contributed to delay.

21. **Applicant's third issue**. The applicant complains that there have been instances where decisions have been made to exercise particular information gathering powers, but the decision has not been implemented (AS [34]).

22. Relevantly, this complaint is made in relation to **MR20/00054**. In MR20/00054, the Principal Director (FOI) gave an instruction on 1 December 2020 to a Senior Review Adviser to issue a s 55U Notice to DFAT, to require production of documents and submissions. A s 55U notice was not issued at the time.[18] The evidence does not explain why the notice was not issued.[19] Given that the relevant Senior Review Adviser resigned in February 2021 and the Director of the SSR team retired in March 2021, it is possible that the task was overlooked.[20] Although an oversight of that kind would be regrettable, it is not indicative of unreasonableness in the circumstances.

23. **Applicant's fourth issue**. The applicant contends that consideration has been given to the exercise of the power under s 54W(b) not to undertake, or continue, an IC review in relation to

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15 *Minister for Home Affairs v DUA16* (2020) 95 ALJR 54, [26] (the Court).

16 See First Dowsett Affidavit: regarding MR20/00054: 16 April 2020 extension request [50], and 5 June 2020 extension request [51]. See also [52]–[53], [56] and [66]; MR20/00424: [91]; MR20/00613: [154]; MR20/00863: [200].

17 First Dowsett Affidavit: regarding MR20/00054: [52], [68], [71]; MR20/00424: [94]; MR20/00613: [155]; MR20/00760 [176]; MR20/01189 [222]; Second Dowsett Affidavit: regarding MR20/00424: [16].

18 First Dowsett Affidavit, [59]; Third Dowsett Affidavit, [49]–[50].

19 Although DFAT had not at this stage provided submissions in response to the s 54Z notice (First Dowsett Affidavit [48] – [59]), the OAIC took the view that the state of satisfaction in s 55U(3) could be reached if evidence had been sought, a reasonable opportunity given for that evidence to be provided and no evidence had been provided (Third Dowsett Affidavit at [49]).

20 Third Dowsett Affidavit, [50].

MR20/00054, and MR20/00613, but that the power has not ultimately been exercised (AS [35]). The applicant contends that it "remains unclear" when, if ever, the respondent would exercise the power under s 54W(b). The applicant does not appear to contend that any particular decision not to exercise the power under s 54W(b) is unreasonable in the relevant sense. The circumstances of each instance where s 54W(b) was considered, but the power was not exercised, do not support such a conclusion.[21] The respondent's evidence is that in the period from 1 January 2020 to 24 February 2023, the power under s 54W(b) has been exercised 324 times. The respondent's approach to the exercise of the power in s 54W(b) is reasonable.[22] The fact that consideration has been given to exercising the power under s 54W(b) in relation to a number of matters, but it has not ultimately been exercised, does not support a conclusion of unreasonable delay.

24. **Applicant's fifth issue**. The applicant contends that in two IC reviews (MR20/00054 and MR20/00863), the respondent has elected to wait for an agency to make a revised decision under s 55G when the agency has indicated an intention to do so, when there is no requirement for the respondent to wait (AS [36]). It appears to be said that the respondent should not have waited for the revised decisions, but should have continued to progress the IC reviews. It is not unreasonable for the respondent to have paused progress of the IC reviews in MR20/00054 and MR20/00863, because the revised decisions would necessarily either resolve the IC reviews or narrow the scope of the disputes.[23] It would not be an efficient use of the FOI branch's resources to continue an IC review where the scope of the review is about to change.[24] Although a significant period elapsed in MR20/00054 between the time DFAT originally indicated it would issue a revised decision (19 November 2020) and the date of the revised decision (14 January 2022), the reasonableness of pausing progress of the IC review pending receipt of the revised decision must be assessed at the time that it was made, based on the expected timeframe for receipt of the revised decision at that time.[25] The fact that preparation of the revised decision was subsequently delayed does not render the decision to pause progress of the IC review unreasonable.

25. **Applicant's sixth issue**. In relation to three ongoing IC reviews (MR20/00054, MR20/00424, and MR20/00863), the applicant contends that the respondent has employed an "overly convoluted" process for providing procedural fairness that involved repeatedly providing rights of response to the parties, going beyond the requirements to ensure that each party has a reasonable opportunity to present their case (AS [37]). Whether the steps taken to provide procedural fairness to the parties in the three relevant IC reviews are capable of contributing to a finding of unreasonable delay depends on whether the step was unreasonable in each instance, having regard to all of the

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21 MR20/00054: First Dowsett Affidavit, [78] – [79], [81]; Third Dowsett Affidavit [56]. MR20/000613: First Dowsett Affidavit [154]; Third Dowsett Affidavit, [78]–[80].

22 Third Dowsett Affidavit, [34]–[39].

23 See s 55G(1) of the FOI Act.

24 Third Dowsett Affidavit, [97].

25 First Dowsett Affidavit, [57], [74]. Regarding MR20/00863, see [200], [204].

circumstances.

26. In **MR20/00054** the DFAT submissions received on 14 January 2022 were not initially provided to the applicant when he was asked to provide submissions addressing the revised decision, which resulted in a further opportunity being given on 25 March 2022 for the applicant to make submissions. It appears that there was initial uncertainty on the part of the OAIC as to whether DFAT's submissions were confidential, given that the Review Adviser sought "clarification on sharing submissions" by email to DFAT on 21 March 2022.[26] It may not have been strictly necessary to provide the DFAT submissions to the applicant on 25 March 2022, because the substance of the matters addressed in the submissions reflected the reasoning in the reasons for the revised decision, which were available to the applicant and which the applicant addressed in his submissions received by the OAIC on 15 February 2022.[27] However, DFAT's submissions made more detailed submissions on certain issues. In these circumstances, provision of the submissions and a further opportunity to the applicant (which the applicant took up[28]) cannot be regarded as unreasonable. The issuing of a notice pursuant to s 55U on 25 July 2022 to require production of the unredacted documents claimed to be exempt under ss 33 and 34 of the FOI Act, after receipt of submissions from DFAT, does not constitute giving rights of procedural fairness "repeatedly". Rather, in issuing the s 55U notice after having received DFAT's submissions, the respondent was following the staged process required by s 55U(3). Although DFAT requested that the OAIC "identify and particularise" its views about the availability of certain exemptions and give DFAT the opportunity to comment, the Review Adviser has not done so. The evidence is that DFAT will only be given an opportunity to make further submissions if necessary to afford procedural fairness.[29]

27. In **MR20/00424**, the prospect of receiving further submissions or a revised decision from DISR arose from DISR's indication on 3 August 2022 that, due to the passage of time, it was considering whether some of the material previously claimed to be exempt could be released.[30] Any invitation to provide further submissions in response to a change in position by DISR is not unreasonable.

28. In **MR20/00863**, in late 2021 DISR and the applicant had made submissions about the terms of the applicant's request and the application of s 22 of the FOI Act.[31] The Review Adviser requested that DISR produce unredacted documents and any 'final submissions in support of the exemptions claimed' on 5 November 2021. This request for further submissions should not be considered unreasonable given the high level of generality of DISR's submissions dated 27 September 2021, and given that the further submissions would accompany the unredacted documents and therefore

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26 First Dowsett Affidavit, [82]; [0054.037], p 0398.
27 First Dowsett Affidavit, [77].
28 First Dowsett Affidavit, [85].
29 Third Dowsett Affidavit, [58].
30 Second Dowsett Affidavit, [13].
31 Third Dowsett Affidavit, [90]–[93].

could address the content of the documents more specifically. The requests for further submissions from DISR in December 2021 and February 2022 arose from the need to determine the appropriateness of certain edits that had been made by DISR pursuant to s 22 of the FOI Act in the documents produced on 2 December 2021.[32] The communications between the respondent and the IC review parties between 31 March and 22 June 2022 involved negotiations intended to limit the scope of the dispute, and are not unreasonable in the circumstances.[33]

29. **Applicant's Seventh Issue**. The applicant criticises the respondent's processes for failing to draw a clear distinction between "procedural fairness steps" and "alternative dispute resolution methods" (AS [38]). The FOI Act expressly permits the respondent to use any technique they consider appropriate "to facilitate an agreed resolution of matters at issue" in an IC review (s 55(2)(a)), and does not require any clear distinction between alternative dispute resolution techniques and steps taken to ensure procedural fairness.

30. This complaint is only made about **MR20/00863**. The gravamen of the applicant's concern seems to be the respondent's decision to allow DISR an opportunity to issue a revised decision under s 55G, rather than the respondent proceeding to make a decision or issuing a preliminary view to the parties. There is a sound reason for the respondent's general position that agencies should be permitted to issue revised decisions under s 55G when they indicate a willingness to do so.[34] There is no substance to this complaint.

31. **Applicant's Eighth Issue**. The applicant questions the practice of allowing IC review respondents to raise new exemptions in an IC review, which were not claimed in the decision under review (AS [39]). The applicant does not squarely contend that it is not open to respondent agencies to raise new exemptions, rather he claims that it is "difficult to comprehend the status of these newly claimed exemptions, and to some extent the submissions which contain them, in circumstances where provision to revise or vary the decision under review is relevantly narrow in scope" (AS [39]). There is no merit in this criticism. The FOI Act does not prevent an agency from raising new exemptions in the course of an IC review. The respondent is reviewing the merits of the original decision, having regard to the information available at the time of the respondent's decision. Raising a new exemption does not constitute a variation of the original decision for the purpose of s 55G(1).[35] The respondent must review the original decision (or any revised decision

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32 First Dowsett Affidavit, [197]–[199].
33 First Dowsett Affidavit, [200]–[206].
34 Third Dowsett Affidavit, [96]–[97].
35 Having regard to the definition of reviewable decisions (s 54L of the FOI Act and see definition of "access refusal decision" in s 53A), and the onus on the agency in the IC review: s 55D(1). The Administrative Appeals Tribunal takes the view that a decision is not a "revised decision" within the meaning of s 55G unless access is given to at least one document in full in accordance with the FOI applicant's request: *Duncan and Secretary, Department of Human Services (Freedom of Information)* [2016] AATA 152 and see discussion in *Australian Information Commissioner v Elstone Pty Ltd* (2018) 260 FCR 470, [12]–[14] (Griffiths J). This position directs attention to the outcome of any decision, not the basis on which the decision is made.

under s 55G) in accordance with the FOI Act, and neither the FOI Guidelines nor a direction made pursuant to s 55(2)(e) can constrain the respondent's review function inconsistently with the FOI Act. DFAT was entitled to raise new exemptions in relation to **MR20/00054**.

32. **Applicant's Ninth Issue**. The applicant alleges that in MR20/00424, the review process has taken so long that events have overtaken the application (AS [40]). The applicant refers to the indication from DISR, in August 2022, that it was considering whether some material could now be released to the applicant. The applicant does not appear to raise any particular issue with the respondent's conduct that can be said to have caused unreasonable delay. A change in a party's position due to the passage of time is not *per se* indicative of unreasonableness.

C. ALTERNATIVE CASE: SECTION 6 OF ADJR ACT

C1. Competency

33. In the alternative to his claim for relief based on unreasonable delay under s 7, the applicant seeks an order for review relying on ss 6(1)(e) and 6(2)(h) of the ADJR Act, in relation to the respondent's "conduct in carrying out the IC reviews": SFAOA [3], SFACS [18], AS [17], [20].

34. The applicant contends that each step identified in the footnotes to paragraphs 32 to 40 of the Applicant's Supplementary Submissions constitutes "conduct" for the purpose of s 6 of the ADJR Act. Section 6 applies only to conduct engaged in, or proposed to be engaged in, for the purpose of making a decision to which the ADJR Act applies. Insofar as any specific instance of conduct relied upon was not engaged in for the purpose of making a decision to which the ADJR Act applies, the application is not competent: see Amended Objection to Competency [2].

C2. Ground of review not made out

35. Sections 6(1)(e) and 6(2)(h) of the ADJR Act direct attention to the ultimate result of any pre-decision "conduct": the ground of review is that the making of the proposed decision (being a decision to which the ADJR Act applies) would be an "improper exercise" of the decision-making power because the result would be uncertain.

36. The applicant does not identify any particular "proposed decision", nor any relevant uncertainty in the result of any proposed decision. The applicant contends that "there is no certainty that the power in s 55K(1) will be exercised in a manner consistent with the objectives of the FOI Act, or the right conferred upon the applicant under s 11(1)" of the FOI Act (AS [21]) or that the power under s 55K(1) will be exercised at all (AS [22]). These contentions are misconceived.

37. The complaint that there is no certainty that the power under s 55K(1) will be exercised consistently with the objectives of the FOI Act, or the right conferred by s 11(1) of the FOI Act, appears to be directed to an apparent state of uncertainty as to if and when any decision might be made under s 55K(1) in relation to each of the relevant IC reviews. However, s 6(1) of the ADJR Act is not apt to respond to an allegation of that kind, which is not a complaint that the result of a proposed decision will be uncertain in the sense of ambiguous or unascertainable. The respondent

has not yet determined whether or not a decision will be made under s 55K(1) in relation to any of the relevant IC reviews. It is still possible that one or more of the IC reviews may be determined by alternative means (under ss 54R, 54W or 55F), without a decision being made under s 55K(1). That reflects the scheme of Pt VII of the FOI Act, and does not indicate that there is any relevant uncertainty for the purposes of ss 6(1)(e) and 6(2)(h) of the ADJR Act. Insofar as the applicant contends that there is uncertainty as to whether any decision will be consistent with the right conferred by s 11(1) of the FOI Act, that is a complaint directed to the merit of any decision ultimately made. There is presently no basis to say that any decision under s 55K(1) would not be consistent with the objects of the FOI Act or s 11(1). The contention is speculative and should not be accepted.

38. The applicant also argues that "if there is no duty to exercise the power in s 55K(1) until after an IC review has been undertaken, there is no certainty that the power will be exercised at all": AS [22]. That appears to be a complaint about the operation of the FOI Act, not about any proposed decision. In any event, as explained in paragraphs 11 and 12 above, the premise of the complaint is erroneous.

D. CONCLUSION

39. For the reasons outlined in the respondent's earlier submissions and these submissions, the separate question should be answered "no".

40. Even if the Court concludes that the application is competent, and that there has been unreasonable delay in making a decision in relation to one or more of the relevant IC reviews, or alternatively there has been conduct that would result in an improper exercise of the power for the purpose of s 6(1) of the ADJR Act, the Court should exercise its discretion to refuse the relief sought,[36] for the reasons outlined in paragraph 18(d) of the Concise Statement in Response to the SFACS.

Date: 6 March 2023

Zoe Maud

Alice Wharldall

Counsel for the respondent

[36] *Kamha v Australian Prudential Regulation Authority* (2005) 147 FCR 516, 536 [87] (the Court).