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No. VID519/2021

Federal Court of Australia
District Registry: Victoria
Division: Administrative and Constitutional Law & Human Rights

Rex Patrick
Applicant
Australian Information Commissioner
Respondent

Applicant's Submissions in Reply

1. This submission is made on behalf of the Applicant in reply to the Respondent's Supplementary Outline of Submissions dated 6 March 2023 and the associated affidavit of Ms Dowsett affirmed 6 March 2023.

Competency, s 7 ADJR Act[1]

2. The Respondent admits it has a duty under s 55(4)(c)[2] and also under s 55K(1) but seeks to disconnect the undertaking of an IC review from the making a decision on an IC review. It disavows the Applicant's argument relating to conduct under s 6 of the ADJR Act and rejects the Applicant's argument that on the Respondent's position, a lacuna exists where the Respondent may decide to undertake an IC review, but the IC application may never be determined.

3. The solution, according to the Respondent, is for the Applicant to seek relief in the form of mandamus to compel the Respondent to perform its duty under s 55(4)(c). That duty, according to the Respondent, is confined to a duty to "conduct the IC review in as timely a manner as is possible" having regard to relevant matters.

4. Thus, it is expected that the Applicant ought to seek an order compelling the Respondent to conduct its discretionary procedure (whatever that may be) in a timely manner (however long that might take) in circumstances where the Respondent maintains it is already conducting a timely process. Such relief would be abstract and illusory.

Unreasonable delay

5. The Respondent asserts that to ground unreasonable delay, the steps taken by the Respondent must be assessed individually to determine whether the step, taken in isolation, can be regarded as objectively "capricious and irrational".[3] It otherwise states that criticisms of process are irrelevant unless the are objectively unreasonable.

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[1] Respondent's Supplementary Outline of Submissions on Separate Question (**RSOS**), [7] – [12].
[2] Cf RS [34] where the duty was merely described as the FOI Act placing "some emphasis" on the importance of timeliness in the conduct of IC reviews: Respondent's Submissions (**RS**), [34].
[3] RSOS, [16].

6. The overall procedure devised and implemented by the Respondent under its broad discretion in s 55 forms the backdrop to each step it takes within the process it conducts. In turn, this process appears to be driven by the Respondent's assumption (rightly or wrongly) that the imperative for it to decide an IC review application does not arise until after that procedure is complete, if it is completed at all. When viewed against this backdrop, it is possible for a procedural step or steps actually taken to be compliant with the written procedure of the Respondent (or to be within the parameters of the discretion), and for the written procedure itself to be objectively reasonable, yet for the procedure as designed and implemented by the Respondent to produce, in a practical sense, an objectively unreasonable outcome in terms of overall delay.

7. Whether a delay is objectively unreasonable, even within a process which is left to the Respondent to devise, necessarily involves the question of whether the objectives of the FOI Act are being achieved by the practical application of that process. Part VII of the FOI Act provides for merits review by the Respondent, but it is the first of two possible rounds of merits review.[4] The first round is supposed to be conducted in as timely a manner as is possible and with as little formality and technicality as is possible given the relevant matters in s 55(4)(a) and (c). It is followed by a second round of merits review conducted in accordance with the procedures of the AAT. This is the legislative context within which "the manner in which an IC review is conducted is left by the legislature for the Respondent to determine" – so much is apparent from the FOI Act itself.

8. Further, there is no reason why the requirement to conduct an informal and non-technical process should be at odds with the pursuit of timely reviews and the proper consideration of matters before the Respondent.[5] If good case management techniques are implemented there ought not be any material tension between these objectives.

Specific aspects of the Respondent's evidence

9. Fourth and eighth issues (RSOS, [23] and [31]): Ms Dowsett deposes to matters relating to consideration of the exercise of the power under s 54W.[6] As to MR20/00054,[7] it is apparent that the Respondent did not consider that the matter of the agency's s 55G decision raising entirely new

[4] cf RSOS, [17], RS, [34].
[5] RS, [34].
[6] To the extent that the information in the table at [39] of the Dowsett Affidavit of 6 March 2023 could be relevant to the separate question applications (which is doubtful), the evidence in the table does not make mention of the fact that all but MR18/00949 and MR22/01850 related to documents of the "National Cabinet" and that in relation to those applications the Applicant explicitly sought from the Respondent either: 1) for the Respondent to refer the matter to the Federal Court on a question of law as to whether the National Cabinet was a Cabinet for the purposes of the FOI Act, or 2) that the Respondent exercise its discretion not to review the decision under 54W(b).

MR22/01850 was an application made following an error made in MR19/00010 (which was a separate question matter in this proceeding). During the proceeding in the AAT in relation to MR19/00010, it became apparent that a document sought by the Applicant (a schedule attached to a contract), did not in fact exist because the version of the contract referred to in the request did not have such a schedule attached to it. Despite the IC review being on foot for 1098 days, the non-existence of the schedule was never identified during the Respondent's review process. As a result of the error, the Applicant made a fresh application (MR22/01850) to seek the schedule. The Respondent was forewarned of the issue and the agency indicated it would not resist an exercise of s 54W in relation to the new application so the Respondent could apply again to the AAT. The Applicant is able to depose to these matters but given the relevance issue, he does not propose to do so at this point.
[7] Dowsett 6 March 2023, [56], and **[00054.032].**

grounds was the catalyst for consideration of the power under s 54W, rather it was the complexity of the issues, including the need to inspect the documents, and the number of documents within the scope of the request – matters which the Respondent could and should have become apprised of far earlier than 25 months into the process. Despite the application being on foot since 22 January 2020, it was only in February 2022 that the Respondent understood this to be the case because it had not earlier "been apparent how many documents there were at the time or the classification of particular documents".[8]

10. It is also to be noted that the Respondent considers itself bound by paragraph 10.88 of the FOI Guidelines which are prepared and updated by it from time to time (and are consequently amenable to change to broaden the indicators for use of the power under s 54W), and also, somewhat surprisingly, that it considers comments by the Auditor-General operating under separate legislation to be relevant to its own exercise of discretion having regard to the objectives of the FOI Act and the duties conferred upon it under that Act.[9] If a reduction in case-load in relation to long-term outstanding IC Reviews is in the interests of the administration of the FOI Act in circumstances where the Respondent claims that lack of staffing and/or funding is a problem within its office, then it is desirable that such applications are permitted to proceed to the more formal process offered by the AAT, rather than languishing within the Respondent's process.

11. Fifth issue (RSOS, [24]) – Ms Dowsett deposes to the Respondent's philosophy behind its approach to s 55G decisions as being one of education of the agency, and the "pausing" of IC reviews to allow an agency to make a revised decision.[10] Yet this appears not to be coupled with any driving impetus from the Respondent for the agency to progress to actually making the revised decision once it has raised that it is even considering whether or not to do so which results in the IC Review being paused.[11] In the context of the exercise of powers under s 55, the imperative for timely conduct of IC Reviews, and the long period of time since the IC review applications were made, such pausing is not reasonable for MR20/00054 or MR20/00863..

12. Ninth issue (RSOS, 32]) – Given no substantive step was taken by the Respondent in MR20/00424 between issuing the s 54Z notice on 27 May 2020, and 29 July 2022 when a s 55 U notice was issued, and then the agency indicated within a matter of days that it was considering "whether things had changed" since its submissions made in 2020, this change in the agency's position due to the passage of time is indicative not only of unreasonable delay in this application, but of unreasonable delay arising directly from the procedure implemented by the Respondent.

13. MR20/00424 – Despite the agency not providing its submissions by the extended date of 30 September 2022, and noting the relevant parts of the general Direction issued by the Respondent,[12] the Respondent did not follow the agency up until 24 February 2023, nor has the

[8] [00054.032]
[9] Dowsett 6 March 2023, [34], [37].
[10] Dowsett6 March 2023, [96] – [97].
[11] See Applicant's Supplementary Submissions, [36] and footnote 40 therein.
[12] [GEN.002], [2.4], [2.5], [5.6], [6.1], [6.2] ; see also, FOI Act, s 55DA "best endeavours" provision, s 55D(1) "onus" provision.

Respondent considered following its own direction as to non-compliance and simply making a s 55K decision on the basis of the information before it. Further, in refusing to grant the requested 4 week extension, the Respondent required that submissions be provided "as soon as possible" creating a situation where the agency has no definitive date by which it must provide submissions despite the extension request being refused.[13] Further, despite the request being refused, the agency has been invited by the Respondent to make further submissions as to why an extension of time should be granted.

Section 6 ADJR ground

14. In relation to the competency of the s 6 ADJR Act ground (RSOS, C1), the Respondent appears to rely on a bare assertion that some or all of the conduct it has engaged in during the IC review process is not conduct for the purpose of making a decision to which the ADJR Act applies. This merely repeats the assertion in its Amended Objection to Competency but provides no indication of the Respondent's position in relation to the purpose of the specific conduct identified.[14]

15. As to the ground of review (RSOS, C2), s 6 of the ADJR Act is squarely directed to the making of "an order of review in respect of conduct" which is a pre-cursor to a decision which is yet to be made. An improper exercise of power under an enactment, in this instance an exercise of the review powers to undertake an IC review which, once undertaken, culminates in an exercise of the decision power, includes circumstances where power is exercised in such a way as to render its effect uncertain.

16. The difference in interpretation between the Applicant and the Respondent appears to be a function of the Respondent considering that the conduct of an IC Review has no, even notional, final destination (that is, a s 55K decision), despite a requirement that the procedure be conducted in a timely manner. If the position is that the Respondent conducts itself in a manner which is predicated on not knowing where or how an application will end, then "timely" is a shifting concept which is not measurable by reference to any particular outcome. If there is no particular destination, then does it really matter how long it takes to arrive? The focus appears to be on the carrying out of the procedure itself, rather than achievement of a timely resolution to an application.

Relief

17. The Applicant first sought relief from this court on 10 September 2021. During that time two of the original nine separate question applications have been decided, both by s 55K decisions (MR19/00010 1098 days since the application was made but see above footnote 6, and MR20/00544 999 days since the application was made). If the Applicant proves his case, he ought to have appropriate relief from the court exercising its discretion.

18. The relief sought is appropriate to achieving a conclusion to applications which are languishing within the Respondent's process. If the Applicant succeeds in proving unreasonable delay, or the

[13] Dowsett 6 March 2023, [68] – [71], **[00424.050]**.
[14] RSOS, [34].

alternative “uncertainty” argument, it is the Respondent’s own conduct of the IC review procedure which is predominantly the reason for any difficulty which may arise in fixing timeframes for relief.

19. The orderly administration of Part VII of the FOI Act requires that the Respondent discharge its duties and powers according to law. If it is not doing so in relation to the Applicant’s applications, it ought to do so. And it ought to do so in relation to every application before it.

20. The Respondent’s position regarding inappropriate prioritisation of the Applicant’s applications, orderly administration of Part VII of the FOI Act, its assertions regarding a lack of funding and staff turnover and the changes it has now made to its procedure[15] support a conclusion that the process the Respondent has devised and implemented to carry out its discretionary powers is not working to achieve the objectives of the FOI Act, and produces perverse outcomes in terms of delay.

21. The Respondent’s own position is that it has a broad discretion as to the procedure on an IC review under s 55. If the discretionary procedure it employs is not working, it ought to devise and implement a new procedure which seeks to drive the process. In the circumstances, the “we have too many applications to deal with” and “we don’t have enough staff” arguments are not an appropriate basis for the court to decline to exercise its discretion in favour of the Applicant.

TIPHANIE ACREMAN
Counsel

14 March 2023

[15] Dowsett, 6 March 2023, [14] – [23].