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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	VID519/2021
File Title:	REX PATRICK v AUSTRALIAN INFORMATION COMMISSIONER
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 8/09/2022 10:01:12 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

As required by the Court's Rules, 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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Federal Court of Australia
District Registry: Victoria
Division: General

No. VID519 of 2021

Rex Patrick
Applicant

Australian Information Commissioner
Respondent

RESPONDENT'S OUTLINE OF SUBMISSIONS ON SEPARATE QUESTION

A. INTRODUCTION

1. The applicant has sought review by the respondent (the **Information Commissioner**) pursuant to Pt VII of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) of various decisions by agencies or Ministers to refuse access to documents, in whole or in part, in response to the applicant's request for access under s 15 of the FOI Act.
2. In this proceeding, the applicant claims that there has been "unreasonable delay" for the purpose of s 7(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) in making a decision in relation to a number of his applications for review by the Information Commissioner. The applicant seeks orders pursuant to s 16(3)(a) of the ADJR Act that the Information Commissioner make a decision in relation to the relevant Information Commissioner reviews (**IC reviews**) within 30 days, or such other time as the Court determines. Alternatively, the applicant seeks orders pursuant to s 16(3)(c) of the ADJR Act directing the Information Commissioner to determine the relevant IC reviews without further unreasonable delay.
3. On 8 December 2021, the Court ordered the hearing and determination of a separate question as to whether the applicant is entitled to the relief sought in relation to nine particular IC reviews.¹ In relation to the separate question, the respondent relies on the affidavit of Rocelle Dowsett affirmed 22 August 2022 (**Dowsett Affidavit**), the second affidavit of Rocelle Dowsett affirmed 8 September 2022 (**Second Dowsett Affidavit**) and the affidavit of Elizabeth Hampton affirmed 5 August 2022. For the reasons that follow, the applicant is not entitled to the relief that he seeks in relation to the eight extant IC reviews the subject of the separate question.

B. RELEVANT STATUTORY PROVISIONS

4. Where the conditions in s 7(1)(a) to (c) of the ADJR Act are satisfied, s 7(1) enables a person to seek an order of review in respect of a failure to make a decision, on the ground that there has been

¹ After the Further Amended Originating Application was filed, a decision was made pursuant to s 55K of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) in relation to one of the nine applications (MR20/00291).

unreasonable delay in making the decision. The preconditions to the making of an application pursuant to s 7(1) of the ADJR Act are that (a) a person has a duty to make a decision to which the ADJR Act applies, (b) there is no law that prescribes a period within which the person is required to make that decision and (c) the person has failed to make that decision: s 7(1)(a) - (c).

5. The applicant contends that s 55K(1) of the FOI Act imposes a duty on the respondent to decide an application for IC review: Further Amended Concise Statement dated 10 December 2021 at [13]; applicant's submissions (**AS**) [16]. In order to assess both whether the Information Commissioner has a duty to make a decision pursuant to s 55K(1) for the purpose of s 7(1)(a) of the ADJR Act, and if so, to assess whether there has been unreasonable delay in making a decision, it is necessary to consider the scheme of the FOI Act, and in particular Pt VII of that Act.
6. Part VII of the FOI Act "sets up a system for review of decisions by the Information Commissioner" (s 54F), referred to as an "IC review". Section 54G provides that an IC review "is a review of an IC reviewable decision undertaken by the Information Commissioner under this Part." The expression "IC reviewable decision" is defined in s 54K to include, relevantly for present purposes, access refusal decisions.
7. Part VII is comprised of 10 Divisions. The stages of the review process under Pt VII can be seen in Div 4 to 7: Div 4 provides for the making of an IC review application; Div 5 confers a discretion on the Information Commissioner to decide not to undertake an IC review, or not to continue an IC review in certain circumstances; Div 6 outlines the general procedure in an IC review; and Div 7 provides for the Information Commissioner to make a decision on an IC review. Divisions 1 to 3 deal with preliminary and machinery matters, Div 8 confers certain information gathering powers on the Information Commissioner, Div 9 addresses a particular procedure that must be followed in relation to an IC review that involves a claim that documents are exempt under s 33 (national security) and Div 10 provides for appeals from a decision of the Information Commissioner on an IC review.
8. An IC review application must be made in accordance with s 54N. The making of an IC review application does not necessarily mean that an IC review will be conducted; the Information Commissioner may make inquiries of the review parties to determine whether or not to undertake an IC review (s 54V), and may decide not to undertake an IC review, or not to continue to undertake an IC review, in certain circumstances (s 54W(b)). An IC review application may be withdrawn by the applicant at any time "before the Information Commissioner makes a decision under section 55K": s 54R.
9. Before undertaking an IC review, the Information Commissioner must inform the decision-maker who made the original decision or, if the IC review application concerns an access grant decision, the person who made the request for access (s 54Z).

10. Part VII of the FOI Act is not prescriptive as to the process that must be followed in the conduct of an IC review. The Information Commissioner may conduct an IC review on the papers, without holding a hearing, if (amongst other things) it appears that the issues for determination can be adequately determined in the absence of the review parties: s 55(1). The Information Commissioner may otherwise conduct an IC review in whatever way they consider appropriate and may use any technique that they consider appropriate to facilitate an agreed resolution of matters at issue in an IC review, including techniques used in alternative dispute resolution processes: s 55(2)(a) and (b). In conducting an IC review, the Information Commissioner may obtain any information from any person, and may make any inquiries, that they consider appropriate: s 55(2)(d). Procedural directions may be given in relation to IC reviews generally or in relation to a particular IC review: s 55(2)(e). The agency or Minister who made the decision the subject of a particular IC review must use best endeavours to assist the Information Commissioner to make their decision in relation to the review: s 55DA.
11. The Information Commissioner must conduct an IC review with as little formality and technicality as is possible, given the requirements of the FOI Act and any other law and “a proper consideration of the matters before the Information Commissioner”: s 55(4)(a). The Information Commissioner must ensure that each party to a review is given a reasonable opportunity to present his or her case, and must conduct an IC review in as timely a manner as is possible given the requirements of the FOI Act and the need to give proper consideration to the issues in a review: s 55(4)(b) and (c).
12. In an IC review of a decision in relation to a document that is claimed to be exempt under s 33 of the FOI Act (national security documents), the Inspector-General of Intelligence and Security (**IGIS**) must be given an opportunity to give evidence before determining that a document is not an exempt document under s 33: s 55ZB(1).
13. A party to an IC review may, at any time during an IC review, request that the Information Commissioner hold a hearing, in which case the Information Commissioner must decide whether or not to do so: s 55B(1) and (3).
14. If the parties to an IC review reach agreement as to the terms of a decision on the review, and the Information Commissioner is satisfied that a decision consistent with those terms would be within their powers and appropriate, a decision may be made in accordance with the agreed terms without completing the IC review: s 55F.
15. At any time during an IC review, the relevant agency or Minister may vary an access refusal decision, including by setting aside the original decision and substituting a new decision, if the revised decision would have an effect of (relevantly) giving access to a document in accordance with the request: s 55G(1)(a). If the agency or Minister makes a revised decision, the Information Commissioner must thereafter deal with the IC review application as though it were an application for review of the varied decision: s 55G(2).

16. If an IC review progresses to completion, not being the subject of decision pursuant to ss 54W or 55F and not being withdrawn by the applicant pursuant to s 55R, s 55K(1) requires the Information Commissioner to make a decision in writing either affirming, varying or setting aside the IC reviewable decision. Section 55K(1) of the FOI Act is in the following terms:

After undertaking an IC review, the Information Commissioner must make a decision in writing:

- (a) affirming the IC reviewable decision; or
- (b) varying the IC reviewable decision; or
- (c) setting aside the IC reviewable decision and making a decision in substitution for that decision.

C. THRESHOLD QUESTION – SECTION 7(1)(a) OF ADJR ACT

17. As noted above, the Information Commissioner’s obligation to make a decision pursuant to s 55K(1) of the FOI Act arises “[a]fter undertaking an IC review”. The introductory words of s 55K(1) should be construed as imposing a subjective precondition to the existence of a duty to make a decision.² In relation to each of the relevant IC reviews, the evidence does not indicate that the decision-maker has formed the state of satisfaction necessary to engage the duty under s 55K(1), namely that an IC review has been undertaken. Even if the precondition to the power in s 55K(1) is construed as an objective criterion, the evidence in relation to each of the eight IC review applications indicates that the process of undertaking an IC review is ongoing.³ Because it cannot presently be said that the IC review process has been completed, the first pre-condition to the making of an application pursuant to s 7(1) of the ADJR Act is not satisfied in relation to any of the relevant IC reviews and the application is accordingly incompetent.⁴
18. Section 55K both imposes an obligation on the Information Commissioner to make a decision in relation to an IC reviewable decision, and also prescribes the nature of the decision that the Information Commissioner may make (affirm, vary or set aside the IC reviewable decision).
19. Section 55K(1) is expressed in mandatory terms. However, it is clear from the opening words of the provision that the obligation to make a decision of the kind set out in s 55K(1)(a) to (c) arises only after the Information Commissioner has undertaken an IC review. As is apparent from the scheme of Pt VII, and in particular ss 54R and 54W, the Information Commissioner will not be required to make a decision under s 55K(1) in relation to every IC review application that is lodged, because at any time during the IC review process, the applicant may withdraw the IC review application, or the Information Commissioner may decide to make a decision not to continue the review under s 54W.

² *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297; *Australian International Pilots Association v Fair Work Australia* (2012) 202 FCR 200 at [147] (Perram J); *The Environment Centre NT Inc v Minister for Resources and Water* (No 2) [2021] FCA 1635 at [57] – [80].

³ Dowsett Affidavit at [86], [107], [148], [165], [179], [207], [215] and [227]; Second Dowsett Affidavit at [11], [21], [23], [24], [25], [27], [28], [30], [32], [33] and [39].

⁴ *Brownsville Nominees Pty Ltd v Federal Commissioner of Taxation* (1988) 19 FCR 169 at 173-174.

Although in general the obligation to make a decision under s 55K(1) only arises after the Information Commissioner has undertaken an IC review, s 55F provides for a particular circumstance where the Information Commissioner may make a decision “without completing the IC review”, namely where the parties have reached agreement as to the terms of a decision on an IC review and the Information Commissioner is satisfied that it is appropriate to make a decision in the terms agreed by the parties.

20. Although the FOI Act permits identification of the commencement of an IC review with reasonable certainty (being not before the giving of notice pursuant to s 54Z), by permitting the Information Commissioner to conduct an IC review without holding a hearing and in whatever way they consider appropriate, the scheme of Pt VII does not readily permit the point in time when an IC review has been undertaken for the purpose of s 55K(1) to be objectively determined. Given the various mandatory requirements that apply to the Information Commissioner in the conduct of an IC review, in particular the obligation to “ensure that each review party is given a reasonable opportunity to present his or her case” (s 55(4)(b)) and, where exemption pursuant to s 33 of the FOI Act is claimed, to give the IGIS an opportunity to be heard before determining that a document is not an exempt document, an IC review could not be said to have been undertaken until, as a minimum, the decision-maker is satisfied that those obligations have been discharged.
21. Having regard to the meaning of the expression “IC review” in s 54G and the scheme of Pt VII of the FOI Act, the expression “[a]fter undertaking an IC review” in s 55K(1) should be understood as identifying the point in time where the decision-maker is satisfied that an assessment of the particular IC reviewable decision has been undertaken in accordance with the requirements of Pt VII of the FOI Act. As a practical matter, it cannot be said that an IC review has been undertaken until (at least) the decision-maker (which can only be the Information Commissioner or the FOI Commissioner)⁵ has considered the relevant material and determined that no further step in the IC review is required. On the evidence, that step has not been reached in relation to any of the relevant IC reviews. Accordingly, the first pre-condition to the making of an application pursuant to s 7(1) of the ADJR Act is not satisfied in relation to any of the relevant IC reviews and the application is incompetent.⁶
22. Acceptance of the respondent’s contentions in relation to the threshold issue will mean that it is unnecessary to consider whether there has been unreasonable delay for the purpose of s 7(1) of the ADJR Act and the separate question should be answered “no”.

D. UNREASONABLE DELAY

23. If, contrary to the respondent’s submission, the respondent has a duty under s 55K(1) to make a decision in relation to each or any of the relevant IC reviews, then it is accepted that the application is

⁵ *Australian Information Commissioner Act 2010* (Cth) (**AIC Act**), s 25.

⁶ *Brownsville Nominees Pty Ltd v Federal Commissioner of Taxation* (1988) 19 FCR 169 at 173 – 174.

otherwise competent. There is no law that prescribes a period within which the respondent is required to make a decision under s 55K(1), and therefore s 7(1)(b) of the ADJR Act is satisfied. Further, there is no dispute that a decision has not yet been made in relation to each of the eight extant IC reviews that are the subject of the separate question, and accordingly s 7(1)(c) is satisfied. The balance of these submissions addresses whether there has been unreasonable delay in making a decision pursuant to s 55K(1) of the FOI Act in relation to any of the eight IC review applications the subject of the separate question and if so, whether relief should nonetheless be refused on discretionary grounds.

Principles relevant to determination of unreasonable delay

24. Section 7(1) of the ADJR Act enables a person to seek an order of review in respect of a failure to make a decision on the ground that there has been “unreasonable delay” in making the decision. The focus of s 7(1) is not merely delay, in the sense of taking longer than expected, but delay that is *unreasonable*. Whether delay is unreasonable requires consideration of all of the circumstances.⁷ The evaluative task is informed by the following considerations.
25. First, a central consideration to the assessment of whether delay is unreasonable is the scheme of the legislation within which the decision-making power is found. Although a legislative scheme may not specify a time limit, “it may nevertheless throw light on what was intended as a reasonable time for the performance of the statutory duty in question”.⁸ In *BMF16 v Minister for Immigration and Border Protection*, Bromberg J said that the “subject matter of the power, its statutory purpose, the importance of its exercise both to the public and to the interests of the persons it is directed to address, the nature of those interests and the likely prejudicial impact upon interest-holders of any delay, as well as the practical limitations which attend the particular exercise of the power by reason of the nature of the decision required and the preparation, investigation and considerations called for, are all likely to be relevant to what, in the context of the particular legislative scheme, was intended as a reasonable time for the performance of the duty.”⁹
26. Secondly, the assessment of whether delay is unreasonable is objective.¹⁰ Thus, in *Thornton v Repatriation Commission* (1981) 52 FLR 285 at 293-294, Fisher J considered that the personal circumstances of the applicant in that case were not likely to be relevant to the assessment of whether there had been unreasonable delay.

⁷ *Thornton v Repatriation Commission* (1981) 52 FLR 285 at 288–292 (Fisher J).

⁸ *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [25] (Bromberg J).

⁹ *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [25] (Bromberg J).

¹⁰ *Thornton v Repatriation Commission* (1981) 52 FLR 285 at 288-291, 293 (Fisher J); *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [26] (Bromberg J).

27. Thirdly, unreasonable delay will not be shown if there are circumstances which a reasonable person might consider render the delay “justified and not capricious”, there being a considered reason rather than the delay being the “consequence of neglect, oversight or perversity”.¹¹
28. Fourthly, it is relevant to consider the demands associated with the office of the relevant decision-maker, and the nature of the statutory task.¹² Whilst an absence of resources is not in general an excuse for delay that would otherwise be regarded as unreasonable,¹³ it is not necessarily the case that all inactivity resulting from lack of resources, including limited numbers of staff, is unreasonable.¹⁴
29. Fifthly, as a matter of practicality it falls to the respondent, as the custodian of the information, to adduce evidence to explain the reason for any lengthy period of inactivity.¹⁵

Scheme of the FOI Act

30. Before addressing the particular circumstances of each IC review, it is relevant to note the following matters about the scheme of the FOI Act and the nature of the decision that the Information Commissioner is required to make pursuant to s 55K(1).
31. First, the nature of the Information Commissioner’s task under Pt VII of the FOI Act is one of merits review of (relevantly for present purposes) a decision by a Minister or agency to refuse access to documents. A request for access to a document may be refused for a number of different reasons, including because the document is an exempt document under Division 2 or is conditionally exempt under Division 3 and access to the document would, on balance, be contrary to the public interest for the purposes of s 11A(5) (s 31B) or because, after taking all reasonable steps to find the document, the agency or Minister is satisfied that the document is in the agency’s or Minister’s possession but cannot be found or does not exist (s 24A). IC review applications involving review of a decision to refuse access to a document (or documents) based on the national security, defence or international relations exemption (s 33) or the Cabinet documents exemption (s 34) will almost always involve considerable complexity. Some IC review applications involve consideration of multiple different

¹¹ *Thornton v Repatriation Commission* (1981) 52 FLR 285 at 292 (Fisher J). The statement from *Thornton* was described in *ASP15 v Commonwealth of Australia* (2016) 248 FCR 372 at [23] (Fully Court) as an “authoritative statement of the appropriate test to be applied in deciding whether or not a delay by an administrative decision-maker is reasonable”.

¹² *AQM18 v Minister for Immigration and Border Protection* [2018] FCA 944 at [68] (Moshinsky J), approved on appeal: *AQM18 v Minister for Immigration and Border Protection* (2019) 268 FCR 424 at [56] – [57] (Besanko and Thawley JJ).

¹³ *Oliveira v The Attorney General (Antigua and Barbuda)* [2016] UKPC 24 at [44]. See also *Wei v Minister for Immigration Local Government and Ethnic Affairs* (1991) 29 FCR 455 at 477 (Neaves J).

¹⁴ *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [30] and [104] (Bromberg J).

¹⁵ See *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at [118] (Gordon and Steward JJ); *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [27] – [28] (Bromberg J).

exemptions, sometimes requiring a line-by-line analysis of the document to determine the applicability of the claimed exemptions.

32. Secondly, the scheme of Pt VII of the FOI Act recognises that the task of reviewing the merits of decisions to refuse or grant access to documents may be one of some complexity and inherently time consuming.¹⁶ Relevantly, the FOI Act provides for, although does not require, the conduct of a hearing (s 55(1), (2) and (5)), and the Information Commissioner is conferred with various powers to require the production of documents or the provision of information (Div 8 of Pt VII). Further, the FOI Act imposes a number of requirements on the Information Commissioner that impact the time required to complete an IC review. In particular, the Information Commissioner must ensure that each review party (which may include an *affected third party* where s 54P applies: s 55A(1)(c)) is given a reasonable opportunity to present his or her case (s 55(4)(b)) and in certain circumstances, must request a third-party to give evidence, such as the IGIS: s 55ZB. Moreover, exercise of the information gathering powers available to the Information Commissioner under Div 8 of Pt VII of the FOI Act depends upon the formation of particular states of belief, which necessarily requires that certain steps be undertaken before the power can be exercised. For example, the effect of s 55U is that the Information Commissioner may only require the production of documents that are claimed to be exempt under s 33 (national security documents), s 34 (Cabinet documents) or s 45A (Parliamentary Budget Office documents) if, first, evidence on affidavit or otherwise has been obtained regarding the basis for the exemption, and the Information Commissioner is not satisfied, based on that material, that the document is an exempt document: s 55U(3).
33. Thirdly, the power to make a decision under s 55K(1) of the FOI Act is only exercisable by the Information Commissioner or the FOI Commissioner.¹⁷ During the period of time relevant to this case, the power under s 55K(1) could therefore be exercised by only one person until August 2021, and thereafter by two people.
34. Finally, the purpose of Pt VII of the FOI Act is to provide for merits review by a specialist, independent person, of decisions by agencies or Ministers to grant or refuse access to documents. Whilst the broad objects of the FOI Act stated in s 3 are not irrelevant to the assessment of whether there has been unreasonable delay in making a decision in a particular case, it is the provisions of the FOI Act that establish the relevant rights and processes that are more useful in illuminating the boundary between reasonable determination of IC review applications in accordance with Pt VII of the FOI Act and unreasonable delay. Neither the right to obtain access to documents created by s 11, nor the general objective of the FOI Act that the functions and powers be performed and exercised to facilitate and promote public access to information promptly and at the lowest reasonable costs (s 3(4) is unqualified

¹⁶ Cf *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [30] (Bromberg J).
¹⁷ AIC Act, s 25.

(*cf* AS [34] – [35]). The right of access is subject to the FOI Act (s 11(1), including Pt IV which establishes various exemptions, and the objective of facilitating prompt access to information applies “as far as possible” (s 3(4)). Similarly, whilst Pt VII of the FOI Act places some emphasis on the importance of timeliness in the conduct of IC reviews (s 55(4)(c)), it also recognises that the pursuit of timely reviews must be balanced against the requirement that IC reviews be conducted as informally as is possible in light of the requirements of the FOI Act and the need to give proper consideration to the matters before the Information Commissioner. Just as the FOI Act seeks to strike a balance between enabling access to government documents and protection of particular information in the public interest, the approach to timeliness in Pt VII the FOI Act recognises that an applicant’s interest in quick decisions (AS [43]) must be balanced against the need to ensure proper consideration of the issues raised on an IC review.

No unreasonable delay

35. It is not clear from the applicant’s submissions how it is said that there “has been, or will be” (AS [10]) unreasonable delay in “determining” the relevant IC review applications. The applicant’s submissions identify in general terms particular “types of delay” (AS [44]), but do not identify the particular periods in which it is said that there has been delay attributable to one of the identified causes, or whether particular periods of inactivity are relied upon as indicating unreasonable delay. Although the respondent may have a practical onus of adducing evidence to establish a reasonable explanation for any delay, it remains for the applicant to persuade the Court that there has been unreasonable delay. In the absence of any attempt by the applicant to date to grapple with the evidence filed on behalf of the respondent, the respondent makes the following observations regarding the conduct of the relevant IC reviews.
36. Each of the eight IC reviews that is the subject of the separate question was lodged in 2020. The matters have been on foot for between approximately 21 months (MR20/01189) and 31 months (MR20/00054). There have been periods of inactivity in the conduct of each review to date. Although periods of inactivity in the conduct of an IC review should not be treated as necessarily indicative of delay, because the nature of the review provided for by Pt VII of the FOI Act is such that periods of inactivity are inevitable, it is accepted that overall, the time taken to date in the conduct of the eight IC reviews indicates delay. The respondent’s acceptance that there has been delay takes account of the longstanding performance criterion set in the Portfolio Budget Statements, to complete 80% of IC reviews within 12 months of lodgement.¹⁸ Although that is relevant to whether a particular time-period indicates delay, it is not determinative; the complexity of some IC reviews will necessarily mean that they cannot be completed within 12 months. However, accepting that the time taken to date

¹⁸ Office of Australian Information Commissioner Annual Report 2016-17, exhibit EH-1 to the affidavit of Elizabeth Hampton affirmed 5 August 2022, p 53.

in the conduct of the eight relevant IC reviews is outside that which would be expected and therefore indicative of delay, the question is whether the delay should be characterised as unreasonable, which requires consideration of the circumstances of each matter.

37. **MR20/00054.** This IC review application was lodged on 22 January 2020. The Department of Foreign Affairs and Trade (**DFAT**) was notified of the application on 11 March 2020 and requested to provide various information by 1 April 2020, including the documents at issue and submissions in relation to the exemptions claimed. DFAT obtained three extensions of time to provide the information. It is evident from the correspondence between DFAT and the Office of the Australian Information Commissioner (**OAIC**) in relation to the extension of time requests that in 2020, the COVID-19 pandemic was significantly impacting DFAT’s ability to deal with FOI matters, including as a result of diversion of staff to assist in the pandemic response and because of remote working arrangements which limited the ability of DFAT personnel to access documents.¹⁹ In the circumstances, the period of inactivity that occurred whilst the OAIC waited for DFAT’s response to the s 54Z notification is not unreasonable.
38. In November 2020, the OAIC was informed that the relevant decision-maker within DFAT had “indicated a willingness to revise its decision”, and due to the complexity of the matter and the “extensive consultations that are required with the relevant business areas, overseas posts and other departments”, it was anticipated that the revised decision would be made in January 2021.²⁰ Given the potential for a revised decision pursuant to s 55G of the FOI Act to resolve or limit the scope of dispute in the IC review, the fact that there was a period of inactivity whilst DFAT considered making a revised decision was not unreasonable.²¹
39. DFAT did not provide a revised decision pursuant to s 55G in January 2021. After MR20/00054 was allocated to a Review Adviser in August 2021, the Review Adviser sought an update from DFAT regarding the status of the proposed revised decision.²² Correspondence from DFAT indicates that preparation of the revised decision was progressing, but by September 2021 was impacted by stay-at-home orders in place in the Australian Capital Territory. In December 2021, a notice was issued pursuant to s 55(2)(e)(ii) of the FOI Act seeking a response to the s 54Z notice and a revised decision by 17 December 2021.²³ DFAT ultimately issued a revised decision on 14 January 2022.²⁴
40. It is accepted that there was a period of inactivity from January to 17 August 2021, during which time no steps were taken to follow up the revised decision and the IC review did not otherwise progress. It

¹⁹ Dowsett Affidavit at [50] – [53].

²⁰ Dowsett Affidavit at [57] and [00054.014].

²¹ Dowsett Affidavit at [57] – [74].

²² Dowsett Affidavit at [64].

²³ Dowsett Affidavit at [71].

²⁴ Dowsett Affidavit at [74].

should be inferred from the evidence that the inactivity during that period was the result of the limited number of staff in the SSR Team and the significant number of IC reviews being managed by that team.²⁵ In the circumstances, that period of inactivity is unfortunate but unavoidable, and should not result in the overall delay in the progress of MR20/00054 being characterized as unreasonable in the relevant sense.²⁶

41. In February and March 2022, the OAIC liaised with the parties to the IC review regarding the scope of the review in light of DFAT's revised decision.²⁷ Documents redacted in part were received from DFAT in April 2022, and unredacted versions were received in August 2022 in response to a s 55U notice.²⁸ The next step in this IC review is for the Review Adviser to consider the exemption claims having regard to the documents and the parties' submissions and if no further information is required, and no additional procedural steps are required, the Review Adviser will prepare draft reasons for decision for consideration by the FOI Commissioner.²⁹ There has been no significant period of inactivity in MR20/00054 since the receipt of the revised decision in January 2022.
42. Although overall the progress of the IC review in MR20/00054 has been slow, having regard to all of the circumstances, in particular the impact of the COVID-19 pandemic on DFAT's ability to complete steps in a timely way and the significant workload of the very small number of Review Advisers in the SSR Team, the Court should not find that there has been unreasonable delay in making a decision.
43. **MR20/00424.** The application for review was lodged on 21 April 2020. On 27 May 2020, the OAIC gave notice of the application to the Department of Industry, Science, Energy and Resources (**DISER**) for the purpose of s 54Z of the FOI Act, and requested production of a copy of one of the documents the subject of the FOI request and submissions in relation to the claimed exemption pursuant to s 34 of the FOI Act.³⁰ Following a number of extensions of time,³¹ DISER provided its response to the request on 24 August 2020.³² Having regard to the justification for each of DISER's requests for an extension of time, there was no unreasonable period of inactivity between April and August 2020.
44. On 29 July 2022, a notice was issued to DISR pursuant to s 55U of the FOI Act, requiring production of marked up and unredacted copies of the documents claimed to be exempt under s 34 of the FOI Act.³³ The s 55U notice was issued by the Director of the SSR Team, notwithstanding that MR20/00424 has not yet been allocated to a Review Adviser.³⁴ In August 2022, the OAIC agreed

²⁵ Dowsett Affidavit at [21] and Second Dowsett Affidavit at [41] and [42].

²⁶ *Thornton v Repatriation Commission* (1981) 52 FLR 285 at 291.

²⁷ Dowsett Affidavit at [76] – [82].

²⁸ Dowsett Affidavit at [84] – [86] and Second Dowsett Affidavit at [9].

²⁹ Second Dowsett Affidavit at [11].

³⁰ Dowsett Affidavit at [89] and [00424.005.A1].

³¹ Dowsett Affidavit at [90] – [94].

³² Dowsett Affidavit at [97].

³³ Dowsett Affidavit at [107] and [00424.028.A1].

³⁴ Dowsett Affidavit at [101] – [107].

that DISR need not comply with the s 55U notice by the due date, in light of the indication that it would consider issuing a revised decision pursuant to s 55G.³⁵ However, following a request for an extension of time by DISR to advise the OAIC how it intended to proceed, on 5 September 2022 the OAIC requested DISR to promptly provide the unredacted documents in accordance with the s 55U notice dated 29 July 2022, and any further submission or revised decision within two weeks.³⁶

45. It is accepted that there was a significant period of inactivity in relation to MR20/00424 between 24 August 2020 and 29 July 2022. The explanation for the absence of activity during that period is the very small number of staff in the SSR Team, the number of IC reviews allocated to that team during the relevant period,³⁷ and the significant increase in IC review applications experienced by the OAIC in 2020-2022,³⁸ which together have resulted in there often being a significant period of time after the initial steps taken by the Intake and Early Resolution Team before an IC Review can be allocated to a Review Adviser in the SSR Team for active case management.³⁹ Having regard to the nature of the merits review task provided by Pt VII of the FOI Act, the scheme of Pt VII should be understood as contemplating some periods of inactivity in processing IC reviews, including due to “reasonable resourcing constraints”.⁴⁰ Inactivity for periods such as that which has occurred in this IC review is regrettable but ultimately unavoidable due to the limited number of Review Advisers available to progress the reviews.

46. **MR20/00544.** The application for review in MR20/00544 was lodged on 4 June 2020.⁴¹ After initial notification of the review was provided to the Attorney-General’s Office (AGO) on 12 August 2020, and an initial request made for production of material relevant to the review, the IC review was allocated to a Review Adviser on about 22 September 2020.⁴² MR20/00544 was allocated to a Review Adviser relatively quickly, because it was initially grouped together with a cohort of other IC reviews that also concerned refusal of access to documents related to the Community Sport Infrastructure Grant program.⁴³ The evidence indicates that MR20/00544 has been actively case managed from soon after lodgement.⁴⁴ Although a significant period of time has passed since MR20/00544 was lodged, that reflects the complexity of the issues that have arisen through the course of the review, including as a consequence of the appointment of two new Attorneys-General and the decision to issue a direction to the National Archives of Australia pursuant to s 55(2)(d) of the FOI Act.⁴⁵ There has been

³⁵ Second Dowsett Affidavit at [15].

³⁶ Second Dowsett Affidavit at [20].

³⁷ Dowsett Affidavit at [21], [28], [40], [42] and [102] and Second Dowsett Affidavit at [41] and [42].

³⁸ Dowsett Affidavit at [18], [20], [21] and [42].

³⁹ Dowsett Affidavit at [28].

⁴⁰ *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [30] (Bromberg J).

⁴¹ Dowsett Affidavit at [108].

⁴² Dowsett Affidavit at [111] and [114].

⁴³ Dowsett Affidavit at [109]-[110] and [114].

⁴⁴ Dowsett Affidavit at [111] - [148] and Second Dowsett Affidavit at [22] and [23].

⁴⁵ Dowsett Affidavit at [129] and [146].

no significant periods of inactivity in relation to the progress of the review in MR20/00544 and the Court should not find that there has been unreasonable delay in the relevant sense.⁴⁶

47. **MR20/00613.** The application for review in MR20/00613 was lodged on 26 June 2020.⁴⁷ On 3 August 2020 the OAIC notified the respondent (Department of Treasury) of the application, and sought submissions in relation to the exemptions claimed under s 34 of the FOI Act.⁴⁸ After two extensions of time, the Department's response to the s 54Z notice was received on 29 September 2020.⁴⁹ No substantive step was taken in relation to MR20/00613 until 31 May 2022, when a notice was issued to the Department pursuant to s 55U of the FOI Act seeking production of the documents claimed to be exempt pursuant to s 34 of the FOI Act.⁵⁰ The documents were received by the OAIC on 24 June 2022.⁵¹ MR20/00613 is waiting to be allocated to a Review Adviser in the SSR Team to review the material received to date and consider the further steps necessary to progress the IC review.⁵² It is accepted that there was a significant period of inactivity between 29 September 2020 and 31 May 2022. The respondent refers to the matters outlined in paragraph 45 above, which also apply to MR20/00613.
48. **MR20/00760.** The application for review in MR20/00760 was lodged on 6 August 2020. On 23 December 2020, a letter was sent to DISER giving notice of the IC review under s 54Z, and requesting the documents at issue and submissions in relation to the exemptions claimed. The period of about 4 months between lodgement of the application and notification to DISER pursuant to s 54Z is relatively long, but should not be regarded as an unreasonably long period in the circumstances, including the small number of staff in the FOI Branch and the significant increase in IC review applications experienced by the OAIC in 2020-2022.⁵³ DISER requested two extensions of time to provide the information, including because resource limitations had resulted in a backlog of IC review matters.⁵⁴ DISER's response to the s 54Z notification was received on 2 July 2021, and subsequently resubmitted in a format that could be accessed on 29 July 2021. Since then, the IC review has been waiting to be allocated to a Review Adviser to progress the review.⁵⁵ It is accepted that there has been no activity in the IC review since 29 July 2021, which is a significant period. The respondent refers to the matters outlined in paragraph 45 above, which also apply to MR20/00760.

⁴⁶ *Thornton v Repatriation Commission* (1981) 52 FLR 285 at 291 and 293.

⁴⁷ Dowsett Affidavit at [149].

⁴⁸ Dowsett Affidavit at [149].

⁴⁹ Dowsett Affidavit at [156].

⁵⁰ Dowsett Affidavit at [161] – [162]. Between December 2021 and April 2022, the OAIC liaised with the Department seeking approval for the use of the OAIC's secure online platform for delivery of documents claimed to be exempt under s 34. Approval was ultimately refused: Dowsett Affidavit at [160] – [163].

⁵¹ Dowsett Affidavit at [164].

⁵² Dowsett Affidavit at [165]; Second Dowsett Affidavit at [24] and [25].

⁵³ Dowsett Affidavit at [18], [20], [21] and [42].

⁵⁴ Dowsett Affidavit at [179].

⁵⁵ Dowsett Affidavit at [175].

49. **MR20/00863.** The application for review in MR20/00863 was lodged on 14 September 2020 in relation to a deemed access refusal decision by DISER pursuant to s 15AC of the FOI Act. Following preliminary enquiries, DISER made a decision in relation to the original access request on 28 September 2020, granting access in part to documents.⁵⁶ The applicant informed the OAIC that he wished to proceed with his application for review, and on 7 January 2021 the OAIC notified DISER of the IC review and requested documents recording the searches conducted by DISER in response to the request and submissions in support of the decision.⁵⁷ Following an extension of time to respond, DISER provided its submissions and information on 1 June 2021.⁵⁸ Since being allocated to a Review Adviser on 26 August 2021, the IC review has been actively progressed, including the issues in dispute being narrowed following issue of a revised decision on 8 June 2022.⁵⁹ Although there have been some periods of inactivity in the conduct of this IC review to date, they are explicable by the circumstances and any delay should not be regarded as unreasonable.
50. **MR20/00922.** This application for review was lodged on 24 September 2020. The Department of Health was notified of the application for the purpose of s 54Z on 26 October 2020, and requested to provide information in relation to the application by 16 November 2020.⁶⁰ The Department provided the information by 5 November 2020. The IC review has not yet been allocated to a Review Adviser and no further steps have been taken in the IC review. The respondent refers to the matters outlined in paragraph 45 above, which also apply to MR20/00922.
51. **MR20/01189.** This application for review was lodged on 30 November 2020. The Department of Prime Minister and Cabinet (**DPMC**) was notified of the application on 3 May 2021, and requested to provide marked-up and unredacted copies of certain documents and submissions in relation to the exemptions claimed.⁶¹ The period of just over five months between lodgement of the application and notification to DPMC is longer than some other matters, but should not be regarded as an unreasonably long period in the circumstances, including the small number of staff in the FOI Branch and the significant increase in IC review applications experienced by the OAIC in 2020-2022.⁶² DPMC provided the requested documents on 1 June 2021.⁶³ A decision was made in August 2021 to issue a s 55U notice to require production of the unredacted documents that were claimed to be exempt pursuant to s 34 (Cabinet documents), however the notice was not issued until 25 July 2022 whilst the OAIC sought approval for use of an secure online platform for delivery of documents claimed to be

⁵⁶ Dowsett Affidavit at [183].

⁵⁷ Dowsett Affidavit at [184] and [187].

⁵⁸ Dowsett Affidavit at [189].

⁵⁹ Dowsett Affidavit at [190] – [206]; Second Dowsett Affidavit at [30].

⁶⁰ Dowsett Affidavit at [212].

⁶¹ Dowsett Affidavit at [220].

⁶² Dowsett Affidavit at [18], [20], [21] and [42].

⁶³ Dowsett Affidavit at [223].

exempt under s 34 of the FOI Act.⁶⁴ It was not unreasonable for the OAIC to have held off issuing the s 55U notice in those circumstances, given the difficulties caused by remote working arrangements for delivery and access by OAIC staff to hard-copy documents required to be kept in a secure location.⁶⁵ The documents were produced by the DPMC on 9 August 2022 and are waiting to be reviewed by a Review Adviser who will consider whether any further submissions are required from the parties before a decision can be made under s 55K(1).⁶⁶ Although there have been some periods of inactivity in the conduct of this IC review to date, they are explicable by the circumstances and any delay should not be regarded as unreasonable.

E. DISCRETION TO REFUSE RELIEF

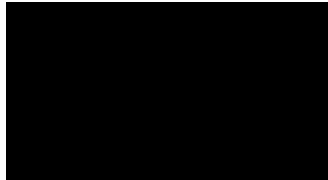
52. Even if the Court finds that the application is competent and there has been unreasonable delay in making a decision in relation to one or more of the relevant IC review applications, the relief sought should nonetheless be refused on discretionary grounds. The relief sought in paragraph 1 of the Further Amended Originating Application (**FAOA**) is inappropriate, given the uncertainty as to the further steps that will be required to be taken in each of the relevant IC reviews, and the consequent difficulty of fixing a reasonable time within which a decision could possibly be made. Further, the effect of the relief sought in both paragraph 1 and 2 of the FAOA is that the respondent would be required to prioritise the applicant's relevant IC review applications ahead of other IC reviews, including matters that were lodged before the applicant's reviews. The applicant's circumstances do not justify such interference with the orderly administration of the FOI Act.⁶⁷

F. CONCLUSION

53. For the reasons outlined, the separate question should be answered "no".

Date: 8 September 2022

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⁶⁴ Dowsett Affidavit at [224], [226] and [227].

⁶⁵ Dowsett Affidavit at [32] – [34].

⁶⁶ Second Dowsett Affidavit at [39].

⁶⁷ See AS [46] – [47].