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Sia Lagos

Registrar

Important Information

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Federal Court of Australia
District Registry: Victoria
Division: General

Rex Patrick

Applicant

Australian Information Commissioner

Respondent

Applicant's Supplementary Outline of Submissions on Separate Question

1. The supplementary outline of submissions should be read in conjunction with the Applicant's Outline of Submissions filed 29 August 2022.
2. The *Freedom of Information Act 1982* (Cth) (**FOI Act**) provides that the functions and powers conferred by it are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.¹ In acting as a "clearing house"² for freedom of information matters, a system of review by the Respondent is created for access refusal and grant decisions made in response to requests for information made under s 15 of the FOI Act. As a clearing house, the IC review process is an initial step of merits review of agency decisions, intended to be conducted in a timely manner and with as little formality and technicality as possible given the requirements of the FOI Act.³
3. The IC review process is a precursor which opens the gateway to a more formal and technical merits review by the Administrative Appeals Tribunal (**AAT**) of an IC decision made under s 55K(1) of the FOI Act (although this process may sometimes be bypassed in favour of direct AAT review of the agency decision by way of s 54W(b) of the FOI Act).⁴

The Respondent has a duty to make a decision on the separate question applications

4. The *Australian Information Commissioner Act 2010* (Cth) (**AIC Act**) establishes the Office of the Information Commissioner⁵ and confers functions, including freedom of information functions as defined in the AIC Act, upon the Respondent.⁶ The freedom of information functions include reviewing decisions under Part VII of the FOI Act.⁷ Part VII of the FOI Act creates a mechanism for Review by the Respondent of an "access grant decision"⁸ and "access refusal decision".⁹ All of the applications for access to documents made by the Applicant which are now the subject of the separate question applications fall within Part VII of the FOI Act.

¹ FOI Act, s 3(4).

² Freedom of Information Amendment (Reform) Bill 2009, Explanatory Memorandum, 1.

³ FOI Act, s 55(4).

⁴ FOI Act, s 57A(1).

⁵ AIC Act, s 5.

⁶ AIC Act, s 10(1)(b).

⁷ AIC Act, s 8(h).

⁸ Defined in s 3 of the FOI Act as a decision under s 53B of the FOI Act.

⁹ Defined in s 3 of the FOI Act as a decision under s 53A of the FOI Act.

5. Division 1 of Part VII contains a single section, s 54F, which provides a guide to Part VII and creates a stepped process which begins with an application for review made under s 54N (in Division 4) and culminates with a decision in accordance with Division 7. Section 54F states that “[t]he Information Commissioner *must* make a decision on the review in accordance with Division 7.”¹⁰ The central provision of Division 7 is s 55K, which is also in mandatory terms: the Respondent “must make a decision” after undertaking an IC review.¹¹
6. Division 5, s 54W provides that “in certain circumstances” for the Respondent may exercise a discretion not to undertake a review of the whole or part of an IC review application¹², or not to continue such a review. This is coupled with a discretion to conduct preliminary enquiries under s 54V for the purpose of determining whether or not to undertake an IC review.
7. Part VII contains an inherent assumption that an IC review will be undertaken upon the making of a decision to undertake an IC review, unless the Respondent exercises its discretion not to review the whole or part of the application, and, in the absence of an exercise of the discretion not to undertake a IC review, the outcome will be a decision in accordance with Division 7.
8. At the point of deciding to undertake an IC review, a duty arises in the Respondent to make a decision pursuant to s 55K(1). The duty continues through the process of undertaking the IC review in Division 6 (beginning with a requirement that notice be given under s 54Z) and ends in a decision under s 55K(1). A decision under s 55K(1) may be reviewed by the AAT (merits review)¹³ and by this Court on a question of law.¹⁴
9. Section 54R assumes the making of a decision by the Respondent under s 55K, in that it permits an applicant to withdraw an IC review application “at any time before the Information Commissioner makes a decision under section 55K”.
10. The word “timely” in s 55(4)(c) also contains an assumption that there will be an endpoint to an IC review. The words “[a]fter undertaking an IC review” in s 55K(1) assume that a decision under that section will be the culmination of a review. The words are not a precondition to the duty arising.¹⁵ Rather, they merely specify the timing of the Respondent’s decision under s 55K.
11. Similarly, the words “before undertaking an IC review” in s 54Z are not words of precondition.¹⁶ They delineate the steps taken pursuant to the duty to make a decision on an application once a decision has been made to undertake an IC review.
12. The power conferred upon the Respondent to undertake an IC review and to implement the procedures in Division 6 is a power conferred for the purposes of arriving at a decision under s 55K(1). At any time

¹⁰ Emphasis added.

¹¹ FOI Act, s 55K(1).

¹² See FOI Act, s 54W.

¹³ FOI Act, s 57A(1)(a).

¹⁴ FOI Act, s 56.

¹⁵ The Respondent’s objection to reliance on s 55(4)(c) appears to be based on a submission that the provision does not create a duty to make a decision. However, the Applicant’s case is that s 55(4)(c) *assumes* such a duty. See Respondent’s Amended Notice of Objection to Competency, dated 17 October 2022, [2]; cf Applicant’s Second Further Amended Originating Application, lodged 11 October 2022, [1].

¹⁶ See Respondent’s Outline of Submissions on Separate Question, dated 8 September 2022, [20].

before the duty is completed by the making of a decision under s 55K(1), the duty may be discontinued by either:

- (a) the Respondent exercising its discretion under s 54W not to continue a review (in which case a duty arises to give notice (s 54X); or
- (b) the applicant withdrawing its application (s 54R); or
- (c) the parties reaching an agreed resolution and the Respondent being “satisfied” that it is appropriate to make a decision in accordance with the agreement “without completing the IC review” (s55F(2)). For the purposes of s 55F(1)(d) a decision will be “within the powers” of the Respondent if it is a decision capable of being made under s 55K(1)(a), (b), or (c) on the terms agreed by the parties.¹⁷

13. After deciding to undertake an IC Review, the means provided in s 54W for the Respondent not to undertake the review are the only unilateral exit mechanism to avoid making a decision under s 55K(1). The possibilities that an applicant may withdraw an application under s 54R, or that the parties may reach an agreed resolution under s 55F, do not alter the purpose of Part VII of the FOI Act to provide for the Respondent to make a decision under s 55K as the culmination of its decision to undertake IC review. By analogy, the possibility of unilateral discontinuance or settlement (including by means of alternative dispute resolution) does not alter the purpose of court processes to culminate in judgments that bind the parties to litigation. So does the purpose of Part VII of the FOI Act remain unaffected by statistics as to the resolution of IC reviews in practice.¹⁸

14. The functions and powers conferred upon the Respondent¹⁹ are conferred for the purposes of achieving the objects of the FOI Act set out in s 3, and as a consequence of:

- (a) there being a legally enforceable right in the Applicant to obtain access to information in accordance with the FOI Act²⁰ which would be rendered nugatory if an unreviewable, unappealable, and unsupervised lacuna existed between the decision to conduct an IC review and the requirement to make a decision under s 55K after undertaking that review (or otherwise to dispose of the application by s 54W);
- (b) the Respondent being required to give notice that an IC review will be undertaken;²¹
- (c) the Respondent being required to conduct an IC review in the manner provided for in s 55(4);
- (d) the Respondent being required to give notice in accordance with s 54X if the discretion not to undertake or continue an IC review is exercised; and
- (e) the assumption that an IC Review will be completed once a decision is made to undertake it, subject to ss 54R, 54W or 55F.

¹⁷ The power under s 54W does not arise on agreement because the matters of which the Respondent must be satisfied do not arise in that situation; similarly, disposition under s 54R does not require agreement of the parties.

¹⁸ cf Respondent’s Concise Statement in Response to Second Further Amended Concise Statement, dated 17 October 2022, [8].

¹⁹ AIC Act, s 8(h), s 10(1)(b).

²⁰ FOI Act, s 11(1).

²¹ FOI Act, s 54Z.

15. The conduct of an IC review is comprised of stages that culminate in a decision under s 55K(1). At the point at which the decision is made to undertake an IC Review, the Respondent has a legal duty to conduct the review to the endpoint of making a decision.
16. The Respondent has determined to undertake an IC Review on the whole of each of the separate question applications.²² A legal duty to conduct the review to the endpoint of making a decision in accordance with Division 7 of the FOI Act has arisen. Section 7(1) of the *Administrative Decisions (Judicial Review) 1977 (Cth) (ADJR Act)* is available to the Applicant and the application for judicial review is competent.

Undertaking an IC review constitutes conduct by the Respondent within s 6 of the ADJR

17. Conduct undertaken within the space between the exercise of the power to decide whether to undertake a review, and the making of a decision under s 55K(1), or the occurrence of an event contemplated by ss 54R, 54W or 55F, is procedural in nature.²³ It is conduct to which s 6(1) of the ADJR is directed, carried out for the purpose of making a decision on an IC Review under s 55K(1).²⁴ Further, conduct in relation to information gathering powers in Division 8 are also procedural in nature in that they deal with obtaining information and/or documents relevant to an IC review.
18. Once the Respondent has decided to undertake an IC Review, the manner in which it conducts the process of IC Review has a direct impact on the Applicant's legally enforceable right under s 11(1). It is the making of a decision under s 55K(1) which opens up an avenue of merits review for the Applicant to the AAT under Part VIIA,²⁵ provides a right of appeal to this Court under Division 10 of Part VII, or gives him access to information which he ought to have obtained from the relevant agency.
19. If, whilst undertaking an IC Review, circumstances indicate that although the Respondent determined to undertake an IC Review, that review should not now be undertaken, it has a discretion in s 54W(b) to decide that it is more appropriate for the AAT to conduct the merits review and the exercise of this discretion opens a means of review by the AAT under s 57A(1)(b).²⁶
20. On the Respondent's evidence in this proceeding, the Respondent's conduct in carrying out the IC reviews at issue constitutes conduct that renders the making of each of the decisions under s 55K improper exercises of that power. The exercises of the power are improper because the result of their exercise is uncertain within s 6(2)(h) of the ADJR Act.
21. The uncertainty for the purposes of s 6(2)(h) has a number of sources (described generally and specifically below). An IC review may (and in the Applicant's experience typically does) take years to complete. 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). Such conduct is an improper exercise of the power conferred upon the Respondent.

²² Dowsett, 22 August 2022, MR20/00054, [46], MR20/00424, [88], MR20/00544, [110], MR20/00613, [150], MR/20/00760, [168], MR20/00863, [185], MR20/00922, [211], MR20/01189, [218].

²³ This is so, regardless of whether the Applicant's submission is correct that a duty to make a decision arises at the point of deciding to undertake an IC review.

²⁴ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

²⁵ FOI Act, s 57A(1)(a).

²⁶ Provided the decision not to undertake a review is not occasioned by a matter within the control of the applicant (s 54W(a) and (c)), s 54W opens up a means of review to the AAT.

22. Further, 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. An applicant for IC review under s 54N may never receive a decision from the Respondent and the review and appeal rights in Part VIIA and Division 10 of Part VII may never become available.
23. The conduct of the Respondent in carrying out the FOI function and utilising the associated powers is to be performed and exercised in accordance with, inter alia, the objective in s 3(4) of the FOI Act. Evidence of the Respondent's conduct demonstrates that this objective is not being achieved in the IC reviews at issue. The Respondent has a broad general discretion under Division 6 as to how to conduct an IC review, and is given a range of tools (including in Division 8) to enable it to carry out a process in conformity with the objectives of the Act and the requirement in s 55(4)(c) that this be "timely" — yet it has not done so.

Part VII process – the Respondent's approach is ambulatory, convoluted and overly technical

24. Ms Dowsett opines that "[g]enerally, the IC Review process is intended to be a non-adversarial process that involves the use of alternative dispute resolution methods, in order to provide a timely and cost-efficient process ..."²⁷ Whilst this may generally be the case, some IC reviews are not suited to alternative dispute resolution methods to achieve timely resolution, and all require good case management practises to move efficiently towards a decision in order to avoid adverse impacts to an applicant's right to information and to achieve the objects of the FOI Act.
25. Although the Respondent has a broad ambit of discretion to determine how an IC review is conducted, that power is not at large. It must exercise its powers for the purposes of achieving the objects of the FOI Act. And, whilst the field of available conduct is only limited by what the Respondent considers to be appropriate,²⁸ it is nevertheless required to conduct the IC review with regard to the imperatives in s 54(4), "with as little formality and as little technicality as possible" and "in as timely a manner as is possible" given legislative requirements and a proper consideration of the relevant matters, and ensuring that each party is given a reasonable opportunity to present its case.²⁹
26. In each of the separate question IC review applications, the Respondent has determined to undertake an IC Review and issued notice under s 54Z (as it is required to do before undertaking an IC review) together with an informal request for documents. Thereafter, the matter waits in a queue to be allocated to an "SSR officer" for case management.
27. It appears that the Respondent considers delay arising from the SSR allocation queue to be a function of underfunding and consequent understaffing, and further, that the Applicant should not be allowed to "queue-jump" by seeking review of the carrying out of the duty, or alternatively the Respondent's procedural conduct. However, it is in fact the method of conducting the IC Review process implemented by the Respondent which is a primary factor contributing to the length of the queue.

²⁷ Dowsett, 22 August 2022, [24]; Office of the Australian Information Commissioner, *FOI Guidelines: Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (February 2022), Exhibit **GEN.0001** [10.15], [10.18], [10.21], [10.23], [10.52], and [10.53] and *Direction as to certain procedures to be followed in IC reviews* (30 January 2018), Exhibit **GEN.0002** [2.1].

²⁸ FOI Act, s 55(2).

²⁹ FOI Act, s 55(4)(a), (b) and (c).

28. Overall, the Respondent's evidence demonstrates that the process it implements is ambulatory, convoluted and repetitive; that many steps are taken but few achieve any material progress towards the making of a decision; and that there is little in the way of active case management by the Respondent to put itself in a position where it has the information it needs to make a decision on an IC review. The repetitive nature of the process produces inefficiency and goes further than providing a *reasonable* opportunity for parties to present their case.
29. Section 55D establishes an onus on the agency to justify its decision on a request for access under s 15 or establish that the Respondent should give a decision which is adverse to an IC Review applicant. Section 55DA requires an agency to use best endeavours to assist the Respondent to make its decision. Despite these provisions, the approach taken by the Respondent to case management is largely driven (at least in terms of timing) by agencies who, having decided not to release documents, have no practical incentive to ensure a timely process, and are provided with little impetus from the Respondent to do so. Inexplicably, the Respondent appears reticent to exercise the broad powers available to it to ensure the timely production of information by agencies, and to require their assistance to enable the Respondent to make a decision on an IC review.³⁰
30. Whilst acknowledging that it is a different legislative regime, the process undertaken by the Respondent can be contrasted with the procedure undertaken by the South Australian Ombudsman under s 39 of the *Freedom of Information Act 1991 (SA)* whereby upon an application being made, submissions and documents are sought from the relevant agency. When these are received, a draft decision is prepared by the Ombudsman and provided to the parties with an invitation to make submissions. Upon considering the parties' submissions, the Ombudsman finalises the decision.³¹

Specific aspects of the Respondent's evidence

31. The Respondent's evidence reveals many failures of process which are contrary to the requirements in s 55(4) and taken individually or together constitute both "unreasonable delay" within the meaning of s7 ADJR Act, and relevant conduct for the purposes of s6 ADJR Act in relation to each of the separate question applications.

³⁰ cf **GEN.001** Guideline: [10.20], [10.21], [10.23] – [10.25], [10.55], [10.59], [10.91] – [10.96], [10.101]; **GEN.002** Direction, [2.4], [2.5], [3.7] – [3.8], [6.1] – [6.2]; Dowsett, 22 August 2022, [26].

³¹ Patrick, 10 June 2022, [89] and Appendix 1 "Procedural Steps" to each of the decisions referred to therein: *SA Forestry Corporation 2020/05758* [2021] SAOmbFOI 3; *SA Forestry Corporation 2021/03554* [2021] SAOmbFOI 18; *Department of Premier and Cabinet 2021/01085* [2021] SAOmbFOI 10; *Department for Health and Wellbeing 2021/06514* [2021] SAOmbFOI 20.

32. First, there have been long periods of delay waiting for allocation to an SSR officer,³² long periods of inactivity without explanation,³³ and a number of occasions where changes in personnel assessing an application have caused delay.³⁴ This last category is unsurprising given each review has taken years. Further delays of this type seem likely given their current stage in the review process.
33. Second, numerous delays have arisen from repetitive extensions of time for agencies to comply with “requests” (usually informal “s 54Z notice” requests) from the Respondent,³⁵ and these are amplified by numerous failures to apply good case management procedures to follow up (either adequately, or at all) on previous requests or notices issued to the relevant agency, or on due dates previously granted by extension.³⁶ Belated responses to “requests” can be contrasted with timely compliance where the

³² MR20/00054, Dowsett, 22 August 2022, [46] 14/2/20 decision to conduct an IC Review, [63] 16/8/21 allocated to SSR; MR20/00424, Dowsett, 22 August 2022, [88] 28/4/20 decision to conduct review, [101] at 22/8/22 the matter had not yet been allocated to SSR. It is unclear whether it has since been allocated; MR20/00544 Dowsett, 22 August 2022, [110] 6/7/20 decision to conduct review, [114] 22/9/20 early allocation to SSR because case managed with other applications relating to similar documents; MR20/00613, Dowsett, 22 August 2022, [150] 28/7/20 decision to conduct review, [165] and Dowsett 8/9/22 [24] not yet allocated to SSR. MR20/00760 Dowsett, 22 August 2022, [168] 18/11/20 decision to conduct review, [179] and Dowsett 8/9/22 [30] not yet allocated to SSR. MR20/00863 Dowsett, 22 August 2022, [185] 17/11/20 decision to conduct review, [190] 26/8/21 allocated to SSR. MR20/00922 Dowsett, 22 August 2022, [211] 1/10/20 decision to conduct review, [165] and Dowsett 8/9/22 [31] not yet allocated to SSR. MR20/01189 Dowsett, 22 August 2022, [218] 5/3/21 decision to conduct review, [223] 26/8/21 allocated to SSR.

³³ MR20/00054 Dowsett, 22 August 2022 [84] – [86] delay between receipt of documents and Applicant’s submissions in April 2022 and issuance of s 55U notice on 25 July 2022. MR20/00424 Dowsett, 22 August 2022 [89], [00424.005.A1], [97], [103], [107], [00424.028.A1] the s 54Z notice requested document 1 and required only submissions on documents 2 and 3 which appear to have been provided on 24/8/20. No substantive step was taken from 24/8/20 until 29/7/22 at which time a s 55U notice was issued requiring production of documents 2 and 3. MR20/00544 Dowsett, 22 August 2022, [145] delay between receipt of Applicant’s submissions on 15/3/22 and writing to AGO on 13/5/22 to request further information. MR20/00613 Dowsett, 22 August 2022, [156], [159] delay between receipt of response to s 54Z notice on 29/9/20 to seeking approval to use online platform for transfer of material in late 2021. MR20/00760 Dowsett 22 August 2022, [[166]–[168] delay of over three months between receipt of application for review on 6/8/20 and initial assessment on 18/11/20. MR20/00760 Dowsett 22 August 2022, [177] three-week delay between receipt of response to s 54Z notice and request for attachments to be re-sent because original attachments inaccessible. MR20/00863 Dowsett 22 August 2022, [184] – [185] delay of over six weeks between confirmation on 1/10/20 that applicant wished to proceed with review and initial assessment on 17/11/20. MR20/01189 Dowsett 22 August 2022, delay of over two months between receipt of application for review on 30/11/20 and initial assessment on 5/3/21.

³⁴ MR20/00054 Dowsett, 22 August 2022, [59], [63], [80] resignation of Senior Review Adviser in January 2021; allocation to Review Adviser in August 2021; allocation in March 2022 to different Review Adviser due to resignation). MR20/00544 Dowsett, 22 August 2022, [127] resignation of Senior Review Adviser in February 2021 followed by reallocation in March 2021; further reallocation in May 2021 due to Review Adviser leaving team. MR20/00544 Dowsett, 22 August 2022, [133] reallocation to new Assistant Review Adviser due to similarity with other applications. MR20/00863 Dowsett, 22 August 2022, [193], [201] reallocation to Assistant Review Adviser due to workload and “competing priorities” of Review Adviser; reallocation to new Review Adviser due to resignation of Assistant Review Adviser. MR20/01189 Dowsett, 8 September, [38] reallocation on 12/8/22 to new Review Adviser due to “departure” of case-managing Review Adviser.

³⁵ cf GEN.0002, [3.8] which refers to the issuing of s 55R notices where multiple extensions are requested.

³⁶ MR20/00054 Dowsett, 22 August 2022, [48] s 54Z request to provide information by 1/4/20; [49] two extensions of time granted to 29/5/20 and 26/6/20; [57], [66], [68] extension of time granted on 27/10/21 to “consult” in order to provide a s 55G revised decision which had been expected in January 2021; deadlines set by the Respondent or the agency itself were not complied with by the agency on ten occasions 1/4/20 [50], 29/5/20 [51], 26/6/20 [52], “the end of July” [00054.11], 14/9/20 [55] – [56], 20/10/20 [57], January 2021 [64], 31/8/21 [65], 20/9/21 [00054.020], [66], 17/12/21 [69], [71]. No response to the s 54Z request to provide information had ever been received. When the information was finally provided following the s 55G revised decision, the documents were provided in redacted form despite an earlier direction to provide unredacted copies [71], [84], [86]. MR20/00424 Dowsett, 22 August 2022, [89] s 54Z request to provide information by 17/6/20; [90] three extensions of time granted however DISER still failed to comply with the new deadline of 3/8/20 [95] – [96]. MR20/00544 Dowsett, 22 August 2022, [111] s

information gathering powers under Division 8 are utilised (s 55R and s 55U notices, the evidence does not reveal an example of any s 55T notice being issued).³⁷

34. Third, there have been decisions to exercise particular powers to issue information gathering notices, followed by failures to do so once the decisions have been made.³⁸
35. Fourth, there have been instances of consideration of whether to exercise the power under s 54W(b) (decision not to undertake an IC review where desirable that the decision be considered by the AAT), but the power has not been exercised. It remains unclear when, if ever, the Respondent would determine to exercise that power.³⁹
36. Fifth, there have been indications from agencies that they will make a s 55G revised decision, followed by the Respondent waiting for the revised decisions for extended periods with little to no progress towards a decision in the meantime.⁴⁰ Section 55G(2) requires the Respondent to deal with the revised decision in place of the original decision, however there is no obligation on the Respondent to simply wait for the revised decision to be made and notified when an agency indicates it is considering revising its decision, or intends to do so.
37. Sixth, the Respondent employs an overly convoluted “procedural fairness” process which involves giving rights of response to the agency and the applicant repeatedly,⁴¹ such that the process becomes

54Z request to provide information by 2/9/20; [116] – [118] two extensions to provide s 54Z response by 9/10/20. The deadline was not complied with; [136] Another extension in relation to submissions was granted. [119] – [121] Following a further extension, non-confidential submissions were provided on 30/10/20. [145] A deadline for the provision of information by 20/5/22 was never responded to. **MR20/00613** Dowsett, 22 August 2022, [151] s 54Z request to provide information by 24/8/20; [154] – [155] two extensions granted to 28/9/20. **MR20/00760** Dowsett, 22 August 2022, [169] s 54Z request to provide information by 15/1/21; [172] by 7/4/21 no response had been received and an extension of time was requested. The Respondent’s response was to invite submissions from DISER to support its request ([175] which was never responded to by the Respondent). [176] a further extension was requested and approved to 2/7/21. **MR20/00863** Dowsett, 22 August 2022, [187] s 54Z request to provide information by 21/1/21. [188] no response from DISER until 7/4/21 when an extension was requested and granted. [196], [198], [199], [200], [203] six further extensions of time were granted for DISER to provide copies of material and submissions.

³⁷ **MR20/00054** Dowsett, 22 August 2022, [72] – [74] s 55R notice was issued and not complied with however, on the due date of the s 55R notice, 14 January 2022, DFAT finally issued a s55G revised decision which had been anticipated in January 2021; [86] (and Dowsett 8 September 2022, [9]) s 55U notice issued and documents produced on the due date. **MR20/00613** Dowsett, 22 August 2022, [162], [164] s 55U notice issued and documents provided only two days late despite an alternative means for delivery becoming necessary. **MR20/01189** Dowsett 8 September 2022, [36]–[37] s 55U notice issued, and complied with following one-day extension.

³⁸ **MR20/00054** Dowsett 22 August 2022, [59] staff instructed to issue s 55U notice but did not do so; **MR20/00544** Dowsett 22 August 2022, [123], [126] two instances of staff being instructed to prepare s 55U notices, but they were never issued.

³⁹ **MR20/00054** Dowsett 22 August 2022, [76], [78]; **MR20/00544** Dowsett, 22 August 2022 [137]; **MR20/00613** [154]; cf **GEN.0001**, [10.85], [10.88] – [10.89], Freedom of Information Amendment (Reform) Bill 2009, Explanatory Memorandum, 31.

⁴⁰ **MR20/00054** Dowsett 22 August 2022, [57], [74] indication from DFAT on 19/11/20 that it would finalise revised decision in in January 2021; DFAT issued revised decision one year later on 14 January 2022. **MR20/00863** Dowsett 22 August 2022, [200], [204] indication on 31/3/22 from DISER that it proposed to make a 55G decision. Decision received by Respondent on 8/6/22.

⁴¹ cf **GEN.0002**, [5.6] which directs agencies to their obligations under ss 55DA and 55D and the need to put forward all relevant contentions supporting reasons in response to the s 54Z notice.

circular.⁴² The procedure adopted in this respect goes beyond the requirement to ensure that each party is given a reasonable opportunity to present its case and is overly technical and time consuming.⁴³ Submissions are provided by applicants together with the IC Review application. Agencies provide submissions in response to s 54Z requests. These are provided to the Applicant and further submissions invited. The Applicant's further submissions are provided to the agency for response. On one occasion (MR20/00054), the Applicant was invited to make a further round of submissions before the agency submissions have been provided which led to yet another invitation to make submissions when they were provided. On the same review, the agency had made submissions but the Respondent was not persuaded by them, so the Respondent invited the agency to provide more submissions.

38. Seventh, the distinction between "procedural fairness steps" and "alternative dispute resolution methods" is by no means clear. For example, in MR20/00863, the Respondent employed steps which appear not to be procedural fairness steps but instead are akin to alternative dispute resolution techniques.⁴⁴ Given the length of delay on this application, it is unclear why the Respondent did not simply make a decision itself under s 55K of the FOI Act, or at the very least provide a preliminary view to the parties for response and then make the decision itself, rather than inviting the agency to re-make the decision and waiting for it to do so.
39. Eighth, in her evidence, Ms Dowsett deposes to a process whereby an agency makes submissions which may include new grounds of exemption that require further consideration or clarification.⁴⁵ This is exemplified by MR20/00054, in which the Department of Foreign Affairs and Trade (DFAT)'s original decision relied on ss 22, 33, 47E and 47G of the FOI Act,⁴⁶ while its revised decision, made two years after the IC review application was lodged, added reliance on ss 34 and 47C.⁴⁷ It is difficult to

⁴² **MR20/00054** Dowsett, 22 August 2022, [77], [82], [85], [86] **[00054.052]**, **[00054.052.A1]**, Dowsett, 8 September 2022 [10], **[00054.057]** Applicant provided submissions in response to a s 55G revised decision on 15/2/22 but was not provided with DFAT submissions of 14/1/22 until 25/3/22 when he was again invited to provide submissions and did so on 26/4/22; s 55U notice issued 25/7/22 requiring DFAT to provide further submissions on exemptions claimed in s 55G revised decision because "The FOI Commissioner considers that, even though the Department's submissions contain a degree of detail, in the light of the number of documents at issue, those submissions are not sufficient to satisfy him that the documents are exempt under ss 33 and 34 of the FOI Act." **[00054.052.A1]**. **MR20/00424** Dowsett, 8 September 2022 [21] the next steps in the review are anticipated to involve further submissions by DISER, it having provided submissions already on 24/8/20 (which presumably will involve a further invitation to the applicant to make submissions), or alternatively a s 55G revised decision by DISER whereupon the applicant will be asked if he is satisfied with the decision and invited to make further submissions which will be shared with DISER and DISER will be given an opportunity to provide more submissions. **MR20/00544** Dowsett, 22 August 2022, [122] – [123] Applicant requested to provide "any final new" submissions in response to AGO submissions. These were provided to AGO and AGO invited to provide submissions in response. [132] **[00544.077]**, [134] Further submissions were invited from AGO, [138] submissions invited from Applicant, [143] further submissions invited from AGO, [144] further submissions invited from Applicant. **MR20/00863** Dowsett, 22 August 2022, [187], [190], [192], [195], [199], [203], [205] 7/1/20 DISER invited to make s 54Z submission, 26/8/21 DISER submissions provided to Applicant who was invited to respond, 14/9/21 Applicant's submissions provided to DISER which provided submissions in response, 5/11/21 DISER invited to make further submissions, 22/2/21 more submissions sought from DISER, 27/4/22 DISER provided an opportunity to make more submissions, 9/6/22 Applicant provided submissions in response.

⁴³ FOI Act, s 55(4).

⁴⁴ **MR20/00863** Dowsett 22 August 2022, [192], [200], [204] On 14/9/21 the Respondent invited DISER to consider whether appropriate to issue revised decision under s 55G and to respond by 28/9/21; DISER did not act on the invitation until 31/3/22 and did not provide a revised decision to the Respondent until 8/6/22.

⁴⁵ Dowsett 8 September 2022, [24], [27], [32].

⁴⁶ Dowsett, 22 August 2022, [44].

⁴⁷ Dowsett, 22 August 2022, [74].

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 review⁴⁸ is relevantly narrow in scope.⁴⁹ The FOI Guidelines caution against an agency or minister putting forward new contentions that further or different exemptions apply in the context of revised decisions made under s 55G; these should be “justified by new circumstances or information that was not available at the time of the earlier decision”.⁵⁰ This is a particular application of a general principle that emerges from the *Direction as to certain procedures to be followed in IC reviews*:

“agencies and ministers should be aware that if they do not make submissions when an opportunity to do so has been provided, the matter may proceed to a decision under s 55K of the FOI Act without any further opportunity to make submissions. It is not open to agencies and ministers to reserve their right to make submissions at a later date.”⁵¹

Yet that is not the approach taken by the Respondent. As MR20/00054 demonstrates, the Respondent allows agencies to make new submissions in addition to the reasons given to the applicant, and then to claim new exemptions.

40. Ninth, in some instances, the review process has taken so long that events have overtaken the application.⁵² MR20/00544 is an example of this. Had the Respondent followed up on obtaining the document which is the subject of the IC review in a timely manner, it would not now be “lost” as a result of the change of Minister.

Conclusion

41. The Applicant deposes to the general and specific impacts of the delay in finalising the separate question applications.⁵³ Having regard to these impacts, the objects of the Act, the length and type of delay apparent in the conduct of the Respondent in undertaking the IC Reviews on the separate question applications, it is submitted that the separate question ought to be answered in the Applicant’s favour on each application.

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6 February 2023

⁴⁸ The “IC reviewable decision” under s 54K.

⁴⁹ FOI Act, s 55G(1)(a).

⁵⁰ **GEN.0001**, [10.74].

⁵¹ **GEN.0002**, [5.7].

⁵² **MR20/00424** Dowsett 8 September 2022, [13] As at 3/8/22, DISR had informed the Respondent that “given that DISR’s submissions were from 2020, consideration was being given to whether things had changed and whether they could release some material to the applicant”, that DISR was considering whether to make a s 55G revised decision and the Respondent would agree to a date for such a decision. **MR20/00544** is, from the Applicant’s point of view, the most egregious example of this. Patrick, 10 June 2022, [49] – [59]; Dowsett, 22 August 2022, [108], [111], [117] – [118], [123], [129] – [130] in response to the Applicant’s s 11 request, one document was identified by the agency as being in possession of the Attorney-General, the Hon. Christian Porter and a s34 Cabinet exemption was claimed (together with a s 42 legal professional privilege exemption). The Respondent issued a s 54Z requests with compliance required by 2/9/20. Two extensions were granted to 9 October 2020. The document was not provided and no s 55U notice was ever issued, despite the Respondent deciding to issue one on 7/12/20. More than four months later, on 30 March 2021, the Hon. Michaelia Cash was appointed Attorney-General. On 18/8/21, 13 months after the decision to undertake an IC Review was made, the Respondent emailed AGO noting that a new Attorney-General had been appointed and pointing out that if the document was not in the possession of the new Minister the FOI Act would not apply. AGO responded that the document was not in the Attorney’s possession. No s 55V Notice was ever issued to compel further searches. Subsequently, elections were held and a new Attorney-General took office. If the document had been produced to the Respondent in a timely manner, it would have been produced by the then Attorney-General to the Respondent prior to the change of Minister on 20 March 2021 and would not now be “lost”.

⁵³ Patrick, 10 June 2022, [7] – [85]; Patrick 29 August 2022, [9] – [50].