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ACN 008 711 877

T: 1800 AUSCRIPT (1800 287 274)

E: clientservices@auscript.com.au

W: www.auscript.com.au

TRANSCRIPT OF PROCEEDINGS

O/N H-1814770

FEDERAL COURT OF AUSTRALIA

VICTORIA REGISTRY

WHEELAHAN J

No. VID 519 of 2021

REX PATRICK

and

AUSTRALIAN INFORMATION COMMISSIONER

MELBOURNE

10.20 AM, MONDAY, 20 MARCH 2023

MS T.J. ACREMAN appears for the applicant

MS Z. MAUD SC appears with MS A. WHARLDALL for the respondent

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HIS HONOUR: I will take appearances. Thank you.

MS T.J. ACREMAN: For the applicant in this proceeding, your Honour, Ms Acreman.

5

HIS HONOUR: Thank you, Ms Acreman.

MS Z. MAUD SC: If the court pleases, I appear with MS. A. WHARLDALL for the respondent.

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HIS HONOUR: Thank you, Ms Maud.

MS ACREMAN: I beg your pardon, your Honour, I was just making sure I was on silent.

15

HIS HONOUR: Ms Acreman, subject to any submissions you want to make, I propose to proceed as follows. First, the court will receive evidence from both parties, hear any objections if they're made, and then proceed to submissions.

20 MS ACREMAN: Thank you, your Honour. Does your Honour have the joint tender bundle?

HIS HONOUR: I do.

25 MS ACREMAN: And your Honour may be aware that there was an affidavit filed and served yesterday.

HIS HONOUR: I've read that affidavit.

30 MS ACREMAN: Okay, then. There are a number of matters in that affidavit that are not pressed, so I will take you through those and then I will seek to tender it with leave.

35 HIS HONOUR: I think, strictly, you only need leave for an extension of time to file the affidavit.

MS ACREMAN: It was filed without a court order, so I had assumed I needed leave. But I won't apply for leave if there's no need to.

40 HIS HONOUR: If that – if the question of timing is not opposed, you don't need to seek leave to file it – Ms Maud.

MS MAUD: The question of timing is not problematic, your Honour.

45 HIS HONOUR: So simply proceed on the basis that I will permit you to tender such of that affidavit that's not overruled.

MS ACREMAN: Thank you, your Honour. Can I take you through – so essentially what will survive from that affidavit, following agreement between the parties on some matters, is that paragraph 1 will survive.

5 HIS HONOUR: Okay. So just to let you know, what I'm going to do, is I'm going to cross out those paragraphs on my copy which are not tendered – don't form part of the tender.

10 MS ACREMAN: Yes, thank you. Paragraph 1 will survive. Paragraphs 2 through to 6 inclusive are not pressed, so they will be out. And then paragraph 11 including the accompanying exhibit is not pressed, so that all that remains of that affidavit is paragraph - - -

15 HIS HONOUR: So I've just crossed out two to six. I've fallen behind a bit.

MS ACREMAN: Sorry. Paragraphs 2 to 6 are not pressed, and paragraph 8 - - -

HIS HONOUR: Is not pressed?

20 MS ACREMAN: Is not pressed, including the accompanying exhibit, RLP6.

HIS HONOUR: So that leaves paragraphs 1 and 7. Is that correct?

25 MS ACREMAN: That's correct, your Honour.

HIS HONOUR: Yes.

30 MS ACREMAN: And I understand that Ms Maud has some reciprocal paragraphs in the Dowsett affidavit material to change in relation to the agreement. There's also one aspect of the applicant's submissions which I need to remove.

HIS HONOUR: We will come to that shortly. So we will just deal with evidence at the start.

35 MS ACREMAN: Sure. So that's the affidavit of Mr Patrick affirmed 19 March 2023, and then in the tender bundle, I seek to tender the affidavit of Mr Patrick at tender bundle pages 1 to 12. That's affirmed 10 June 2022. The affidavit of Mr Patrick 29 August 2022. That's tender bundle 13 to 20, and the associated annexures. There are some matters in that material that are not pressed. So – I beg
40 your pardon, your Honour.

45 HIS HONOUR: Sorry, can I just indicate for the assistance of all counsel what I've done. Because there's at least one affidavit in the tender bundle that doesn't include any of the annexures, I have separated into my own folder each of the affidavits that I anticipate the parties would wish to tender, and I will be referring myself to those affidavits as separate documents. So that forms the foundation of the next question. In the tender bundle, there are listed separately some but not all annexures to the

affidavits, so, for instance, in the case of Mr Patrick, the affidavit listed at number 2, there are then four annexures listed. Now, my question is, looking at the affidavits individually from the applicant's perspective only, are all the annexures tendered?

5 MS ACREMAN: All the annexures that were filed are intended to be tendered.

HIS HONOUR: Yes, thank you.

MS ACREMAN: Yes.

10

HIS HONOUR: So it's sufficient for me just to look at the actual affidavits rather than the tender bundle?

MS ACREMAN: Yes, and in fact, that's what I'm doing myself.

15

HIS HONOUR: Thank you.

MS ACREMAN: I'm not really referring to the tender bundle. Thank you.

20 HIS HONOUR: So you were about to indicate – there are some aspects, I take it, of the evidence that are not pressed? And by that, I take it – take you to mean that you don't seek to tender particular passages in the affidavits. Is that correct?

25 MS ACREMAN: Yes. In response to some objections which I anticipate from the respondent.

HIS HONOUR: Yes, yes.

MS ACREMAN: So I might just take you to those parts that are not pressed now.

30

HIS HONOUR: Yes.

MS ACREMAN: In the affidavit of Mr Patrick dated 10 June 2022, paragraph 8 is deleted in full.

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HIS HONOUR: And I take it this is as a product of discussions you've had with Ms Maud?

MS ACREMAN: That's correct, your Honour.

40

HIS HONOUR: Yes.

MS ACREMAN: I've received on Friday afternoon a table of objections which I understand Ms Maud is going to hand up to you. And there are some aspects of that which we've agreed upon.

45

HIS HONOUR: Okay. Can I commend counsel for taking that course.

MS ACREMAN: Thank you, your Honour. So - - -

HIS HONOUR: So I've struck out paragraph 8 on my copy.

5 MS ACREMAN: Yes. And paragraphs 23 to 30 in that same affidavit are not pressed. And paragraphs 49 to 59 inclusive are not pressed. Paragraphs 86 to 90 inclusive are not pressed. And paragraph 87 is not pressed.

HIS HONOUR: So did you just say 86 to 90?

10

MS ACREMAN: I beg your pardon, yes, I'm sorry, it's a separate item in the table. So 86 to 90 are not pressed.

HIS HONOUR: Yes.

15

MS ACREMAN: Thank you. In the affidavit - - -

HIS HONOUR: Just pause there. Are there any other objections to that affidavit?

20 MS MAUD: There are, your Honour, yes.

HIS HONOUR: Pardon?

MS MAUD: There are, yes.

25

HIS HONOUR: Okay.

MS ACREMAN: In the affidavit for Mr Patrick affirmed 9 August 2022 - - -

30 HIS HONOUR: So there's nothing in the affidavit of 20 – sorry, 29 August 2022, I've got that.

MS ACREMAN: Yes, it's 29 August. I beg your pardon. Paragraph 7 is not pressed. And paragraphs 27 to 31 inclusive are not pressed. And those are the
35 aspects that are not pressed, so I seek to tender the applicant's affidavits, your Honour.

HIS HONOUR: Okay. Well, before I receive those, I will hear any submissions on behalf of the respondent in relation to evidentiary objections.

40

MS MAUD: Your Honour, if I might deal with the affidavit that was filed over the weekend, paragraph 7 of that affidavit, which is the only substantive surviving paragraph. Your Honour will see that this paragraph refers to an IC review from 2022, which is not the subject of the separate question, in my submission, it's not
45 apparent how decisions made in relation to a matter that's not the subject of this IC review is relevant to any issue that your Honour has to determine in the proceeding.

HIS HONOUR: Yes. I will just raise another issue which is an adjunct to the point you've just raised, which is should the court make an order varying the order fixing the separate question so as to exclude those two matters that have been determined since that order was made.

5

MS MAUD: Your Honour could do that, alternatively, no relief is sought in relation to those two applications, as I understand it. So it may just be that there's no need for your Honour to deal with that as a matter of relief.

10 HIS HONOUR: Okay. I will hear Ms Acreman on those two – I will deal with the affidavits one by one.

MS MAUD: Yes, I think that's best. Thank you, your Honour.

15 MS ACREMAN: Thank you, your Honour. I'm in your hands as to the order in relation to the resolved matters. It might be tidier to make an order. I can confirm that relief is not pressed for those two matters, but it would be, I think, to deal with them in the orders themselves in final disposition, or in an earlier order.

20 HIS HONOUR: What I propose to do at some stage today, I will make an order removing those two applications from the matters that are to be the subject of the separate trial, and I will also make some sort of anodyne order which will list as a schedule to that order any paragraphs of the affidavits that are either not pressed, or where objections are upheld, so that it's clear what's in evidence and what's not,
25 both for this court and for the Full Court if the matter goes further.

MS ACREMAN: Thank you, your Honour. As to the second issue, the paragraph that remains is relied upon for what I anticipate might be argument in relation to the other objections. So I respectfully request that we deal with this particular paragraph
30 and whether it's in or out after we deal with the objections that are about to be raised on the other material.

HIS HONOUR: Okay. So we will come back to paragraph 7.

35 MS ACREMAN: Thank you.

MS MAUD: All right. In that case, dealing then with the first affidavit of Mr Patrick that was in the tender bundle, the affidavit of 10 June 2022, we do have a table, your Honour, which sets out just in summary form the position, if we could
40 hand that up. Your Honour, the table is colour coded. That's just to identify that although there's a large number of paragraphs that objection is taken to, they raise common issues. So we've just sought to colour code them so that the common issues are a bit more readily identifiable. So the first objection has fallen away, because that paragraph is not pressed. The first paragraph of the affidavit to which objection
45 is taken is paragraph 17. And this paragraph deals with the impacts from the applicant's perspective of delay, and it's a slightly confusing paragraph. The first sentence says that it:

Delay can lead to adverse impacts regardless of whether I'm ultimately successful in obtaining information under an application.

It then, I think, goes on to explain the two scenarios:

5

If I'm successful in obtaining documents as a result of an IC decision, the delay created by assessment times within the office of the IC results in a delay in me receiving documents –

10 That's an obvious proposition. The second aspect of it is where an application for a review to the information commissioner is unsuccessful, the delay in obtaining a decision from the information commissioner factors into my own decision-making on how and when to engage in some aspects of public debate. Your Honour, the objection is just really that this is irrelevant. The consequences for the individual
15 applicant of delay, in my submission, are not relevant, and this issue will arise in a number of ways. We – in a number of instances in the affidavits. We haven't taken objection to the general evidence about Mr Patrick having been a senator and these information requests having been made for the purpose of discharging his duties as a senator.

20

I accept that that might be a broadly relevant background circumstance. But what the affidavits do is they seek to adduce evidence in relation to the purpose of the specific FOI requests. What the applicant was seeking the information for, and what he sought to do, and the consequences of delay for him in relation to each of those
25 matters. And, in my submission, that's objective evidence of impacts is irrelevant. There is some discussion of this in the cases, your Honour, and it does go both ways to some extent. There's at least two cases that your Honour will be taken to in due course which are old cases in relation to this unreasonable delay concept in the ADJR Act, and they take a different approach on this issue. In the first of those
30 decisions, Thornton v Repatriation Commission - - -

HIS HONOUR: That's Fisher J's decision, which I've read.

35 MS MAUD: Yes, your Honour. In that case, Fisher J took the view that the individual circumstances of the applicant were irrelevant, because the question of whether there had been unreasonable delay had to be determined as an objective question. In the other old case of Wei v Minister for Immigration and – I think at that time, it might have been Local Government or something like that – in that decision, there was – it was regarded as relevant that some of the applicants in that
40 case – there were five of them – and for some of them, the delay had meant that they had moved from being legally in Australia to being unlawfully because – in Australia, because their visas had expired, and Neaves J in that case thought it was relevant that – that that circumstance was relevant.

45 So your Honour can see that they're slightly different approaches taken, but in my submission, in this case, having regard to the scheme of the FOI Act, the individual reasons why an applicant might want particular documents, and the consequences for

that applicant of delay are not objectively relevant to the assessment of whether there has been unreasonable delay. The only caveat to that, is that if an application had been made to have the IC review expedited, then – and that had been refused, then I accept that – and if that was said to be one of the grounds that had contributed to
5 unreasonable delay, then it's possible that your Honour would then have to, through the prism of unreasonableness, assess that decision. But there has not been an application for expedition of any of the seven remaining IC reviews the subject of the separate question. So, in my submission, if the individual circumstances of the applicant, his reasons for wanting the documents and the consequences of delay in
10 relation to the individual matters is not relevant. And so this paragraph, although it is framed at a more general level, in my submission, is not relevant for that reason.

HIS HONOUR: Well, just pausing with paragraph 17, is there anything else you want to say about paragraph 17?

15 MS MAUD: No, your Honour.

HIS HONOUR: Yes. I don't need to hear from you, Ms Acreman. I overrule the objection. I'm – the extent to which the evidence in paragraph 17 of the applicant's
20 affidavit is relevant to the question whether delay is reasonable or not is a matter that can be the subject of argument by the parties during the course of the hearing, and in my view, it's a matter that I might ultimately be called upon to determine at the conclusion of the hearing, and it's not appropriate that I pre-empt those conclusions by making a ruling on evidence by reference to the criteria in section 55 at the
25 present point in time. The question may well arise as to the extent to which anything said in paragraph 17 of the applicant's affidavit would constitute facts that are apparent or ought to be apparent to the respondent, so that they would, in effect, be mutually known facts for the purposes of determining whether the delay has been unreasonable.

30 MS MAUD: If the court pleases. The next paragraph is paragraph 20, and in particular, the last sentence – pardon me, I withdraw that – the last sentence of paragraph 20:

35 *This has resulted in the government making the decision without the opportunity for properly informed public engagement in the process.*

Your Honour, in my submission, that sentence is speculative, and it's in the nature of a submission, and there's no foundation for the problem stated there.

40 HIS HONOUR: Ms Acreman.

MS ACREMAN: Thank you, your Honour. In relation to the allegations of this being speculative, in my submission, it's actually a factual statement. It does depend
45 on whether or not documents will ultimately be released, but that is a matter that is not able to be determined by the applicant himself. It's wholly within the powers of the respondent to decide whether or not documents will be released at the end of an

IC review, and then the AAT, if an appeal is taken of the IC review decision. So whilst it is a factual statement about the impact, if documents are released in the end, that is a matter that ought to go to weight. So the - - -

5 HIS HONOUR: Thank you. I don't need to hear from you any further.

MS ACREMAN: Thank you.

10 HIS HONOUR: I overrule the objection. The last sentence of paragraph 20 is a – is no more than a conclusion that's implicit from the sentences that precede it, to which no objection has been taken.

MS MAUD: If the court pleases. The next item in the table is the paragraphs that have been not pressed, 23 to - - -

15 HIS HONOUR: Sorry, I can't hear you.

MS MAUD: Pardon me. The next item in the table, item 4, has already been dealt with. Those paragraphs are not pressed. The next contested objection is paragraph 20 33. And I suspect that, your Honour, this will be resolved in the same way that your Honour has just resolved the previous objection, because the basis for it is the same.

HIS HONOUR: So that means it's not objected to?

25 MS MAUD: Yes.

HIS HONOUR: Thank you.

MS MAUD: Well, it is, but I will take your Honour to – overrule me on that, yes.

30 HIS HONOUR: Well, you – you no longer have an intention to make an objection?

MS MAUD: The next paragraph is paragraph 35.

35 HIS HONOUR: Sorry, this is upside down.

MS MAUD: It has been printed on both sides, your Honour. I think the objection here is just the words "frustratingly", and then the balance of the sentence that says - - -

40 HIS HONOUR: Ms Maud, I'm capable of detecting hyperbole.

MS MAUD: Yes, your Honour. Yes. I accept that, your Honour. I won't press that objection. 36, your Honour has already dealt with that substantive issue. 46, I 45 think will be the subject of your Honour's first ruling. Again, this paragraph, again, presumes that access to the documents will be granted as the outcome of the IC review. So it's speculative in that sense, and it's irrelevant. But, your Honour,

perhaps I can just identify for the transcript, the paragraphs to which objection has been taken, but which your Honour applying the same reasoning for the first ruling, will be taken to have overruled, that's paragraphs 46, 62 and 64, 67 to 68, 73, 75, 79 and 83.

5

HIS HONOUR: So just for the transcript, these are paragraphs to which you would have objected, save that you've seen which way the wind is likely to blow?

MS MAUD: Yes, your Honour.

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HIS HONOUR: So therefore you don't press any objection?

MS MAUD: Yes, your Honour. And then the last two objections in relation to that affidavit, the paragraphs are not pressed, so those are all of the objections in that particular affidavit.

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HIS HONOUR: Thank you. So the upshot of that, is that the affidavit of the applicant dated 10 June 2022 will be exhibit A1, subject to the deletion of those paragraphs which are 8, 23, 24, 25 – I will say that again – 23 to 30, 49-59 and 86-90 which are not read to the court.

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**EXHIBIT #A1 AFFIDAVIT OF THE APPLICANT SUBJECT TO DELETION
OF MENTIONED PARAGRAPHS NOT READ TO THE COURT DATED
10/06/2022**

25

MS MAUD: Thank you, your Honour. If your Honour would just give me one moment, the second affidavit – I think the objections are all of the same kind that your Honour has already dealt with. Thank you, your Honour. In light of your Honour's ruling in relation to the first two objections, I won't press the objections in relation to the balance of the paragraphs in the second affidavit of Mr Patrick.

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HIS HONOUR: So the affidavit of the applicant dated 29 August 2022 will be marked exhibit A2. That affidavit will be received subject to paragraphs 27 to 31 not being read to the court.

35

**EXHIBIT #A2 AFFIDAVIT OF THE APPLICANT, SUBJECT TO
PARAGRAPHS NOT BEING READ TO THE COURT DATED 29/08/2022**

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MS MAUD: If the court pleases. Yes, your Honour, I'm helpfully reminded that paragraph 7 of that affidavit was also not pressed.

45

HIS HONOUR: Yes, thank you very much, Ms Maud. So paragraph 7 also is not read to the court.

MS MAUD: That leaves, then, the affidavit that was filed over the weekend. I'm not sure now what the position is in relation to that affidavit.

HIS HONOUR: I will hear from Ms Acreman.

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MS ACREMAN: Thank you, your Honour. I was going to make some submissions about the Wei case – and that paragraph. I do still press that paragraph, because I will be making those - - -

10 HIS HONOUR: Which paragraph?

MS ACREMAN: I beg your pardon, the paragraph of Mr Patrick's affidavit of 19 March 2023. I can make the submission now.

15 HIS HONOUR: Yes. So the objection is on the ground of relevance, on the basis that application MR22O1189 is not before the court.

MS ACREMAN: And it's accepted that that application is not before the court, but didn't form any part of this proceeding. However, in my submission, because the
20 respondent has put the question of whether it has the resources to properly carry out its administrative function, and that resourcing is a – an issue which feeds into any delays which have occurred, then it becomes relevant to assess whether or not the applicant's right under section 11(1) of the Freedom of Information Act, the access to information right has been set at nought, or has been detrimentally affected. You
25 will recall from the Wei decision that there was a comment by his Honour that – where resourcing was argued in that case if the rights of the applicant is set at nought by a failure to provide resources, then that is a matter for – which is relevant, and in that instance, the applicants had become a legal Once one understands that, the impact on the applicant is relevant, then ipso facto, the reasons for him seeking the
30 information must also be relevant. One can't understand the impact on his right to the information unless one knows what he was going to use it for.

HIS HONOUR: Can you just explain to me what – what I'm to make of the fact that one application was the subject to a decision under section 54W?
35

MS ACREMAN: So if I can take you to the exhibit. It's RLP5.

HIS HONOUR: Got that.

40 MS ACREMAN: The first part of the exhibit was the expedition request, which is included for the sake of completeness. Following the expedition request, the respondent exercised the section 54W power. And if I can take you to page 9 of the exhibit - - -

45 HIS HONOUR: Just pausing with the letter.

MS ACREMAN: I beg your pardon, sir?

HIS HONOUR: Just pausing with the letter of 13 December 2022.

MS ACREMAN: Yes.

5 HIS HONOUR: That contains representations that might be relevant on the application. So, for instance, in the third paragraph, the office is currently focusing on case management and finalisation of aged matters.

10 MS ACREMAN: Yes. I haven't looked at it from that point of view, but I'm not seeking to take this letter out.

HIS HONOUR: Yes.

15 MS ACREMAN: I'm seeking to have it in as an exhibit. It's relevant for the purposes of, perhaps, understanding why the expedition request was refused. But that's a matter for the respondent. The focus of my attention is the exercise of the discretion in 54W, and the reasons stated in the second part of the exhibit as to why the discretion was exercised.

20 HIS HONOUR: Yes. I've distracted you. Which – which page?

MS ACREMAN: Sorry, it's paragraph 10. I had the wrong page anyway.

25 HIS HONOUR: Yes.

MS ACREMAN: Sorry, page 10.

HIS HONOUR: Got that.

30 MS ACREMAN: You will see that the reasons for decision commence at paragraph 16. And on the bottom of that page, the applicant submits that the subject matter of the request has considerable public interest, which has a temporal urgency. In my submission, this reveals that what the applicant says about the way that the information will be important if it's released, and therefore, the way he's going to
35 use the information, or what it's relevant to, following release, is a matter that will be taken into account by the respondent in some instances in making a section 54B – 54WB decision, and that the public interest aspect, as well as the temporal urgency feeding to the – the resulting use of the information, if it is released. So – and they also feed into delay. So it's sought to be adduced for the purposes of showing that
40 these are matters which can feed into the discretion and in which, in some cases, do feed into the discretion exercised by the respondent under 54WB. So it's a methodology of the exercise of the discretion, if you will. And I will just add that, in my submission, looking at the public interest and temporal urgency aspects necessarily involves an examination by the respondent of the impact of the delay and
45 the applicant's reasons for requesting the information. Those are the submissions on that point.

HIS HONOUR: I don't need to hear from you, Ms Maud. I uphold the objection to paragraph 7. I'm not satisfied that the commissioner's consideration of a different request and the determination to refer that review to the AAT for the several reasons referred to in paragraph 16 of the decision including that the respondent did not
5 object to the request that it be sent to the tribunal, and that any review decision is likely to be taken on appeal to the tribunal in any event, will have any bearing on the disposition of this proceeding to the extent which it relates to those reviews that are the subject of the trial of the separate question.

10 MS ACREMAN: Thank you, your Honour. So that's the evidence.

HIS HONOUR: Does that have the consequence then that the affidavit of 19 March 2023 is not tendered?

15 MS ACREMAN: That's correct, your Honour.

HIS HONOUR: Yes.

20 MS ACREMAN: So that's the evidence for the applicant, your Honour.

MS MAUD: If the court pleases, the respondent seeks to tender five affidavits. The first is the – item 3 in the joint tender bundle, the affidavit of Elizabeth Hampton of 5 August 2022, along with the five exhibits to that affidavit. And I seek to tender that affidavit, your Honour. I don't understand there's any objection taken to that
25 affidavit.

MS ACREMAN: There's no objection taken, your Honour. There's matters of hearsay in the affidavit which are not objected to. I'm not going to use the court's time going through hearsay matters when there's a narrative there based on
30 documents. Some of the material definitely appears in the Resolve records, which are the business records of the respondent. Most of it is in there - - -

HIS HONOUR: Sometimes it's easier for the court if someone actually explains what's going on, than the court having to go through computer generated records to
35 try and work it out for itself.

MS ACREMAN: Yes. And I must say, I found it helpful to have a narrative. So there's no objection taken, but I'm – obviously the documents themselves are the primary evidence, and if there are any issues around hearsay, then I'm sure that your
40 Honour is well able to deal with those. So there's no objection today.

HIS HONOUR: And if there's any representation, hearsay representation made in the affidavit which is disputed, then you will have an opportunity to make submissions about that.

45 MS ACREMAN: Thank you, your Honour.

HIS HONOUR: Thank you. So the affidavit of - - -

MS MAUD: Your Honour, just - - -

5 HIS HONOUR: - - - Elizabeth Hampton dated 5 August 2022 will be marked as exhibit R1.

EXHIBIT #R1 AFFIDAVIT OF ELIZABETH HAMPTON DATED 5/08/2022

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MS MAUD: Thank you, your Honour. Just to clarify, that's not the affidavit that exhibits the Resolve records and other records. That's - - -

15 HIS HONOUR: That's one of the Dowsett affidavits – in fact, several of the Dowsett affidavits.

MS MAUD: Yes, they're the Dowsett affidavits, which I'm about to come to. There's four of them, your Honour.

20

MS ACREMAN: I beg your pardon, those – I intended that to be the August Dowsett affidavit. Thank you.

HIS HONOUR: That's okay, yes.

25

MS MAUD: Just to clarify that. So, your Honour, the second affidavit that the respondent seeks to tender is the affidavit of Rocelle Anne Dowsett of 22 August 2022, and that affidavit has a large number of – it has one annexure, but it's voluminous, and the documents are indexed individually at the - - -

30

HIS HONOUR: And just for future reference - - -

MS MAUD: Yes, your Honour.

35 HIS HONOUR: - - - I know these questions can be difficult, and involve judgments, but the presentation of this affidavit is not best practice.

MS MAUD: Yes, your Honour.

40 HIS HONOUR: The file is about 400 megabytes, and every time I go to mark it up, my device wants to save the file, and that takes significant amounts of time. It would have been better, in hindsight, if an affidavit with this number of exhibits was organised so that at least separately there was a spreadsheet which enabled one to click on the exhibits individually so that they did not contribute to a 400 megabyte
45 document.

MS MAUD: Yes, your Honour. I've encountered the same problems, and I can only apologise.

5 HIS HONOUR: So those people responsible for IT at the office of your instructing solicitors should put this in the column learnings.

10 MS MAUD: We will certainly take note of that for future, your Honour. There are 295 separate documents that form part of that first exhibit, and I seek to tender the affidavit with all of those, subject to taking out some paragraphs of the affidavit which deal with the one matter that, at the time, the affidavit was prepared was still on foot, but which has now been resolved, and in my submission, your Honour won't need the evidence in relation to those matters.

15 HIS HONOUR: Okay. Do you want to just go through those now and I will cross them out on my copy?

MS MAUD: Yes, your Honour. It's from paragraph 108 through to - - -

20 HIS HONOUR: And your intention is that this will include the corresponding exhibits that are not read either?

25 MS MAUD: Yes, that's right, your Honour. And it's through to paragraph 148. So those paragraphs along with the pages that are referred to in them will not be relevant to your Honour, and they can come out. Yes, your Honour, the same issue arises in relation to paragraph 43. That paragraph merely notes the fact that the application – the IC review had been determined. If your Honour is going to amend the separate question to remove these two matters altogether, then, in my submission, even that bare fact is not necessary.

30 HIS HONOUR: Sorry, just take me back, paragraph 40 what?

MS MAUD: 43, your Honour.

35 HIS HONOUR: So 43 is not read either?

MS MAUD: On the basis that your Honour is proposing to amend the separate question.

40 HIS HONOUR: Yes.

MS MAUD: It was included because it would otherwise have been relevant to the question of relief in relation to this particular IC review.

45 HIS HONOUR: Ms Acreman has invited me to remove those.

MS MAUD: Yes. So on that basis, that paragraph can also come out.

HIS HONOUR: And I will make an order during the course of the day to that effect.

MS MAUD: Thank you, your Honour. So subject to deletion of paragraph 43 and paragraphs 108 through to 148, I tender that affidavit, your Honour.

5

HIS HONOUR: Ms Acreman, any objections?

MS ACREMAN: No objection, your Honour.

10 HIS HONOUR: The affidavit of Rocelle Anne Dowsett dated 22 August 2022 will be marked as exhibit R2, noting that paragraphs 43 and 108 to 148 together with the corresponding annexures are not read to the court.

15 **EXHIBIT #R2 AFFIDAVIT OF ROCELLE ANNE DOWSETT WITH MENTIONED PARAGRAPHS AND ANNEXURES NOT READ TO THE COURT DATED 22/08/2022**

20 MS MAUD: If the court pleases. The next affidavit of Ms Dowsett is the supplementary affidavit of 8 September 2022 along with exhibit RAD2 and, again, your Honour, I seek to tender the whole of this affidavit, other than the paragraphs that, again, that deal with matter MR2000544, which are paragraphs 22 and 23.

25 HIS HONOUR: Any objections, Ms Acreman?

MS ACREMAN: No objection, your Honour.

30 HIS HONOUR: Exhibit R3 will be the affidavit of Rocelle Anne Dowsett dated 8 September 2022, noting that paragraphs 22 and 23, and the corresponding annexures referred to in paragraph 22 are not read.

35 **EXHIBIT #R3 AFFIDAVIT OF ROCELLE ANNE DOWSETT WITH PARAGRAPHS 22-23 AND CORRESPONDING ANNEXURES NOT READ DATED 08/09/2022**

40 MS MAUD: If the court pleases. The next affidavit is the third affidavit of Ms Dowsett of 6 March 2023, along with exhibit RAD3 to that affidavit. And again, paragraphs that are not read are paragraph 39, your Honour – this, in fact, doesn't relate to that matter of 00544. Rather, this is the agreement that the parties have reached as my learned friend alluded to earlier. This evidence was included in response to a line in the applicant's submissions. That line is not pressed, so we're
45 content to take out paragraph 39 of this affidavit. And then the paragraphs in relation to matter MR20/000 – 00544, are 75 and 76, your Honour. So subject to deletion of

those three paragraphs, I otherwise seek to tender that affidavit along with the exhibit. I don't understand there otherwise to be objection to that.

HIS HONOUR: Any objections?

MS ACREMAN: There's no objection.

HIS HONOUR: Thank you. Exhibit R4 will be the affidavit of Rocelle Anne Dowsett dated 6 March 2023 noting that paragraphs 39, 75 and 76 and the annexure referred to in paragraph 76 are not read to the court.

**EXHIBIT #R4 AFFIDAVIT OF ROCELLE ANNE DOWSETT EXCLUDING
PARAGRAPHS 39, 75, 76 AND ANNEXURE REFERRED TO IN
PARAGRAPH 76 DATED 06/03/2023**

MS MAUD: Thank you, your Honour. Then the last affidavit is the fourth affidavit of Ms Dowsett affirmed 14 March 2023, and in relation to this paragraph, we don't seek to read paragraph 9 for the same reason as paragraph 39 of the previous affidavit, so that paragraph 9 can come out. And that's the only deletion from that paragraph. I otherwise seek to tender that along with the exhibit.

HIS HONOUR: Any objections?

MS ACREMAN: No objection. Thank you.

HIS HONOUR: Exhibit R5 will be the affidavit of Rocelle Anne Dowsett dated 14 March 2023 noting that paragraph 9 of the affidavit is not read to the court.

**EXHIBIT #R5 AFFIDAVIT OF ROCELLE ANNE DOWSETT EXCLUDING
PARAGRAPH 9 DATED 14/03/2023**

MS MAUD: If the court pleases. That's the evidence – I beg your pardon. I should deal with the couple of – there's a small number of documents that are included in the tender bundle which are duplicates of documents that are part of Ms Dowsett's first affidavit. The reason they are replicated again in the tender bundle separately is because we have identified that there's a small number of redactions of those documents which had the effect of obscuring surrounding text. So in the other versions that are in the tender bundle, that issue has been corrected. I note that the documents numbered 15, 16 and 17 in the tender bundle – I don't seek to press those, because they all relate to the matter MR20/0054, which – 544 which has now been determined. So I don't press those. But otherwise I don't know whether it will be an issue. The issues are fairly minor. In relation to two of them, though, they do – the redactions in the affidavit itself do have the effect of deleting details like the date of the email and – in one part, some text of the email itself.

HIS HONOUR: Now, you've just tendered the affidavit, the first affidavit.

MS MAUD: Yes, your Honour.

5 HIS HONOUR: So can you just explain to me again what the purpose of these separate documents is?

MS MAUD: They are, in effect, to take the place of the version of that same document in the affidavit, to deal with the fact that the version in the affidavit has
10 some redacting problems.

HIS HONOUR: Like what, for instance?

MS MAUD: Of the kind I just described, your Honour, where because of the
15 redaction in one line, text in the line below has - - -

HIS HONOUR: I see, erroneous redaction, which has had the consequence – so I didn't understand you the first time, but it has had the consequence, for instance, that the date of the application was redacted, when that - - -
20

MS MAUD: Yes. It seems to be an issue with the redaction software. So they're not erroneous redactions. The redactions that are made that appear in black text were intended, but what has happened is, that for some reason, the text in the line below has then been blanked out.
25

HIS HONOUR: So these are better copies of the exhibits?

MS MAUD: Yes, precisely, your Honour, yes.

30 HIS HONOUR: And so there's nothing in what has been tendered that should not have been tendered?

MS MAUD: No, your Honour, no.

35 HIS HONOUR: Yes.

MS MAUD: There are really only two where the issue is potentially significant. The rest of them it is things like the position in the email, signature, those sorts of things. They are of a minor nature, but given that it is a small number of documents,
40 we thought it was preferable to - - -

HIS HONOUR: So could you just identify for me those documents that are in the box, with the documents numbered 8 to 17 that are not tendered?

45 MS MAUD: I'm not sure I understand your Honour's question.

HIS HONOUR: I thought you – I thought you told me that there were – some of these revised documents that were no longer relevant.

MS MAUD: Yes, pardon me, your Honour. That's 15, 16 and 17.

5

HIS HONOUR: Okay.

MS MAUD: So it's tender of eight through to 14 in the joint tender bundle. And your Honour will see in the description of the document, there's a description, and then in italics underneath that, it identifies the paragraph of Ms Dowsett's affidavit, and the number in the index - - -

10

HIS HONOUR: Okay, so what I propose - - -

MS MAUD: - - - that the document is duplicating.

15

HIS HONOUR: - - - subject to any submissions of Ms Acreman, is to receive documents numbered 8 to 14 as a bundle, and I will have my chambers ascertain whether the existing annexures in the 400 megabyte document can be easily replaced.

20

MS MAUD: Yes. Well, your Honour might recall when the affidavit was first filed in August - - -

HIS HONOUR: It didn't even have an index.

25

MS MAUD: It may not have. The other problem was, there were more significant redaction problems at that point which were identified after it had been filed. That's why it was re-sworn later in August. We took the view that it was necessary to re-swear it, rather than just replacing the issues in the exhibit, the particular documents. But these further redaction issues have been identified late in the piece, and because they are just a small number of documents, we thought rather than re-swearing the affidavit again - - -

30

HIS HONOUR: Okay. Anyway, you're content for me to receive documents numbered 8 to 14 as one exhibit?

35

MS MAUD: Yes, your Honour.

HIS HONOUR: Thank you. Ms Acreman.

40

MS ACREMAN: No objection, your Honour.

HIS HONOUR: Exhibit R6 will be a bundle of documents comprising the documents listed or numbered as 8 to 14 in the joint tender bundle filed on behalf of the parties and described therein.

45

**EXHIBIT #R6 BUNDLE OF DOCUMENTS COMPRISING DOCUMENTS
NUMBERED 8 TO 14 IN JOINT TENDER BUNDLE FILED ON BEHALF OF
THE PARTIES AND DESCRIBED THEREIN**

5

MS MAUD: If the court pleases. That's the evidence of the respondent.

HIS HONOUR: Ms Acreman.

10 MS ACREMAN: I propose to just make some opening observations rather than
doing a more formal opening, and then progress to dealing with the legislative
context. I will start with the FOI Act and then the ADJR Act. I imagine your
Honour will have some questions of me at that time, and then I will move to looking
15 at some of the cases that the applicant seeks to rely on. I'm not going to dwell in
detail on those, because I think your Honour has had the opportunity to read them
and I will just take you briefly to those parts which the applicant says are relevant,
and then I will deal with the evidence.

It seems – well, in my submission, there's an issue underlying the approach taken by
20 both of the parties in this case, which seems to feed into how the discretion is
exercised on procedure, and the delays that are experienced by the applicant in
having his applications processed. Firstly, the applicant's approach in a legal sense
in this case, and also the applicant's approach personally when he applies to the
information commissioner for an IC review, is that his application is made for a
25 merits review of the agency decision, and that it is the merits review he is asking for,
and that is the imperative that drives the – or ought to drive the processing of his
application, even if it ends up being resolved in some other way, for example,
through a decision under section 54WB, or if there's consent between the agency and
the applicant, or if the applicant withdraws his application.

30

One might imagine that it's like – the application is moving on train tracks towards a
decision, and it might divert otherwise, but really, the decision is the imperative
driving the destination, and the – if it resolves otherwise, then unless and until it
does, it's heading towards a 55 k decision, whereas it appears to me that the
35 respondent's approach is that it's not under a duty to make such a decision until after
the IC review has completed, so rather than the decision being part of that IC review
as one encapsulated entity, it's separated out. So there's a review process which is –
which is disjointed from the decision which is made at the end of that process. And
it appears from the material filed thus far that the respondent considers that a section
40 55K decision on an application for IC review is but one of many options to resolve
the application.

And that it doesn't operate as an imperative or a driver in the way that it might, for
example, if one was to apply to the AAT. The – on an application to the AAT, for
45 merits review, there's the spectre of a hearing and a decision to be made, which
drives the process forward. There may be alternative dispute resolution aspects
along the way. There may be other – other methods utilised, but really it is the

imperative of the decision looming which drives the process. And in my submission, if there's no looming destination to guide the exercise of the respondent's procedural discretion, then it's difficult, and if it not impossible, to measure whether a procedure is being conducted in as timely a manner as is possible, which is, on the respondent's material, a duty it admits having.

So that's the first observation I make. The second observation relates to the nature of the respondent's discretion. The respondent has a broad discretion on the procedural aspects of how it will conduct an IC review, and I don't think that's in dispute. But it devises and implements its own procedure within the parameters of its discretion. It publishes guidelines which are not a legislative instrument on how it will exercise its powers, and it formulates target numbers, for example. It aims to resolve 80 per cent of applications within 12 months. That's, as I understand it, a target that it devises itself. And it expresses that the process - - -

HIS HONOUR: I saw those figures in the annual report. It seemed to me that that said nothing or very little about the quality or type of applications that were included in the 20 per cent that were not resolved.

MS ACREMAN: Yes, your Honour. And nor is it possible to tell from the increasing number of applications for review the quality or the types of those applications, so it might be that there's - there's a lot of applications for personal information which can be dealt with quite readily. In my submission, a large jump in the number of applications for IC review in a given year doesn't necessarily mean that there is that same large jump of time taken or staff numbers or resourcing taken to deal with those applications. It's simply not really possible to work out what the type - sorry, for example, from my recollection, there has been a 63 per cent increase in the number of applications presented to the information commissioner in the last financial year compared to the previous financial year. Whilst that means there are more applications in number, it doesn't speak to what it would take to resolve those applications. It doesn't necessarily mean a 63 per cent greater workload, is I suppose is what I'm getting at.

HIS HONOUR: That might be the case, but common sense would tell you there's an increase in the workload to a significant degree.

MS ACREMAN: I don't think it can be disputed that there's an increase in the workload, and it's a matter of evidence how significant that might be. So on the one hand, the respondent has a broad discretion as to how it conducts the process in relation to IC reviews, and I note from Ms Dowsett's evidence there have been changes made recently. There's been a restructure and changes made to the process following this proceeding being on foot. Although I'm not saying the two are related. It's clear that the respondent has the power to change the process, and if the objectives of the FOI Act and the objectives of the conferral of powers on the respondent are not being achieved, then it does have power to change that process. The question for your Honour is, whether or not it has the powers required to change

the process to achieve the objectives, or whether resourcing is – is a question that is properly defensive of the allegations of unreasonable delay in the Wei sense.

5 HIS HONOUR: It struck me that there are three issues, but the first is whether there has been unreasonable delay for the purposes of section 7, which I would apprehend to be a question of fact, but after the court determines what the statutory text would require, and – so I can see that’s a live issue. So just looking at the AJDR Act just so that I state the text accurately, the court’s jurisdiction under 7(1) is enlivened, it seems to me, if there has been unreasonable delay in making the decision.

10 MS ACREMAN: Yes.

HIS HONOUR: So a question arises as to what unreasonable delay is in the statutory context, and by what criteria is delay to be measured as being unreasonable or not. And so in completely different context, in tort we have the reasonable person, 15 we have the reasonable lay observer, we have the officious bystander. Is there some hypothetical person here, or not? And what does the word “unreasonable” mean? Does it take its colour from the fact that it – it’s in a piece of legislation that is concerned with the correction of legal error? It’s concerned with the legality of 20 administration decision-making, where the concept of unreasonableness has a particular meaning or a particular understanding that would be different from the law of the tort of negligence.

MS ACREMAN: I can take you to the cases which describe the way that 25 unreasonable delay has been treated in relation to other legislative contexts.

HIS HONOUR: So there’s – that’s the first issue. The second issue is the claim based upon section 16, subsection (3). I don’t need to say too much about that. The parties’ submissions are developed in their written submissions.

30 MS ACREMAN: I’m sorry. Is that of the ADJR?

HIS HONOUR: Yes, of the ADJR.

35 MS ACREMAN: Section 6, subsection - - -

HIS HONOUR: 16 - - -

40 MS ACREMAN: Yes, sorry, yes.

HIS HONOUR: And – sorry, I think I’ve jumped ahead. I really did mean to include within that, section 6. So that’s the alternative basis upon which the application is put. And the third issue is assuming – to take the first issue up, that unreasonable delay is established, whether in the exercise of its discretion the court 45 should grant any remedy.

MS ACREMAN: Thank you, your Honour. I take on board what you've just said, and I thank you for an indication of your Honour's - - -

5 HIS HONOUR: You're free to argue the case any way you wish, I was just giving you my preliminary thoughts of what the process of reasoning might be.

MS ACREMAN: Thank you, your Honour, and I found that helpful. I may consider coming back to those specific issues, and I think it will – they will be revealed during the course of my submissions in any event. If I can just take us back
10 a step, and get back to the nature of the discretion. In my submission, where there's a broad discretion as to procedure, it is – the breadth of the discretion permits a flexible and proactive approach, particularly in light of there being a requirement to conduct that process in as timely manner as is possible, having regard to various aspects of the Act.

15 So, in my submission, the respondent has the powers and the option to keep the process moving. The legislation provides a range of powers to do this, including the powers in division 8 of part 7 to obtain information and documents, the information gathering powers. And then the power to make directions in section 55(2)(e) for the
20 conduct of reviews generally, and of a particular review. There's a couple of documents that have been exhibited in RAD1, which are directions – general directions, not IC review specific directions, made by the respondent under section 55(2), and those are GEN.00002.

25 HIS HONOUR: Those numbers mean nothing to me.

MS ACREMAN: Okay.

30 HIS HONOUR: And I discourage their use, for future reference, except for internal purposes. I would appreciate being referred to the tab number in the index.

MS ACREMAN: Sure. I may come back to those, your Honour.

35 HIS HONOUR: Sorry to put you on the spot, but - - -

MS ACREMAN: No, I understand.

40 HIS HONOUR: Part of the purpose in taking exception to the way the initial affidavit was filed is there were just these meaningless characters referring to documents, and the administration of justice is a human process.

MS ACREMAN: I understand. My friend has just assisted, thank you. It's one, two and three in the index of the affidavit of Ms Argo – Ms Dowsett from the August – it's the August 2022 affidavit. I'm just finding that myself. If you just bear with
45 me for a moment, your Honour. Sorry, it's the index to that affidavit. I don't have it to hand myself. I've probably got it somewhere in the material, but it's not

something that I've been referring to. So it's documents 1, 2 and 3. It's at the front of the affidavit, I'm sorry.

5 HIS HONOUR: Anyway, another reference point is if you just tell me what paragraphs of the affidavit the documents - - -

10 MS ACREMAN: So the directions made under section – under that section are at paragraphs 20 – paragraph 23 of the August Dowsett affidavit, and then guidelines made under – I think it's section 93A of the FOI Act, are at paragraph 22.

HIS HONOUR: Anyway, I've got each of those three documents up on my screen.

15 MS ACREMAN: Thank you, your Honour. I am actually going to refer to them specifically shortly, but not at this point in time. I'm intending to take you to the detail a little later. I'm merely alluding to the fact that these are not legislative instruments. They're more in the nature of policy documents which are statements by the respondent about how it will exercise its discretion. But because they are documents devised by the respondent, in my submission, they are equally capable of being amended and updated, and from time to time, are. If there is a delay which is
20 unreasonable in processing, or if there are fundamental concerns around the procedure that's being implemented, and whether or not it's able to be conducted in a manner that's consistent with the resourcing available – there are ways for the respondent to change the processes that it conducts, and to change the policy documents which underlie those processes, which guide how it exercises its
25 discretion.

So the situation is that the respondent has a broad discretion, and yet, at the same time, says, "We've got a broad discretion about how to conduct this process", and yet, the delays exist because it's too difficult and we don't have enough resourcing,
30 whereas, in my submission, it is within the respondent's power to change that fact, and in fact, it has more recently taken steps to do so. And so this feeds into the types of delay, or the species of delay which are alleged by the applicant.

35 HIS HONOUR: Does the applicant's case require the court to make findings in relation to the delays that have occurred in each of the seven subject applications?

MS ACREMAN: There's an element of delay – sorry, to ground relief, it will be necessary to determine on each application whether or not there has been an unreasonable delay. That unreasonable – that delay may be an individual delay of a
40 period of time. It may be the cumulative effect of a number of individual delays in that particular application, and it also might be a systemic or process wide delay that has affected or fed into the delays experienced in a particular application. So the way that the respondent conducts its discretionary process is relevant to whether or not delays have been created, for example, in the written submissions, there are
45 aspects that the applicant takes issue with in relation to repetitive and circular steps in an ambulatory process.

It's – it comes back to the first observation I made about whether or not there is an impetus or a driving focus on getting to the section 55K point, a decision juncture, as to how the process is conducted. Does it amble with no specific destination, and go through a series of say, back and forth processes allowing procedural fairness steps
5 where a party raises something, submissions are given, there's a response, that might raise a new matter, there's response – there's a response, etcetera, or is there an imperative to get to a section 55K decision with an attempt to reduce the scope or to settle parts of the application along the way, but using that 55K destination as the guiding light.

10 HIS HONOUR: Doesn't that require the court, on your case, to determine in relation to each application, whether there has been unreasonable delay?

MS ACREMAN: It does.

15 HIS HONOUR: Now, there might be common characteristics between the different applications, but doesn't it require the court to examine the timeline in relation to each application to determine that factual question?

20 MS ACREMAN: It does. So, your Honour, in my submission, will need to make individual findings on each application as to whether there has been unreasonable delay, but there are three species of unreasonable delay that need to be considered in each instance, individual steps, cumulative delays based on an assessment of all of those individual steps, and then the process wide delay which might feed in.

25 HIS HONOUR: Now, many, if not all of the seven applications are currently in the queue, awaiting review, although I think one of them has currently been actively considered by a review officer. Is that the position?

30 MS ACREMAN: I'm not sure of the number. I think it might be two that have been allocated. I would have to check.

HIS HONOUR: So it might be two that are being – have been allocated, and I think at least one of those – some draft decision might be being written up. But the others
35 are in the queue.

MS ACREMAN: Yes. Some – a great many of them are. The majority of them are in the queue awaiting allocation.

40 HIS HONOUR: And in respect of those, there's evidence that there are other applications that chronologically are ahead of those in the queue, and the delay – there's incremental delay each day, so the delay builds upon delay, but just focusing on the position at the current time, is it part of your case that there is unreasonable delay, because the applications are sitting in a queue with other applications ahead of
45 them?

MS ACREMAN: Yes. There is unreasonable delay because they're sitting in a queue and that's based partly on the timing at which they entered the queue, and partly on the systemic processing delays.

5 HIS HONOUR: So you will need to develop that, because it – there's a lot of factual material here, and I won't be going through thousands of pages of documents and working all this out for myself. And it's also in a statutory context where, as I read the statute, primarily the focus is on the information commissioner as the decision-maker. The review function under part 7 of the FOI Act is conferred on the
10 information commissioner, but it seems that by operation of the conferral of certain functions of the commissioner on the freedom of information commissioner, there are two individuals who might perform the review function. Is that correct?

MS ACREMAN: Firstly, in the most recent affidavit of Ms Dowsett, Ms Dowsett
15 deposes to the fact that the FOI commissioner – the individual who holds that office has resigned - - -

HIS HONOUR: Yes, I'm just looking at the office holder.

20 MS ACREMAN: But aside from that – yes.

HIS HONOUR: So there are two individuals. And under the Act, it seems to me that the decision-making function cannot be delegated.

25 MS ACREMAN: I understand it can now be delegated, but recently there have been some changes, and that, again, comes from either 6 March or 15 March affidavit of Ms Dowsett. So I - - -

30 HIS HONOUR: So there has been an amendment to section 25 of the Act, has there?

MS ACREMAN: I think that - - -

35 HIS HONOUR: That is the Australian Information Commissioner Act.

MS ACREMAN: But I think Ms Maud is probably across more of the detail of this aspect, and I'm happy to see – to her to make the submission on this if - - -

40 HIS HONOUR: Okay.

MS ACREMAN: And I will follow and make sure that I agree, but I think she will be across the detail more readily, thank you, your Honour.

45 MS MAUD: Your Honour is correct. Until quite recently, I think some time in February, the AIC Act, section 25, permitted the information commissioner to delegate all of the powers under the FOI Act, which are known as the FOI functions, apart from certain limited powers, including the power to make decisions under

section 55K, that has recently been amended, so that that 55K decision-making power may now be delegated, and there is a delegation now in place. But that is a quite a recent amendment.

5 HIS HONOUR: Okay. Thanks.

MS ACREMAN: I don't disagree with anything that was said, your Honour.

10 HIS HONOUR: Now, under section 55K, subsection (4), there's a requirement that there be a statement of reasons for the decision.

MS ACREMAN: Yes.

15 HIS HONOUR: Section 55K(4)(a). And I take it that that would bring with it the requirement for the provision of the Acts Interpretation Act in relation to the standard of reasons that's required.

MS ACREMAN: I don't see why it wouldn't raise that.

20 HIS HONOUR: Yes. So someone has to sit down and, in relation to each of these reviews, draft a set of reasons complying with the statutory standard in order to discharge the decision-making function. And in addition, comply with any express or implied requirements of affording procedural fairness to interested persons.

25 MS ACREMAN: Yes, your Honour. It's not the applicant's case that it's an easy task that can be done in an hour or so. It's certainly not the applicant's - - -

HIS HONOUR: But I think there's also evidence as to how long it takes to write a set of reasons.

30 MS ACREMAN: Yes, there is.

HIS HONOUR: Typically.

35 MS ACREMAN: Yes. The – it's not disputed – obviously that evidence is not disputed. It's in. It's not being challenged. Most of the delay that occurs in applications relates to allocation queue delays which I understand the respondent says are resourcing issues. However, the way that it conducts the process in the earlier stages – and you will see this particularly from the first – the oldest
40 application that's on foot – which I will refer to as 054. If I may, I will refer to them – or 0054, by the last four digits of the application. That's how I have been doing that in my prep. 0054, you will see that it's quite a convoluted meandering process that, to some extent, doesn't drive towards that decision-making point. So there's
45 significant delays in obtaining documents.

So I will just step back a bit – the process seems to be that once the application is made, the first step is to send a section 54Z notice, and that's accompanied by a

request for the documents and a request for submissions. In the case of cabinet documents, it's a request for affidavit or submission evidence as to the exemptions claimed. In a great many cases, there is a long period of time until compliance with that section 54Z request. There's consideration in the evidence of whether or not to
5 compel production, but in many cases, either it's decided to issue a relevant notice, say, for example, a section 55U notice, but then no notice is ever issued, or there's consideration at an early stage, but just - - -

10 HIS HONOUR: Just – you're talking now about case number 0054, or generally?

MS ACREMAN: I'm talking about, in part, 0054, but also generally. I'm taking a broad suave. I will take you to the individual cases, and perhaps that's a better point at which to deal with the specifics. But there's – the evidence reveals that the process doesn't move forward. There are many steps taken which use up resources,
15 but don't necessarily achieve any material movement towards the point of being able to make a decision. And so, in my submission - - -

HIS HONOUR: Just to use the vernacular, wheels are spinning, but there's no movement.

20 MS ACREMAN: That's correct, your Honour.

HIS HONOUR: That's your submission?

25 MS ACREMAN: Yes, your Honour. And I might leave the specifics until I take you to the evidence. There's another issue which, from the Resolve records, it appears that during those early stages in waiting for a response to the section 54Z notice, the matter is not put into the allocation queue, so it's – it can't take a number and then wait its turn until there's a response to the 54Z notice. So if there's a failure
30 to issue information gathering power notices, and there's just a long delay between the request for information and the response to the 54Z or actually obtaining documents and submissions, then it seems from the evidence that the matter is not yet in the queue, and has not yet taken a number. So that delay, if it's not managed properly, can increase the amount of time that the matter spends in the allocation
35 queue, because it's not even yet made it to the allocation queue, if the agency is not being cooperative in providing a response to the 54Z, then because of that - - -

HIS HONOUR: There's reference in the affidavit material to something called SSR. And I couldn't easily pick up what that means.

40 MS ACREMAN: Again, Ms Maud is going to be across this more than me, but – and I understand that the procedure has changed so there's now not an SSR team, but I understand that - - -

45 HIS HONOUR: But that – in these little areas of the law, the people who work in them use acronyms, but judges have to do all sorts of different cases, and acronyms often mean very little, so do you know what SSR means?

MS ACREMAN: I think it's significant and systemic review, but I stand to be corrected. I think the label is less important than the concept that it's a specific team that deals with specific types of matters, and I will leave it to the respondent to explain what they might be. But it seems to me that from the evidence and the

5 Resolve records that an application is made, preliminary inquiries are made to determine whether an IC review will be undertaken, and then there's a decision to undertake the IC review. It's at that point that the applicant says the duty to make a decision arises because it sees the review process as culminating in a 55K decision and that those – that the process is not disjointed or disaggregated from the decision.

10 So once - - -

HIS HONOUR: There might be a whole lot of decisions that might be made, including decisions to enforce the provision of the subject documents, to enforce the provision of information, a decision to hold a public hearing, if that ever occurs, a

15 decision to refer the matter to the AAT, a decision to dismiss the matter as frivolous. And it might be said that the legislative scheme is a meandering country road with different intersections.

MS ACREMAN: I suspect that's the way that the respondent will approach the

20 topic, but it's certainly not the way the applicant approaches the topic. The applicant sees that from the scheme of the Act, and in particular from the scheme of part 7 of the Act divisions 5, 6 and 7 – perhaps I can just take you to those now. So if we start at the front page of part 7.

25 HIS HONOUR: I've got that.

MS ACREMAN: Okay, then. You will have noticed from the concise statement that the applicant says that the division 5, 6, 7 process is a stepped process that is not disaggregated. 54F sets out the summary of the divisions. Division 2 is key

30 concepts, and at section 54G, the applicant submits that the IC review by implication culminates in a 55K decision. And I will take you to why in a moment. The application made by the applicant is not an application for a procedure, it's an application for a merits review. And similar to a plaintiff applying to court, when a plaintiff files proceedings in court, the expectation is that a decision will be made

35 unless and until another method of disposition arises.

So division 2 is key concepts. Division 3 sets out the types of IC reviewable decisions. So it's mechanical or it's descriptive. And then division 4 provides for the making of applications, so it provides the mechanics of how to make an

40 application. And then you get to the point where an application is made, and then we get to division 5.

So at this point the application has been made and the information commissioner under section 54V can make some preliminary inquiries to determine whether or not

45 to undertake an IC review.

So at this point, prior to the decision being made to undertake an IC review, the information commissioner can determine such matters as whether it's a complete application, whether it's a valid application, whether it is seeking merits review of a matter that falls within division 3, the IC reviewable decisions, etcetera. So that's the
5 pre-IC review step to determine whether or not all of the integers of a valid application exist. And if there's a valid application, then a decision is made to undertake review. And it's at that point that the applicant says that the duty to make a decision arises. 54W is a decision to review but provides a discretion not to review, and this is a discretion not to review or continue to undertake a review. So
10 bearing in mind that a decision has been made to undertake a review on all of the extant applications, 54W provides for under subparagraph (a) matters that are – if one will, matters that are the fault, for want of a better word, of the applicant. (b) is the discretion not to review that I took you to during the objection phase. And then (c) again is a matter that is, for want of a better word, the fault of the applicant.

15 So the applicant – sorry, the respondent has a discretion not to commence a review at all by exercising 54W(b). And that's prior to the decision to undertake a review unless it's the discontinuance aspect, so at any time during the IC review process, the information commissioner can decide to discontinue a review that it has already
20 decided and then moving onto 54X there's a requirement for notice, and 54Y deals with decisions made in deemed decision circumstances.

So once that decision to review has actually been made, 54W(b) permits discontinuance during the process, but that is after an IC review has already
25 commenced. So there is a link there in terms of deciding to undertake an IC review, and then, after deciding to undertake an IC review, at any time during the IC review, it can be discontinued.

54Z in division 6 provides – sorry, division 6 provides procedure on the IC review,
30 so it's procedural in nature, and it commences in 54Z with “before undertaking an IC review” and sets out a couple of things that the information commissioner needs to do. And you will see that that language is mirrored in reverse in 55K.

35 *After undertaking an IC review, the information commissioner must make a decision.*

So my understanding of the respondent's case is that its submission is that that phrase “after undertaking an IC review” is a subjective precondition to the exercise of the power to make the decision. In my submission, it's not to be interpreted as
40 such. It merely picks up on the language in 54Z, so that once you've decided to undertake a review, before undertaking a review, you need to do some things, and then after undertaking a review, you need to make a decision in writing, and that that is one stepped process which ought not be disaggregated in the way that is put by the respondent, and that the duty arises on the decision to undertake the review, and then
45 that is what becomes the driving process.

If one looks to the provisions in relation to the timely procedure which is required, and which the respondent says it has a duty to reserve – so that’s section 55(4)(c) – so as part of the procedure – a procedure must be conducted in as timely a manner as is possible, given matters – given the list of matters. So timeliness is an imperative
5 as revealed in the language of the statute, and in my submission, a timely process by implication includes timely disposition by making a decision on the IC review under section 55K, unless and until you hop off the train in some other way.

HIS HONOUR: Is 55(4)(c) an enforceable obligation, or just an exhortation?

10 MS ACREMAN: The respondent’s case is that it’s a duty. The applicant’s case is that the duty is to make a decision, and an integer of that duty relates to the conduct to be followed in relation to an IC review, and so no – there’s no – for example, there’s no duty which can be enforced by mandamus, and if there were – sorry,
15 there’s – there’s no duty under 55(4)(c), which, as a standalone, can be enforced by mandamus. Or if there is, then the question is, how would one enforce 55(4)(c) as a standalone, where there’s a very broad discretion as to procedure and many different smaller decisions along the way which relate to the matters your Honour raised earlier, about how to proceed in the next phase of the process, do I issue a 55U
20 notice, do I consider 54WB etcetera.

There are many small decisions to be made along the way in the lead up to a 55K decision. So in circumstances where there is a very broad discretion that involves many smaller steps, if one was to ask for that duty in 55(4)(c) to be enforced, it
25 would be asking the respondent to be more timely. And that is something that is in the abstract and would be illusory as a matter of relief. How is the court to supervise being more timely when the process permits a range of different small decisions, so – it might be said that the supervision could be of the conduct to a certain point, but then you have a situation where the respondent would be under an order to be more
30 timely, and yet, still have a very broad discretion as to how it exercised the – exercised its powers in relation to procedure with no 55K destination to provide the guiding light. And therefore, timeliness becomes almost immeasurable, because what do you – what do you measure time against if there’s no light guiding you, if you’re not on the train tracks on the way to a destination, how do you know what is
35 timely or not? Have I answered - - -

HIS HONOUR: One of the remedies that you seek is an order of the court that the respondent make a decision in relation to each of the review applications by a time and date fixed by the court. Now, that relief would have to sit with – sorry, I’ve lost
40 the FOI. It would have to sit with section 55(4) of the FOI Act, which includes in subsection (4), subparagraph (a)(iii), a requirement that the information commissioner in relation to the review have regard to a proper consideration of the matters before the information commissioner. So it might be said that the relief that’s sought which seeks a decision by a particular date cuts across the information
45 commissioner’s statutory obligations there.

MS ACREMAN: I understand the observation. The flexibility of the procedure would permit, in my submission, the respondent to provide an estimate of when it thinks it could make such a decision, and the orders sought are a fixed time or a time to be fixed by the court. If it transpired that the respondent was not able to make the
5 decision in time in relation to the orders, it would be permissible to seek to have the orders extended.

HIS HONOUR: What if the respondent were to come back and say, “Sure, but I’ve got all these applications that are ahead in the queue, and the way I wish to conduct
10 the administrative arrangements for my office, is we do things chronologically, once they’re referred to a review officer to write up a draft decision.”

MS ACREMAN: Yes, and so the issue is, if there’s unreasonable delay in – if there’s a finding of unreasonable delay in the applicant’s applications, then it can be
15 inferred that there may be unreasonable delay in relation to other applications.

HIS HONOUR: In hundreds of applications. And so the respondent doesn’t say that this is atypical. The respondent’s case, as I understand it, which includes
20 tendering the last annual report, is that there are resourcing issues.

MS ACREMAN: Yes, and that evidence is not challenged. It’s not a matter within the purview of the applicant to know what the resourcing issues are, or what the resourcing should be, or is, or - - -

HIS HONOUR: But they’re described in some detail in the evidence. There’s evidence about numbers of staff, staff leaving employment, new staff, what seems to me, on the face of it, to be a very small team, having regard to the tasks at hand, and ultimately the fact that the applications are coming in more quickly than they can be
25 disposed of.

MS ACREMAN: There is some evidence in Ms Hampton’s affidavit, in particular one paragraph where Ms Hampton deposes as to estimates she made of the number of staff. It’s at paragraph 49 of her affidavit. In my submission those calculations, at
30 least where they were made before the most recent changes to procedure restructuring of the teams within the office of the respondent that are dealing with IC reviews, those numbers are calculations on the basis of business as usual operations. They’re assumptions made on the basis of, well, we’ve had this many previously, if we’re going to have a 50 per cent increase, then this is what I expect will be made. But in the very recent affidavit material of Ms Dowsett on 6 March 2023, Ms
35 Dowsett deposes to changes to the review process and changes to the structure of the FOI branch.

HIS HONOUR: So this all feeds back into a question that I’m going to have to resolve as to what the word “unreasonable” means and whether it’s part of the
45 court’s function to be forming judgments about internal decision-making by the commissioner as to how resources should be allocated within the office so that the starting point might be I would need to have a very clear case that these decisions

about resource allocation that are referred to in the affidavit material are not reasonable, and perhaps for that purpose “unreasonable” very much does take on its administrative law context and sense.

5 MS ACREMAN: I understand the – your Honour’s observations in relation to the reticence or inability of the court to tell an administrator how to allocate its funding. In a factual sense, there has been a restructure. There has been a refocusing, so to speak, of how the procedure might operate. But those aspects are too late for these applications. If there was a restructure and a change to the process that could be
10 implemented from 1 February 2023, then it can be inferred that it could have been implemented earlier. now, it hasn’t been, so the delays that arise on these applications that are before your Honour have been subject to an older process. The respondent has repeatedly said it’s a funding issue, it’s a resourcing issue, but
- - -

15 HIS HONOUR: Did I read somewhere that the annual budget is \$8 million?
Paragraph 43.

MS ACREMAN: Of Ms Hampton’s affidavit?
20

HIS HONOUR: Yes now increased to 9.5 million. That’s the base operating funding.

MS ACREMAN: And as your Honour has rightly pointed out, it’s not for the court
25 to assess - - -

HIS HONOUR: How the money should be - - -

MS ACREMAN: - - - how to manage that funding, but in my submission if a
30 restructure and a change to procedures was possible on 1 February 2023, it was possible at an earlier time, and it is permissible for the court to look at the impact on these applications of the way that the process was conducted. Not necessarily about – not necessarily telling the respondent how to use its funding, but examining - - -

35 HIS HONOUR: But ultimately one of the orders sought is that decisions be made in these seven applications for review, which, if the court were to make that order, might have the consequence that those reviews should be put at the top of the queue in order to comply with the court orders. That would have the effect of the court reorganising the priorities within the office in circumstances where if the court were
40 to find that there were unreasonable delay in these applications, the inference would readily arise that there has been unreasonable delay in other applications.

MS ACREMAN: Yes. I agree that that inference could arise if there is
45 unreasonable delay. And as to whether your Honour finding that there is unreasonable delay will exercise the discretion, then on behalf of the applicant the submission is that the court ought to exercise its discretion because the applicant has sought relief, and the process undertaken permits of the respondent to dispose of

applications other than by making a decision, so applications that are not the subject of this proceeding, if an order is made for a decision to be made, can be managed in other ways.

5 HIS HONOUR: Okay. So I've probably taken you far off your track.

MS ACREMAN: Well, it is helpful to understand your Honour's train of thought, so no complaint there.

10 HIS HONOUR: Can I just indicate we will rise at 12.45, but at some stage of your submissions, Ms Acreman, I would like to know what the roadmap is through each of the 7 applications where you accept that you are inviting the court to make findings that there has been unreasonable delay in each of those applications, that is the IC reviews.

15 MS ACREMAN: Thank you. I'm not proposing to take your Honour through the general scheme of the Act in terms of the IC review process being the first stage of merits review and there not being an option to proceed to the AAT for the second round until the decision has been made. I take it your Honour is aware of the scheme
20 of the Act, so I will get to the heart of the matters.

HIS HONOUR: And so your case, just to put it in context, is since 2010 there has been an inability to have independent merits review by the AAT with the information commissioner interposed, and by reference to these cases, your submission is that
25 there's a delay of at least two, perhaps at least three years before the applicant and anyone else wishing to exercise rights of review can get to the AAT.

MS ACREMAN: On some applications, yes. On the applications before your Honour. I can't comment on other applications.

30 HIS HONOUR: Yes.

MS ACREMAN: And in fact, it may be more than three years, because there's – there's matters in the allocation queue waiting to be allocated to a review - - -
35

HIS HONOUR: Well, there are some that are at least three years old already.

MS ACREMAN: And have hundreds of applications in front of them. So it could be a number of years before they are reached.
40

HIS HONOUR: And just in a nutshell, your submission would be that a system that tolerates that undermines the operation of the objects of the FOI Act?

MS ACREMAN: Yes. Thank you, yes. And the – it undermines the objects of the
45 FOI Act, and also the parliamentary intention of putting in place an IC review process, which was to operate as a first round of merits review that was – the quick and dirty first round, so to speak, and then if – if the matter is decided under 55K,

and there's an IC review decision and reasons, then you can go to the AAT for a second round. It ought to be borne in mind that the IC review process is the first of two rounds of available merits review process. It wasn't, in my submission, intended to operate in the formal manner that the AAT operates. It was intended to be faster, and - - -

HIS HONOUR: Well, that's provided for by the provisions which authorise decisions on the papers, whereas the default position of the AAT is the AAT has a hearing, usually open to the public, where there's a right of parties to be heard and called – and call witnesses.

MS ACREMAN: And, consequently, the question - - -

HIS HONOUR: It's a different process.

MS ACREMAN: It is a different process. But it is a second layer that's available once one passes the IC review hole, so to speak. But the fact that there is a second layer and a more formal process feeds into the concept that, say, for example, the respondent receives 1000 applications for IC review in a year. Many of them may be susceptible to proper resolution within the procedure implemented by the respondent. It may be that they're resolved quite quickly. It may be that they're – that no decision under 55K is required, because their agreement is reached.

There's a variety of aspects of other applications that may be amenable to this IC review process, but it appears that the applications before your Honour, which have taken years, and are still waiting for decision, many still waiting for allocation to a queue, are not applications which are properly susceptible to the processes that are implemented by the respondent to achieve the goals set out by having an IC review process in the first place. If a process is supposed to be as timely as is possible, having regard to the matters in the Act, then, in my submission, there is a focus on moving things forward, and if one sets aside the allocation queue even, it is apparent that some of these matters are – some of the difficulties with these matters is that the agencies have been lax, whether deliberately or otherwise, I'm not commenting – but the agencies have been lax in their responses, and that the Act provides the tools for the respondent to address those issues, and yet the respondent seems reluctant to use those tools - - -

HIS HONOUR: See, the difficulty I have with those types of submissions, is I understand how you might seek to characterise patterns of conduct by the respondent in ways such as that, but ultimately, I have to focus on the seven applications. So broad brush submissions are helpful in identifying themes, but ultimately, as I understand your application, you're inviting the court to make findings in relation to the seven applications.

MS ACREMAN: I am, and I think it will become apparent when I go to the evidence, and I might do that now. I just wanted to make sure that I dealt with the

statutory matters first. So I – it feeds into the systematic aspects of the species of delay that I addressed your Honour on earlier, where - - -

5 HIS HONOUR: So there are instances, for instance, where DFAT says, “We want to make another decision”, and on your submission, DFAT is allowed to do that, and they take 14 months or something of that order.

10 MS ACREMAN: And longer, yes. And so rather than there being a driving process towards making a decision, there is a lack of case management despite the tools being there. And in my submission, it’s unreasonable, and that is a finding which your Honour is permitted to make, because it’s not telling the respondent how to exercise its discretion, it’s an observation that there are powers there. It hasn’t used them, and it’s unreasonable not to do so.

15 HIS HONOUR: That – the submission that it’s unreasonable not to do so, does that then direct attention to the concept of unreasonableness in the ADJR Act, for instance, in section 5(2)(g)? Which refers to an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power. Now, I appreciate that’s not what we’re concerned with here, unreasonable delay, but once
20 we start going to particular decisions, allowing, say, DFAT more time to find the documents or to reconsider its decision or to make submissions and things like that, does that then direct attention to unreasonableness at that – that level?

25 MS ACREMAN: In my submission, it’s not a Wednesbury unreasonableness level, which is, I think, the type of unreasonableness that your Honour just pointed to in the – in section 5. I can – I think it’s the Thornton case, there’s a capricious aspect to it, so your Honour will have read - - -

30 HIS HONOUR: I have read that, yes.

MS ACREMAN: In my submission, it is not at the level of Wednesbury unreasonableness that no other – no decision-maker could have made the decision. It’s not at the height of a section 5 administrative law unreasonableness, because
35 what the court is being asked to look at is whether there’s unreasonable delay which is a focus on the delay itself, and the background reason for it. But it’s not a focus on the - - -

40 HIS HONOUR: So that one might say that the delays here, just looking at them in terms of time, are spectacular. But that doesn’t answer the question of whether they’re unreasonable.

MS ACREMAN: No, it doesn’t. And the answer is that the hurdle is not Wednesbury unreasonable high, but the requirement is that the respondent adequately explain the delay. There is an element of the objective - - -

45 HIS HONOUR: The way I would look at that issue – and I’ve looked at your submissions there – is that the applicant carries the legal onus of demonstrating

unreasonable delay, but there might be an evidentiary – if reasonable – unreasonable delay appears on the material, an evidentiary onus might shift to the respondent to explain delay, which the court might infer to be unreasonable in the absence of explanation, but the legal onus remains at all times on the applicant.

5

MS ACREMAN: Yes. I will just tweak that slightly to say that in my submission it's a legal onus on the applicant to prove unreasonable delay, and once delay has been raised as opposed to unreasonable delay, because that finding comes later – once delay has been raised, then it's for the respondent to – there's an evidentiary burden on the respondent to explain the delays, particularly because it's the holder of all of the information about the delays, and then what follows is a finding - - -

10

HIS HONOUR: Well, that just feeds into what Mansfield L said in *Blach v Archer* that you weigh evidence according to the power of one party or the other to adduce the evidence.

15

MS ACREMAN: Yes. And indeed this is a peculiarly strong example of that situation. But yes, I don't resile from the position that the legal onus is on the applicant in the proceeding. I might, over the lunch break, look at whether I need to say anything more about the specifics of interpretation of the FOI Act. It might be more efficient if I do it that way.

20

Aside – I mean, the focus has been on the duty issue, but there is this conduct issue under section 6 of the ADJR, which I may address your Honour on now. The focus of the – of section 6 is on the – it's prospective, or it permits a focus on the prospective aspects of a decision that's proposed to be made. And it provides for review of conduct before a decision has been made. And it seems to me that the difference in the way the respondent and the applicant view whether or not this provision could be made out relates to the disaggregation that I was referring to earlier. So the applicant – the applicant's position is that regardless of whether a duty arises after undertaking an IC review in the way that the respondent states, the procedure and the decision are not disaggregated, and therefore under 1(e) provision is made for the review of the making of the proposed decision and the conduct leading up to it, and – sorry, I've just lost my place. Please bear with me for a moment. And the exercise of powers in relation to the conduct of the review ought not be disaggregated from the decision-making power in 55K. So both are part of the consideration under section 6.

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30

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So section 6 provides for a review of the conduct before a decision has been made and then permits that if a section 5 – 55K decision is made, then the uncertainty created by the powers exercised in relation to the procedure on review create uncertainty which results in - - -

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HIS HONOUR: But it's the result of the exercise of the power that has to be shown to be uncertain.

45

MS ACREMAN: And the result would be that the decision could be made at some point in the future, but there's no certainty whether it will be at all.

5 HIS HONOUR: So what's the exercise of power that you rely upon for the purposes of 61(e)? Is it the power in 55K(1)?

MS ACREMAN: Yes. So in 61(e) it's the combined process of review power and the decision-making power, not disaggregated.

10 HIS HONOUR: Sorry, at least includes the power to make the decision under 55K(1)?

MS ACREMAN: Yes. It's the disaggregation issue is the difference between the respondent and the applicant's position.
15

HIS HONOUR: But when it refers to the making of the proposed decision, the proposed decision is the one under 55K(1).

MS ACREMAN: Yes, it is. And the making - - -
20

HIS HONOUR: So then if that power is exercised on the assumption that the procedures described in the evidence follow, that is, that a review officer prepares some draft reasons, they're presented to the commissioner or her delegate, what's the evidentiary foundation to think that the result of the exercise of that power will be
25 uncertain?

MS ACREMAN: The evidence relates to the procedure that's being undertaken.

30 HIS HONOUR: But it has to feed into the result of the exercise of the power. So it might be said that the date by which a decision will be made is uncertain, but that's a different concept, isn't it?

MS ACREMAN: I don't think I can make further submissions on that, your Honour, thank you. It might be a good use of time for me to quickly go through one
35 of the smaller, shorter evidentiary matters. So for example, if I go through 1189 and the evidence in relation to that application, which is the last in terms of filing date.

HIS HONOUR: Yes. So I'm looking for assistance from all counsel as to how best to consider the factual material. So looking at the affidavits, it's organised under
40 headings, for instance, in Ms Dowsett's first affidavit, and then there are supplementary pieces of information in the subsequent affidavits, but ultimately I'm going to have to look at what has happened in relation to each of these applications chronologically.

45 MS ACREMAN: I can on that now, your Honour, if I can find my the way that I've chosen to do it – and it might be a way that your Honour could approach the task – is that I've sought to have a look at the Resolve records, which is the list of

steps and comments, and base my assessment of the evidence on the most recent Resolve records so we can see the steps. So some of the applications, the Resolve records don't really include all of the information in Ms Dowsett's affidavit. I'm not taking issue with that. Merely to say that they form a better template for some matters than others. And I think 1189 is a matter that is well served by this methodology, so what I have sought to do is look at where the most up to date Resolve record is, and in relation to 1189, it's in the exhibit to Ms Dowsett's 6 March affidavit. It's in RAD3. And I've got a document ID number. I know that your Honour - - -

10 HIS HONOUR: That's okay, I will work it out.

MS ACREMAN: I've been finding it by going - - -

15 HIS HONOUR: I've got the index at the front.

MS ACREMAN: I'm sorry?

20 HIS HONOUR: Yes. I've got the index at the front of the affidavit.

MS ACREMAN: Mine wasn't hyperlinked. I think the court bundle is. So if the hyperlinks are working appropriately, then you can click on it, and it's RES.01189.03.

25 HIS HONOUR: Can you just tell me what the document is?

MS MAUD: Your Honour, if it assists, I think it might be number 36 in the index to that affidavit, the last document.

30 HIS HONOUR: Thank you.

MS ACREMAN: Thank you for the assistance. I think just in the way I've prepared, because I was preparing earlier than any indexes were available in some instances, or else the documents weren't hyperlinked, I've used document number rather than index number, and I may not be able to efficiently get that each time, so I would be grateful for the assistance of my learned friend on that. So if your Honour has RES.01189.03, you can see that that's a Resolve record for 1189. The top right corner, it says received date. I understand that to be the date that the application was received, the application for IC review was received.

40 There's a bunch of information which I'm sure - well, which the respondent may take you to, but I will take you just to some aspects. You will see about midway down the page is "assessor note, cat 5.2". This is a category that is assigned by the respondent to each application. The number may vary, and there's an explanation in some of the materials somewhere about what those categories are. And then what follows this is the exemptions that were claimed. Further down you will see the parties. Then there's a summary.

So you can read that summary to understand the initial request for documents – for information from the agency and the original decision made by the agency, which in this instance was the – appears to be 27 November 2020. Documents found within the scope of the request. So it's saying that they're exempt in part under those
5 provisions. And the number of documents at issue is three. So there's three documents. There are exemptions claimed under 34(3) and 47(e)(d). Just taking you back up to the assessor's note midway down the page, you can see that 34(3) and 47(e)(d) are there, and then 54Z I think indicates that the response to the 54Z notice and request for information has been received. I stand to be corrected on that, but
10 that's the way I've interpreted this information.

HIS HONOUR: So does that mean – should one infer that means the documents were produced or have been produced at least at the date this Resolve report was printed out?
15

MS ACREMAN: No. It means that there has been a response to the 54Z request – sorry, the process is that at the initial stages once a decision to review it made, then a 54Z notice is issued in compliance with section 54Z of the Act, and that is usually accompanied by a request for the documents or, in the case of - - -
20

HIS HONOUR: That's what I was getting at. But not necessarily - - -

MS ACREMAN: Or in the case of some exemptions, for example, cabinet exemption or national security exemptions, submissions – evidence by affidavit or
25 otherwise as to the exemptions claimed. For complex matters I understand that often there's a schedule which indicates the exemptions claimed on each document and the parts of the documents. So it's an information gathering exercise which in some instances seeks the actual documents, in other instances seeks submissions on the documents, but at the very least seeks to understand how many documents, the types
30 of exemptions claimed and parts of the documents over which those exemptions are claimed and the submissions relating to why the exemptions are claimed. And those submissions can be made in a confidential manner with a separate version that can be provided to the applicant, which is a non-confidential version.

35 So if we turn to the Resolve record, under number of documents at issue, there's scope of review, and it's the – what the applicant's seeking. You can see that in this instance on 1189 the applicant has sought to make submissions once the matter has been allocated to a case officer, bearing in mind that cabinet material may at one point be cabinet material but if it's released to the public in some other means it may
40 then lose the protection of the exemption because it's in the public domain in any event. So circumstances - - -

HIS HONOUR: Ms Acreman, I'm going to adjourn for lunch.

45 MS ACREMAN: Yes.

HIS HONOUR: The purpose of my question is whether we should come back – the purpose of the following question is to determine at what time we should resume. How are you tracking for time?

5 MS ACREMAN: Unfortunately not well, your Honour, but I intend to use the time over the lunch break to implement some efficiency measures, and I am aiming to be complete by the end of today, subject to what is put on behalf of the respondent. I think if I can finish by the end of today, it may be – well, it should be possible to finish the entire case by the end of tomorrow. But perhaps you – perhaps the views
10 of the respondent are different on that.

HIS HONOUR: Okay. Ms Maud.

15 MS MAUD: Your Honour, the understanding between us is that my learned friend will have today and I will have most of tomorrow apart from we've allowed tentatively half an hour for a reply. Hopefully that will be enough, but we will see how we go.

20 HIS HONOUR: Okay. I will adjourn until 2 pm, but I think the rubber hits the road when we look at the individual - - -

MS ACREMAN: I'm sorry, I didn't quite hear you then.

25 HIS HONOUR: The rubber will hit the road when we look at the individual applications for review in order to ascertain whether, in relation to each individual application, there has been unreasonable delay.

MS ACREMAN: I think the heart of it is there. Thank you.

30 HIS HONOUR: Adjourn the court until 2 pm.

ADJOURNED **[12.48 pm]**

35 **RESUMED** **[2.00 pm]**

40 MS ACREMAN: Thank you. Your Honour, may I just confirm with you what time you are intending to rise this evening.

HIS HONOUR: Well, normally 4.15.

45 MS ACREMAN: Yes. Thank you. I just wanted to make sure I understood correctly. I am going to focus on the evidence now. I will try and link it back to the neglect over the sight perversity aspects raised in the case law. I am – I am hoping to be finished today, because I don't want this case to go over time, and I will try and

be efficient about how I do it. I will just quickly go through the rest of this Resolve record, because it will serve the template for the other Resolve records, and that is the Resolve record for 1189 that we were looking at before the break. So I have – I have gone through page 1, essentially. At the top of page 2, you will see that here is post-triage notes, and there is a date at the bottom of that, of 5 March 2021. I take that to be the date that the decision to undertake a review was made, and you will see that it was – the note is:

Refer matter to significant and systemic team.

That is, I think, the SSR aspects for the significant and systemic reviews that are to be undertaken. But I take it that it is not immediately allocated to that team. It is difficult for me to ascertain on the material whether that is the case or not, but it seems to me that it is not until about a-third of the way down the third page, so that page at the top says:

26 April '21.

And you will see that it says:

Reassign from FOI IC reviews ER to FOI IC reviews significant and systemic.

And I understand that usually occurs where the response to the section 54Z notice and request is received. It is not apparent to me here whether or not the 54Z has been received on this one. I will be in the evidence somewhere. But the difficulty is reading the Resolve record and then reading along with the Dowsett, in particularly the August affidavit, is what is required, and it is a complex task. But really, the – the bulk of it should be apparent on the Resolve notes, and if it's not here, then it is in the Dowsett material.

So you will see there is a couple of pages of actions, one of which was the reallocation, which I took you to. So that is where it is sitting in the queue, from around 2 June 2021. Sometimes the dates don't always match up to precisely the day that is deposited by Ms Dowsett. But those two dates, two columns of dates you will see, are headed, Due And Completed. So I have been looking at the completed date, but then sometimes there is also a date in the comments that are made, for example, about halfway down that page, it says:

Awaiting advice from PNNC.

That note is dated 26 October 2021, and yet its completed date is 8 December 2021. So from the applicant's point of view, all we can do is accept whatever the dates are in Ms Dowsett's evidence to understand when things occurred or not in her narrative evidence. Moving on. At the end of the Resolve record, there is documents, and so sometimes it will be apparent from those documents when a step was taken, even if it is not apparent in the notes section or the actions section. It is a – it is a complex and not very intellectually rewarding task to go through these, I must say.

So if I turn to the applicant's assertions and submissions in relation to this particular application, at footnote 33 of the supplementary submissions, the applicant alleges that there is inactivity without explanation, and that is because there is a delay of over two months between the receipt of the application for review, on 30 November
5 2020, and the initial assessment and decision to undertake a review, on 5 March 2021, and there is no explanation for that in the material. If one looks at the Resolve record - - -

10 HIS HONOUR: Now, Ms Acreman, did you have passed on to you an email that I had my associate send your instructing solicitors last Thursday?

MS ACREMAN: I am not sure. If you are able to let me - - -

15 HIS HONOUR: The tenor of it was that it appeared that substantial submissions were made in the footnotes, referring in particular to footnotes 52 through to 52.

MS ACREMAN: I am sorry? 52 through to - - -

20 HIS HONOUR: 32 until 52.

MS ACREMAN: Yes.

25 HIS HONOUR: 52, and that it appeared – I will just say this now, it appears to me that what those footnotes do are to aggregate features of – across all seven applications and bundle them into footnotes, rather than one document which says, “This is application 0054. These are the facts. These are the features”. Because I have to write a judgment.

30 MS ACREMAN: I have not seen the email, your Honour.

HIS HONOUR: Yes.

35 MS ACREMAN: I took the decision to aggregate things in that way to try and come up with some commonality - - -

HIS HONOUR: Yes.

40 MS ACREMAN: - - - and to try and fit – to try and take a broader overview of the – those – where there might be commonality, so that by grouping them in that way, we can allocate them to specific aspects. For example, we would say that the allocation queue delays are aspects of neglect. The respondent will raise funding and then we will say they are a weigh – or weigh in a weigh case aspects as to why the funding argument doesn't fly. There are aspects where there are procedural fairness circularity or – or procedural circularity, and we say that is a perverse outcome,
45 because to not apply good case management principles is to not follow good practice. So I can understand the difficulty with the aggregation, but it was, in a sense, an attempt to put like with like, to make it easier. Now, I accept that it may not have

turned out that way, but that was the intention. I will just put my hand on the submissions. So is it of assistance - - -

HIS HONOUR: So - - -

5

MS ACREMAN: Sorry.

HIS HONOUR: - - - I will – I will just read out the email for your benefit, Ms Acreman. It was from my associate to the solicitors. I will just read out parts of it:

10

His Honour is concerned that the volume of documents which are to be tendered and the way in which they have been organised and referred to by the parties in the written submissions that have been filed, and identified two concerns.

15

Or through my associate I identified two concerns. The second was:

20

Substantial submissions appear to have been made in the footnotes to the applicant's supplementary submissions, and the court refers in particular to footnotes 32 to 52. It appears from these footnotes that the applicant has aggregated various features of the documentation across the individual applications for review. At the hearing on Monday, his Honour will expect counsel to address how the evidentiary material and the submissions will be organised by the parties so that on a factual level they address the disputed applications for review individually.

25

Now, I realise upon reflection I have – I have made that point a few times this morning, and we may have been across purposes, given that you had not seen that email.

30

MS ACREMAN: And I - - -

HIS HONOUR: That is what I am getting at.

35

MS ACREMAN: So what I was proposing to do is to take you through the individual applications.

HIS HONOUR: Yes.

40

MS ACREMAN: And would that address your Honour's concerns in that respect?

HIS HONOUR: Yes. Well, we will see. But it is adversarial litigation, and you bear an onus.

45

MS ACREMAN: Yes, and I – I should just add that I have not read the email. I am not sure. It may have been forwarded to me by my instructor. I am not suggesting that it wasn't. So I think I had just referred to an aspect of inactivity in relation to

this application, which was in footnote 33. I have one single copy, but I don't have a second copy or a third copy to give to my friend, which is a table where I have separated the footnotes out into the - - -

5 HIS HONOUR: So just going back to footnote – did you say 32 or 33?

MS ACREMAN: 33.

HIS HONOUR: 33.

10

MS ACREMAN: Where inactivity is alleged.

HIS HONOUR: So application 1189 is the last application referred to in that footnote.

15

MS ACREMAN: Yes. So that is what we are on now.

HIS HONOUR: So the point is delay of two months between receipt of application for review and initial assessment?

20

MS ACREMAN: That is right.

HIS HONOUR: Okay.

25 MS ACREMAN: And so in my submission, that is a neglect on the part of the respondent, and there is no explanation for that in the material that I can see. Your Honour, I had planned to go through orally through each record, pointing out some parts of the Resolve record, some parts of Ms Dowsett's affidavit, if the Resolve record doesn't reveal much information. I hear what your Honour has just said. Is
30 that – I am – I am going to continue with that process, because it seems to me that that is addressing some of the concern your Honour had about the aggregation and – of the applications in the footnotes.

35 HIS HONOUR: So going back to a comment I made before lunch, as I understand the way you argue the application, you submit that there has been unreasonable delay in respect of each of the seven IC reviews.

MS ACREMAN: Yes.

40 HIS HONOUR: So in order to make good that case you're going to need to go through each of the seven IC reviews to demonstrate unreasonable delay.

MS ACREMAN: Yes. And that's my intention.

45 HIS HONOUR: Yes.

MS ACREMAN: Okay. Okay. So looking at the Resolve record, about halfway down on the third page, you will see that there's a file note with a completed date of 8 December; it's the one I took you to earlier. It actually seems that this file note is from 26 December and it refers to requesting delivery of the documents in response to a notice under section 55U. That notice has not, at this point, been issued, as far as I can see, by 26 October. And then in the note – in the notes following there is discussion around using a method of delivery of the documents which appears to be called Kojenski but, ultimately, what is decided, after months, is to accept delivery by Safe Hands delivery which is the usual method of delivery. So there's a number of months of prevarication over the way to obtain documents and ultimately it's decided to just obtain them in the usual way anyway.

You will see that the handover notes for the incoming review advisor, on 29 March 2022, say:

This matter has not been substantially progressed. The AIC were waiting for to confirm their willingness to use Kojenski to secure share sent material online.

And that has been something which has been waited for since the 18th of the 1st 2022 in the above file notes. So there's a couple of months where they're simply waiting for an answer on how to obtain the documents. And it wasn't until 25 July 2022 that a section 55U notice was finally issued; it's at the bottom of that page. And then the documents were received a couple of weeks later. So despite there having been an early section 54Z request for documents, in around March 2021, it took until August 2022 to obtain the documents and, in my submission, that's a material step towards looking through the IC review application let alone a material step towards making a decision on the application. Where you have an application which is before you and it takes such a significant amount of time to even obtain the material which you need to look at to make a decision or to determine how to deal with the application for future steps prior to making a decision it's unreasonable for it to take so long in those circumstances.

And so once the material has been received, on 9 August 2022, which is speedy compliance with the section 55U notice where it's – where the respondent chooses to actually use one – then nothing, it appears, has occurred since that time. Bearing in mind that this application – the decision to review was on 5 March 2021 and it appears to have been allocated to an actual review officer. So the stages are that it is – there's a decision to review, there might be some steps in between, but then eventually it's put into the allocation queue and then the next step is to go to an allocation officer.

HIS HONOUR: Where do I see that?

MS ACREMAN: It's in Ms Dowsett's affidavit material where she explains process. I don't think it's specifically set out but it's apparent from the evidence on each application that something can be in the queue and then awaiting allocation to a

review officer. In relation to this specific one, at paragraph (227) of the August affidavit – sorry, it's not (227). At paragraph (223), second sentence:

The application was allocated to a review advisor on 26 August 2021.

5 And you can see from the Resolve record that it was allocated to the significant and systemic queue on 2 June 2021. In relation to other – as one reads through the evidence the process becomes apparent. I don't know that it's delineated. I don't recall it being delineated as a stepped out process by the affidavit material. But once
10 one reads through all of the material it seems that that is the process that it – you receive the application, you decide to – you do preliminary investigations, you decide to review and issue the 54Z notice and request, then once that has been received you allocate it to the SSR team and then the next step, which involves another period of time, is to allocate it to a particular review officer in that team.
15 Having said that sometimes it seems that the matter can be put into the SSR allocation queue, waiting for allocation to a review officer, when the 54Z response hasn't yet been received.

20 So in relation to 1189 the decision to conduct a review was on 5 March 2021 but the allocation to a review officer was on 26 August 2021. So it was sitting in the allocation queue and it was allocated, compared to the other applications, relatively quickly to a review officer. And it – there was, nevertheless, a delay but if we look at some that were in the queue at the same time, for example, 922 the most up to date Resolve record is RAD3.

25 HIS HONOUR: So what are you going to now?

MS ACREMAN: I will take you to – well, I will take you to it now.

30 HIS HONOUR: So you're going to another application?

MS ACREMAN: Yes. I'm going to application 0922.

35 HIS HONOUR: So just before we move on - - -

MS ACREMAN: Yes.

40 HIS HONOUR: - - - just to summarise what you have said in relation to 1189 there's an initial delay, you submit, in making an initial appraisal of the application for review.

MS ACREMAN: Yes.

45 HIS HONOUR: And then upon the appraisal being undertaken by an intake and early resolution team there's then a further delay before the matter is allocated to a review team. Is that the position?

MS ACREMAN: Before the matter – yes.

HIS HONOUR: To an individual reviewer.

5 MS ACREMAN: There's a delay between the decision to conduct a review, putting it in the queue waiting for a review advisor. So it's – the decision to conduct a review and then there's a delay until it is put into the queue waiting for allocation and then another delay until it is allocated.

10 HIS HONOUR: Okay. So when is it put into the queue awaiting allocation?

MS ACREMAN: In this instance it appears to 2 June 2021.

HIS HONOUR: And where do I get that date from?

15

MS ACREMAN: The Resolve record, on the third page, about a third of the way down where it says:

Significant and systemic.

20

HIS HONOUR: So that's the queue for the queue, is it?

MS ACREMAN: It's the queue. So you have taken a number and you're standing waiting for a review advisor - - -

25

HIS HONOUR: Okay.

MS ACREMAN: - - - to pick you.

30 HIS HONOUR: So what's the next step then?

MS ACREMAN: So after you have taken a number you're waiting for allocation to a review advisor.

35 HIS HONOUR: So when did that occur in relation to 1189?

MS ACREMAN: It – it occurred on 26 August 2021 which is the next line in the Resolve record. Because of the redactions it's not readily apparent but it is in the affidavit material of Ms Dowsett as well. That's at paragraph (223) of the August
40 affidavit of Ms Dowsett. So it wasn't until 26 August 2021 that it was allocated to someone; that is a five month delay between the decision to undertake a review and the allocation to an officer to actually look at it. And after that point in time the review officer is trying to get material in and considering whether or not to issue a 55U notice to do so but doesn't ultimately issue one for some time until 25 July
45 2022. So there's a delay while it's with a review officer.

HIS HONOUR: Okay. So that's three periods of delay.

MS ACREMAN: Yes.

HIS HONOUR: Any other periods of delay in relation to 1189?

5 MS ACREMAN: I don't think so. I will just have a look. No. There's no other matters in relation to that one.

HIS HONOUR: So now you're going to move to 0922.

10 MS ACREMAN: Yes. I am. And the most up to date Resolve record for this is in RAD3. And the document number is RES.0 – sorry – .00922.03.

HIS HONOUR: Okay. That's document 35.

15 MS ACREMAN: Okay. So the Resolve record shows that the decision to conduct a review was taken on 1 October 2020. A section 54Z notice was issued on 26 October 2020 and that can be seen on the third page of the Resolve record; at the top of the page it says:

20 *Decision to review notification to applicant.*

And then the second:

25 *Decision to review letter to respondent.*

It's the 54Z letter to respondent. Following that it was allocated to the SSR queue on 6 November 2020. And nothing appears to have happened in relation to this application since that time. It has not yet been allocated to a review officer. And, in my submission, simply allocating it to a queue is not a material step so the delay is actually since the 54Z notice was issued not from the time that it was simply
30 reassigned in a – in the ether to the SSR queue.

HIS HONOUR: There is also says that:

35 *Receipt of documents 6 November 2020.*

MS ACREMAN: So that's the agency giving some documents to – so, yes, in the documents on the last page:

40 *Receipt of documents 6 November 2020. The documents in relation to the 54Z notice are received.*

And that's when it is allocated into the SSR queue waiting to be allocated to an advisor.

45 HIS HONOUR: Now, is there any explanation in the respondent's evidence for the delay since 6 November 2020?

MS ACREMAN: Not – well, I anticipate that what will be put is it's a resourcing issue because all of the allocation queue waiting time, as I understand it, is argued by the respondent to be a resourcing issue from what I can see. But I will have to leave it to the respondent to - - -

5

HIS HONOUR: I was just asking what the evidence says.

MS ACREMAN: In the - - -

10 HIS HONOUR: So is there a paragraph of Ms Dowsett's affidavit dealing with this application that says "nothing has happened since 6 November for the following reasons".

15 MS ACREMAN: No. Ms Dowsett's affidavit material, specifically in the August affidavit, simply lists steps and doesn't really, for each application, provide explicit explanations. Although, I think it's apparent from the material overall that the allocation queue delay is considered a resourcing issue. But, of course, I may be wrong about that; that's what I have discerned from the material. In some instances I think there's also – I'm speaking in the general sense here – I think in some
20 instances there's also an argument by the respondent that there are changes in personnel along the way that have contributed to delay. I don't think this is – this may be one of them.

HIS HONOUR: So I would imagine one would have to look at this at different
25 levels, that is there's general delay, in other words there's a queue because of, arguably, so the respondent would say, budgetary constraints, changes in personnel and within the framework of the statutory requirements to make considered decisions supported by written reasons and so forth. That's at a general level. I was really asking you whether there's anything in the affidavit material about this particular
30 review application explaining the delay.

MS ACREMAN: Not in the August affidavit.

35 HIS HONOUR: Because I want to go through these one-by-one. So we're on the second one and then we have got five to go.

MS ACREMAN: Yes. We have. And these are the shorter ones. So - - -

40 HIS HONOUR: So I won't ask any more questions.

MS ACREMAN: I can only point you to the – so in the August affidavit there is no explanation. In paragraphs (31) to (34) of the September Dowsett affidavit there's just – there's some discussion – it seems mostly to be factually stepped out rather than specifically directed to explaining delays. But, really, I'm going to have to
45 leave it to the respondent to put forward its explanation for the delays that I am going to raise, I think, otherwise I'm going to be making submissions for a very long time.

Okay. The – in relation to 922, just to finish off, in the August affidavit, at paragraph (215) Ms Dowsett deposes that:

5 *The application is still awaiting allocation to a review advisor within the SSR team for further case management. I am not able to say when it will be allocated. As at 3 August 2022 there are approximately 165 IC reviews that have been assigned to the SSR team but not yet allocated to a review advisor that were lodged with the OAIC prior to this application.*

10 So that gives an indication of where it is in the queue. So in - - -

HIS HONOUR: My recollection is there are corresponding paragraphs in relation to each of the applications in the updated affidavit material.

15 MS ACREMAN: They are. And in relation to this one it seems that in fact it has gone from having 165 applications in front of it to having 193 applications in front of it, if one compares the 14 March affidavit, at paragraph (28); yes, that's the case. So it has actually gone backwards in the queue. There's another matter to be considered in relation to a comparison between 922 and 1189 - - -

20 HIS HONOUR: Sorry. Just to go back to paragraph (28) of the affidavit of 14 March 2023, I don't read that as saying there are 193 matters ahead of this one, just to say that there are 193 other matters.

25 MS ACREMAN: I beg your pardon. Yes. It's the way that – so the phrasing has changed. I beg your pardon.

30 HIS HONOUR: That is the applications were lodged before 922 but it's not entirely clear what system of prioritisation is employed. Although it may just be chronological.

MS ACREMAN: I am assuming it is chronological. It's like taking a number at the delicatessen - - -

35 HIS HONOUR: Yes.

40 MS ACREMAN: - - - department and I can see the error which I have made in the comparison. You can imagine the task of trying to prepare this. So the format and description that is used in the August affidavit is not the format and description that is used in the March affidavit on 14 March. I'm just checking the – nor is it the format used on 6 March.

HIS HONOUR: I wouldn't concern yourself too much with that.

45 MS ACREMAN: No.

HIS HONOUR: I don't think there's much difference in the mode of expression.

MS ACREMAN: Well - - -

HIS HONOUR: So perhaps just move on.

5 MS ACREMAN: Sure.

MS MAUD: Pardon me, your Honour, I'm sorry to interrupt my friend but just to correct one thing that she said, she did say that there's no explanation for the allocation factors but, in fact, they are explained in paragraph (30) of Ms Dowsett's first affidavit. She outlines what is taken into account in allocating matters.

10

MS ACREMAN: I'm not sure that I specifically addressed that topic.

HIS HONOUR: I don't think, in fairness to you, Ms Acreman, that was responsive to my question which was: was there anything specific about this particular application that is the subject of evidence. I understood there's general evidence - - -

15

MS ACREMAN: Yes.

20 HIS HONOUR: - - - about lack of resources and things of that nature.

MS ACREMAN: Yes. I'm not sure that I - - -

HIS HONOUR: So can that just move on.

25

MS ACREMAN: Yes.

HIS HONOUR: Don't worry too much about that.

30 MS ACREMAN: No. Thank you, your Honour.

HIS HONOUR: So I'm making notes here and I have made notes in relation to two of the seven applications. So what I want to know is what was the delay - - -

35 MS ACREMAN: Yes.

HIS HONOUR: - - - where do I find it in the material, why was it unreasonable.

MS ACREMAN: Okay. In relation to application 863. The most up to date Resolve record for this is in RAD2. And the record number is RES.00863.0 - - -

40

HIS HONOUR: What's RAD2? What affidavit?

MS ACREMAN: The September affidavit. September 2022.

45

HIS HONOUR: Okay. So this is the document listed as document 16 in the index documents to that affidavit. So I have got the Resolve record up on my screen.

MS ACREMAN: Thank you, your Honour. The first period of inactivity is – well, the first delay is said to be inactivity of over six weeks between confirmation by the applicant that he wished to proceed with a review of the agency decision and the initial assessment on 17 November 2020. The initial assessment appears on page 2
5 of the resolve record, as the decision – the date I take as the decision to undertake a review, and the confirmation - - -

HIS HONOUR: Okay. So these entries are in chronological order.

10 MS ACREMAN: Yes.

HIS HONOUR: What's the first date I should look at?

MS ACREMAN: Well, the first date is – is actually not in the actions. It's the date
15 at the bottom above the word Actions, 17 November 2020, and then the second date is the 17th of the 11th 2020, which doesn't appear in the resolve record but is in the Dowsett affidavit at 184 and 185 of the August affidavit. It's, in fact, in paragraph 185, 17 November 2020. So – I beg your pardon. I withdraw that. Paragraph 184 states that the applicant confirmed he wished to proceed with a review on 1 October
20 2020, and then there wasn't an initial assessment undertaken to determine whether a review would be carried out until 17 November 2020. That's the date that appears in the resolve record. And so there's that six week or more delay there.

HIS HONOUR: So I'm just having trouble finding the first date that you have
25 referred to. The - - -

MS ACREMAN: I can't see it in the resolve record relating to the applicant. It is above – it's – it's in the – two lines above the decision to review date of 17
November 2020. It says:

30 *Share the applicant's proceed submission of 1.10.2020.*

So I take that to be the submission from the applicant where he said, "Proceed with the application," and it's also in paragraph 184 to 5 of the Dowsett August affidavit.

35 HIS HONOUR: Okay. So the first period of delay that's the subject of your submission is the period of approximately six weeks between 1 October and 18 November.

40 MS ACREMAN: Well, 17 November.

HIS HONOUR: Where do you get the 17th from?

MS ACREMAN: That's the date above the word Actions, when the decision was
45 made to undertake the review.

HIS HONOUR: So I'm looking at the bottom of the page:

18 November 2020, Rocelle 54Z conduct review.

Anyway, it doesn't matter whether it's the 17th or the 18th. I was just interested where you got the 17th from.

5

MS ACREMAN: It's that date above the word Actions that I have referred to.

HIS HONOUR: Yes.

10 MS ACREMAN: Because when I have gone through and compared the narrative form in the affidavit material with the resolve record, it seems to be that date above the word Actions that is the decision to review.

HIS HONOUR: Yes.

15

MS ACREMAN: And that matches up with the evidence in paragraph 185. But a day either way.

20 HIS HONOUR: Okay. So there's a delay of about – a bit over six weeks between 1 October and mid-November 2020.

MS ACREMAN: Yes. Then there's – from the time that the decision to conduct a review was made on 17 November 2020 until the matter was placed in the allocation queue, which appears to be on 23 June 2021, which is at the bottom of – near to the bottom of the third page of the resolve record - - -

25

HIS HONOUR: Yes:

Ownership reassigned.

30

MS ACREMAN: So that's the period – if you see at the top of that page, you can see in capital letters at the bottom of the note there:

Refer matter to Significant and Systemic Team, 17.11.20.

35

And that occurred in June 2021.

HIS HONOUR: Yes.

40 MS ACREMAN: And I – I suspect that's because the 54Z response had not been received. In my submission, there's no reason to wait for that response to put it in a queue if you already know on 17 November 2020 that it's going to go to the significant and systemic queue anyway, so it should have entered soon after – entered the queue soon after 17 November. And then if we're looking at next steps
45 in the – in the process, it wasn't allocated to an actual review officer until 26 August 2021, and I will just find exactly where that is. That's on the – the following page of the resolve record, where it says:

Reassign from FOI Significant and Systemic to –

And, presumably, that's the name of the review officer that has been redacted.

5 HIS HONOUR: So that's three periods of delay?

MS ACREMAN: Yes.

10 HIS HONOUR: Which takes us to 26 August 2021.

MS ACREMAN: And then there's a period of – of simply waiting for the respondent to make a revised decision under section 55G. It might be easier if I take you to the Dowsett affidavit at paragraph 187. In the statutory context, if the agency makes a section 55G revised decision, that then becomes the decision under review
15 by the respondent, but what seems to have occurred here is that there is delay created by the agency being invited to revise its decision but not taking that opportunity up, and then much further down the track saying it will make a decision. So let me take you through that. Sorry. So the respondent invited the agency to make a section 55 – or to consider making a section 55G decision on 10 September 2021.

20 HIS HONOUR: Where do I find that? I see. I have got paragraph 190 of the affidavit.

MS ACREMAN: Yes, that's where it is.
25

HIS HONOUR: So there's a request that the applicant provide submissions by 10 September.

MS ACREMAN: Yes, and then those are provided to the agency and it's invited to make a 55G decision, and it appears not to have responded to that invitation.
30 Paragraph 192 - - -

HIS HONOUR: Okay. So where do I find the invitation?

35 MS ACREMAN: Paragraph 192:

*On 14 September 2021, the review advisor provided the applicant's submissions to the agency and invited it to consider whether it would be appropriate to revise the decision. The response was requested by 28
40 September 2021.*

Rather than revising the decision under 55G, it appears that the agency provided submissions in response to the applicant's submissions, so it didn't take up that opportunity to revise the decision. And then in paragraph 195, there was a request
45 for marked-up and unredacted copies of the documents, and any further submissions in support of the exemption. So there's another opportunity to make submissions from the agency, even though they had already been provided on 10 September. And

then in paragraph 196, there's some back and forth between the agency and the respondent, and then the department requested an extension of time, and then the – then further material was provided on 2 December. Then at paragraph 197, after considering the material provided by the agency, the review advisor requested further
5 information be provided by the agency.

HIS HONOUR: Can I just ask you to pause, because my hyperlinks aren't working.

MS ACREMAN: Sure. If your Honour is waiting for - - -
10

HIS HONOUR: It's working now.

MS ACREMAN: Okay. So to focus on the actual period of delay that is in issue, if one looks to paragraphs 195 and 196 of the August affidavit, and then 198, 199, 200
15 and 203, between December 2021 and May 2022, there were six extensions of time granted to the agency to provide copies of materials and submissions, in circumstances where it had already provided a couple of sets of submissions.

HIS HONOUR: Well, let's – this is helpful, because let's test this. At paragraph
20 199, an extension of time was requested until 31 March. It was given only until 22 March. Now, how am I to evaluate whether that contributes – is or contributes to unreasonable delay, without knowing all the circumstances in which the extension was sought and given?

MS ACREMAN: I would link it to the procedure stated by the respondent in the direction, which is item 2 in the index to the 22 August affidavit.

HIS HONOUR: I have got that document.

MS ACREMAN: So this is a direction under 55(2)(e)(i). It's a general direction.
30 (ii) gives provision for specific directions to be made in relation to specific applications. 2.1:

*The process is intended to be informal, non-adversarial and a timely means of
35 seeking external merits review.*

2.4, the second sentence – well, the first sentence is relevant, but –

*Therefore, full and timely production of documents at issue, submissions and
40 any other information that has been requested is important.*

And then 2.5 refers to section 55DA, which is the best endeavours provision. So there's an – it's incumbent upon agencies to use their best endeavours to assist the Information Commissioner to conduct reviews, and section 55D(1) provides that the
45 onus is on the agency to establish the decision refusing access is justified. In circumstances where repeated extensions of time are granted and that creates delay, in my submission, the respondent is not following its own direction - - -

HIS HONOUR: But where does it say here that extensions of time should not be given?

MS ACREMAN: At paragraph 3.8 on the following page:

5

Where an agency or Minister fails to provide information and documents within the initial or extended timeframe, or requests another extension, the Information Commissioner may proceed to require the provision of information and the production of documents.

10

I'm not saying that the Information Commissioner is saying there every time there's a request for extension on a second occasion that they will require production of documents, but there is a – a reticence, it seems, to use the powers that are available to move the process along. So the option is there but it's not taken up, and this, in my submission, creates an unreasonable delay, because whilst there are repeated extensions of time and there's no compulsion to require agencies to comply, then timeframes blow out. The onus – sorry. And there – because of the onus provision, what needs to be provided is a reasonable opportunity. Where there are repeated extensions, in my submission, it's not reasonable, but that needs to be assessed in terms of the length of the delay, the reason given by the agency, etcetera.

20

HIS HONOUR: So I have marked that as delay period number 4, being the extensions of time referred to in paragraphs 195 generally until 199 of the Dowsett affidavit.

25

MS ACREMAN: And there's one more paragraph which I don't think I mentioned just before which might be incorporated into that period of time. So at paragraph 204 of the August affidavit, on 6 June 2022, a further extension was requested by the agency and it wasn't explicitly granted, but it doesn't appear that it was responded to, and then the agency didn't comply until the date that it had set for itself as the extended time, so, effectively, that's a – an extension by omission.

30

HIS HONOUR: That's a two-day extension.

35 MS ACREMAN: I'm sorry?

HIS HONOUR: It looks to me like that's a two-day extension.

MS ACREMAN: No, it's – well, it's a five-day extension. So they didn't comply with the extended time, and then after the – after it was already due, they have asked. I'm – I'm not saying that should be incorporated into the delay period as a separate item. It's adding.

40

HIS HONOUR: I see. So there – there was a request for a further extension until 3 June. That's in paragraph 203.

45

MS ACREMAN: Yes. And then that was approved.

HIS HONOUR: And then they got the document in on 8 June.

MS ACREMAN: Yes. I'm not saying that's a separate – a separate delay. I'm saying that's part of the aggregated delays of repeated extensions. So not five days
5 on its own but as one period.

HIS HONOUR: Is it relevant to view the – say, a delay like five days, through the prism of the overall delays that are experienced by the office? So if the reviewing officer knows, for – just to pick a figure out of the air – that no one is going to be
10 writing a decision about this for another two years, what – what's another five days?

MS ACREMAN: It – it's something I have given some thought and it comes back to the concept that there's really nothing motivating the process. If – to some extent, in some situations, if something ends up being in the SSR allocation queue and it's
15 going to sit there for years, why take any steps? And yet the respondent does take steps, so it allocates its own resources to taking these steps in matters that it either ought to know or will or are likely to end up in the SSR queue. In some instances it's determined at the date of the decision to undertake a review that it will go into the SSR queue. So rather than – than just stop and wait till an actual review advisor
20 is available to case manage the matter, these steps are taken in the interim which eat up resources, and yet which may end up needing to be repeated in any event. For example, if there's exemptions claimed of a cabinet nature, by the time three or four years have passed, those documents may not have a proper exemption claimed over them, or, as in this instance, a revised decision might occur. So the landscape
25 changes quite dramatically in some instances.

HIS HONOUR: Okay. So just focusing on 863, are there any other periods of delay?

30 MS ACREMAN: Paragraph 200:

On 31 March 2022, the agency indicated it proposed to make a 55G decision, it having been invited to do so in September 2021 and not taking up the option to do so.

35 And then that paragraph sets out the steps which were taken. So once the agency proposes to make a revised decision, this sets off a situation where the scope and the – there are discussions with the applicant. In this instance, the applicant made a counter-proposal and there was – so there was some backwards and forwards, and
40 the department requested an extension of time until 11 May 2022, which was approved, and then the decision was ultimately received – and paragraph 204 indicates – on 8 June 2022. So from the time that the 55G was raised and then following discussions with the applicant – so that – that finished on 20 April, and then – and the department requested an extension of time till 11 May, and there was
45 non-compliance until 6 June. I'm sorry, I will just have to correct what I have just said.

HIS HONOUR: So there was an extension of time sought by one week.

MS ACREMAN: And then in 204, another extension of time till 8 June.

5 HIS HONOUR: Okay. So what I would like to know is, in relation to 863, when does that matter enter the queue of applications awaiting a written draft decision? So there's reference to that in paragraph 207.

10 MS ACREMAN: Okay. In the resolve record on the bottom of the third page, it entered the queue, it seems, on 23 June 2021.

HIS HONOUR: Okay. So all these happenings, like the 55G decision referred to in paragraph 200, don't affect the overall delay; is that correct?

15 MS ACREMAN: Sorry, which paragraph?

HIS HONOUR: 200.

20 MS ACREMAN: 200. They do. Well, it was allocated to the queue on 23 June 2021, and what we're talking about is a year later, so June 2022. So it's not an allocation queue issue that's overtaking anything else that happens. It's – it was allocated to an officer on 26 August 2021, so there's – from 26 August 2021, there's no delays being created by the allocation queue.

25 HIS HONOUR: We might be at cross-purposes, so I will just put the proposition a bit differently. Assuming it was allocated in August 2021 to some sort of queue awaiting a decision, where is the evidence that anything that happens in 2022, say, from paragraph 199 to 206, affects the overall delay in the decision-making?

30 MS ACREMAN: The delay is the result of the respondent not being in a position at that point in time to make a decision because they don't have - - -

HIS HONOUR: But the implied premise of my proposition - - -

35 MS ACREMAN: Yes.

HIS HONOUR: And I'm – the premise might be incorrect. But the implied premise is that there was going to be that sort of delay anyway because of the lack of resources to prepare written decisions to a standard required by the statute.

40

MS ACREMAN: Written decisions occurs – so the written decision is not prepared by the review advisor, as I – they may draft it but it's – sorry. Part of the reason why there's not enough – sorry. Part of the reason why there won't be a draft decision and then a decision made on this is not necessarily, in my submission, because
45 there's no funding; it's because the respondent doesn't even have the information it needs to start to draft the decision, and - - -

HIS HONOUR: Well, the information changes, for instance, if there's a – a decision under 55G.

5 MS ACREMAN: And part of the reason why there might be a decision under 55G is because of the passage of time since the application was made, put into the queue, allocated to a review advisor. So that gets back to the systemic issue around if these aren't being processed then it's a little bit like chasing your tail. The longer the delay, the more likely it is that the information that the respondent has will be out of date, and then steps need to be repeated and it all becomes circular. So to some extent, the resourcing issue is created by the delay itself.

HIS HONOUR: Okay. Is there anything more about 863?

15 MS ACREMAN: Only to say that documents on this application weren't received until 30 January 2023, and that's in one of the more recent Dowsett affidavits at paragraph 108. I will just check which one. It's 6 March. So from paragraph 98. So the application has been on foot for a couple of years at this point, and there is still no documents in until 30 January to enable a decision to be made, despite earlier requests for the documents. I think that's all I will say on 922. Sorry, 863. In relation to 760, the most up-to-date resolve record is in RAD2, which is the September Dowsett affidavit. I beg your pardon. It's actually RAD3, which is the 6 March Dowsett affidavit.

25 HIS HONOUR: So what document am I looking at?

MS ACREMAN: RES.00760.03, and I'm sorry, I don't know what it is on the index.

30 HIS HONOUR: 24.

MS ACREMAN: Okay. In this application, in the August Dowsett affidavit at paragraph 169, the section 54Z notice and request sought marked-up and unredacted copy of the documents at issue and submissions in relation to the - - -

35 HIS HONOUR: What paragraph of the Dowsett affidavit is that? 69?

MS ACREMAN: 169.

40 HIS HONOUR: 169.

MS ACREMAN: So information on the 54Z response was requested by 15 January 2021, and then no documents were provided, no response was provided. On 7 April 2021 – this is paragraph 172 – the agency requested extensions of time to provide its material in multiple IC review applications, including this one, and they requested an extension until 16 June 2021. From the material, it appears that there were multiple applications with this agency where the response was sluggish, and that the

respondent or representatives of the respondent were in conversation with the agency about them. Then paragraph 173 goes to the - - -

5 HIS HONOUR: Sorry, can I just ask you to pause, because I – I marked up that paragraph, and every time I mark up a paragraph the machine wants to save it, so I will stop marking things.

MS ACREMAN: Sure. Are you ready for me to continue, your Honour?

10 HIS HONOUR: So I – what I have done is I have opened up the email of 7 April 2021, and it says:

Due to changes in staff, unexpected periods of leave and competing priorities, we are requesting extensions.

15 So what am I to make of that? How do I evaluate whether the delay is unreasonable?

MS ACREMAN: Well, that's the request for the extension and the reason given by the agency.

20 HIS HONOUR: Yes.

MS ACREMAN: And then further down at paragraph - - -

25 HIS HONOUR: And then there's a reference to a backlog and competing priorities and limited resources.

MS ACREMAN: And so at paragraph 175, the agency sought an extension of time again till 16 June, and they weren't advised whether the extension was granted, and then on 16 June they requested another extension of time – that's at 176 – of another two weeks to enable them to finalise the response and an extension to 2 July was approved, and it was at that point that it was - - -

35 HIS HONOUR: So what should the office have reasonably done?

MS ACREMAN: In my submission, the point in time at which the extension to 2 July 2021 was approved and there was a note that if the response wasn't provided by that date a formal notice for production of information would be issued, the notice could have and should have been issued earlier because there was a delay by that time from – so the information was initially requested by 15 January 2021, and then at the point in time at which there is a reference to a formal notice for production being issued, the agency complies and provides – the response that was expected in January 2021, it provides it on 2 July. However, there was an issue around being able to open the attachments. So once the material in the attachments was provided in an openable form on 29 July 2021, it then went into the allocation queue, and it has been sitting there since. I'm just going to check the more recent affidavits. And

it hasn't been allocated to an SSR review advisor as yet. So it has been awaiting allocation since 29 July 2021.

5 HIS HONOUR: So is that two periods of delay then that you rely upon? The first in failing to require the production of documents in a timely fashion, including by issuing the relevant notice requiring compliance. That's the first period of delay.

MS ACREMAN: Yes.

10 HIS HONOUR: And the second period is from about then until now.

MS ACREMAN: Yes, from 29 July 2021 until now. That's an allocation queue issue. There's one further – I'm just looking over my notes. There's one further delay in that one, I think. At paragraphs 166 to 168 of Dowsett, in August, there's a
15 decision to conduct a review on 18 November 2020, but that is over three months from the application being made on 6 August 2020.

HIS HONOUR: Okay.

20 MS ACREMAN: Okay.

HIS HONOUR: Next one.

MS ACREMAN: 613. The most up-to-date Resolve record is in RAD-2. Again, I
25 apologise I don't have the number. I will need to give you the document number when you're ready for it.

HIS HONOUR: Yes. I'm ready.

30 MS ACREMAN: RES.00613.002.

HIS HONOUR: Document 13.

MS ACREMAN: Okay. So this application was made on 26 June 2020 and there
35 was a decision to conduct a review on 28 July 2020. So that's four weeks to decide to conduct the review.

HIS HONOUR: Is that unreasonable.

40 MS ACREMAN: Well, in the context of it being a triage to undertake an initial look at how to proceed with the application, then the applicant would submit that it is unreasonable. There's 11 documents at issue and two exemptions claimed.

HIS HONOUR: How do I evaluate that.

45 MS ACREMAN: I'm sorry.

HIS HONOUR: How do I evaluate whether or not that was reasonable without having complete insight into the workings of the office, and how many other files were there, how many people were on annual leave, and so forth.

5 MS ACREMAN: Yes. I understand the issue. I won't say any more about that. So the Resolve record shows that from 28 July 2020 – sorry, I will – sorry. The Resolve record shows that two months later the 54Z response was received, and so, therefore, it was only on 2 October 2020 that it was put into the allocation queue. So I'm not saying that that's an unreasonable delay. What I'm saying is that from 2 October
10 2020 it was in the queue.

HIS HONOUR: Where do I see that date.

MS ACREMAN: It's on the third page of the Resolve record.
15

HIS HONOUR: What's the entry.

MS ACREMAN:

20 *Ownership Reassigned. Reassigned from FOI IC reviews ER to significant and systemic.*

So I take that as being - - -

25 HIS HONOUR: 2 October. Yes. I see.

MS ACREMAN: - - - it placed in the queue, and it remains unallocated to this day. So no one is actively case managing it. It's still waiting to be assigned to a review officer. At paragraph 154 of the August Dowsett affidavit, there's reference to Ms
30 Dowsett asking a member of the team to consider whether this matter should progress to a decision under section 54WB. I can't see in relation to this application where that was actually considered, and although it's not possible for the court to determine whether it's appropriate to discontinue the review under 54WB, it's clear it was a matter that was raised as a possibility by the respondent, but there's no
35 evidence that it actually was considered and determined, whether or not that would be an appropriate means.

If it is appropriate for 54WB to be applied to this, then it has been sitting in the allocation queue with no one looking at it or considering any material aspect of it in
40 the sense of assessment since that time – or since 2 October 2020. So, in my submission, there's potentially a matter which overtakes the allocation queue issue and was flagged in August 2020. There's another delay in this application which is referred to at paragraph 156 of the August affidavit. The Department's response to the section 54Z notice was received on 29 September 2020, and there was a claim of
45 confidentiality over the attachments. It wasn't until – in paragraph 159 – late 2021, so approximately a year later, that the respondent sought approval for the use of a secure online platform to transfer material of that classification – to transfer material of

that classification. So having known that it would need to obtain the material, it did nothing for a year to follow-up on obtaining – on a methodology for obtaining the material.

5 HIS HONOUR: So what's not clear to me on the evidence – I think I made this point earlier – is if one looks at 165, the next step is for the matter to be allocated to a review advisor in the SSR team. It's not clear to me whether that steps occurs only after section – the notice under section 55U has been complied with, so that in the
10 meantime, in the intervening period, other matters are jumping the queue, so to speak.

MS ACREMAN: And it's not clear to me either. I can see that sometimes the 55U notice is issued before it's even put in the queue. I think the timing on the 55U is not set. But it seems that – yes. It's not clear to me – yes – what the next step would be.
15 So if we look at section – sorry. If we look at paragraph 162, your Honour will see that once the power to obtain information was actually exercised on 31 May 2022, the exempt material was provided by Safe Hands Delivery in response to the section 55U notice. So when the powers are exercised it results in a prompt response, generally. So that's all in relation to 613. Moving to 424. The most recent Resolve
20 record is in RAD-3, and I will read the number when your Honour's ready.

HIS HONOUR: So I've got RAD-3 up.

MS ACREMAN: And the number of the document is RES.00424.04.
25

HIS HONOUR: It might be .03, but in any event, on my reckoning, it's document 13.

MS ACREMAN: I think it's my error, your Honour.
30

HIS HONOUR: Don't worry. I've got the document.

MS ACREMAN: No. It's – can I ask – so there's two – I think in RAD-3, which is the exhibit that you're in, there's actually potentially two – .04 is actually the current
35 version. I have it at PDF page 378 of 508 in that exhibit, if that helps. Okay. I think we can clarify - - -

HIS HONOUR: So I'm in - - -

40 MS ACREMAN: I think I can clarify what's - - -

HIS HONOUR: - - - RAD-3 and I can see only one Resolve record for this matter.

MS ACREMAN: And I think I can clarify that it's my error, your Honour, and I
45 apologise. It's RAD-4, so it's the next affidavit.

HIS HONOUR: Okay. So that's document number 1 in the index to that affidavit.

MS ACREMAN: I do apologise for the time wasted there. I – juggling the amount of material in this case has been quite a challenge. Okay. So the application was made on 24 April 2020. Four days later a decision was made to review it, and then it was placed in the queue for allocation on 25 August 2020 after the 54Z response had been received. So there's a period of delay there of four months, and then since 25 August 2020, when it was placed in the allocation queue, it has not yet been allocated to a review advisor. The Resolve records show that steps have been taken, despite it not being allocated, and those steps largely relate to – well, in part, relate to a section 55U notice. If I can take you to the Resolve record on page 2. There's a note from the review advisor which says, near the top:

Consider where the document at issue is required under section 55U.

I understand that to be a standard note that's placed there in accordance with a document which sets out the categories of review. There's some standard notes that are made in the file, so that one and then the reference to the AAT decision is a standard note. But nevertheless, it – the issue of whether 55U ought to have been exercised to obtain the documents was first raised on 28 August – sorry, 28 April 2020. It's not until 29 July 2022 that a 55U notice is drafted on the basis that the agency has not satisfied the respondent by submission that the documents are exempt under the relevant provisions. This raises the question of what is a reasonable opportunity for an agency to respond in the context of the agency having an onus on it to satisfy the respondent that the exemptions should apply, and how long does the respondent need to wait, or how many times does the need – does the respondent need to give the agency an opportunity to satisfy it of those matters, so that it has provided a reasonable opportunity to respond.

HIS HONOUR: When were the documents provided.

MS ACREMAN: The 55U response was due on 12 August 2022, and I will just check – sorry. I will just have to look it up. 26 September 2022.

HIS HONOUR: Okay.

MS ACREMAN: So the issue of repetitive extensions of time comes up in this matter. Actually I withdraw that. I – I'm – sorry. I'm just – okay. Yes. So at footnote 36 of the submissions there is a situation which is described at paragraph 89 of the Dowsett affidavit of August. So the 54Z notice was sent out requesting a response by 17 June 2020, and then, at paragraph 90, the agency requested three extensions of time to provide the information requested, each of which was granted. However, the agency still failed to comply with the new deadline which was 3 August 2020, and that's at paragraph 95, and then paragraph 96, on 13 August 2020, the agency sent an email to the respondent regarding the Cabinet document's exemption, third party discussions, and said it would provide its response shortly but didn't provide a due date.

The respondent simply asked when it could expect a response, and then the response was provided on 24 August 2020. So there's three extensions of time in circumstances where the agency's failing to comply, and then time passes, and in paragraph 13 of the September Dowsett affidavit, two years later on 3 August 2022, the agency said that it was considering making a revised decision and that is because given that the agency's submissions were from 2020, consideration was being given to whether things had changed and whether they could release some more material to the applicant. So the result of the delay – if we're talking in terms of impact of the delay, what has occurred here is that a bunch of information has been given in 2020, and then there's such a significant time period passing that the information is out-of-date and the circumstances have changed, and this leads to more and more steps being taken to really not materially progress the application further.

So the extent of the delays results in many additional steps needing to be undertaken during the course of the assessment and resolution of the applications. So it's a stale information issue and that's an issue that's raised in footnote 52, and there's one more issue in this one. I will just go – move to it. If I can take you to the Dowsett affidavit of 6 March 2023. At paragraph 67 – sorry, paragraph 66, you can see that the agency requests an extension of time to provide submissions, and the request wasn't until 23 September 2022 and then they amended the request to 30 September 2022.

HIS HONOUR: So what date affidavit are you looking at at the moment.

MS ACREMAN: This is the affidavit of Dowsett, 6 March 2023.

HIS HONOUR: Thanks. Which paragraph.

MS ACREMAN: 66. So there was a request for an extension of time to provide submissions and the request was amended to 30 September 2022. In paragraph 67, documents were provided on 26 September 2022. Paragraph 68, the agency did not provide submissions or a revised decision on 30 September 2022, which was the date when the extension was until, and then it wasn't until 24 February 2023 that the review advisor followed up. So nothing has happened from the extension date, 30 September 2022, until a phone call on 24 February, and then there was another extension granted in paragraph 70 – sorry, there was another extension requested, but in paragraph 71 it was refused, but at the same time was refusing the four week extension of time the respondent asked that the submissions be provided as soon as possible. So there's no due date now.

So, effectively, what we've gone from – got is a request to a certain date replaced with a request to as soon as possible, and then that's updated in the 14 March affidavit at paragraph 17.

HIS HONOUR: Where do you get the “as soon as possible” timeframe.

MS ACREMAN: Paragraph 71 of the 6 March Dowsett affidavit, and the document itself - - -

HIS HONOUR: I see. The last line.

5

MS ACREMAN: - - - is there if you click on to it.

HIS HONOUR: Yes.

10 MS ACREMAN: And then it's on the 14 March 2023 affidavit, at paragraph 17, there's an email to the review advisor acknowledging the request for submissions to be provided as soon as possible, and the review advisor says she would "seek an update mid next week" unless the agency have contacted the respondent before then, and then there's some more contact seeking an update and the submissions still
15 haven't been provided at 13 March 2023. Again, this raises the question of what's a reasonable opportunity in circumstances where months have passed by. How long does the respondent wait for submissions from an agency when it's required under section 55(4) – I think it's (a) – to – or (b) – to give party – parties to an IC review a reasonable opportunity to be heard.

20

If an agency just doesn't take up that opportunity, in my submission, it's not reasonable to just simply wait interminably for that response to come. There's an onus on the agency and it's required to use best endeavours to assist the respondent to come to a decision. So whilst it is the agency who has been, to some extent,
25 recalcitrant, the respondent has the power to push back, and it given those powers specifically to make sure there's a timely process here.

HIS HONOUR: So as I've mentioned a couple of times, I want to know what the evidence says about whether all these extensions of time are operating in parallel
30 with systemic delay caused by the long queue, such that it might be said these extensions are immaterial. Now, on my reckoning, you've identified six of your seven applications; is that correct.

MS ACREMAN: That's right, and I must say the reason I've left it till last is that
35 this 0054 is the most convoluted, and it might be helpful – now that I'm on a role in the methodology of presenting them to your Honour, it might actually be helpful if I were to use the time overnight to efficiently - - -

HIS HONOUR: Okay. We will start at 10 o'clock - - -

40

MS ACREMAN: - - - present it.

HIS HONOUR: - - - in the morning and I will give you 15 minutes to do 0054.

45 MS ACREMAN: Thank you, your Honour.

HIS HONOUR: Now, is there anything else you want to say today.

MS ACREMAN: No. Nothing else today. Thank you, your Honour.

HIS HONOUR: All right. Just before we adjourn I've got a question for Ms Maud.
5 What's the purpose of the tender of exhibit RAD-3, which is the report – that is the annual report of the Information Commissioner.

MS MAUD: That's the most recent annual report. The affidavit of Elizabeth
Hampton has a series of earlier annual reports, and I will be taking your Honour to
10 some of the information in the annual reports about the increase in the number of IC reviews, and the effect that has had on the time to resolve them, and there's also some statistics in those reports about a number of IC reviews that are resolved in the different ways, whether by agreement between the parties, etcetera.

HIS HONOUR: So can I get you to answer this question in the morning.
15

MS MAUD: Yes.

HIS HONOUR: Section 46 of the Public Governance, Performance and
Accountability Act requires that the report be prepared and sent to the responsible
20 Minister for the purposes of tabling in Parliament, and it occurred to me that, whilst there might be information in the annual report, it might also be said there are omissions in the annual report, and that is that on one view of the evidence the annual report doesn't really confront the problems that exist in the office as a result of the absence of resources, and before I went down that path I just wanted your
25 submissions on whether section 16 of the Parliamentary Privileges Act effects the use to which that report might be made. That is any use.

MS MAUD: Your Honour, I will think about that overnight. I hadn't appreciated
that was the purpose of the annual reports and I will need to give that some - - -
30

HIS HONOUR: No. But, you see, if you want to rely on it to paint a rosy picture
about "We've processed 80 per cent of applications within targets", and things like
that, the evidence presents a different picture, it seems to me.

MS MAUD: The annual reports indicate that the 80 per cent target hasn't been met
35 for a number of years. So that's not the submission and it's not the purpose of relying on them.

HIS HONOUR: But it might be said if the purpose of the annual report is to report
40 to Parliament about the performance of the office.

MS MAUD: Yes.

HIS HONOUR: Parliament might want to know about how long this queue is and
45 how applications are sitting around for years before they're processed, and where do I find that in the annual report.

MS MAUD: The annual report does indicate the number of reviews received in the particular year, and it does indicate the percentage that are resolved within the 12 month-mark. So you can draw from that – you can infer the number that are taking longer than 12 months, but I accept what your Honour says that - - -

5

HIS HONOUR: I couldn't find any reference in the annual report to applications taking more than two years, and perhaps more than three years before they even get to a reviewer - - -

10 MS MAUD: Yes.

HIS HONOUR: - - - and I would have thought that's something Parliament would want to know about.

15 MS MAUD: I will give that some consideration overnight, your Honour.

HIS HONOUR: Okay. Adjourn the court.

20 **MATTER ADJOURNED at 4.13 pm UNTIL TUESDAY, 21 MARCH 2023**

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